

Date of Hearing: August 5, 2020
Counsel: Nikki Moore

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 922 (Chang) – As Amended June 18, 2020

SUMMARY: Permits the tolling of the statute of limitations for the prosecution of a felony offense for specified computer crimes until the discovery of the commission of the offense, but no more than nine years from the commission of the offense, for crimes committed after January 1, 2021 or for crimes for which the statute of limitations has not lapsed as of that date.

EXISTING LAW:

1) Makes it unlawful to:

- a) Knowingly access and without permission alter, damage, delete, destroy, or otherwise uses any data, computer, computer system, or computer network in order to either (A) devise or execute any scheme or artifice to defraud, deceive, or extort, or (B) wrongfully control or obtain money, property, or data. (Pen. Code, § subd. (c)(1).)
- b) Knowingly access and without permission take, copy, or make use of any data from a computer, computer system, or computer network, or takes or copies any supporting documentation, whether existing or residing internal or external to a computer, computer system, or computer network. (Pen. Code, § subd. (c)(2).)
- c) Knowingly and without permission use or cause to be used computer services. (Pen. Code, § subd. (c)(3).)
- d) Knowingly accesses and without permission add, alter, damage, delete, or destroy any data, computer software, or computer programs which reside or exist internal or external to a computer, computer system, or computer network. (Pen. Code, § subd. (c)(4).)
- e) Knowingly and without permission disrupt or cause the disruption of computer services or deny or cause the denial of computer services to an authorized user of a computer, computer system, or computer network. (Pen. Code, § subd. (c)(5).)
- f) Knowingly and without permission provide or assist in providing a means of accessing a computer, computer system, or computer network in violation of this section. (Pen. Code, § subd. (c)(6).)
- g) Knowingly and without permission access or cause to be accessed any computer, computer system, or computer network. (Pen. Code, § subd. (c)(7).)
- h) Knowingly introduce any computer contaminant into any computer, computer system, or computer network. (Pen. Code, § subd. (c)(8).)

- i) Knowingly and without permission use the internet domain name or profile of another individual, corporation, or entity in connection with the sending of one or more electronic mail messages or posts and thereby damage or cause damage to a computer, computer data, computer system, or computer network. (Pen. Code, § subd. (c)(9).)
 - j) Knowingly and without permission disrupt or cause the disruption of government computer services or denies or causes the denial of government computer services to an authorized user of a government computer, computer system, or computer network. (Pen. Code, § subd. (c)(10).)
 - k) Knowingly access and without permission add, alter, damage, delete, or destroy any data, computer software, or computer programs which reside or exist internal or external to a public safety infrastructure computer system computer, computer system, or computer network. (Pen. Code, § subd. (c)(11).)
 - l) Knowingly and without permission disrupt or cause the disruption of public safety infrastructure computer system computer services or denies or causes the denial of computer services to an authorized user of a public safety infrastructure computer system computer, computer system, or computer network. (Pen. Code, § subd. (c)(12).)
 - m) Knowingly and without permission provide or assist in providing a means of accessing a computer, computer system, or public safety infrastructure computer system computer, computer system, or computer network in violation of this section. (Pen. Code, § subd. (c)(13).)
 - n) Knowingly introduce any computer contaminant into any public safety infrastructure computer system computer, computer system, or computer network. (Pen. Code, § subd. (c)(14).)
- 2) States that no action may be brought pursuant to this subdivision unless it is initiated within three years of the date of the act complained of, or the date of the discovery of the damage, whichever is later. (Pen. Code, § subd. (e)(5).)
- 3) Provides that prosecution for crimes punishable by imprisonment for eight years or more must commence within six years after commission of the offense, unless otherwise provided by law. (Pen. Code, § 800.)
- 4) Provides that prosecution for a felony punishable by imprisonment for less than eight years must commence within three years commission of the offense, except as specified. (Pen. Code, § 801.)
- 5) Provides that prosecution for crimes involving fraud, breach of a fiduciary duty, embezzlement of funds from an elder or dependent adult, or misconduct by a public official does not start to run until the discovery of the offense and prosecution must be commenced within four years after discovery of the crime or within four years after completion, whichever is later. (Pen. Code, §§ 801.5 & 803, subd. (c).)

