

---

# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair  
2021 - 2022 Regular

---

**Bill No:** AB 124                      **Hearing Date:** July 6, 2021  
**Author:** Kamlager  
**Version:** April 15, 2021  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** SC

**Subject:** *Criminal procedure*

## HISTORY

**Source:** Black Futures Lab Public Policy Institute  
California Coalition of Women Prisoners  
Free to Thrive  
Human Rights Watch  
National Center for Youth Law  
Survived and Punished  
USC School of Law Post-Conviction Justice Project  
Young Women's Freedom Center

**Prior Legislation:** AB 2942 (Ting), Ch. 1001, Stats. 2018  
SB 823 (Block), Ch. 650, Stats. 2016  
AB 1761 (Weber), Ch. 636, Stats. 2016  
AB 1156 (Brown), Ch. 378, Stats. 2015  
SB 2035, Ch. 893, Stats. 1982  
SB 54, Ch. 404, Stats. 1981

**Support:** 3strands Global Foundation; ACLU California Action; All of Us or None Riverside; Alliance for Children's Rights; Anti-Recidivism Coalition; Art of Yoga Project; Black to the Future Action Fund; California Alliance for Youth and Community Justice; California Against Slavery; California Attorneys for Criminal Justice; California Catholic Conference; California Coalition for Women Prisoners; California Commission on the Status of Women and Girls; California Legislative Women's Caucus; California Partnership to End Domestic Violence; California Prison Focus; California Public Defenders Association; Californians for Safety and Justice; Californians United for a Responsible Budget; Center for Community Action and Environmental Justice; Ceres Policy Research; Center for Public Interest Law/Children's Advocacy Institute/University of San Diego; Children's Defense Fund – CA; Citizens for Choice; Clergy and Laity United for Economic Justice; Coleman Advocates for Children and Youth; Communities United for Restorative Youth Justice (CURYJ); Community Agency for Resources Advocacy and Services; Community Legal Services in East Palo Alto; Community Works; Conxion to Community Center for Training and Careers Inc.; County of San Diego; Crime Survivors for Safety and Justice; Cure Violence Global; Dignity and Power Now; Ella Baker Center for Human Rights; Empowering Pacific Islander Communities; Essie Justice Group; Fair Chance Project; Family Violence Law Center; Felony Murder Elimination Project; Finen

Family; Forever Found; Free to Thrive; Fresno Barrios Unidos; I-5 Freedom Network; Initiate Justice; Interface Children and Family Services; John Burton Advocates for Youth; Journey House; Justice LA; Kern County Participatory Defense; LA Best Babies Network; Los Angeles Democratic Party; Los Angeles LGBT Center; Mental Health Advocacy Services; Monarch Services; National Association of Social Workers, California Chapter; National Center for Youth Law; National Institute for Criminal Justice Reform; National Women’s Political Caucus of Sacramento; North County Lifeline; People's Pottery Project; Point Loma Nazarene University; Praxis Project; Prisoner Advocacy Network; Public Law Center; Re:store Justice; Rights4Girls; San Diego City Attorney’s Office; San Diego Human Trafficking & CSEC Advisory Counsel; San Diego Public Defender; San Diego Workforce Partnership, Inc.; San Diego Youth Services; Shared Hope International; Showing Up for Racial Justice (SURJ) Bay Area; Silicon Valley De-bug; Sonoma County Black Coalition; Starting Over, INC.; Survived & Punished; The Well Path; Time for Change Foundation; Transgender Advocacy Group; Transformative In-Prison Workgroup; Treasures; Uncommon Law; Underground Grit; W. Haywood Burns Institute; Women Democrats of Sacramento County; Women's Foundation of California

Opposition: California District Attorneys Association; California Narcotics Officers’ Association; California State Sheriffs’ Association; Crime Victims United of California; Orange County District Attorney

Assembly Floor Vote: 54 - 12

## PURPOSE

***The purpose of this bill is to require courts to consider whether specified trauma to the defendant contributed to the commission of the offense when making sentencing and resentencing determinations and to expand access to vacatur relief and the affirmative defense of coercion for victims of human trafficking to victims of intimate partner violence and sexual violence.***

*Existing law* states that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice. When a sentence includes incarceration, this purpose is best served by terms that are proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. (Pen. Code, § 1170, subd. (a)(1).)

