
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: SB 1393 **Hearing Date:** April 3, 2018
Author: Mitchell
Version: February 16, 2018
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Sentencing*

HISTORY

Source: American Civil Liberties Union (ACLU) of California
The Advocacy Fund
California Coalition for Women Prisoners
Californians United for a Responsible Budget
Drug Policy Alliance
Ella Baker Center
Friends Committee on Legislation of California
Pillars of the Community
Women's Foundation of California

Prior Legislation: SB 180 (Mitchell), Ch. 677, Stats. 2017
SB 620 (Bradford), Ch. 682, Stats. 2017
SB 966 (Mitchell), 2015-2016, failed Assembly Public Safety Committee

Support: Access Support Network; Alameda County Public Defender's Office; Alliance San Diego; American Friends Service Committee; California Association of Alcohol and Drug Program Executives; California Catholic Conference; California Immigrant Policy Center; California Public Defenders Association; Center on Juvenile and Criminal Justice; Coleman Advocates for Children & Youth; Contra Costa County Racial Justice Coalition; Courage Campaign; Crossroads, Inc.; Daily Kos; Dr. Martin Luther King, Jr. Academic Middle School; Felony Murder Elimination Project; Harm Reduction Coalition; Harm Reduction Services; HealthRIGHT 360; Immigrant Legal Resource Center; Justice Now; Lawyers' Committee for Civil Rights; Legal Services for Prisoners with Children; Los Angeles Regional Reentry Partnership; A New Way of Life Reentry Project; Oakland Rising; Prison Renaissance; Public Health Justice Collective; Restaurant Opportunities Centers of California; Riverside Temple Beth El; Root & Rebound; Rubicon Programs; San Diego Immigrant Rights Consortium; San Francisco Public Defenders Office; Showing up for Racial Justice; St. James Infirmary; Successful Reentry; Tarzana Treatment Centers, Inc.; W. Hayward Burns Institute; Western Center on Law and Poverty; White People for Black Lives/Showing Up for Racial Justice – Los Angeles; several individuals

Opposition: Association for Los Angeles Deputy Sheriffs; California District Attorneys Association; California State Sheriffs' Association; Los Angeles Police Protective League; Peace Officers Research Association of California

PURPOSE

The purpose of this bill is to allow a court, in the interest of justice, to strike or dismiss a prior serious felony conviction which otherwise adds an enhancement of 5 years for each prior conviction of a serious felony.

Existing law states that any person convicted of a serious felony who previously has been convicted of a serious felony, as defined, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction. The terms of the present offense and each enhancement shall run consecutively. (Pen. Code § 667, subd. (a)(1).)

Existing law provides that if a defendant has one prior serious and/or violent felony conviction, as defined, that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction. (Pen. Code, § 667, subd. (e)(1).)

Existing law provides that if a defendant has two or more prior serious and/or violent felony convictions, as defined, that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment as specified. (Pen. Code, § 667, subd. (e)(2).)

Existing law specifies that the total amount of credits that may be awarded to a person convicted of a serious felony shall not exceed 20% of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison. (Pen. Code, § 667, subd. (c)(5).)

Existing law authorizes a judge or magistrate, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, to order an action to be dismissed, as specified. (Pen. Code, § 1385, subd. (a).)

Existing law prohibits a judge from striking any prior conviction of a serious felony for purposes of enhancement of a sentence. (Pen. Code, § 1385, subd. (b).)

This bill deletes the prohibition against striking any prior serious felony convictions for purposes of enhancing a sentence.

COMMENTS

1. Need for This Bill

According to the author:

Nearly every sentence enhancement in California can be dismissed at the time of sentencing if the judge finds that doing so would serve the interest of justice. However, under existing law people with current and prior serious felony convictions receive a mandatory five-year enhancement. As a result, judges lack the discretion to tailor these sentences based on the facts of the case, the defendant's history and culpability or other potential mitigating factors. This has resulted in mandatory additional terms for thousands of individuals incarcerated throughout California's prisons. This rigid and arbitrary system has meted out punishments that are disproportionate to the offense, which does not serve the interests of justice, public safety, or communities.

SB1393 amends Penal Code Sections 667 and 1385 by restoring the court's discretion, in the interest of justice, to strike a five-year sentence enhancement for each prior serious felony conviction on a person's record, when a person is currently convicted of a serious felony. Allowing judicial discretion is consistent with other sentence enhancement laws and retains existing penalties for serious crimes.

2. Sentencing Enhancements

Existing law contains a variety of enhancements that can be used to increase the term of imprisonment a defendant will serve. Multiple enhancements can be imposed in a single case. Enhancements 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.

According to a recent Public Policy Institute of California (PPIC) publication on enhancements,

Overall, California has more than 100 separate code sections that enhance sentences based on the current offense or the offender's record. For example, using a firearm while committing a violent and/or sexual felony adds anywhere from 10 to 25 years. A gang-related felony results in 2 to 10 additional years, depending upon the seriousness of the offense.

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.

(Sentence Enhancements: Next Target of Corrections Reform? PPIC (Sept. 2017) <http://www.ppic.org/blog/sentence-enhancements-next-target-corrections-reform/>) [as of Mar. 21, 2018].) CDCR data indicates that, as of December 1, 2017, there were 19,677 sentences that included the 5-year enhancement.

