
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: AB 931 **Hearing Date:** June 28, 2022
Author: Villapudua
Version: June 6, 2022
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Sentencing: dismissal of enhancements*

HISTORY

Source: Author

Prior Legislation: SB 81 (Skinner), Ch. 721, Stats. 2021

Support: California District Attorneys Association; Peace Officers Research Association of California

Opposition: American Civil Liberties Union California Action; California Public Defenders Association; Californians for Safety and Justice; Californians United for a Responsible Budget; Ella Baker Center for Human Rights; Friends Committee on the Legislation of California; Initiate Justice; San Francisco Public Defender

Assembly Floor Vote: Not relevant

PURPOSE

The purpose of this bill is to amend recently enacted law that gives guidance to courts by specifying a non-exclusive list of circumstances for a court to consider when determining whether to dismiss an enhancement in the interests of justice.

Existing law authorizes a court, either on its own motion or upon the application of the prosecuting attorney, to dismiss an action in the furtherance of justice. The reasons for the dismissal shall be stated orally on the record and those reasons shall be set forth in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. A dismissal shall not be made for any cause that would be ground of demurrer to the accusatory pleading. (Pen. Code, § 1385, subd. (a).)

Existing law states that if the court has the authority to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice. (Pen. Code, § 1385, subd. (b).)

Existing law provides that the above provisions do not authorize the court to strike the additional punishment for any enhancement that cannot be stricken or dismissed. (Pen. Code, §1385, subd. (b)(2).)

Existing law states that notwithstanding any other law, the 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 provides that in exercising its discretion on whether to dismiss an enhancement, the court shall consider and afford great weight to evidence offered by the defendant to prove that any of the specified mitigating circumstances are present. Proof of the presence of one or more circumstances weighs greatly in favor of dismissing the enhancement unless the court finds that the dismissal of the enhancement would endanger public safety. (Pen. Code, § 1385, subd. (c)(2).)

Existing law defines “endanger public safety” to mean there is a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others. (*Ibid.*)

Existing law specifies the following mitigating circumstances for the court to consider when determining whether to dismiss an enhancement:

- Application of the enhancement would result in discriminatory racial impact as specified.
- Multiple enhancements are alleged in a single case. In this instance, all enhancements beyond a single enhancements 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. (Pen. Code, § 1385, subd. (c)(3)(A)-(I).)

Existing law specifies that the above-listed factors are not exclusive and the court maintains authority to dismiss or strike an enhancement in accordance with existing law. (Pen. Code, § 1385, subd. (c)(4).)

Existing law states that while the court may exercise its discretion at sentencing, nothing in this subdivision shall prevent a court from exercising its discretion before, during, or after trial or entry of plea. (Pen. Code, § 1385, subd. (c)(3).)

Existing law provides that “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. (Pen. Code, § 1385, subd. (c)(5).)

Existing law provides that a court may conclude that a defendant's mental illness was connect 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. (Pen. Code, § 1385, subd. (c)(5).)

Existing law provides that the following terms have following meanings:

- "Childhood trauma" means 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.
- "Prior victimization" means 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. (Pen. Code, § 1385, subd. (c)(6).)

This bill replaces the language in existing law that states that the court *shall* dismiss an enhancement if it is in the furtherance of justice to do so and does not endanger public safety; instead provides that the court *may* dismiss an enhancement if it is in the furtherance of justice to do so and does not endanger public safety.

This bill strikes out the provisions in existing law specifying that when multiple enhancements are alleged in a single case or the application of an enhancement could result in a sentence of over 20 years, and if it is in the furtherance of justice and does not endanger public safety, the court shall dismiss the enhancement or enhancements.

COMMENTS

1. Need for This Bill

According to the author's office:

On April 18, 2022, Alycia 'Lala' Reynaga was stabbed to death by Anthony Gray who wandered into the Stagg High School Campus located in Stockton California. Anthony Gray has since been charged with murder along with special circumstances of torture as well as the personal use of a deadly weapon, corporal injury to a child, infliction of great bodily injury and bringing a weapon on school grounds. Mr. Gray has also been previously convicted of multiple charges, including assault and possessing a firearm in prison, in Santa Clara and Napa counties over the past several decades.

