
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: AB 1310 **Hearing Date:** July 11, 2023
Author: McKinnor
Version: June 26, 2023
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Sentencing: recall and resentencing*

HISTORY

Source: Initiate Justice

Prior Legislation: SB 81 (Skinner), Ch. 721, Stats. 2021
SB 620 (Bradford), Ch. 682, Stats. 2017
AB 4 (Bordonaro), Ch. 503, Stats. 1997

Support: ACLU California Action; California Attorneys for Criminal Justice; California Public Defenders Association; Californians United for a Responsible Budget; Ella Baker Center for Human Rights; Families Against Mandatory Minimums Foundation; Initiate Justice Action; Legal Services for Prisoners With Children; MILPA; Showing Up for Racial Justice Bay Area; Smart Justice California

Opposition: Arcadia Police Officers' Association; Burbank Police Officers' Association; California District Attorneys Association; California Reserve Peace Officers Association; California State Sheriffs' Association; Claremont Police Officers Association; Corona Police Officers Association; Culver City Police Officers' Association; Deputy Sheriffs' Association of Monterey County; Fullerton Police Officers' Association; Murrieta Police Officers' Association; Newport Beach Police Association; Novato Police Officers Association; Palos Verdes Police Officers Association; Placer County Deputy Sheriffs' Association; Pomona Police Officers' Association; Riverside Police Officers Association; Riverside Sheriffs' Association; San Diegan Against Crime; San Diego County District Attorney's Office; San Diego Deputy District Attorneys Association; Santa Ana Police Officers Association; Upland Police Officers Association; Ventura County District Attorney's Office

Assembly Floor Vote: 41 - 19

This Analysis Reflects the Bill as Proposed to be Amended

PURPOSE

The purpose of this bill is to allow a person whose sentence included the imposition of a term for specified firearm enhancements to be considered for recall and resentencing.

Existing law provides that any person who personally uses a firearm in the commission or attempted commission of a felony, in addition and consecutive to the punishment for the underlying felony offense, shall be sentenced to a term of 3, 4, or 10 years in state prison, unless the use of a firearm is an element of the offense for which they are convicted. A person who personally uses an assault weapon or machine gun during the commission of a felony or attempted felony is subject to an additional consecutive term of 5, 6 or 10 years in state prison. (Pen. Code, § 12022.5, subs. (a) & (b).)

Existing law provides for the 10-20-life firearm law. A person who personally uses a firearm, whether or not the firearm was operable or loaded, during the commission of certain enumerated offenses is subject to an additional consecutive term of 10 years in prison. If the firearm is personally and intentionally discharged during the crime, the defendant is subject to an additional consecutive term of 20 years in prison. If discharging the firearm results in great bodily injury (GBI) or death, the defendant is subject to an additional, consecutive term of 25-years-to-life in prison. (Pen. Code, § 12022.53, subs. (b)-(d).)

Existing law states that if the offense is gang-related, the 10-20-life firearm enhancements shall apply to every principal in the commission of the offense. An enhancement for participation in a criminal street gang shall not be imposed in addition to an enhancement under this provision, unless the person personally used or personally discharged a firearm in the commission of the specified offense. (Pen. Code, § 12022.53, subs. (e)(1) & (e)(2).)

Existing law provides that only one additional term of imprisonment under the 10-20-life firearm law shall be imposed per person per crime. An enhancement for use of a firearm shall not be imposed on a person in addition to an enhancement under this provision. (Pen. Code, § 12022.53, subd. (f).)

Existing law states that when two or more enhancements may be imposed for being armed with or using a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. (Pen. Code, § 1170.1, subd, (f).)

Existing law states that, notwithstanding any other law, the sentencing court “shall dismiss” an enhancement “if it is in the furtherance of justice to do so” except if dismissal of that enhancement is prohibited by any initiative statute. (Pen. Code, § 1385, subd. (c)(1).)

