
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No: SB 81 **Hearing Date:** March 16, 2021
Author: Skinner
Version: February 8, 2021
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Sentencing: enhancements*

HISTORY

Source: California Attorneys or Criminal Justice
Californians for Safety and Justice

Prior Legislation: SB 136 (Wiener), Ch. 590, Stats. 2019
SB 1393 (Mitchell), Ch. 1013, Stats. 2018
SB 180 (Mitchell), Ch. 677, Stats. 2017
SB 620 (Bradford), Ch. 682, Stats. 2017

Support: American Civil Liberties Union; Bend The Arc: Jewish Action; California Catholic Conference; California Public Defenders Association; California Religious Action Center of Reform Judaism; Communities United for Restorative Youth Justice; Drug Policy Alliance; Ella Baker Center for Human Rights; Fresno Barrios Unidos; Friends Committee on Legislation of California; Initiate Justice; Legal Services for Prisoners with Children; Prosecutors Alliance of California; Re:Store Justice; Rubicon Programs; San Francisco Public Defender's Office; Smart Justice California; Time for Change Foundation

Opposition: California State Sheriffs' Association; Peace Officer Research Association of California

PURPOSE

The purpose of this bill is to provide guidance to courts by specifying circumstances for a court to consider when determining whether to apply an enhancement.

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).)

This bill states that the court shall dismiss an enhancement upon finding any of the following circumstances to be true, unless there is a showing by clear and convincing evidence that dismissal would endanger public safety:

- Application of the enhancement would result in a disparate racial impact.
- Multiple enhancements are alleged in a single case or the total sentence is over 20 years.
- The current offense is connected to mental health issues.
- The current offense is connected to prior victimization or childhood trauma.
- The current offense is nonviolent.
- The defendant was a juvenile when they committed the current offense or prior offenses.
- 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.

This bill clarifies that the above list is not exhaustive and that the court maintains authority to dismiss or strike an enhancement in the interests of justice.

This bill specifies that this bill's provisions do not apply to an enhancement if dismissal of that enhancement is prohibited by any initiative statute.

COMMENTS

1. Need for This Bill

According to the author's office:

California's penal code has multiple sentence enhancements that can be added to a criminal charge. Sentence enhancements are not elements of the crime, they are additional circumstances that increase the penalty, or time served, of the underlying crime. While the application of an enhancement may appear straightforward, research reviewed last year by the Committee on the Revision of the Penal Code revealed inconsistency in their use.

Current law allows judges to dismiss sentencing enhancements "in furtherance of justice." This standard lacks clarity and does not provide judges clear guidance on how to exercise this discretion. A ruling by the California Supreme Court noted

that the law governing when judges should impose or dismiss enhancements remains an “amorphous concept,” with discretion inconsistently exercised and underused because judges did not have adequate guidance.

Data indicates that in about 20% of cases, judges chose not to apply sentence enhancements. Conversely, in about 80% of cases, individuals had their terms lengthened by sentence enhancements, in many cases with two, three or more enhancements assigned. Thus for the committing the same crime some individuals receive only the base sentence while others have five, ten or more years added to their time.

Building on the California Rules of Court that guide judges in certain sentencing decisions, SB 81 aims to provide clear guidance on how and when judges may apply sentence enhancements. By clarifying the parameters a judge must follow, SB 81 codifies a recommendation made by the Committee on the Revision of the Penal Code to improve fairness in sentencing and help ensure that penalties more closely reflect the circumstances of the crime.

2. Sentencing Enhancements

Existing law contains a variety of enhancements that can be used to increase the term of imprisonment a defendant will serve. 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 Mar. 1, 2021].)

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.*)

3. Sentence Increases: Research on Deterrent Effect and Impact on State Prisons

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

A large body of research has studied the effects of incarceration and other criminal penalties on crime. Much of this research is guided by the hypothesis that incarceration reduces crime through incapacitation and deterrence. Incapacitation refers to the crimes averted by the physical isolation of convicted offenders during the period of their incarceration. Theories of deterrence distinguish between

general and specific behavioral responses. General deterrence refers to the crime prevention effects of the threat of punishment, while specific deterrence concerns the aftermath of the failure of general deterrence—that is, the effect on reoffending that might result from the experience of actually being punished.

(National Research Council (2014) *The Growth of Incarceration in the United States: Exploring Causes and Consequences Committee on Causes and Consequences of High Rates of Incarceration*, J. Travis, B. Western, and S. Redburn, Editors. Committee on Law and Justice, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press. (http://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf.)

In regard to deterrence, the authors note that in “the classical theory of deterrence, crime is averted when the expected costs of punishment exceed the benefits of offending. Much of the empirical research on the deterrent power of criminal penalties has studied sentence enhancements and other shifts in penal policy.” (National Research Council, *supra*, *The Growth of Incarceration in the United States*, p. 132.)

