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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

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**Bill No:** SB 180                      **Hearing Date:** April 18, 2017  
**Author:** Mitchell  
**Version:** January 24, 2017  
**Urgency:** No                                      **Fiscal:** No  
**Consultant:** SJ

**Subject:** *Controlled Substances: Sentence Enhancements: Prior Convictions*

## HISTORY

**Source:** American Civil Liberties Union of California  
California Public Defenders Association  
Californians United for a Responsible Budget  
Coalition for Humane Immigrant Rights of Los Angeles  
Drug Policy Alliance  
Ella Baker Center for Human Rights  
Friends Committee on Legislation of California  
Legal Services for Prisoners with Children

**Prior Legislation:** SB 966 (Mitchell) Failed Assembly Public Safety (2016)  
AB 2320 (Condit) Chapter 1398, Stats. 1985

**Support:** Access Support Network of San Luis Obispo and Monterey Counties; Access Women's Health Justice; Alameda County Public Defender; American Federation of Teachers, Local 2121; American Friends Service Committee; Amity Foundation; A New Way of Life Re-Entry Project; Anti-Recidivism Coalition; Asian American Criminal Trial Lawyers Association; Asian American Drug Abuse Program, Inc.; Asian Pacific Environmental Network; Asian Prisoner Support Committee; Bay Area Black Worker Center; Because Black is Still Beautiful; Bend the Arc: A Jewish Partnership for Justice; Berkeley Youth Alternatives; Black Women Organized for Political Action; California Alliance for Youth and Community Justice; California Association of Alcohol and Drug Program Executives, Inc.; California Attorneys for Criminal Justice; California Catholic Conference; California Coalition for Women Prisoners; California Immigrant Policy Center; California Immigrant Youth Justice Alliance; California Prison Focus; California Prison Moratorium Project; Center for Living and Learning; Center on Juvenile and Criminal Justice; City and County of San Francisco Human Rights Commission; City of Refuge Church; City of Richmond, Mayor Tom Butt; Coleman Advocates; Communities United for Restorative Youth Justice; Congregation Beth Israel Judea; Contra Costa County Board of Supervisors, District One; Contra Costa County Racial Justice Coalition; Courage Campaign; Critical Resistance Los Angeles; Downtown Women's Center; Eastlake United for Justice; El/La Para TransLatinas; Equal Justice Society; Felony Murder Elimination Project; Forward Together; Further The Work; Harm Reduction Services; Health RIGHT 360; HIV Education and Prevention Project of Alameda County; Homeless Health Care Los Angeles; Human Rights of the

Incarcerated at UC Berkeley; Immigrant Youth Coalition; Jewish Youth for Community Action; Justice Now; Kehilla Community Synagogue; Law Enforcement Action Partnership; National Association of Social Workers, California Chapter; National Center for Youth Law; National Council of Jewish Women, California; National Employment Law Project; Needle Exchange Emergency Distribution; Oakland Rising; Or Shalom Jewish Community; People's Life Fund; Positive Women's Network; Prison Law Office; Prison Policy Initiative; Project Inform; Reentry Success Center; Riverside Temple Beth El; Root and Rebound; Roots Community Health Center; Rubicon Programs; Safe Alternatives to Violent Environments; SHIELDS for Families; Starting Over, Inc.; Students for Sensible Drug Policy; Swords to Plowshares; Tarzana Treatment Centers, Inc.; Temple Beth El Jewish Community Center; The Gubbio Project; The Kitchen; The Sentencing Project; Think Dignity; Time for Change Foundation; Together to End Solitary Confinement, Santa Cruz; Transgender Gendervariant Intersex Justice Project; T'ruah; Trybe Inc.; Urban Habitat; Venice Community Housing Corp.; W. Haywood Burns Institute; Wellstone Democratic Renewal Club; Western Regional Advocacy Project; Women's Foundation of California; Youth for Environmental Safety; Youth Justice Coalition; several individuals

Opposition: Association for Deputy District Attorneys; Association for Los Angeles Deputy Sheriffs; California Association of Code Enforcement Officers; California College and University Police Chiefs Association; California District Attorneys Association; California Narcotics Officers Association; California Police Chiefs Association; California State Sheriffs; Association; International Faith Based Coalition; Los Angeles County Professional Peace Officers Association; Los Angeles Police Protective League; Riverside Sheriffs Association; San Diego County District Attorney