Criminal sentencing enhancements increase the possible sentence for a crime. Typically, enhancements relate to the defendant's criminal history or specific details regarding the circumstances of the crime that increase its gravity. Sentence enhancements can also act as an additional deterrent when persons are considering committing a more severe crime, or can keep people who may be a danger to their community in custody for longer periods of time; depending on the crimes committed.

Over the last several decades, legislation has been passed to change the Penal Code related to sentencing enhancements. One recent example was SB 81 (Chapter 721, of 2021) with the intent of providing guidance to courts by specifying circumstances for a court to consider when determining whether to apply an enhancement.

As currently drafted in Penal Code Section 1385 (c) (2), SB 81 allows the court discretion to impose enhancements when the dismissal would endanger public safety. However, in sub-sections (c) (2) (B) and (C), the language prohibits the court from imposing multiple enhancements, as well as prohibiting the court from imposing enhancements if the enhancements will result in a sentence of more than 20 years.

Penal Code Section 1385 (c)(2) (B) states that if multiple enhancements are alleged in a single case, all enhancements beyond a single enhancement "shall be dismissed." Section 1385 (c) (2) (C) states that if the application of an enhancement could result in a sentence of over 20 years, "the enhancement shall be dismissed."

2. Sentence Enhancements

Existing law contains a multitude of enhancements that can be used to increase the term of imprisonment a defendant will serve. All enhancements must be specifically alleged in the accusatory pleading and proved or admitted by the defendant. Enhancements add time to a person's sentence for factors relevant to the defendant such as prior criminal history or for specific facts related to the crime. Multiple enhancements can be imposed in a single case and

can range from adding a specified number of years to a person's sentence, or doubling a person's sentence or even converting a determinate sentence into a life sentence.

A Public Policy Institute of California (PPIC) publication on enhancements found that, "As of September 2016, 79.9% of prisoners in institutions operated by the California Department of Corrections and Rehabilitation (CDCR) had some kind of sentence enhancement; 25.5% had three or more. Aside from second and third strikes, the most common enhancement adds one year for each previous prison or jail term." (*Sentence Enhancements: Next Target of Corrections Reform?* PPIC (Sept. 2017) < <http://www.ppic.org/blog/sentence-enhancements-next-target-corrections-reform/> > [as of June 16, 2022].)

According to the PPIC publication, there are over 100 separate code sections in California law that can be used to enhance a person's sentence and the most common enhancement is for a previous prison or jail sentence. (*Ibid.*)

In recent years, California has passed laws to reduce the severity of enhancements. SB 180 (Mitchell), Chapter 677, Statutes of 2017 limited the application the three-year enhancement for a prior conviction related to the sale or possession for sale of specified controlled substances. SB 620 (Bradford), Chapter 682, Statutes of 2017, allowed a court, in the interest of justice, to strike or dismiss a firearm enhancement which otherwise adds a state prison term of three, four, or 10 years, or five, six, 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. SB 136 (Wiener) repealed the one-year sentence enhancement for each prior prison or county jail felony term that applied to a defendant sentenced on a new felony. SB 81 (Skinner), Chapter 721, Statutes of 2021, gave guidance to courts on when enhancements should be dismissed while retaining the court's discretion to apply enhancements when the courts deems it to be appropriate.

3. Committee on the Revision of the Penal Code Recommendation

On January 1, 2020, the Committee on the Revision of the Penal Code ("Committee") was established within the Law Review Commission to study the Penal Code and recommend statutory reforms. (SB 94, Ch. 25, Stats. 2019; Gov. Code, § 8280.) The Committee's objectives are as follows:

- (1) Simplify and rationalize the substance of criminal law;
- (2) Simplify and rationalize criminal procedures;
- (3) Establish alternatives to incarceration that will aid in the rehabilitation of offenders; and,
- (4) Improve the system of parole and probation.