Existing law instructs the court to consider the following factors in determining whether it is in the interests of justice to dismiss an enhancement:

- Application of the enhancement would result in a discriminatory racial impact, as specified;
- Multiple enhancements are alleged in a single case, in which case all enhancements but one shall be dismissed;
- Application of the enhancement could result in a sentence of over 20 years, in which case the enhancement shall be dismissed;
- The current offense is connected to mental illness, as specified;

- The current offense is connected to prior victimization or childhood trauma, as specified;
- The current offense is not a violent felony, as specified;
- The defendant was a juvenile when they committed the current offense or any prior juvenile adjudication that triggers the enhancement or enhancements applied in this case;
- The enhancement is based on a prior conviction that is over five years old;
- Though a firearm was used in the current offense, it was inoperable or unloaded. (Pen. Code, § 1385, subd. (c)(3)(A)-(I).)

Existing law states that proof of the presence of one or more of those mitigating circumstances weighs greatly in favor of dismissing the enhancement, unless the court finds that dismissal of the enhancement would “endanger public safety,” meaning that there is a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others. (Pen. Code, § 1385, subd. (c)(2).)

Existing law provides that no part of the Penal Code is retroactive, unless expressly so declared. (Pen. Code, § 3.)

This bill makes a person who, on or before January 1, 2018, suffered a conviction of an enhancement for personal use of a firearm or the 10-20-life firearm law eligible for recall and resentencing.

This bill requires the Secretary of the Department of Corrections and Rehabilitation (CDCR) to identify persons in their custody currently serving a term for a sentencing that includes an enhancement for personal use of a firearm or the 10-20-life firearm law and provide the following information to the sentencing court that imposed the enhancement:

- The name of each person,
- The person’s date of birth; and,
- The relevant case number or docket number.

This bill provides the following timelines for providing this information to the sentencing court:

- By March 1, 2024, for individuals who have served their base term and any other enhancements and are currently serving a sentence based on a Section 12022.5 or 12022.53 enhancement. For purposes of this paragraph, all other enhancements shall be considered to have been served first; and,
- By July 1, 2024, for all other individuals.

This bill states that upon receiving the information from CDCR, the court shall review the judgement and verify that the current judgment includes a sentence enhancement for personal use of a firearm or the 10-20-life firearm law.

This bill provides that if the court determines that the current judgment includes a sentence enhancement for personal use of a firearm or the 10-20-life firearm law, the court shall appoint counsel for the defendant and recall the sentence.

This bill requires the review and resentencing by the sentencing court to be completed as follows:

- By October 1, 2024, for individuals who have served their base term and any other enhancement and are currently serving a sentence based on the enhancement; and,
- By December 1, 2025, for all other individuals.

This law provides that in exercising its discretion under this section, the court shall consider and afford great weight to evidence offered by the defendant to prove that any of the following mitigating circumstances:

- Application of the enhancement would result in a discriminatory racial impact as described in in the Racial Justice Act;
- Multiple enhancements are alleged in a single case. In this instance, all enhancements beyond a single enhancement shall be dismissed;
- The application of an enhancement could result in a sentence of over 20 years. In this instance, the enhancement shall be dismissed;
- The current offense is connected to mental illness;
- The current offense is connected to prior victimization or childhood trauma;
- The current offense is not a violent felony as defined;
- The defendant was a juvenile when they committed the current offense or any prior juvenile adjudication that triggers the enhancement or enhancements applied in this case;
- The enhancement is based on a prior conviction that is over five years old;
- Though a firearm was used in the current offense, it was inoperable or unloaded; or,
- The court may consider postconviction factors, including, but not limited to, the disciplinary record and record of rehabilitation of the defendant while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the defendant's risk for future violence, and evidence that reflects that circumstances have changed since the original sentencing so that continued incarceration is no longer in the interest of justice.

This bill provides that the circumstances listed above are not exclusive.

This bill specifies that for purposes of whether a the offense was connected to mental illness, a mental illness is a mental disorder as identified in the most recent edition of the Diagnostic and

Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia. A court may conclude that a defendant's mental illness was connected to the offense if, after reviewing any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense, the court concludes that the defendant's mental illness substantially contributed to the defendant's involvement in the commission of the offense.