## PURPOSE

***The purpose of this bill is to repeal the current enhancement for specified drug offenses under which a defendant receives an additional three-year term for each prior conviction of any one of a number of specified drug offenses, except in cases where a minor was used in the commission of the prior offense.***

*Existing law* classifies controlled substances in five schedules according to their medical utility and potential for abuse. Schedule I controlled substances have the greatest restrictions and penalties, including prohibiting the prescribing of a Schedule I controlled substance. (Health & Saf. Code, §§ 11054 to 11058.)

*Existing law* provides penalties for possession, possession for purposes of sale, and manufacturing, transporting and distributing controlled substances. Sentences for drug offenses are typically subject to Penal Code Section 1170 (h). Convicted persons serve felony sentences in county jails, unless disqualified by a prior serious felony conviction or a sex offender registry requirement. (Health & Saf. Code §§ 11350-11401.)

*Existing law* provides that a person convicted of certain specified drug commerce crimes who has previously been convicted of any of those crimes, is subject to an additional three-year

sentence enhancement for each prior conviction, to be served in jail unless the defendant is disqualified from a jail term by a prior serious felony conviction or sex offender registration, or another statute requires a prison term. (Health & Saf. § 11370.2.) The enhancement also covers a conviction for conspiracy to commit any of the listed crimes. The qualifying offenses are as follows. All statutory references in the list are to the Health and Safety Code:

- Possession for sale of cocaine, heroin, specified opiates, and other specified drugs - § 11351
- Possession for sale of cocaine base - § 11351.5
- Sale, distribution, or transportation of cocaine, cocaine base, heroin, specified opiates - § 11352
- Possession for sale of methamphetamine or specified other drugs - § 11378
- Sale, distribution, or transportation of methamphetamine or specified other drugs - § 11379
- Possession for sale of PCP - § 11378.5
- Sale, distribution, or transportation of PCP - § 11379.5
- Manufacturing any controlled substance through chemical extraction or synthesis - § 11379.6
- Using a minor in the commission of specified drug offenses - § 11380
- Possession of precursor chemicals with intent to manufacture PCP - § 11383

*This bill* repeals the three-year sentence enhancement for each of a defendant's prior convictions for the above listed drug offenses where the defendant is convicted in the current case of one of a number of specified drug offenses, except in cases where the person was convicted of using a minor to commit the prior offense.

## COMMENTS

### 1. Need for This Bill

According to the author:

Sentencing enhancements do not prevent or reduce drug sales, but do have destabilizing effects on families and communities. Research finds that the length of sentences does not provide any deterrent or significant incapacitation effect; in other words, longer sentences for drug offenses do not reduce recidivism, nor do they affect drug availability. Most people who commit crimes are either unaware of penalties or do not think they will be caught (Russell, Sarah F, "Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing," 43 UC Davis L. Rev. 1135 2010). Research shows that people incarcerated for selling drugs are quickly replaced by other people (U.S. Sentencing Commission, Fifteen Years of Guideline Sentencing: An assessment of how well the federal criminal justice system is achieving the goals of sentencing reform 2004).

As of 2014, there were at least 1,635 people in county jails across California sentenced to five to ten years. There were at minimum, 124 people sentenced to more than ten years in county jail. The leading causes of these excessive sentences are drug sales, possession for sale, or similar nonviolent drug offenses, which are compounded by cruel and costly sentencing enhancements. (California

State Sheriffs Association letter to “Interested Parties” April 25, 2014.)  
Thousands more are serving such sentences in prison.

In November 2016, voters overwhelmingly passed Proposition 57, making people in prison with non-violent convictions eligible for parole after completing their base terms – prior to serving time on any sentence enhancements. However, Proposition 57 does not impact people in county jail. Thus, people in county jail can serve longer sentences than those in state prison, even if they have been convicted of the same crime.

The current policy of sentencing people with nonviolent convictions to long periods of incarceration is an expensive failure that does not reduce the availability of drugs in our communities. Instead, it cripples state and local budgets that should prioritize drug prevention and treatment, education, and employment as our best policies against drug sales and drug use.

