

Date of Hearing: June 29, 2021
Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 81 (Skinner) – As Amended April 27, 2021

As Proposed to be Amended in Committee

SUMMARY: Creates a presumption that it is in the furtherance of justice to dismiss an enhancement upon the court's finding that one of specified circumstances is true. Specifically, **this bill:**

- 1) Requires a court to dismiss an enhancement if it is in the furtherance of justice to do so, except under the following circumstances:
 - a) Upon a showing of clear and convincing evidence that dismissal of the enhancement would endanger public safety; or,
 - b) When the dismissal of an enhancement is prohibited by an initiative statute.
- 2) Creates a presumption that it is in the furtherance of justice to dismiss an enhancement upon the court's finding that any of the following circumstances is true:
 - a) Application of the enhancement would result in a disparate racial impact;
 - b) Multiple enhancements are alleged in a single case. In this case, 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 which case 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 specified;
 - g) The defendant was a juvenile when they committed the current offense or prior offenses;
 - h) The enhancement is based on a prior conviction that is over five years old; or,
 - i) Though a firearm was used in the commission of the current offense, it was inoperable or unloaded.
- 3) Specifies that these provisions apply prospectively.

- 4) Defines the following terms for purposes of dismissing enhancements:
- a) A “mental illness” is a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders;
 - b) “Childhood trauma” means that as a minor the person experienced physical, emotional, or sexual abuse, physical or emotional neglect, or had a household member who experienced mental illness, a substance use disorder, intimate-partner violence, absence due to divorce or separation, or incarceration; and,
 - c) “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.

EXISTING LAW:

- 1) Defines an “enhancement” as “an additional term of imprisonment added to the base term.” (Cal. Rules of Court, rule 4.405(3).)
- 2) Provides that when the court imposes a sentence for a felony, the court shall also impose, in addition and consecutive to the offense of which the person has been convicted, the additional terms provided for any applicable enhancements. (Pen. Code, § 1170.1, subd. (d).)
- 3) States that when an enhancement is punishable by one of three terms, the court shall, in its discretion, impose the term that best serves the interests of justice. The court must state the reasons for its sentencing choice on the record. (Pen. Code, § 1170.1, subd. (d); Cal. Rules of Court, rule 4.428(a).)
- 4) Allows a court, either on its own motion or upon the application of the prosecutor, to dismiss an action in the furtherance of justice. The court must state the reasons for the dismissal orally on the record. (Pen. Code, § 1385, subd. (a).)
- 5) Provides that a dismissal shall not be made for any cause that would be ground of demurrer to the accusatory pleading. (Pen. Code, § 1385, subd. (a).)
- 6) 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); Cal. Rules of Court, rule 4.428(b).)
- 7) States that in determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration. (Cal. Rules of Court, rule 4.428(b).)
- 8) 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).)

FISCAL EFFECT: Unknown.

COMMENTS:

- 1) **Author's Statement:** According to the author, "California's penal code has over 150 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 has a standard for dismissing sentence enhancements that 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.

"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 developed with the input of the judges who serve on the Committee on the Revision of the Penal Code for the purpose of improving fairness in sentencing while retaining a judge's authority to apply an enhancement to protect public safety."

- 2) **Impetus for this Bill:** The Committee on the Revision of the Penal Code ("Committee") was established within the Law Revision Commission to study the Penal Code and recommend statutory reforms. (SB 94, Ch. 25, Stats. 2019; Gov. Code, § 8280.) 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).) The Committee's first annual report made 10 recommended reforms to the Penal Code. (See < http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2020.pdf > [as of June 6, 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.)

Specifically, the Committee recommendations are:

Establish guidelines and presumptions (but not requirements) that judges should consider dismissing sentencing enhancements in furtherance of justice when:

The current offense is nonviolent.

The current offense is connected to mental health issues.

The enhancement is based on a prior conviction that is over five years old.

The current offense is connected to prior victimization or childhood trauma.

The defendant was a juvenile when he/she committed the current offense or prior offenses.

Multiple enhancements are alleged in a single case or the total sentence is over 20 years.

A gun was used but it was inoperable or unloaded.

Application of the enhancement would result in disparate racial impact.

Provide that the presumptions can be overcome if there is "clear and convincing evidence that dismissal of the enhancement would endanger public safety."

Clarify that the list is not exclusive. Judges maintain power to strike enhancements in other compelling circumstances.

(*Annual Report and Recommendations 2020*, *supra*, at p. 37.)

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

As noted by the author, the California Rules of Court, which are adopted by the Judicial Council of California, do provide some guidance to judges on how to exercise discretion when imposing a sentence on enhancements. Rule 4.428, titled “Factors Affecting Imposition of Enhancements,” advises that “In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant’s criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration.” (Cal. Rules of Court, rule 4.428(b).)