This bill defines "childhood trauma" to mean "that as a minor the person experienced physical, emotional, or sexual abuse, physical or emotional neglect. A court may conclude that a defendant's childhood trauma was connected to the offense if, after reviewing any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, medical records, or records or reports by qualified medical experts, the court concludes that the defendant's childhood trauma substantially contributed to the defendant's involvement in the commission of the offense."

This bill defines "prior victimization" to mean the person was a victim of intimate partner violence, sexual violence, or human trafficking, or the person has experienced psychological or physical trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence. A court may conclude that a defendant's prior victimization was connected to the offense if, after reviewing any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, medical records, or records or reports by qualified medical experts, the court concludes that the defendant's prior victimization substantially contributed to the defendant's involvement in the commission of the offense.

This bill requires a person who is resentenced to be given credit for time served and to be subject to parole for one year following completion of their sentence, unless the court in its discretion, as part of its resentencing order, releases the person from parole.

This bill provides that a person shall be subject to parole supervision by CDCR and the jurisdiction of the court in the county in which the parolee is released or resides, or in which an alleged violation of supervision has occurred, for the purpose of hearing petitions to revoke parole and impose a term of custody.

This bill authorizes a person who has completed their sentence that includes an enhancement for personal use of a firearm or the 10-20-life firearm law to file an application before the trial court that entered the judgment of conviction in their case to have the enhancement conviction reconsidered pursuant to the provisions in this bill.

This bill states that if the judge that originally sentenced the petitioner is not available, the presiding judge shall designate another judge to rule on the petition or application.

This bill provides that the bill's provisions do not diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant nor does resentencing diminish or abrogate the finality of judgments in any case that does not come within the purview of this bill's provisions.

This bill clarifies that a resentencing hearing ordered under the provisions of this bill constitutes a “postconviction proceeding” for purposes of Marsy’s Law.

This bill authorizes a person committed to a state hospital after being found not guilty by reason of insanity to petition the court to have their maximum term of commitment reconsidered, as provided.

This bill provides that resentencing may be granted without a hearing upon stipulation by the parties; however resentencing shall not be denied, nor a stipulation rejected, without a hearing where the parties have an opportunity to address the basis for the intended denial or rejection.

This bill states that if a hearing is held, the defendant may appear remotely and the court may conduct the hearing through the use of remote technology, unless counsel requests their physical presence in court.

COMMENTS

1. Need for This Bill

According to the author of this bill:

Firearm enhancements are one of the most commonly used tools to add extra years to a sentence. The latest available data shows that 37,237 people in CDCR custody had some form of gun enhancement as part of their sentence. 89% of these people are people of color. There is no compelling evidence that indicate that gun enhancements improve public safety. In fact, the opposite may be true. While initial incarceration prevents crime through incapacitation, studies show that each additional sentence year causes a 4 to 7 percent increase in recidivism that eventually outweighs the incapacitation benefit.

Enhancements do not increase public safety and there is no data to support that enhancements deter crime. Research has consistently shown that people age out of crime, so by the time the state has sentenced someone to an extremely long sentence, they have reached an age where they no longer pose a threat to public safety.

This bill will ensure that people receive equal treatment under the law by allowing past legislation to be applied retroactively. Public safety will not be jeopardized because judges will retain full discretion and prosecutors will have the opportunity to prove that someone is an unreasonable risk to public safety and unfit to be resentenced.

2. The 10-20-life Firearm Enhancement

In 1997, the Legislature enacted Penal Code section 12022.53 which required a sentencing enhancement of 10-20-life for possessing a gun at the time of committing a specified felony, such as robbery, homicide, or certain sex crimes. (AB 4 (Bordonaro), Ch. 503, Stats. 1997.) Under the law, if someone uses a gun while committing one of the identified crimes, their

sentence is extended by 10 years, 20 years, or 25 years-to-life, depending on how the gun was used.