SB 180 (Mitchell) will reduce racial disparities in the criminal justice system. Although rates of drug use and sales are comparable across racial lines, people of color are far more likely to be stopped, searched, arrested, prosecuted, convicted, and incarcerated for drug law violations than are whites. (Human Rights Watch, “Decades of Disparity: Drug Arrests and Race in the United States.” 2009). Research also shows that prosecutors are twice as likely to pursue a mandatory minimum sentence for Blacks as for whites charged with the same offense (Sonja B Starr and Marit Rehavi, “Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker,” Yale Law Journal 123, no. 1 2013).

However, incarceration can lead to more crime by destabilizing families and communities. Many people who return from incarceration face insurmountable barriers to finding jobs and housing and reintegrating into society. Family members of incarcerated people also struggle with overwhelming debt from court costs, visitation and telephone fees, and diminished family revenue. The longer the sentence, the more severe these problems (Ella Baker Center for Human Rights, “Who Pays? The True Cost of Incarceration on Families” 2015).

## **2. History of the Enhancement for Prior Drug Offenses**

The enhancement for prior drug crime convictions was enacted through AB 2320 (Condit), Chapter 1398, Statutes of 1985. The bill included un-codified legislative intent “to punish more severely those persons who are in the regular business of trafficking in, or production of, narcotics and those persons who deal in large quantities of narcotics as opposed to individuals who have a less serious, occasional, or relatively minor role in this activity.”

The bill - called “The Dealer Statute” - was sponsored by the Los Angeles District Attorney and also included enhancements based on the weight of the drug involved in specified drug commerce crime. The weight enhancement is found in Health and Safety Code Section 11370.4. The Senate Judiciary Committee analysis of the bill set out the sponsor’s explanation that the bill was modeled on particularly harsh federal drug crime laws. The sponsor argued that the bill was necessary to eliminate an incentive for persons “to traffic [in drugs] in California where sentences are significantly lighter than in federal law.” The federal laws to which the sponsor

referred were those enacted in the expansion of the war against drugs during the Reagan administration. These laws included reduced judicial discretion through mandatory minimum sentences. In recent years, Congress has passed some sentence reductions, most notably reducing the disparity between cocaine powder crimes and cocaine base crimes.

### 3. Research on the Deterrence Effect of Sentences Increases

Criminal justice experts and commentators have noted that, with regard to sentencing, “a key question for policy development regards whether enhanced sanctions or an enhanced possibility of being apprehended provide any additional deterrent benefits.

Research to date generally indicates that increases in the certainty of punishment, as opposed to the severity of punishment, are more likely to produce deterrent benefits.<sup>1</sup>

A comprehensive report published in 2014, entitled *The Growth of Incarceration in the United States*, discusses the effects on crime reduction through incapacitation and deterrence, and describes general deterrence compared to specific deterrence:

A large body of research has studied the effects of incarceration and other criminal penalties on crime. Much of this research is guided by the hypothesis that incarceration reduces crime through incapacitation and deterrence. Incapacitation refers to the crimes averted by the physical isolation of convicted offenders during the period of their incarceration. Theories of deterrence distinguish between general and specific behavioral responses. General deterrence refers to the crime prevention effects of the threat of punishment, while specific deterrence concerns the aftermath of the failure of general deterrence—that is, the effect on reoffending that might result from the experience of actually being punished. Most of this research studies the relationship between criminal sanctions and crimes other than drug offenses. A related literature focuses specifically on enforcement of drug laws and the relationship between those criminal sanctions and the outcomes of drug use and drug prices.<sup>2</sup>

In regard to deterrence, the authors note that in “the classical theory of deterrence, crime is averted when the expected costs of punishment exceed the benefits of offending. Much of the empirical research on the deterrent power of criminal penalties has studied sentence enhancements and other shifts in penal policy. . . .

Deterrence theory is underpinned by a rationalistic view of crime. In this view, an individual considering commission of a crime weighs the benefits of offending against the costs of punishment. Much offending, however, departs from the strict decision calculus of the rationalistic model. Robinson and Darley (2004) review the limits of deterrence through harsh punishment. They report that

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<sup>1</sup> Valerie Wright, Ph.D., *Deterrence in Criminal Justice Evaluating Certainty vs. Severity of Punishment* (November 2010), The Sentencing Project (<http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf>.)