- 6) Provides that the prosecution of a misdemeanor must commence within one year of the commission of the offense, unless otherwise provided by law. (Pen. Code, § 802 subd. (a).)
- 7) States that, unless otherwise provided by law, a statute of limitations is not tolled or extended for any reason. (Pen. Code, § 803, subd. (a).)
- 8) States that, for specified crimes, the statute of limitations does not begin to run until the offense has been discovered, or could have reasonably been discovered. (Pen. Code, § 803, subd. (e).)
- 9) Provides that if more than one statute of limitations period applies to a crime, the time for commencing an action shall be governed by the period that expires later in time. (Pen. Code § 803.6, subd. (a).)
- 10) States that a prosecution is commenced when one of the following occurs:
 - a) An indictment or information is filed;
 - b) A complaint charging a misdemeanor or infraction is filed;
 - c) The defendant is arraigned on a complaint that charges him or her with a felony; or,
- 11) An arrest warrant or bench warrant is issued. (Pen. Code, § 804.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "Crimes committed in cyberspace have real world consequences. From frozen bank accounts to destroyed or damaged files, cybercrimes have grown in scope and frequency. Hackers and cybercriminals are targeting individuals and families, small businesses and large corporations, and even entire municipalities. Hackers and their crimes become more brazen when they are failed to be apprehended and prosecuted. And while small businesses, schools, and various other institutions move towards more online operations, the COVID-19 pandemic has provide prime opportunity for cybercriminals to strike. Everyone that uses the Internet is at risk of being hacked or a victim of a cybercrime. For unfortunate Californians who find themselves the victim of cybercrime, SB 922 is a step in the right direction towards holding hackers and cybercriminals accountable."
- 2) **Statute of Limitations:** The statute of limitations requires commencement of a prosecution within a certain period of time after the commission of a crime. A prosecution is initiated by filing an indictment or information, filing a complaint, certifying a case to superior court, or issuing an arrest or bench warrant. (Pen. Code, § 804.)

The statute of limitations serves several important purposes in a criminal prosecution, including staleness, prompt investigation, and finality. The statute of limitations protects persons accused of crime from having to face charges based on evidence that may be

unreliable, and from losing access to the evidentiary means to defend against the accusation. With the passage of time, memory fades, witnesses die or otherwise become unavailable, and physical evidence becomes unobtainable or contaminated.

The statute of limitations also imposes a priority among crimes for investigation and prosecution. The deadline serves to motivate the police and to ensure against bureaucratic delays in investigating crimes. Additionally, the statute of limitations reflects society's lack of desire to prosecute for crimes committed in the distant past. The interest in finality represents a societal evaluation of the time after which it is neither profitable nor desirable to commence a prosecution.

These principals are reflected in court decisions. The United States Supreme Court has stated that statutes of limitations are the primary guarantee against bringing overly stale criminal charges. (*United States v. Ewell* (1966) 383 U.S. 116, 122.) There is a measure of predictability provided by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced. Such laws reflect legislative assessments of the relative interests of the state and the defendant in administering and receiving justice.

More recently, in *Stogner v. California* (2003) 539 U.S. 607, the Court underscored the basis for statutes of limitations: "Significantly, a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. And that judgment typically rests, in large part, upon evidentiary concerns - for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable." (*Id.* at p. 615.)

The failure of a prosecution to be commenced within the applicable period of limitation is a complete defense to the charge. The statute of limitations is jurisdictional and may be raised as a defense at any time, before or after judgment. (*People v. Morris* (1988) 46 Cal.3d 1, 13.) The defense may only be waived under limited circumstances. (See *Cowan v. Superior Court* (1996) 14 Cal.4th 367.)

The court is required to construe application of the statute of limitations strictly in favor of the defendants. (*People v. Zamora* (1976) 18 Cal.3d 538, 574; *People v. Lee* (2000) 82 Cal.App.4th 1352, 1357-1358.)