*Existing law* provides, until January 1, 2022, that when a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. (Pen. Code § 1170, subd. (b).)

*Existing law* states that at least four days prior to the time set for imposition of judgement, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation. In determining the appropriate term, the court may consider the record in the case, the probation officer’s report or other reports, and statements in aggravation or mitigation submitted by the prosecution, defendant or victim, or family of the victim, and any further evidence introduced at the sentencing hearing. (*Ibid.*)

*Existing law* states that the court shall select the term which, in the court's discretion, best serves the interests of justice and the court shall set forth on the record the reasons for imposing the term selected. The court may not impose an upper term by using the fact of any enhancement upon which the sentence is imposed. (*Ibid.*)

*This bill* states that unless the court finds that the aggravating circumstances so far outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice, the court shall order imposition of the lower term if any of the following was a contributing factor in the commission of the offense:

- The person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence;
- The person is a youth, or was a youth as defined under subdivision (b) of section 1016.7 at the time of the commission of the offense; or,
- Prior to the instant offense, or at the time of the commission of the offense, the person is or was a victim of intimate partner violence or human trafficking.

*This bill* clarifies the court is not precluded from imposing the lower term even if there is no evidence of the circumstances listed above.

*Existing law* authorizes a sentencing court, within 120 days of the date of a defendant's commitment into custody, on its own motion, or at any time upon the recommendation of the secretary of the Board of Parole Hearings, the county correctional administrator, or the county district attorney, to recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if they had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. (Pen. Code, § 1170, subd. (d)(1).)

*Existing law* states that the resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. (*Ibid.*)

*Existing law* provides that a court resentencing under this paragraph may reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice. The court may consider postconviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice. (*Ibid.*)

*This bill* requires the court to additionally consider if the defendant has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence, if the defendant was a victim of intimate partner violence or human trafficking prior to or at the time of the commission of the offense, or if the defendant is a youth or was a person under the age of 26 at the time of the commission of the offense, and whether those circumstances were a contributing factor in the commission of the offense.

*Existing law* states that for youthful offenders, the court shall have discretion to resentence the defendant in the same manner as if the defendant had not been previously sentenced, provided

that the new sentence, if any, is not greater than the initial sentence. The discretion of the court shall be exercised in consideration of the criteria that specifically applies to resentencing of youthful offenders. Victims, or victim family members if the victim is deceased, shall be notified of the resentencing hearing and shall retain their rights to participate in the hearing. (Pen. Code, § 1170, subd. (d)(2)(F)-(G).)

*This bill* provides that the court shall have discretion to resentence the defendant to a term that is less than the initial sentence if any of the following were a contributing factor in the commission of the alleged offense,

- The person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence;
- the person is a youth, or was under 26 years old at the time of the commission of the offense; or,
- Prior to the instant offense, or at the time of the commission of the offense, the person is or was a victim of intimate partner violence or human trafficking.

*This bill* clarifies that the court is not prohibited from resentencing the defendant to a term less than the initial sentence even if none of the circumstances listed above are present.

*Existing law* provides that except as otherwise provided by law, and subject to existing laws prohibiting double punishment, a court may sentence a person convicted of 2 or more felonies to an aggregate term of imprisonment for all convictions at a sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements, prior convictions, and prior prison terms. (Pen. Code, § 1170.1, subd. (a).)

*Existing law* provides that the principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses. (*Ibid.*)

*This bill* states, except as otherwise provided by law, unless contrary to the interests of justice, the court shall not impose consecutive terms of imprisonment for two or more felonies where any of the following were a contributing factor in the commission of the offense:

- The person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence;
- The person is under 26 years old, or was under 26 years old at the time of the commission of the offense; or,
- Prior to the instant offense, or at the time of the commission of the offense, the person is or was a victim of intimate partner violence or human trafficking.

*Existing law* authorizes the court, generally, to dismiss or strike an enhancement in the interests of justice. (Pen. Code, § 1385.)

