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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

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**Bill No:** SB 620                      **Hearing Date:** April 25, 2017  
**Author:** Bradford  
**Version:** March 28, 2017  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** JRD

**Subject:** *Firearms: Crimes: Enhancements*

### HISTORY

**Source:** Author

**Prior Legislation:** AB 4 (Bordonaro) Chap. 503, Stats. of 1997  
AB 2173 (Wayne) Chap. 126, Stats of 2002

**Support:** Alliance for Boys and Men of Color; Anti-Recidivism Coalition; Californians for Safety and Justice; Californians United for a Responsible Budget; Friends Committee on Legislation of California

**Opposition:** California District Attorneys Association; California State Sheriffs' Association

### PURPOSE

*The purpose of this legislation is to allow the court, in the interest of justice and at the time of sentencing, strike a firearm enhancement, as specified.*

*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 be sentenced to a term of 3, 4, or 10 years in the state prison unless the use of a firearm is an element of the offense for which he or she is convicted. (Penal Code § 12022.5(a).)

*Existing law* provides that a person who personally uses an assault weapon or machine gun during the commission of a felony is subject to an additional and consecutive term of 5, 6 or 10 years in state prison. (Penal Code § 12022.5(b).)

*Existing law* allows a court, in the interests of justice, to dismiss an action, allegation or enhancement, except where specifically and clearly prohibited by statute. (*People v. Superior Court (Romero)* (1996) 13 Cal. 3d 497; Penal Code § 1385.)

*Existing law* states that the court may not strike an allegation that a person personally used a firearm in the commission of a felony or a finding bringing a person within the provisions of this enhancement. (Penal Code § 12022.5(c).)

*Existing law* states that notwithstanding the limitation that a firearm use enhancement may not be imposed if use of a firearm is an element of an offense, the enhancement shall be imposed in a case involving assault with a firearm or for murder if the killing is committed by means of shooting from a motor vehicle at another person with the intent to inflict great bodily injury, (GBI) or death. (Penal Code § 12022.5(d).)

*Existing law* states that when a person is found to have personally used a firearm, an assault weapon, a machinegun, or a .50 BMG rifle, in the commission of a felony or attempted felony as provided in this section and the firearm, assault weapon, machinegun, or a .50 BMG rifle, is owned by that person, the court shall order that the firearm be deemed a nuisance and disposed of in the manner provided in Sections 18000 and 18005. (Penal Code § 12022.5(e).)

*Existing law* states that, for purposes of imposing an enhancement under Section 1170.1, the enhancements under this section shall count as one, single enhancement. (Penal Code §12022.5(f))

*Existing law* provides for the "10-20-life" law relating to the use of a firearm. A person who uses a firearm, whether or not the firearm was operable or loaded, during the commission of certain enumerated offenses (robbery, carjacking, murder, kidnapping, sexual assault, and mayhem) is subject to an additional consecutive term of 10 years in prison. If the firearm was 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 GBI or death, the defendant is subject to an additional, consecutive term of 25-years-to-life in prison. (Penal Code § 12022.53.)

*Existing law* states that probation cannot be granted to, nor shall the execution or imposition of sentence be suspended for, any person found to come within the provisions of this section. (Penal Code § 12022.53(g).)

*Existing law* states that the court cannot strike an allegation under this section or a finding bringing a person within the provisions of this section. (Penal Code § 12022.53(h).)

*Existing law* provides that total amount of credits awarded not exceed 15 percent of the total term of imprisonment imposed on a defendant upon whom a sentence is imposed pursuant to this section. (Penal Code § 12022.53(i).)

*This legislation* would provide that the court may, in the interest of justice and at the time of sentencing, strike an enhancement otherwise required to be imposed by 12022.5 or 12022.53. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.

## COMMENTS

### 1. Need for this Legislation

According to the author:

The term extensions are additional and consecutive.

- The term of imprisonment for using a firearm in the commission of a felony is imprisonment in a state prison for 3, 4, or 10 years.
- The term of imprisonment for discharging a firearm in the commission is imprisonment in a state prison for 5, 6, or 10 years.
- The term of imprisonment for a person who personally uses a firearm to commit certain specified felonies is imprisonment in a state prison for 10 years, or for 20 years if he or she discharged the firearm, or for 25 years to life if he or she discharges the firearm and proximately causes great bodily harm.

Existing law prohibits the court from striking an allegation or finding that would make a crime punishable pursuant to these provisions.

Underlying these sentence enhancements is an already long sentence as a result of the commission of a felony.

Instead, these sentence enhancements **cause** several problems:

- Greatly increases the population of incarcerated persons
- Disproportionately increases racial disparities in imprisonments

Over 30,000 persons currently incarcerated as a result of these extensions.

Several studies have concluded that increasing an already long sentence has no material deterrent effect. Rather, certainty of sentences acts as the more effective deterrent, calling into question California reliance on extremely long prison terms.

SB 620 would allow a court use judicial discretion when applying a sentence enhancement when a person uses or discharges a firearm when a person is convicted for committing a felony. This is consistent with other enhancement sentence laws and retains existing sanctions for serious crimes.