“Often the enhancement for gun use is longer than the sentence for the crime itself. For example, in the case of second-degree robbery, a person could serve a maximum of five years for the robbery and an extra 10 years for brandishing a gun during the robbery, even if the gun was unloaded or otherwise inoperable. Someone convicted of first-degree murder would be sentenced to at least 50 years-to-life if a gun was used, whereas if the murder was carried out using another method – such as strangulation – the sentence would be half the length (25 years-to-life). A judge has no discretion in applying this enhancement; if a gun was used, a judge must apply it.” (California Budget and Policy Center (2015) *Sentencing in California: Moving Toward a Smarter, More Cost-Effective Approach*.)

Deterrence was a driving factor behind this legislation: “The Legislature finds and declares that substantially longer prison sentences must be imposed on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime.” (AB 4 (Bordonaro), Chapter 503, Statutes of 1997.)

This bill would allow recall and resentencing in cases where a section 12022.53 enhancement was imposed at any time prior to January 1, 2018. A person in custody would have their case referred to the sentencing court by CDCR; a person who has completed their sentence would be authorized to file a petition with the trial court.

3. Personal Use of a Firearm Enhancement

Penal Code section 12022.5 imposes an additional term of 3, 4, or 10 years for the personal use of a firearm in the commission, or the attempted commission of any felony. (Pen. Code, § 12022.5, subd. (a).) If the firearm is an assault weapon or a machine gun, then the additional term is 5, 6, or 10 years. (Pen. Code, § 12022.5, subd. (b).) This time period is in addition and consecutive to the punishment that you receive for the underlying felony offense. The firearm need not be operable or loaded. (*People v. Nelums* (1982) 31 Cal.3d 355, 360; see *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795.) Someone personally uses a firearm if he or she intentionally displays the firearm in a menacing manner, hits someone with the firearm, or fires the firearm. (*People v. Bland* (1995) 10 Cal.4th 991, 997; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320; see also Pen. Code, § 1203.06, subd. (b)(2).)

This bill would allow recall and resentencing in cases where a section 12022.5 enhancement was imposed at any time prior to January 1, 2018. A person in custody would have their case referred to the sentencing court by CDCR; a person who has completed their sentence would be authorized to file a petition with the trial court.

4. Judicial Discretion to Dismiss Enhancements

Penal Code section 1385 specifies that a judge may, in furtherance of justice, order an action to be dismissed. That provision has been interpreted to allow courts broad discretion to strike prior convictions and enhancements in order to provide individualized sentencing to a defendant. "Section 1385 has long been recognized as an essential tool to enable a trial court 'to properly individualize the treatment of the offender.'" (*People v. Tanner* (1979) 24 Cal.3d 514, 530.) "It

was designed to alleviate ‘mandatory, arbitrary or rigid sentencing procedures [which] invariably lead to unjust results.’” (*People v. Dorsey* (1972) 28 Cal.App.3d 15, 18.) “Society receives maximum protection when the penalty, treatment, or disposition of the offender is tailored to the individual case. Only the trial judge has the knowledge, ability, and tools at hand to properly individualize the treatment of the offender.” (*People v. Williams* (1970) 30 Cal.3d 470, 482, citation and internal quotation marks omitted.) One of the purposes of Section 1385 is to ensure that sentences are proportional to a defendant’s conduct.

SB 81 (Skinner) Chapter 721, Statutes of 2021, added subdivision (c) of Penal Code section 1385 which provided guidance to courts on when to dismiss enhancements in the interests of justice for sentencings that occur on or after January 1, 2022. The law provided that a court “shall dismiss” an enhancement if it is in the furtherance of justice to do so, unless any initiative statute prohibits such action, and unless dismissal endangers public safety. (See *People v. Mendoza* (2023) 88 Cal.App.5th 427 [section 1385, subdivision (c)(2)(C) does not mandate dismissal of an enhancement that could result in a sentence over 20 years where the trial court finds dismissal would endanger public safety].)