*This bill* states that unless contrary to the interest of justice and unless an initiative requires the court to impose a term of imprisonment for the enhancement, the court shall not impose a term of

imprisonment for any sentence enhancement where any of the following were a contributing factor in the commission of the alleged offense:

- The person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence;
- the person is, or was, under the age of 26 at the time of the commission of the offense; or,
- Prior to the instant offense, or at the time of the commission of the offense, the person is or was a victim of intimate partner violence or human trafficking.

*Existing law* authorizes a person arrested for or convicted of any nonviolent offense committed while the person was a victim of human trafficking, including, but not limited to, prostitution as described in subdivision (b) of Section 647, to petition the court for vacatur relief of their convictions and arrests. The petitioner shall establish, by clear and convincing evidence, that the arrest or conviction was the direct result of being a victim of human trafficking. (Pen. Code, § 236.14.)

*Existing law* defines “vacate” to mean that the arrest and any adjudications or convictions suffered by the petitioner are deemed not to have occurred and that all records in the case are sealed and destroyed. (Pen. Code, § 236.14, subd. (t)(2).)

*Existing law* defines “nonviolent offense” for purposes of the vacatur law to mean any offense not listed as a “violent felony.” (Pen. Code, § 236.14, subd. (t)(1).)

*This bill* deletes the exclusion of “violent felonies” from vacatur relief.

*This bill* creates a similar provisions for vacatur relief for a person convicted of any offense committed while the person was a victim of intimate partner violence or sexual violence.

*This bill* requires the petitioner for relief to establish by clear and convincing evidence that the arrest or conviction was the direct result of being a victim of intimate partner violence or sexual violence.

*This bill* requires the petition for relief and supporting documentation to be served on the state or local prosecutorial agency that obtained the conviction for which vacatur is sought or with jurisdiction over charging decisions with regard to the arrest. The state or local prosecutorial agency shall have 45 days from the date of receipt of service to respond to the petition for relief.

*This bill* provides that if opposition to the petition is not filed by the applicable state or local prosecutorial agency, the court shall deem the petition unopposed and may grant the petition.

*This bill* specifies that the court may, with the agreement of the petitioner and all of the involved state or local prosecutorial agencies, consolidate into one hearing a petition with multiple convictions from different jurisdictions.

*This bill* states that if the petition is opposed or if the court otherwise deems it necessary, the court shall schedule a hearing on the petition and describes the evidence that may be presented at the hearing.

*This bill* provides that after considering the totality of the evidence presented, the court may vacate the conviction and expunge the arrests and issue an order if it finds all of the following:

- That the petitioner was a victim of intimate partner violence or sexual violence at the time the crime was committed;
- The commission of the crime was a direct result of being a victim of intimate partner violence or sexual violence;
- The victim is engaged in a good faith effort to distance themselves from the perpetrator of the harm; and,
- It is in the best interest of the petitioner and in the interests of justice.

*This bill* states that an order of vacatur shall: set forth a finding that the petitioner was a victim of intimate partner violence or sexual violence when they committed the offense; set aside the guilty verdict or the adjudication and dismiss the accusation or information against the petitioner; and notify Department of Justice that the petitioner was a victim of intimate partner violence or sexual violence when they committed the crime and of the relief granted.

*This bill* specifies that a petitioner that is granted relief shall not be relieved of any financial restitution order that directly benefits the victim of a crime, unless it has already been paid.

*This bill* allows a person who was adjudicated in juvenile proceedings for committed an offense while they were a victim of intimate partner violence or sexual violence to petition for vacatur relief. If the petitioner establishes that the arrest or adjudication was the direct result of being a victim of intimate partner violence or sexual violence the petitioner is entitled to a rebuttable presumption that the requirements for relief have been met.

*This bill* requires a petition for vacatur relief to be made and heard within a reasonable time after the person has ceased to be a victim of intimate partner violence or sexual violence, or within a reasonable time after the petitioner has sought services for being a victim of intimate partner violence or sexual violence, whichever occurs later, subject to reasonable concerns for the safety of the petitioner, family members of the petitioner, or other victims of intimate partner violence or sexual violence who may be jeopardized by the bringing of the application or for other reasons.