## **2. Firearms Enhancements: Impact on State Prison Population and Deterrence**

In 2014, the Little Hoover Commission explained how California's sentencing structure and enhancements have impacted the prison system:

At the beginning of the state's prison building boom in the early 1980s, adult and youth corrections accounted for 4 percent of California's General Fund expenditures at \$1 billion per year. Today, it represents 9 percent of the total General Fund, approximately \$9.5 billion. This growth has come at the expense of other state priorities including higher education and social services.

With the exception of the recently completed California Health Care Facility and the planned infill housing previously described, California ended its prison-building boom with the opening of Kern Valley State Prison in 2005 after adding 21 new facilities between 1984 and 2005. The state previously had built 12 prisons over the course of 132 years. During the 20-year building campaign, California policy makers enacted hundreds of laws increasing sentence length,

adding sentence enhancements and creating new sentencing laws. The end result was that every new prison the state built was quickly filled to capacity.

...[T]he 10-20-Life “Use a Gun and You’re Done” Law in 1997, added significant sentencing enhancements to certain serious felonies. In addition to being sentenced for the felony, an enhancement of 10 years of prison time is added if an offender commits certain crimes while in possession of a gun; 20 years prison time is added if the gun is fired, and 25 years to life is added if someone is killed or seriously injured. As a result of the gun enhancement law, a convicted murderer who used a gun to commit the crime could get as much or more time for the sentence enhancement than the actual murder charge. A second degree murder conviction might result in a 15-years-to-life sentence and the gun enhancement would add a 25-years-to-life sentence for a combined 40-years-to-life sentence.

Unless lawmakers and the public they represent are willing to build more prisons and commit a greater percentage of the General Fund to corrections to pay for the ongoing expenses of running additional facilities, state prisons, under the current sentencing system likely will remain overcrowded. Without additional, long-term measures, prison overcrowding will continue to be a constant and costly battle for California.

(<http://www.lhc.ca.gov/studies/219/Report219.pdf>; Citations omitted.)

The impact that “Use a Gun and You’re Done” law would have on California’s prison system was evident at the time it was passed, but the focus was seemingly on the legislation’s deterrent value:

The toughest gun-sentencing law in the nation will go into effect Thursday when California imposes a new statute that dramatically increases prison terms for anyone who wields a firearm while committing a crime.

Through a massive advertising campaign initiated in recent days, state officials are warning would-be criminals that the law requires that 10 years be added to the sentence of anyone over 14 years old who simply carries a gun -- loaded or unloaded -- in the commission of a serious crime. It requires that 20 years be amended to a term for firing the gun -- even if the bullet hits no one, and that 25 years to life be mandated for seriously injuring a victim.

Although numerous states in recent years have initiated gun bans and other efforts to curb the use of firearms, no other state has so drastically increased the punishments.

All sentences under the new law, which was signed by Gov. Pete Wilson (R) on Sept. 25 with little fanfare or controversy, will be added to whatever punishment is imposed for the crime that was committed with the gun.

This makes it, in the words of Attorney General Dan Lungren, “quite simply the toughest gun-abuse control measure in the nation.”

The additional sentences cannot be suspended, probation cannot be recommended and persons convicted will be required to serve at least 85 percent of the additional prison terms after credit for good behavior is deducted.

The sentencing add-ons will apply to gun possession during the commission of 17 crimes, including robbery, kidnapping, rape and assault with intent to commit a felony.

California law enforcement officials predict that the new "10-20-life" law will be copied elsewhere in the country just as the state's 1994 "three-strikes-and-you're-out" law mandating life sentences for third-time felons has been adopted by about two dozen states in one form or another.

As California attempts to get the word out about the new law, no one is being left out. Each of the more than 156,000 inmates in the state's 33 prisons will be handed a brochure in the weeks ahead warning of the law's provisions.

Criminals outside the prison system will get the message about the new law through advertisements broadcast over 300 television and radio stations statewide, featuring actor Alan Autry, who plays tough cop Bubba Skinner on the "Heat of the Night" television series.

"Do you know a tough guy with a gun? Let him know the law just came to town," Autry says before outlining the new sentence enhancements. "Now, if you're 14 years or older, this law applies to you. Use a gun and you're done . . . 10, 20, life, the law is here."

Critics of the new law say it is a well-intentioned but misguided measure that will simply fuel an explosion in new prison construction without addressing either the proliferation of guns or the root causes of crime.

"These types of excessive laws lead to an enormous waste of government resources without solving anything. The government instead should look more closely at regulating the possession of guns in a much stricter fashion so that the use of guns is no longer a possibility," said Elizabeth Schroeder, associate director of the Southern California branch of the American Civil Liberties Union.

The ACLU opposed the measure when it was enacted almost unanimously by the state legislature, calling it "excessive and gratuitous" because existing law already allows for sentence enhancements of up to 10 years when a person uses a firearm in the commission of a felony.

What's different, however, is that the new law mandates the additional sentences.

And that change, according to proponents, is not only critical but won't necessarily swell the ranks of prisons. "We'd rather fill up the prisons than fill the cemeteries," said Sean Walsh, Wilson's press secretary. "But we also believe that when the word gets out there will be fewer crimes committed with guns. We believe it will be a deterrent."