This bill provides the judge with discretion to strike a prior serious felony conviction in appropriate circumstances in the interests of justice. The judge retains the ability to continue imposing the enhancement where the additional punishment is warranted. The reasons for the dismissal must be stated orally on the record. If requested by either party, the reasons must also be set forth in a written minute order. (Pen. Code, § 1385, subd. (a).) Where the trial court's action lacks reason, it may be invalidated as an abuse of discretion. (See *People v. Williams*, (1998) 17 Cal.4th 148, 159.) For example, in *Williams*, the Court found that the trial court improperly struck the prior felony because the defendant could not be deemed "outside the spirit" of the three strikes law – i.e., the trial court's order fell outside the bounds of reason under the applicable law and the relevant facts. (*Id.* at pp. 161, 162-165.)

Striking a prior conviction pursuant to Penal Code section 1385 does not wipe out the prior conviction, or prevent that conviction from being considered in connection with later convictions; it simply means that the judge made a determination that, in the interest of justice, the defendant should not be required to be sentenced to a statutorily increased penalty. (*People v. Ortega* (2000) 84 Cal.App.4th 659, 666.)

3. Legislative History

Penal Code section 1385 gives discretion to judges to strike or dismiss a prior conviction or added punishment. The California Supreme Court has ruled that even if a statute prescribing a particular sentence uses the term "shall," this is insufficient to evidence an intent that the trial court was precluded from exercising such discretionary powers. (See *People v. Williams* (1981) 30 Cal.3d 470.) In *Williams*, the Court reviewed the history and purpose of Penal Code section 1385:

The trial court's power to dismiss an action has been recognized by statute since the first session of the Legislature in 1850. The rules of criminal procedure enacted in that session included the provision that "[the] Court may, either of its own motion, or upon the application of the District Attorney, and in furtherance of justice, order any action, after indictment, to be dismissed; but in such case the reasons of the dismissal shall be set forth in the order, which must be entered on the minutes." (Stats. 1850, ch. 119, § 629, p. 323.) With slight changes, this provision became section 1385 when the Penal Code was enacted in 1872.

....

"A determination whether to dismiss in the interests of justice after a verdict involves a balancing of many factors, including the weighing of the evidence indicative of guilt or innocence, the nature of the crime involved, the fact that the defendant has or has not been incarcerated in prison awaiting trial and the length of such incarceration, the possible harassment and burdens imposed upon the defendant by a retrial, and the likelihood, if any, that additional evidence will be presented upon a retrial. When the balance falls clearly in favor of the defendant, a trial court not only may but should exercise the powers granted to him by the Legislature and grant a dismissal in the interests of justice." (*People v. Superior Court of Marin County (Howard)* (1968) 69 Cal. 2d 491, 505.)

The court also discussed the policy served by [the section at issue in the case]. "Mandatory, arbitrary or rigid sentencing procedures invariably lead to unjust results. 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. Subject always to legislative control and appellate review, trial courts should be afforded maximum leeway in fitting the punishment to the offender." (*People v. Dorsey* (1972) 28 Cal.App3d 15, 18.)

(*People v. Williams, supra*, 30 Cal.3d at 479-482.) The Court then looked to the legislative intent and found that there was no indication of contrary legislative intent and thus held that absent a clear expression of legislative intent in this regard, a sentencing statute will not be construed to abrogate a trial court's general section 1385 power to strike. (*Id.* at p. 482.)

Similarly, in *People v. Fritz* (1985) 40 Cal.3d 227, the California Supreme Court held that although the language of Penal Code section 667, subdivision (a)(1) is mandatory – "[any] person convicted of a serious felony . . . shall receive . . . a five-year enhancement for each such

prior conviction" – such language did not eliminate the court's ability under Penal Code section 1385 to strike or dismiss a conviction in the interests of justice. The Court found that neither Penal Code section 667 or article I, section 28, both enacted by the voters as part of Proposition 8 in the June 1982 election, contained express language eliminating this discretion nor was there anything in the ballot analysis or arguments which were before the voters that suggests such a purpose. (*Id.* at pp. 230-231.)

In 1986, the California Legislature passed, and the governor signed into law, a bill to abrogate *Fritz* by specifically restricting the authority of the trial court to strike prior convictions of serious felonies when imposing an enhancement under Section 667 of the Penal Code. (Chapter 85, Statutes of 1986.) This bill deletes this restriction and returns the court's discretion to strike prior serious felony convictions for purposes of the 5-year enhancement.

4. Argument in Support

Drug Policy Alliance, a sponsor of this bill, writes:

SB 1393 is a modest, incremental reform that corrects a costly inconsistency in state law. The bill will provide for judicial discretion in sentencing a person convicted for a second or subsequent serious offense. Current law inappropriately ties a judge's hands, requiring that the court, when imposing a sentence for a serious felony, in addition and consecutive to the term imposed for that serious felony, to impose an additional 5-year enhancement for each prior conviction of a serious felony. This is above and in addition to "strike enhancements" that may also be applied to persons who have been previously convicted of a serious offense.

California law generally authorizes a judge, in the interests of justice, to order an action dismissed. SB 1393 will return to the court, appropriate authority to sentence

according to the facts of the case, in the interests of justice. It does not affect the base sentence, or [any] another enhancements. It allows the judge to impose the five-year enhancement if they believe it to be just and necessary.

5. Argument in Opposition

The Peace Officers Research Association of California opposes this bill:

Current law requires the court, when imposing a sentence for a serious felony, in addition and consecutive to the term imposed for that serious felony, to impose a 5-year enhancement for each prior conviction of a serious felony. Existing law generally authorizes a judge, in the interests of justice, to order an action dismissed, but precludes a judge from striking any prior serious felony conviction in connection with imposition of the 5-year enhancement. This bill would delete the restriction prohibiting a judge from striking a prior serious felony conviction in connection with imposition of the 5-year enhancement described above and would make conforming changes.

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