*This bill* states that petitioner, or their attorney, may be excused from appearing in person at a hearing for relief only if the court finds a compelling reason why the petitioner cannot attend the hearing, in which case the petitioner may appear telephonically, via videoconference, or by other electronic means established by the court.

*This bill* provides that if the court denies the application because the evidence is insufficient to establish grounds for vacatur, the denial may be without prejudice. The court may state the reasons for its denial in writing or on the record that is memorialized by transcription, audio tape, or video tape, and if those reasons are based on curable deficiencies in the application, allow the applicant a reasonable time period to cure the deficiencies upon which the court based the denial.

*Existing law* provides in addition to any affirmative defense, it is a defense to a charged of a crime that the person was coerced to commit the offense as a direct result of being a human trafficking victim at the time of the offense and had a reasonable fear of harm. This defense does not apply to a serious felony, a violent felony, or a violation of human trafficking. A defendant

has the burden of establishing the affirmative defense by a preponderance of the evidence. (Pen. Code, § 236.23.)

*This bill* allows the use of this affirmative defense in cases of serious felonies, violent felonies, and human trafficking.

*Existing law* provides that certified records of a federal, state, tribal, or local court or governmental agency documenting the person's status as a victim of human trafficking at the time of the offense, including identification of a victim of human trafficking by a peace officer and certified records of approval notices or enforcement certifications generated from federal immigration proceedings, may be presented to establish the affirmative defense. (Pen. Code, § 236.23, subd. (c).)

*This bill* clarifies that information contained in governmental agency reports, which is relevant to the identification of a victim of human trafficking by a peace officer may also be presented even if a peace officer did not make an identification.

*Existing law* states that if the defendant prevails on the affirmative defense the defendant is entitled to specified relief including having the records of the case sealed as specified and being released from all penalties and disabilities resulting from the charge as specified. (Pen. Code, § 236.23, subd. (e).)

*This bill* establishes an affirmative defense to a charge of a crime that the person was coerced to commit the offense as a direct result of being a victim of intimate partner violence or sexual violence at the time of the offense and had a reasonable fear of harm. A defendant asserting the affirmative defense has the burden of establishing the affirmative defense by a preponderance of the evidence.

*This bill* provides that if the defendant prevails on the affirmative defense the defendant is entitled to specified relief including having the records of the case sealed as specified and being released from all penalties and disabilities resulting from the charge as specified.

*Existing law* defines "plea bargaining" as any bargaining, negotiation, or discussion between a criminal defendant, or their counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant. (Pen. Code, § 1192.7, subd. (b).)

*This bill* requires the prosecutor, in the interest of justice, and in order to reach a just resolution during plea negotiations, to consider during plea negotiations, among other factors, the following circumstances as factors in support of a mitigated sentence if any of the following were a contributing factor in the commission of the alleged offense:

- The person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence.
- The person is a youth, or was a youth at the time of the commission of the offense.
- Prior to the instant offense, or during the commission of the offense, the person is or was a victim of intimate partner violence or human trafficking.

*Existing law* allows evidence of mental disease, mental defect, or mental disorder in a criminal trial solely for the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged. (Pen. Code, § 28, subd. (a).

*This bill* would instead provide that evidence that an individual suffers from a mental disease, mental defect, or mental disorder is admissible on the issue of whether or not the accused actually formed the required mental state for the crime that is charged, including whether or not the accused committed a willful act, premeditated, deliberated, harbored malice aforethought, acted knowingly, acted maliciously, or acted with conscious disregard for human life.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

According to the ACLU, nearly 60% of female state prisoners nation-wide and as many as 94% of certain female prison populations have a history of physical or sexual abuse before being incarcerated (ACLU: Prison Rape Elimination Act of 2003). Black women make up a quarter of the incarcerated population in California, which when considered alongside the reality that Black women are only five percent of the adult population yet are incarcerated at five times the rate of white women, demonstrates a deplorable overrepresentation of Black women in prison (California's Prison Population). Similar disparities exist for other individuals of color, including Latinx and indigenous communities. Transgender, lesbian, and bisexual women, trans men, and gender non-conforming people are also disproportionately survivors of violence and overrepresented in prisons, though little quantitative research is available to highlight these disparities.