<sup>2</sup> *The Growth of Incarceration in the United States* (2014), Jeremy Travis, Bruce Western and Steve Redburn, Editors, Committee on Causes and Consequences of High Rates of Incarceration, The National Research Council, p. 131 (citations omitted) ([http://johnjay.jjay.cuny.edu/nrc/NAS\\_report\\_on\\_incarceration.pdf](http://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf).)

offenders must have some knowledge of criminal penalties to be deterred from committing a crime, but in practice often do not.”<sup>3</sup>

The authors of the 2014 report discussed above conclude that incapacitation of certain dangerous offenders can have “large crime prevention benefits,” but that incremental, lengthy prison sentences are ineffective for crime deterrence:

Whatever the estimated average effect of the incarceration rate on the crime rate, the available studies on imprisonment and crime have limited utility for policy. The incarceration rate is the outcome of policies affecting who goes to prison and for how long and of policies affecting parole revocation. Not all policies can be expected to be equally effective in preventing crime. Thus, it is inaccurate to speak of the crime prevention effect of incarceration in the singular. *Policies that effectively target the incarceration of highly dangerous and frequent offenders can have large crime prevention benefits, whereas other policies will have a small prevention effect or, even worse, increase crime in the long run if they have the effect of increasing postrelease criminality.*

#### 4. Argument in Support

According to the sponsors of the bill:

The RISE Act would repeal the three-year sentence enhancement for prior drug convictions, with an exception for convictions involving a minor. This extreme punishment has failed to protect communities or reduce the availability of drugs, but has resulted in overcrowded jails and prisons, harsh sentences, and crippled state and local budgets. By repealing this expensive and ineffective punishment, funds will be freed to reinvest in community programs that actually improve the quality of life and reduce crime....

The RISE Act is urgently needed. Counties around the state are building new jails to imprison more people with long sentences, funneling money away from community-based programs and services.

Since 2007, California has spent \$2.5 billion on county jail construction – not including the costs borne by the counties for construction and increased staffing, or the state’s debt service for these high-interest loans. Sheriffs have argued for this expansion by pointing to their growing jail populations, particularly people with long sentences and with mental health and substance use needs. By reforming sentencing enhancements for people with prior drug convictions, SB 180 will address the rationale for costly jail expansion, allowing state and county funds to be invested in programs and services that meet community needs and improve public safety, including community-based mental health and substance treatment, job programs, and affordable housing.

The RISE Act will reduce racial disparities in the criminal justice system. Although rates of drug use and selling are comparable across racial lines, people

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<sup>3</sup> *Id.* at 132-133.

of color are far more likely to be stopped, searched, arrested, prosecuted, convicted and incarcerated for drug law violations than whites.

Further, sentence enhancements based on prior convictions target the poorest and most marginalized people in our communities – those with substance use and mental health needs, and those who, after prior contact with police or imprisonment, have struggled to reintegrate into society.

## **5. Argument in Opposition**

According to the Association for Los Angeles Deputy Sheriffs, the Association of Deputy District Attorneys, the California Association of Code Enforcement Officers, the California College and University Police Chiefs Association, the California Narcotic Officers Association, the Los Angeles County Professional Peace Officers Association, the Los Angeles Police Protective League, and the Riverside Sheriffs Association:

Under current law, we have the ability to impose higher sanctions on those who are hard-core drug traffickers by adding an additional three years for each prior conviction to the current conviction of a trafficker who has been convicted pursuant to Health & Safety Code Sections 11351, 11351.5 or 11352 – opiates, opiate derivatives or hallucinogenic substances. Senate Bill 180 will prevent the imposition of the enhancement for opiate, opiate derivative or hallucinogenic traffickers who have prior drug trafficking convictions. The consequence of Senate Bill 180 will be to treat the career drug trafficker exactly the same as the person who has been convicted of their first offense.

We believe that there is an enhanced level of seriousness posed to a community by career drug traffickers and that the enhanced sentence that is available under current law should be retained. Put another way, there is nothing benign about the drug dealer who systematically preys on the most vulnerable of our society. We do not believe that proponents of the bill have made the case that the arc of social progress is advanced by reducing the accountability of career drug traffickers.

**-- END --**