(Gov. Code, § 8290.5, subd. (a).) In making recommendations to achieve these objectives, the Committee may recommend adjustments to the length of sentence terms. (Gov. Code, § 8290.5, subd. (b).) The Committee is required to prepare an annual report that describes its work in the prior calendar year and its expected work for the subsequent calendar year. (Gov. Code, § 8293, subd. (b).)

After holding meetings over the course of a year and hearing from multitudes of witnesses, including Governor Newsom, former Governor Brown, Attorney General Becerra, and other stakeholders involved in the criminal justice system such as law enforcement groups, public defenders, victims' advocates, and formerly incarcerated individuals, on February 9, 2021, the Committee released its first annual report describing the Committee's work and recommendations. The Committee members unanimously recommended ten reforms to the Penal Code. (See <clrc.ca.gov/CRPC/About/History.html> [as of June 16, 2022].)

One of the Committee's recommendations is to provide guidance for judges considering sentence enhancements. According to the Committee's report:

Sentence enhancements can be dismissed by sentencing judges. The current legal standard instructs judges to dismiss a sentence enhancement when "in furtherance of justice." Courts have not clarified or defined this standard, and the California Supreme Court noted that the law governing when judges should impose or dismiss enhancements remains an "amorphous concept." As a result, this discretion may be inconsistently exercised and underused because judges do not have guidance on how courts should exercise the power.

The lack of clarity and guidance is especially concerning given demographic disparities in sentences. As noted, Three Strikes sentences and gang enhancements in California are disproportionately applied against people of color. People suffering from mental illness are also overrepresented among people currently serving life sentences under the Three Strikes law for nonviolent crimes.

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The Committee recommendation follows legal guidance provided to judges when exercising sentencing discretion in other contexts. For example, California law directs judges on how to exercise their sentencing discretion in the context of probation. Furthermore, our recommendation builds on existing California Rules of Court that guide judges on what circumstances they should consider in aggravation and mitigation in imposing a felony sentence, such as prior abuse, **recency** and frequency of prior crimes, and mental or physical condition of the defendant. The Committee recommendations are also informed by the California Surgeon General's recent annual report, which recommends that the criminal legal system implement policies and practices that address trauma in justice-involved youth and adults.

Finally, the Committee believes that judges should retain authority to impose sentence enhancements in appropriate cases. The Committee's recommendation *leaves to judges the authority to impose sentence enhancements to protect public safety*. But providing guidance on how and when judges should evaluate the appropriateness of sentence enhancements would provide more consistency, predictability, and reductions in unnecessary incarceration while ensuring that punishments are focused on protecting public safety.

(*Annual Report and Recommendations 2020*, Committee on Revision of the Penal Code, pp. 40-41, fn. omitted, emphasis added.) SB 81 codified the committee's recommendation.

Specifically, SB 81 expanded upon existing law that provided judges with discretion to dismiss an enhancement pursuant to Penal Code 1385. SB 81 stated that if the court finds that dismissing an enhancement is in the furtherance of justice, the court shall do so unless the court finds that dismissing the enhancement would endanger public safety. “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. SB 81 provided guidance to judges on how to make the determination of when to dismiss an enhancement by listing non-exclusive circumstances for the court to consider. These circumstances are as follows:

- (A) Application of the enhancement would result in a discriminatory racial impact as described in paragraph (4) of subdivision (a) of Section 745.
- (B) Multiple enhancements are alleged in a single case. In this instance, all enhancements beyond a single enhancement shall be dismissed.
- (C) The application of an enhancement could result in a sentence of over 20 years. In this instance, the enhancement shall be dismissed.
- (D) The current offense is connected to mental illness.
- (E) The current offense is connected to prior victimization or childhood trauma.
- (F) The current offense is not a violent felony as defined in subdivision (c) of Section 667.5.
- (G) 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.
- (H) The enhancement is based on a prior conviction that is over five years old.
- (I) Though a firearm was used in the current offense, it was inoperable or unloaded.