Case law interpreting Penal Code section 1385 also provides some guidance on dismissing enhancements. While the judge’s discretion to dismiss is very broad, the phrase “furtherance of justice” requires that in determining whether or not to dismiss, both the defendant’s constitutional rights and the interests of society be considered. (*People v. Orin* (1975) 13 Cal.3d 937, 945; *People v. Bracey* (1994), 21 Cal.App.4th 1532, 1541.)

This bill enacts a presumption that it is in the furtherance of justice to dismiss an enhancement when the aforementioned specific circumstances, such as mental health issues, prior victimization or childhood trauma, disparate racial impact, the allegation of multiple enhancements, or a sentence exposure of over 20 years, are present.

- 3) **Penal Code Section 1385:** Penal Code section 1385 authorizes the court to dismiss an “action” if it is in furtherance of justice.” (Pen. Code, § 1385, subd. (a).) The word “action” in section 1385 means “individual charges and allegations in a criminal action.” (*In re Varnell* (2003) 30 Cal.4th 1132, 1137[.]) This includes sentencing enhancements. (*People v. Thomas* (1992) 4 Cal. 4th 206, 209.) In addition, rather than dismissing an enhancement, the court has the option to strike its punishment. (Pen. Code, § 1385, subd. (b)(1).) When exercising discretion under section 1385, the court must state its reasons on the record. (Pen. Code, § 1385, subd. (a).)

Although the statute provides that a dismissal may be ordered either on the court’s own motion, or the motion of the district attorney, a defendant may “invite” the court to exercise its discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 375.)

- 4) **Enhancements Generally:** An “enhancement” is “an additional term of imprisonment added to the base term.” (Cal. Rules of Court, rule 4.405(3).) All enhancements must be specifically alleged in the accusatory pleading and proved or admitted by the defendant. (Pen. Code, § 1170.1, subd. (e).) There are two types of enhancements, generally known as “conduct” enhancements and “status” enhancements. Conduct enhancements attach to the crime (i.e. infliction of great bodily injury, armed with a firearm, commission in furtherance of street gang activity) whereas status enhancements attach to the defendant (i.e. prior prison term, prior serious felony convictions).

An enhancement differs from an alternative penalty scheme. An alternative penalty scheme does not add an additional term of imprisonment to the base term; instead, it provides for an alternate sentence for the underlying felony itself when it is proven that certain conditions specified in the statute are true. (See *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 899; *People v. Jefferson* (1999) 21 Cal.4th 86, 101.) These include the Three Strikes Law (*People*

v. Superior Court (Romero) (1996) 13 Cal.4th 497, 527); Penal Code section 186.22, subdivision (b)(4) in the criminal street gang statute (*People v. Jones* (2009) 47 Cal.4th 566, 576); and the One Strike Law (*People v. Anderson* (2009) 47 Cal.4th 92, 102) among others. The presumption created by this bill applies to enhancements, but does not encompass alternative penalty schemes.

- 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 specifies that its provisions do not apply to an enhancement if dismissal of that enhancement is prohibited by any initiative statute.

- 6) **Argument in Support:** According to the *California Attorneys for Criminal Justice*, a co-sponsor of this bill, "Penal Code section 1385 generally authorizes trial judge to dismiss sentencing enhancements 'in the furtherance of justice.' But the statute provides no standards to guide a court's exercise of discretion. Consequently, grave sentencing disparities occur among defendants convicted of identical offenses – even when they have comparable criminal histories, and their crimes are committed under similar circumstances.

"In addition to these disparities, case law precludes a court from exercising its discretion to dismiss enhancements unless 'extraordinary' circumstances exist. (See, e.g., *People v. Mayfield* (2020) 50 Cal.App.4th 1096, 1105.) This standard has contributed to California's mass incarceration crisis. Indeed, a significant portion of inmates serving sentences where the period imposed for an enhancement is greater than the time imposed for the crime itself. As an example, robbery is punishable by imprisonment for two, three, or five years. But a gun enhancement imposed under Penal Code section 12022.53 will increase that sentence by ten,

twenty, or 25 years to life.

“SB 81 seeks to rectify the issues. It does this by ensuring that enhancements will not be imposed if various conditions are met, unless there is proof – by clear and convincing evidence – that dismissal of the enhancement would jeopardize public safety. This approach simultaneously encourages uniformity of sentencing, and the imposition of enhancements only when necessary to protect the public.”

- 7) **Argument in Opposition:** According to the *California District Attorneys Association*, “This bill would severely limit the use of sentencing enhancements by establishing a presumption that an enhancement be dismissed under a wide variety of circumstances. Specific enhancements – also known as conduct-based enhancements – are directly related to the underlying offense and are based on the defendant’s conduct during a crime, such as use/discharge of a firearm, infliction of serious bodily injury, amount of theft/damage, and victim’s vulnerable status (i.e., elderly, child, racial minority). Certainly, defendants should be held accountable if they engage in aggravated conduct during the commission of a crime, particularly if it results in added trauma or injury to a victim.