In exercising discretion under subdivision (c) of Penal Code section 1385, the court must give “great weight” to evidence offered by the defendant to prove any of mitigating circumstances, unless the court finds that dismissal would endanger public safety. Examples of mitigating circumstances include: where the enhancement would result in discriminatory racial impact; where multiple enhancements are alleged in a single case; where the enhancement could result in a sentence exceeding 20 years; and where the enhancement is based on a prior conviction that is over five years old. The statute allows a court to exercise this discretion before, during, or after trial or entry of plea as well as at sentencing.

After SB 81 was signed into law, the Judicial Council amended and adopted Rules of Court on the application of the new law. Rule of Court 4.428 governs imposition of enhancements. In providing guidance on the application of SB 81, the courts amended existing Rule 4.428 to include the following language:

(c) Dismissing enhancements under section 1385(c)

- (1)** The court shall exercise the discretion to dismiss an enhancement if it is in the furtherance of justice to do so, unless the dismissal is prohibited by initiative statute.
- (2)** In exercising its discretion under section 1385(c), the court must consider and afford great weight to evidence offered by the defendant to prove that any of the mitigating circumstances in section 1385(c) are present.
- (A)** In exercising its discretion under section 1385(c), the court must consider and afford great weight to evidence offered by the defendant to prove that any of the mitigating circumstances in section 1385(c) are present.
- (B)** The circumstances listed in 1385(c) are not exclusive.
- (C)** “Endanger public safety” means there is a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others.

(3) If the court dismisses the enhancement pursuant to 1385(c), then both the enhancement and its punishment must be dismissed.

(Cal. Rules of Court, rule 4.428(c), adopted effective March 14, 2022.) The Advisory Committee included the following comments on determining “furtherance of justice” and “afford great weight” for purposes of the new law:

Case law suggests that in determining the "furtherance of justice" the court should consider the constitutional rights of the defendant and the interests of society represented by the people; the defendant's background and prospects, including the presence or absence of a record; the nature and circumstances of the crime and the defendant's level of involvement; the factors in aggravation and mitigation including the specific factors in mitigation of section 1385(c); and the factors that would motivate a "reasonable judge" in the exercise of their discretion. (Citing *People v. Romero* (1996) 13 Cal.4th 947; *People v. Dent* (1995) 38 Cal.App.4th 1726; *People v. Kessel* (1976) 61 Cal.App.3d 322; *People v. Orin* (1975) 13 Cal.3d 937.)

....

The court is not directed to give *conclusive weight* to the mitigating factors, and must still engage in a weighing of both mitigating and aggravating factors. A review of case law suggests that the court can find great weight when there is an absence of "substantial evidence of countervailing considerations of sufficient weight to overcome" the presumption of dismissal when the mitigating factors are present. (*People v. Martin* (1996) 42 Cal.3d 437.) In exercising this discretion, the court may rely on aggravating factors that have not been stipulated to by the defendant or proven beyond a reasonable doubt at trial by a jury or a judge in a court trial. (*People v. Black* (2007) 41 Cal.4th 799.)

(Advisory Com. com, Cal. Rules of Court, rule 4.428(c).) While subdivision (c) of Penal Code section 1385 applies only to sentencings after January 1, 2022 (*People v. Flowers* (2022) 81 Cal.App.5th 680), when a sentence is vacated or recalled for other reasons and resentencing occurs after January 1, 2022, the court must apply the laws in effect at the time of sentencing which would include subdivision (c) of Penal Code section 1385. (*People v. Sek* (2022) 74 Cal.App.5th 657, 674 [“Because any resentencing in this case will take place after Senate Bill No. 81 became effective on January 1, 2022, we agree with Sek that the court must apply the new law in any such proceeding.”]; see also *People v. Padilla* (2022) 13 Cal.5th 152 [new laws apply at resentencing after habeas corpus petition led to original sentence being vacated as unconstitutionally imposed].)

Both Penal Code sections 12022.5 and 12022.53 contained a provision that stated notwithstanding Penal Code section 1385, the court shall not strike an allegation or a true finding under these firearm enhancements. (Former Pen. Code, §§ 12022.5, subd. (c) and 12022.53, subd. (h).)