This bill would remove the requirement that the court dismiss enhancements when multiple enhancements are charged or when the enhancement would result in a sentence of over 20 years if it is in the interests of justice to do so based on consideration of specified circumstances and after considering whether there would be a danger to public safety.

4. Rules of Court on the Application of SB 81

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 court 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.)

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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).)

As made clear by the statutory language enacted by SB 81 (“In exercising its discretion under this subdivision . . .” Pen. Code, § 1385, subd. (c)(2); see also Judicial Council’s neutral position letter for SB 81 dated Aug. 24, 2021, “These amendments support the exercise of judicial discretion and also permit a court to consider public safety, as defined, when making its determination.”), as well as the Rules of Court and related Advisory Committee comment, the listed circumstances provided by SB 81 do not require the court to dismiss any enhancement. Rather, the court is required to consider the weight of both mitigating and aggravating circumstances and make a determination of whether to dismiss the applicable enhancement or enhancements. While the proof of the presence of one or more specified mitigating

circumstances weighs greatly in favor of dismissing the enhancement, endangerment of public safety would outweigh those mitigating circumstances.

5. Research on the Deterrent Effect of Sentence Increases and Impact on State Prisons

In a 2014 report, the Little Hoover Commission (LHC) addressed the disconnect between science and sentencing – that is, putting away offenders for increasingly longer periods of time, with no evidence that lengthy incarceration, for many, brings any additional public safety benefit.

The report also explained how California’s sentencing structure and enhancements contributed to a 20-year state prison building boom, noting: “During the 20-year building campaign, California policymakers enacted hundreds of laws increasing sentence length, adding sentence enhancements and creating new sentencing laws.” (Sensible Sentencing for a Safer California, LHC (Feb. 2014) <https://lhc.ca.gov/sites/lhc.ca.gov/files/Reports/219/Report219.pdf> [as of June 16, 2022].)

6. Argument in Support

According to Peace Officers Research Association of California:

In recent years, legislation has been passed relating to sentence enhancements. For example, SB 81 (2021) was signed with the intent to provide guidance to courts by specifying circumstances for a court to consider when determining whether to apply an enhancement. However, SB 81 unintentionally removed the ability of judges to retain discretion in sentencing.

AB 931 would clarify the intent of SB 81 by providing clear and concise guidance to prosecutors, defense attorneys, and judges by ensuring the preservation of judicial discretion. This bill will make sure individuals who may be a danger to themselves and others do not get years off their sentence on a technicality.

7. Argument in Opposition

According to ACLU California Action:

Current law, as established by SB 81, provides that courts shall dismiss enhancements when doing so is in the furtherance of justice. In making this determination, they shall consider and afford great weight to certain mitigating factors, such as when the offense is connected to the defendant’s prior victimization of human trafficking or sexual abuse, or when the enhancement is based on a prior conviction that is more than 5 years old, unless the court finds that dismissal of the enhancement would endanger public safety (Pen. Code § 1385 subd. (c)).

AB 931 would remove the requirement that courts dismiss enhancements when it is in the furtherance of justice to do so, thus making it far more likely that sentence enhancements are imposed even under unjust circumstances. While we appreciate that the intention of the bill may be to reduce crime, the evidence shows that AB 931 will unfortunately fail to do so. Decades of academic research

analyzing crime and incarceration data have shown that increasing the severity of punishment does not improve public safety – doing so neither increases deterrence nor meaningfully prevents crime by incapacitation. Instead, data show that enhancements increase racial disparities and drive over-incarceration, thus aggravating and exacerbating the root causes of crime.

California needs to bring evidence and rationality to our sentencing system to ensure that it truly improves public safety. In ensuring that enhancements are more likely to be imposed, thus increasing incarceration and punishment without any public safety benefit, AB 931 would take California in the opposite direction.

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