Despite the body of research showing that the effect of trauma and abuse drives girls into the juvenile and criminal justice systems, the system itself typically overlooks the context of abuse when determining whether to arrest or charge a girl. When law enforcement views girls as perpetrators, and when their cases are not dismissed or diverted but sent deeper into the justice system, the cost is twofold: girls' abusers are shielded from accountability, and the trauma that is the underlying cause of the behavior is not addressed. The choice to punish instead of support sets in motion a cycle of abuse and imprisonment that has harmful consequences for victims of trauma (Human Rights Project for Girls, Georgetown Law Center on Poverty and Inequality, and Ms. Foundation for Women). This research indicates that LGBT and gender non-conforming girls in particular experience higher rates of incarceration.

Moreover, judges often lack the discretion to dismiss charges, reduce harsh sentences, and strike sentence enhancements to tailor court responses to adequately serve vulnerable populations and the interest of justice. Too often, limited opportunities to present relevant mitigating evidence, and limited judicial discretion to make fair and balanced decisions leads to inequitable outcomes for trauma victims.

AB 124 is an opportunity to correct unjust outcomes of the past, provide full context of the experiences that might impact a person's actions, and use a more humanizing and trauma-informed response to criminal adjudication.

## 2. Admissibility of Mental State Evidence

Generally “every crime has two components: (1) an act or omission, sometimes called the *actus reus*; and (2) a necessary mental state, sometimes called the *mens rea*.” (*People v. Williams* (2009) 176 Cal.App.4th 1521, 1528.) “In criminal law, there are two descriptions of criminal intent: general intent and specific intent. ‘A crime is characterized as a “general intent” crime when the required mental state entails only an intent to do the act that causes the harm; a crime is characterized as a “specific intent” crime when the required mental state entails an intent to cause the resulting harm.’ (*People v. Davis* (1995) 10 Cal.4th 463, 518-519, fn. 15, 41 Cal. Rptr. 2d 826, 896 P.2d 119.) ‘General criminal intent thus requires no further mental state beyond willing commission of the act proscribed by law.’” (*People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1172-1173, quoting *People v. Sargent* (1999) 19 Cal.4th 1206, 1215.)

Existing law makes inadmissible evidence of a mental disease, mental defect, or mental disorder “to show or negate the capacity to form any mental state” including intent, but it may be admissible to show “a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.” (Pen. Code, § 28, subd. (a).) While current law restricts mental state evidence to specific intent cases, prior to a 1982 amendment, this evidence was admissible in general intent cases. (See *People v. Whisett* (1983) 149 Cal.App.3d 213, 220.)

This bill would restore the law to how it was applied prior to the 1982 amendment restricting its application to specific intent crimes only. It expands the admissibility of this evidence to the issue of whether or not the defendant formed the required mental state for the crime, including whether the defendant committed a willful act, premeditated, deliberated, harbored malice aforethought, acted knowingly, acted maliciously, or acted with conscious disregard for human life.

## 3. Expansion of Vacatur Relief

Existing law authorizes vacatur relief for victims of human trafficking who have been arrested or convicted of nonviolent crimes. (Pen. Code, § 236.14.) A nonviolent crime is any offense that is not listed as a violent felony. (Pen. Code, § 236.14, subd. (t)(1).) The law allows a person to file a petition with the court, under penalty of perjury, and shall establish by clear and convincing evidence that the arrest or conviction was the direct result of being a victim of human trafficking. (Pen. Code, § 236.14, subd. (a).) The state or local prosecutorial agency shall have 45 days from the date of receipt of service to respond to the petition for relief. If the petition is opposed, then the court shall hold a hearing. (Pen. Code, § 236.14, subd. (c).) If opposition is not filed by the applicable state or local prosecutorial agency, the court shall deem the petition unopposed and may grant the petition. (Pen. Code, § 236.14, subd. (d).) If the petition is granted, the court may vacate the conviction and expunge the arrest and issue an order reflecting the court’s determination. (Pen. Code, § 236.14, subd. (g)-(h).) The petitioner shall not be relieved of any financial restitution order that directly benefits the victim of the crime, unless it is already paid. (Pen. Code, § 236.14, subd. (i).) The term “vacate” for purposes of vacatur relief means “the arrest and any adjudications or convictions suffered by the petitioner are deemed not to have occurred and that all records in the case are sealed and destroyed. The court shall provide the

petitioner with a copy of the orders and inform the petitioner that they may thereafter state that they were not arrested for, or adjudicated or convicted of, the charge that was vacated. (Pen. Code, § 236.14, subd. (Pen. Code, § 236.14, subd. (t)(2).)