“Judges should be permitted to consider various factors when evaluating whether to impose or dismiss an enhancement, but SB 81 essentially prohibits enhancements in multiple circumstances. The bill creates a presumption in favor of dismissing an enhancement unless overcome by clear and convincing evidence, thus taking discretion away from judges who are in the best position to evaluate the facts of the case and the particulars of the offender.

“We are particularly concerned with several of the circumstances listed in SB 81 that mandate dismissal of an enhancement, including:

- Disparate racial impact - specific enhancements are tied to an offender's conduct and a defendant's race should not play a factor (with the limited exception of race-based hate crimes).
- Multiple enhancements or total sentence over 20 years - if a defendant engages in various conduct that results in multiple enhancements, such as the use of several weapons or infliction of serious injury on multiple victims, then multiple enhancements would be warranted to hold the defendant accountable for his aggravated conduct.
- Offense is connected to prior victimization or childhood trauma - it is unclear what the term ‘connected’ means and the definition of ‘prior victimization’ and ‘childhood trauma’ is simply too broad.
- Offense is non-violent - this provision is unclear as many times it is the enhancement (based on the aggravating nature of the conduct such as use of a firearm or infliction of serious injury) that makes an offense violent.
- Defendant was a juvenile – a specific enhancement is tied to conduct, regardless of age.
- Prior convictions over 5 years old - this washout period is inadequate and does not take into account a defendant's conduct over the washout period (i.e., has the defendant been free from the commission of an offense or incarceration over that period).

- Inoperable or unloaded firearm - surely a firearm that is used as a blunt object to seriously injure or kill a victim, even though inoperable or unloaded, should qualify. And an unloaded firearm nevertheless instills fear in a victim and increases the chances of a violent confrontation.

“Finally, it is unclear what the standard for overcoming the mandatory dismissal of an enhancement – ‘showing by clear and convincing evidence that dismissal of an enhancement would endanger public safety’ – actually means and how it will be interpreted by courts.

“Judges are in the best position to evaluate the circumstances of the crime, the particulars of a defendant’s background, and the interests of justice and public safety. As such, judges should be given discretion and flexibility in determining whether to impose or dismiss an enhancement, something judges currently have under existing law.”

8) **Related Legislation:**

- a) AB 1509 (Lee) repeals several firearm enhancements, reduces the penalty for using a firearm in the commission of specified crimes from 10 years, 20 years, or 25-years-to-life to one, two or three years, and authorizes recall and resentencing for a person serving a term for these enhancements. AB 1509 was held in the Assembly Appropriations Committee.
- b) SB 483 (Allen) retroactively applies the repeal of sentence enhancements for prior prison or county jail felony terms and for prior convictions of specified crimes related to controlled substances. SB 483 is pending hearing in this committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Attorneys for Criminal Justice (Co-Sponsor)
ACLU California Action
Alliance San Diego
Arts for Healing and Justice Network
Asian Solidarity Collective
Bend the Arc: Jewish Action
California Calls
California Catholic Conference
California Public Defenders Association (CPDA)
Californians for Safety and Justice
Cat Clark Consulting Services LLC
Center on Juvenile and Criminal Justice
Change Begins With Me Indivisible Group
Communities United for Restorative Youth Justice (CURYJ)
Courage California
Del Cerro for Black Lives Matter
Democratic Club of Vista

Democrats of Rossmoor
Dolores Huerta Foundation
Drug Policy Alliance
Ella Baker Center for Human Rights
Essie Justice Group
Faith in Action Bay Area
Fresno Barrios Unidos
Friends Committee on Legislation of California
Hillcrest Indivisible
Initiate Justice
Legal Services for Prisoners With Children
Los Angeles Regional Reentry Partnership (LARRP)
Mission Impact Philanthropy
Multi-faith Action Coalition
Partnership for The Advancement of New Americans
Pillars of The Community
Prosecutors Alliance California
Re:store Justice
Represent Justice
Riseup
Rubicon Programs
San Diego Progressive Democratic Club
San Francisco Public Defender
Sd-qtpoc Colectivo
Showing Up for Racial Justice (SURJ) San Diego
Showing Up for Racial Justice North County San Diego
Smart Justice California
Social Workers for Equity & Leadership
Team Justice
Think Dignity
Time for Change Foundation
UC Berkeley's Underground Scholars Initiative (USI)
Underground Scholars Initiative UC Berkeley
Uprise Theatre
We the People - San Diego

Oppose

Arcadia Police Officers' Association
Burbank Police Officers Association
California Coalition of School Safety Professionals
California District Attorneys Association
California Narcotic Officers' Association
California Police Chiefs Association
California State Sheriffs' Association
Culver City Police Officers Association
Fullerton Police Officers' Association
Inglewood Police Officers Association
Los Angeles School Police Officers Association

Newport Beach Police Association
Orange County District Attorney
Palos Verdes Police Officers Association
Peace Officers Research Association of California (PORAC)
Pomona Police Officers' Association
Riverside Sheriffs' Association
San Diegans Against Crime
San Diego County District Attorney's Office
San Diego District Attorneys Association
Santa Ana Police Officers Association

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