The amount of time in which a prosecuting agency may charge an alleged defendant varies based on the crime. In general, the limitations period is related to the seriousness of the offense as reflected in the length of punishment established by the Legislature. (*People v. Turner* (2005) 134 Cal.App.4th 1591, 1594-1595; see, e.g., Pen. Code, §§ 799-805.) After a comprehensive review of criminal statutes of limitation in 1984, the Law Revision Commission recommended that the length of a "limitations statute should generally be based on the seriousness of the crime." (17 Cal. Law Revision Com. Rep. (1984) p. 313.) The Legislature overhauled the entire statutory scheme with this recommendation in mind. In *People v. Turner, supra*, 134 Cal.App.4th 1591, the court summarized the recommendations of the Law Revision Commission:

The use of seriousness of the crime as the primary factor in determining the length of the applicable statute of limitations was designed to strike the right

balance between the societal interest in pursuing and punishing those who commit serious crimes, and the importance of barring stale claims. It also served the procedural need to provid[e] predictability and promote uniformity of treatment for perpetrators and victims of all serious crimes. The commission suggested that the seriousness of an offense could easily be determined in the first instance by the classification of the crime as a felony rather than a misdemeanor. Within the class of felonies, a long term of imprisonment is a determination that it is one of the more serious felonies; and imposition of the death penalty or life in prison is a determination that society views the crime as the most serious. (*People v. Turner, supra*, 134 Cal.App.4th at pp. 1594-1595, citations omitted.)

There are, however, some statutes of limitations not necessarily based on the seriousness of the offense. The Legislature has acknowledged that some crimes by their design are difficult to detect and may be immediately undiscoverable upon their completion. So for example, crimes involving fraud, breach of a fiduciary duty, bribes to a public official or employee, and those involving hidden recordings have statutes of limitations which begin to run upon discovery that the crime was committed. (See Pen. Code, § 803, subd. (c), see also Pen. Code, § 803, subd. (e).)

This bill would provide that a charge for the crime of computer hacking may be filed be up to three years after discovery of the crime, but no longer than nine years from the commission of the crime.

- 3) **Ex Post Facto:** In *Stogner v. United States, supra*, 539 U.S. 607 the Supreme Court ruled that a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution. (*Id.* at pp. 610-611, 616.) However, extension of an existing statute of limitations is not ex post facto as long as the prior limitations period has not expired. (*Id.* at pp. 618-619.)

SB 239 (Chang), of 2019-20 of Legislative Session, is a prior version of this bill. SB 239 did not account for the principles of the Ex Post Facto Clause. However, this bill specifically does not apply to crimes for which the statute of limitations has run.

- 4) **Argument in Support:** According to *Alameda County District Attorney*, “This straightforward bill would assist in the prosecution of computer related crimes by changing the statute of limitations from 3 years from the time the crime was committed to 3 years from the discovery of the commission of the crime.

“Currently, the statute of limitations for a computer related crimes including knowingly and without permission accessing any computer, computer system, or computer network or introducing malware to a computer or computer system is 3 years. However, the nature of crime on the internet sometimes prevents speedy prosecution. It is possible, for example, for a crime to be committed on a computer or computer system and not be discovered for years.

“This bill would provide much needed time for prosecuting these crimes, and prevent an instance of a crime being discovered after the 3 year statute with no available recourse.”

5) Prior Legislation:

- a) SB 239 (Chang), of the 2019-20 Legislative Session, provided that, notwithstanding any other statutes of limitations, for the crime of unauthorized access to computers, a criminal complaint may be filed within three years after the discovery of offense. SB 239 was held in the Assembly Appropriations Committee.
- b) AB 32 (Waldron), Chapter 614, Statutes of 2015, increased specified fines related to computer crimes from a maximum of five thousand dollars (\$5,000), to a maximum of ten thousand dollars (\$10,000), and tolled the statute of limitations for illegally acquiring digital images of a person that displays an intimate body part of a person.
- c) AB 1649 (Waldron), Chapter 379, Statutes of 2014, specified the penalties for any person who disrupts or causes the disruption of, adds, alters, damages, destroys, provides or assists in providing a means of accessing, or introduces any computer contaminant into a “government computer system” or a “public safety infrastructure computer system,” as specified.

REGISTERED SUPPORT / OPPOSITION:**Support**

AARP

Alameda County District Attorney's Office

California District Attorneys Association

California State Sheriffs' Association

Los Angeles County District Attorney's Office

Peace Officers Research Association of California (PORAC)

Opposition

None

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