In 2017, the Legislature passed SB 620 (Bradford), Chapter 682, Statutes of 2017, deleting the prohibitions on striking an allegation or finding under the personal use of a firearm and 10-20-life law. This legislation allowed a court, in the interest of justice, to strike or dismiss a firearm enhancement which otherwise adds a state prison term of 3, 4, or 10 years, or 5, 6, or 10 years, depending on the firearm, or a state prison term of 10 years, 20 years, or 25-years-to-life depending on the underlying offense and manner of use.

According to the author's statement for SB 620:

Right now these sentences are imposed as a mandate, regardless of the circumstances of a crime. If for some valid reason a court wanted to impose a lesser sentence they cannot.

And these mandates are adding to an already long sentence. The individual is already facing a long sentence as a result of a felony conviction. The mandates make a long sentence longer.

SB 620 provides the court with discretion to strike a firearm enhancement in any case in which that would be in the interests of justice to do so. A defendant who merits additional punishment for the use of a firearm in the commission of a felony would receive it. SB 620 allows a court to decide whether or not to extend the sentence if a specific case indicates that it would be appropriate to do so.

Longer sentences do not deter crime or protect public safety according to research on these laws.

Instead, research has found that these enhancements cause problems. They disproportionately increase racial disparities in prison populations and they greatly increase the population of incarcerated persons.

SB 620 does NOT eliminate these enhancements. Instead, SB 620 allows a judge to exercise discretion on whether or not to make a long sentence longer if it is in the interest of justice.

This bill allows a court to recall and resentence a person who was sentenced prior to the enactment of SB 620 authorizing court discretion in imposing one of these firearm enhancements and requires the court to consider specified mitigating factors subsequently adopted into law by SB 81 when exercising its discretion.

5. Technical Amendments to be Adopted in Committee

The author intends to amend the bill with the following technical amendments:

- Removal of county correctional administrator as a referring agency.
- Delete listing of circumstances that mirror those found in subdivision (c) of Penal Code section 1385 and instead add cross reference.
- Clarify that the court must recall the sentence, not that the court must resentence the individual.

6. Argument in Support

According to Initiate Justice, the sponsor of this bill:

Passed in 2017, SB 620 (Bradford), gives judges the discretion to strike or dismiss firearm enhancements at sentencing in the interest of justice, but this change in law was not made available to anyone currently incarcerated. AB 1310 will ensure currently incarcerated people . . . the same relief. Sentence enhancements add extra years to someone's sentence in addition to the statutory ranges for criminal offenses. There are more than 100 sentence enhancements across California's penal code. These enhancements are costly, ineffective, and a relic of the failed tough on crime era. Firearm enhancements are one of the most commonly used enhancements that add extra years to a sentence. The latest available data shows that 37,237 people in CDCR custody had some form of gun enhancement as part of their sentence. 89% of these people were people of color. Many people receive these firearm enhancements without a firearm ever being physically recovered, or if a firearm was recovered, it doesn't need to even be loaded or operable for the enhancement to be applied. Additional research has shown that people suffering from mental illness disproportionately receive these enhancements.

. . . .

This bill is not a get-out-of-jail free card because judges retain full discretion and prosecutors will be able to argue that someone is an unreasonable risk to public safety and unfit to be resentenced. Therefore public safety will not be jeopardized and there will be significant state savings while striking the right balance between fairness and safety.

7. Argument in Opposition

According to the California District Attorneys Association (CDA):

Your bill would provide for the presumptive resentencing of everyone convicted of a firearm enhancement – those who used, discharged, and/or killed someone unlawfully during the commission of their crime. This measure makes no distinction between those who have demonstrated some indicators of redemption or rehabilitation and those who have not. This bill provides for a one-size-fits-all process that will necessarily provide relief to those who have injured and killed others during their crimes yet have not demonstrated the degree of reflection deserving of relief.

While CDA applauds efforts to identify those deserving of relief, this bill simply goes too far in applying such relief to an entire category of people who have harmed others with firearms. For these reasons, we cannot support your bill.

-- END --