This bill deletes the requirement that the arrest or conviction must have been for a nonviolent offense. Additionally, this bill creates a similar provision authorizes vacatur relief for victims of intimate partner violence or sexual violence.

#### 4. Recall and Resentencing Provisions

As a general matter, a court typically loses jurisdiction over a sentence when the sentence begins. (*Dix v. Superior Court* (1991) 53 Cal. 3d 442, 455.) Once the defendant has been committed on a sentence pronounced by the court, the court no longer has the legal authority to increase, reduce, or otherwise alter the defendant's sentence. (*Id.*)

However, the Legislature has created limited statutory exceptions allowing a court to recall a sentence and resentence the defendant. (*Id.*; Pen. Code, § 1170, subd. (d).) Specifically, within 120 days of commitment, the court has the ability to resentence the defendant as if it had never imposed sentence to begin with, provided the new sentence, if any, is no greater than the initial sentence. (Pen. Code, § 1170, subd. (d)(1).) The court may consider post-conviction factors, including, but not limited to, an inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice. (*Ibid.*)

This bill requires the court to additionally consider if the defendant has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence, if the defendant was a victim of intimate partner violence or human trafficking prior to or at the time of the commission of the offense, or if the defendant is a youth or was a youth at the time of the commission of the offense, and whether those circumstances were a contributing factor in the commission of the offense. Youth is defined as a person under the age of 26.

Existing law also authorizes a recall and resentencing procedure for offenders who were under 18 years of age when they committed their offense and received a sentence of imprisonment for life without the possibility of parole after they have been incarcerated for at least 15 years. (Pen. Code, § 1170, subd. (d)(2).) The law requires the defendant to file the original petition for recall and resentencing with the sentencing court and requires the court to consider specified factors related to the defendant's crime, individual circumstances, and rehabilitation. (Pen. Code, § 1170, subd. (d)(2)(F).) The court has the discretion to resentence the defendant in the same manner as if defendant had not previously been sentenced, provided the new sentence, if any, is not greater than the initial sentence. (Pen. Code, § 1170, subd. (d)(2)(G).)

This bill provides that the court may also resentence the defendant to a term that is less than the initial sentence if any of the following were a contributing factor in the commission of the offense: the person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence; the person is a youth, or was a youth, which for purposes of this bill means under the age of 26; prior to the instant offense, or at the time of the commission of the offense, the person is or was a victim of intimate partner

violence or human trafficking. This bill further specifies that a court may also resentence a defendant to a term that is less than the initial sentence even if the listed circumstances are not present.

### **5. Sentencing: Circumstances in Aggravation and Mitigation**

Existing law states that when a statute specifies three possible terms of imprisonment, the choice of the appropriate term shall rest within the sound discretion of the court. (Pen. Code, § 1170, subd. (b).) The California Rules of Court provide that in exercising discretion to select one of the three authorized terms of imprisonment, "the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing." (California Rules of Court, Rule 4.420(b).)

Specifically, the rules enumerate circumstances in aggravation related to the crime which may include any of the following:

- 1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness;
- 2) The defendant was armed with or used a weapon at the time of the commission of the crime;
- 3) The victim was particularly vulnerable;
- 4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission;
- 5) The defendant induced a minor to commit or assist in the commission of the crime;
- 6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process;
- 7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed;
- 8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism;
- 9) The crime involved an attempted or actual taking or damage of great monetary value;
- 10) The crime involved a large quantity of contraband; and

- 11) The defendant took advantage of a position of trust or confidence to commit the offense.
- 12) The crime constitutes a hate crime. (Cal. Rules of Court, Rule 4.421(a).)