Prison officials have said the short-term impact on the inmate population will be negligible because criminals would be serving time for the basic crime they committed

anyway. They said the longer-term impact of the enhanced sentences will be determined by how effective a deterrent the 10-20-life law becomes.

State officials estimated four years ago that the prison population would soar to 230,000 by the turn of the century because of the three-strikes law and that prisons would run out of beds by 1998. But those predictions proved to be off the mark. Department of Corrections officials now say they will be housing only 181,000 inmates by the year 2000.

Among the reasons given for the lower-than-expected increase were that judges have not imposed three-strike sentences as often as was originally expected, and that felons facing non-three strikes sentences leveled off along with the general decline in the crime rate. Supporters of the 10-20-life law say they expect the same type of flattening out of the crime rate to help reduce the pressure on prisons.

But to be successful, the new law will have to be recognized as a certainty by criminals, said one of the measure's chief proponents, Mike Reynolds, a Fresno anti-crime activist who co-wrote the three-strikes ballot initiative after his 18-year-old daughter, Kimber, was shot to death during a purse-snatching outside a movie theater in 1992.

"It's tough stuff. It's a real deterrent, but you can't bluff these people. You need certainty and realness to make it sink in and cause a real drop in crime," Reynolds said. (*Starting Today, California Packs Toughest Gun-Sentencing Law*; William Claiborne; Washington Post; January 1, 1998.)

The findings of the legislation echoed the deterrence value of 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. (Assembly Bill 4 (Bordonaro), Chap. 503, Stats of 1997.)

Over twenty years later, the research has demonstrated that lengthy sentences may not be an effective deterrent. 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.<sup>1</sup>

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. . . .

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.”<sup>2</sup>

Given that, according to the author, there are “over 30,000 persons currently incarcerated” as a result of these enhancements, members may wish to discuss the deterrent value of these enhancements.

### 3. Effect of This Legislation

Existing law includes Penal Code section 1385, which grants a court the power and discretion to dismiss an action or any part of an action in the interests of justice. The Legislature can limit or prohibit the court's exercise of discretion under section 1385 for any particular crime or enhancement. However, any limits on section 1385 discretion must be clearly and specifically stated. (*People v. Superior Court (Romero)*, supra, 13 Cal.3d 497.) Penal Code sections 12022.5 and 12022.53 both include a provision forbidding the court from dismissing an enhancement imposed under that section.

This legislation would provide 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. By doing this, relief would be available to a deserving defendant, while a defendant who merited additional punishment for the use of a firearm in the commission of a felony would receive it.

### 4. Argument in Support

According to Californian’s for Safety and Justice:

Sentence enhancements significantly increase the amount of time offenders are incarcerated and are a cause of overcrowded prisons in California. Additionally, enhancing already lengthy sentences does not deter crime, hampers successful reentry, and contributes to recidivism. Ultimately, mandatory firearm sentence enhancements come at a high cost and do little to protect the public.

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<sup>1</sup> *The Growth of Incarceration in the United States* (2014), Jeremy Travis, Bruce Western and Steve Redburn, Editors, Committee on Causes and Consequences of High Rates of Incarceration, The National Research Council, p. 131 (citations omitted) ([http://johnjay.jjay.cuny.edu/nrc/NAS\\_report\\_on\\_incarceration.pdf](http://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf)),

<sup>2</sup> *Id.* at 132-133.

Importantly, SB 620 does not dispose of existing sanctions for serious felony offenses. Rather, SB 620 allows a court to use judicial discretion and take into account the nature and severity of the crime and other mitigating and aggravating factors during sentencing. Consequently, SB 620 provides judges the ability to impose sentences that fit the severity of the offense.

## 5. Argument in Opposition

According to the California District Attorneys' Association:

Generally, under current law, individuals who personally use a firearm or assault weapon in the commission of a felony are subject to an additional and consecutive prison term of 3, 4, or 10 years for a firearm, or 5, 6 or 10 years for an assault weapon. The court already has the discretion to impose the low, middle, or high term of that additional sentence, based on the circumstances of the case.

Additionally, if a defendant personally uses a firearm in the commission of crimes like murder, kidnapping, robbery, or rape, he or she is subject to an additional term of 10 years in state prison. If he or she intentionally discharges the firearm, that additional term is 20 years, and if a person causes great bodily injury or death, the additional term is 25 years to life.

For some individuals, these additional sentences are the only thing keeping them from being eligible for early parole under Proposition 57. For example, currently, an individual convicted of assault with a firearm on a peace officer is subject to an additional term under Penal Code section 12022.53. Any violation of PC 12022.53 is deemed a violent felony under PC 667.5(c), which makes that individual ineligible for early parole consideration under Proposition 57. However, without the additional term under PC 12022.53, that same offender would be eligible for early parole under Proposition 57 because assault with a firearm on a peace officer is not a violent felony under Penal Code section 667.5(c).

SB 620 would allow a judge to disregard these additional sentences, denying justice to victims and dramatically shortening the length of time before these individuals are released back in the community.

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