Deterrence theory is underpinned by a rationalistic view of crime. In this view, an individual considering commission of a crime weighs the benefits of offending against the costs of punishment. Much offending, however, departs from the strict decision calculus of the rationalistic model. Robinson and Darley (2004) review the limits of deterrence through harsh punishment. They report that offenders must have some knowledge of criminal penalties to be deterred from committing a crime, but in practice often do not.

(*Id.* at p. 133.) The report concludes: The incremental deterrent effect of increases in lengthy prison sentences is modest at best. “Because recidivism rates decline markedly with age, lengthy prison sentences, unless they specifically target very high-rate or extremely dangerous offenders, are an inefficient approach to preventing crime by incapacitation.” (*Id.* at p. 5.)

In a 2014 report, the Little Hoover Commission addressed the disconnect between science and sentencing: 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 explains how California’s sentencing structure and enhancements contributed to a 20-year state prison building boom. (<http://lhc.ca.gov/sites/lhc.ca.gov/files/Reports/219/Report219.pdf>.)

4. Committee on Revision of the Penal Code

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 Mar. 1, 2021].)

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.) This bill would codify the Committee's recommendation on the application of sentence enhancements.

5. Limitations on Amending Voter Initiatives

When laws are enacted through the initiative process, there are limitations on how those laws may be subsequently amended by the Legislature. Generally, the Legislature may not amend a statute enacted by initiative without subsequent voter approval unless the initiative permits such amendment, and then only upon whatever conditions the voters attached to the Legislature's amendatory powers. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 568; see also Cal. Const., art. II, § 10, subd. (c).) The California Constitution states, "The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." (Cal. Const., art. II, § 10, subd. (c).) Therefore, unless the initiative expressly authorizes the Legislature to amend, only the voters may alter statutes created by initiative.

The purpose of California's constitutional limitation on the Legislature's power to amend initiative statutes is to protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent. Courts have a duty to jealously guard the people's initiative power and, hence, to apply a liberal construction to this power wherever it is challenged in order that the right to resort to the initiative process is not improperly annulled by a legislative body. (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473.) Yet, despite the strict bar on the Legislature's authority to amend initiative statutes, judicial decisions have recognized that the Legislature is not thereby precluded from enacting laws addressing the general subject matter of an initiative. The Legislature remains free to address a "related but distinct area" or a matter that an initiative measure "does not specifically authorize or prohibit." (*People v. Kelly* (2010) 47 Cal.4th 1008, 1025-1026.)

This bill provides that its provisions do not apply to an enhancement if dismissal of that enhancement is prohibited by any initiative statute. Specifically, enhancements that may not be dismissed by the court due to express language provided by the initiative include those enacted by Proposition 83, pertaining to sex offenses, firearms, and causing great bodily injury during the commission of specified crimes, passed in 2006; and Proposition 115 pertaining to special circumstances for murder, passed in 1990.

6. Argument in Support

According to Smart Justice:

California's penal code has a multitude of sentence enhancements that can be added to a person's term of incarceration. Current law allows judges to dismiss sentencing enhancements "in furtherance of justice." This standard lacks clarity and does not provide judges clear guidance on how to exercise this discretion. Research examined by the Committee on the Revision of the Penal Code [CRPC]

revealed that sentence enhancements were applied disproportionately to women, people of color, and those exhibiting mental health issues. Many states have reformed sentence enhancement processes and provided more guidance – for example, by limiting the use of enhancements to convictions that occurred within 5 years.

SB 81 establishes a presumption that judges would only apply sentence enhancements when there is clear and convincing evidence that not using the enhancement would endanger the public. By clarifying the parameters a judge must follow, SB 81 codifies a recommendation made by the CRPC to improve fairness in sentencing and help ensure that penalties more closely reflect the circumstances of the crime.

7. Argument in Opposition

According to the California State Sheriffs' Association:

SB 81 seeks to limit the application of many enhancements, including in circumstances in which multiple enhancements are alleged in a single case or the total sentence is over 20 years, the current offense is connected to mental health issues, the current offense is connected to prior victimization or childhood trauma, the current offense is nonviolent, or the enhancement is based on a prior conviction that is over five years old. Some of these conditions are subjective and potentially difficult to demonstrate or prove. Others, including the circumstances wherein multiple enhancements are alleged or a prior conviction is more than five years old, do not necessarily provide enough information as to whether an enhancement enacted by the Legislature or California voters should ultimately be imposed.

Unfortunately, this bill creates several conditions under which otherwise appropriate sentence enhancements that would be imposed based on the nature of the offense and the actions taken by the offender are negated. Instead, a court would be permitted to decline to dismiss a charged sentencing enhancement upon a showing by clear and convincing evidence that dismissal of an enhancement would endanger public safety. This showing would be in addition to existing law that not only requires a defendant to be found guilty beyond a reasonable doubt but also requires enhancements to generally be pled and proved.

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