There are also enumerated circumstances in aggravation related to the defendant which may include any of the following:

- 1) The defendant has engaged in violent conduct that indicates a serious danger to society;
- 2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;
- 3) The defendant has served a prior term in prison or county jail under section 1170(h);
- 4) The defendant was on probation, mandatory supervision, postrelease community supervision, or parole when the crime was committed; and
- 5) The defendant's prior performance on probation, mandatory supervision, postrelease community supervision, or parole was unsatisfactory. (Cal. Rules of Court, Rule 4.421(b).)

This bill provides that unless the court finds that the aggravating circumstances so far outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice, the court shall order the imposition of the lower term if any of the following circumstances was a contributing factor in the commission of the offense: the person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence; the person is a youth, or was a youth, which for purposes of this bill means under the age of 26; prior to the instant offense, or at the time of the commission of the offense, the person is or was a victim of intimate partner violence or human trafficking.

Existing law also provides that the court may sentence a defendant who is convicted of more than one felony to either a consecutive term or a concurrent term. Existing law also provides the court with the authority to strike or dismiss a charge or enhancement in the interests of justice.

This bill states that when the mitigating circumstances listed above were a contributing factor in the commission of the offense, the court shall not impose consecutive terms of imprisonment for multiple felonies and shall not impose a term of imprisonment for any sentence enhancement, unless contrary to the interests of justice or if imposition of a term of imprisonment is required by an initiative.

## **6. Affirmative Defense of Duress**

Under existing law, the affirmative defense of duress is available to defendants who commit a crime “under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.” (Pen. Code, § 26, subd. (6).) A threat of future harm is not sufficient; the danger to life must have been immediate. (CALCRIM No.

3402.) Duress is not a defense to murder, unless the charge is felony-murder in which duress can be used to negate the underlying felony. (Pen. Code, § 26; *People v. Anderson* (2002) 28 Cal.4th 767, 784.) The rationale behind allowing duress as a defense for any crime except murder is explained as follows:

The basic rationale behind allowing the defense of duress for other crimes "is that, for reasons of social policy, it is better that the defendant, faced with a choice of evils, choose to do the lesser evil (violate the criminal law) in order to avoid the greater evil threatened by the other person." (Fn. omitted.) This rationale, however, "is strained when a defendant is confronted with taking the life of an innocent third person in the face of a threat on his own life. . . . When the defendant commits murder under duress, the resulting harm--i.e. the death of an innocent person--is at least as great as the threatened harm--i.e. the death of the defendant." (*People v. Anderson*, supra, 28 Cal.4th at p. 772, citing *U.S. v. LaFleur* (1992) 971 F.2d 200, 205.)

The court must instruct the jury on the defense of duress when it is requested by the defendant and there is substantial evidence supporting the defense. (CALCRIM No. 3402.) Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983.) If the prosecutor cannot prove beyond a reasonable doubt that the defendant did not act under duress, the jury must find the defendant not guilty of the underlying crime. (CALCRIM No. 3402.)

Existing law provides a separate affirmative defense to a crime if the defendant establishes by a preponderance of the evidence that they were "coerced to commit the offense as a direct result of being a human trafficking victim at the time of the offense and had a reasonable fear of harm." (Pen. Code, § 263.23, subd. (a)-(b).) This defense does not apply to a serious felony or a violent felony or to a charge of human trafficking. (Pen. Code, § 263.23, subd. (a).) This defense may be asserted at any time prior to the entry of a guilty plea and before the conclusion of any trial for the offense. (Pen. Code, § 263.23, subd. (d).) If the defendant prevails on the defense, the defendant is entitled to have the records related to the case sealed and to be generally released from all penalties and disabilities resulting from the charge. (Pen. Code, § 263.23, subd. (e).)

This bill removes the limitation that this defense cannot be applied to a serious or violent felony or to human trafficking. This bill also creates a similar provision that provides an affirmative defense for persons who were coerced to commit a crime as a direct result of being a victim of intimate partner violence or sexual violence at the time of the offense and had a reasonable fear of harm. A person who is able to establish this defense by a preponderance of the evidence is entitled to the same relief that is authorized for victims of human trafficking.

Considering the long-standing legal principle making the defense of duress unavailable when a defendant is charged with murder, allowing the use of the affirmative defense of coercion for victims of specified crimes to apply without limitation conflicts with the rationale behind the defense. Specifically, should a person's criminal liability for committing a crime be negated when the crime committed may be more serious than the harm that the person could face if they were to resist the coercion?

## 6. Plea Bargaining

Plea bargaining is statutorily defined as “any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant.” (Pen. Code, § 1192.7, subd. (b).) A plea bargain is a contract between the accused and the prosecutor. (*People v. Vargas* (2001) 91 Cal.App.4th 506, 533.) Both these parties are bound to the terms of the agreement; when the court approves the bargain, it also agrees to be bound by its terms. (*People v. Armendariz* (1993) 16 Cal.App.4th 906, 910-911.)

This bill would require the prosecution, in negotiating and bargaining, to consider specifically whether trauma, youthfulness, or being a victim of human trafficking or intimate partner violence was a contributing factor in the commission of the offense.

## 7. Argument in Support

According to the Family Violence Law Center (FLVC):

The FLVC helps diverse communities in Alameda County heal from domestic violence (DV) and sexual assault through survivor-centered legal and crisis intervention. Through advocacy, we engage different systems to uplift the needs and concerns of survivors. AB 124 is about treating survivors as survivors and not aggressors. The criminalization of trauma and survivor defense behavior is an unfortunate reality that we battle in the work we do as survivor providers. In California alone, roughly 67% of women in prison for killing a significant other did so in self-defense. That statistic, along with the fact that nearly 60% of female state prisoners nationwide and as many as 94% of certain female prison populations have a history of physical or sexual abuse before being incarcerated, speaks volumes to how pervasive generational violence and trauma often informs individuals’ responses to dangerous and triggering events, such as gender-based violence. Such information is important to integrate into criminal sentencing protocols because it allows for more just sentencing. All too often, survivor defense behaviors are misconstrued and manipulated in court to pain the survivor out to be the aggressor when in fact it was the survivor’s life at stake. AB 124 would help combat such harmful court techniques by allowing currently ignored context like the impacts of generational trauma on survivors to be considered when determining criminal sentences.

....

AB 124 would create just outcomes moving forward, provide full context of the experiences that contributed to a survivor’s actions or inactions, and use a more humanizing and trauma-informed response to criminal adjudication.

## 8. Argument in Opposition

According to the California District Attorneys Association:

[T]his bill would authorize the court to recall an inmate's sentence and resentence them upon a motion by the inmate. This will likely result in many incarcerated inmates making a request to recall their sentence as we have seen in past measures, which will prove costly for the courts, district attorneys, and public defenders who will have to respond and appear for every request made by an inmate. Further, as mentioned earlier, the proof required for the court is not clear.

Next, the bill has been expanded to include mental defect being a defense for not only specific intent crimes, but for general intent crimes. This is a dramatic change in the law that undercuts decades of case law and the Victim's Bill of Rights in the California constitution.

The removal of "nonviolent offense" fails to address the effects of the individual's actions on the secondary victims of violent crime. If individuals are not held responsible for their violent offenses, the constitutional rights of those victims may be infringed upon. Further, because this bill essentially creates an additional and specific "duress defense" for vulnerable populations, there should still be a weight applied to the crimes they committed versus the crimes that were committed against them. A true duress defense is well defined by case law and requires certain elements be met. This bill seriously lacks in defining how one might prove or disprove the defense. Also, a duress defense historically has not applied to murder and this bill does not eliminate murder as a possible charge on which to seek relief. Duress generally applies when a person commits a crime as a lesser of two evils, but without further direction, this bill leaves far too much room for interpretation on what circumstances allow a perpetrator to have the arrest and conviction vacated versus what actions they should be held responsible for.

The amendments to section 236.15 creates conflicts for the People and for Defense attorneys. One defendant would now be accusing another individual of a crime, on the record. The defense would now be putting the potential abuser on trial. That individual would then have the right to an attorney. Providing this information to the court would require additional hearings, further impacting courts and increasing costs.

-- END --