

Date of Hearing: April 20, 2021
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Reginald Byron Jones-Sawyer, Sr., Chair

AB 124 (Kamlager) – As Amended April 15, 2021

SUMMARY: Expands access to vacatur relief and the affirmative defense of coercion for victims of human trafficking and creates that same relief for victims of intimate partner violence and sexual violence; requires courts, in making sentencing determinations, to consider whether trauma, youthfulness, or being a victim of human trafficking or intimate partner violence contributed to commission of the current offense; and makes evidence of mental state admissible on the issue of whether or not the accused actually formed the required mental state for the crime charged, as specified. Specifically, **this bill:**

- (1) Requires the court to impose the lower term where any of the following was a contributing factor in the commission of the offense, unless the court finds that the aggravating circumstances so far outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice:
 - (a) The person has experienced psychological, physical, or childhood trauma, including but not limited to abuse, neglect, exploitation, or sexual violence (hereinafter “trauma”);
 - (b) The person is a youth, or was a youth, as defined, at the time of the commission of the offense (hereinafter “youthfulness”); or,
 - (c) Prior to the instant offense, or at the time of the commission of the offense, the person is or was a victim of intimate partner violence or human trafficking.
- (2) Defines youthfulness as including any person under 26 years of age at the time of the offense.
- (3) Specifies this does not prohibit the court from imposing the lower term even if none of these contributing factors is present.
- (4) Requires the court, when recalling and resentencing an inmate, to consider whether trauma, youthfulness, or being a victim of intimate partner violence or human trafficking was a contributing factor in the commission of the offense.
- (5) Allows the court, when recalling and resentencing a defendant who was under 18 years of age at the time of the offense, was sentenced to life without the possibility of parole (LWOP), and who has been incarcerated for at least 15 years, to impose a term less than the original sentence if trauma, youthfulness, or being a victim of intimate partner violence or human trafficking was a contributing factor in the commission of the offense.

- (6) Prohibits the court, except as otherwise provided by law and unless contrary to the interests of justice, from imposing consecutive terms of imprisonment for two or more felonies where trauma, youthfulness, or having been a victim of intimate partner battering or human trafficking was a contributing factor in the commission of the alleged offense.
- (7) Prohibits the court, unless contrary to the interest of justice, from imposing a term of imprisonment for any enhancement that is found true where trauma, youthfulness, or having been a victim of intimate partner battering or human trafficking was a contributing factor in the commission of the alleged offense. This section does not apply if an initiative requires the court to impose a term of imprisonment for the enhancement.
- (8) States that in the interest of justice, and in order to reach a just resolution during plea negotiations, the prosecutor must consider, among other factors in support of a mitigated sentence, whether trauma, youthfulness, or having been a victim of intimate partner battering or human trafficking was a contributing factor in the commission of the alleged offense.
- (9) Makes the affirmative defense for victims of human trafficking applicable to all crimes the defendant was coerced to commit, deleting the provision which excluded serious and violent crimes.
- (10) Creates a new affirmative defense for victims of intimate partner violence or sexual violence which mirrors the human trafficking affirmative defense.
- (11) Provides that the defendant may present evidence relevant to their identification as a victim of human trafficking or intimate partner violence or sexual violence that is contained in government reports, as specified, even if the peace officer did not identify them as a victim.
- (12) Makes evidence that an individual suffers from a mental disease, mental defect, or mental disorder admissible on the issue of whether or not the accused actually formed the required mental state for the crime that is charged, including whether or not the accused committed a willful act, premeditated, deliberated, harbored malice aforethought, acted knowingly, acted maliciously, or acted with conscious disregard for human life.
- (13) Makes vacatur relief for victims of human trafficking applicable to all crimes, rather than just nonviolent crimes.
- (14) Creates vacatur relief for victims of intimate partner violence or sexual violence which mirrors the vacatur relief for victims of human trafficking.

EXISTING LAW:

- (1) Authorizes the court, until January 1, 2022, to pick the term that best serves the interests of justice when a judgment of imprisonment is imposed and specifies three possible terms. As of January 1, 2022, in those circumstances, the court must impose the middle term unless there are circumstances in aggravation or mitigation of the crime. (Pen. Code, § 1170, subd. (b).)

- (2) Provides that in determining the term, the court may consider the record in the case, the probation officer's report, other reports, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. (Pen. Code, § 1170, subd. (b).)
- (3) Requires the court to set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended. (Pen. Code, § 1170, subd. (b).)
- (4) Provides that until January 1, 2022, when a sentencing enhancement specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. As of January 1, 2022, the court must impose the middle term unless there are circumstances in aggravation or mitigation. (Pen. Code, § 1170.1, subd. (d)(1).)
- (5) Authorizes a court, within 120 days after sentencing the defendant or at any time upon a recommendation from specified correctional entities or the prosecution, to recall an inmate's sentence and resentence that inmate to a lesser sentence. (Pen. Code, § 1170, subd. (d).)
- (6) Requires the court in resentencing to apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. (Pen. Code, § 1170, subd. (d)(1).)
- (7) Allows the court in resentencing to reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice. (Pen. Code, § 1170, subd. (d)(1).)
- (8) Allows the resentencing court to consider postconviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice. (Pen. Code, § 1170, subd. (d)(1).)
- (9) Provides that a defendant who is serving an LWOP sentence for an offense committed when the defendant was under 18 years of age and who has been incarcerated for at least 15 years may submit to the sentencing court a petition for recall and resentencing. (Pen. Code, § 1170(d)(2)(A)(i).)
- (10) Provides that sentencing choices that require a statement of a reason include selecting one of three authorized terms in prison or county jail for either a base term or enhancement. (Cal. Rules of Court, rule 4.406(b)(4).)
- (11) Requires the sentencing judge to consider relevant criteria enumerated in the Rules of Court. (Cal. Rules of Court, rule 4.409.)
- (12) Provides that, in exercising discretion to select one of the three authorized terms of imprisonment, the sentencing judge may consider circumstances in aggravation or mitigation,

and any other factor reasonably related to the sentencing decision. The relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing. (Cal. Rules of Court, rule 4.420(b).)

- (13) Prohibits the sentencing court from using a fact charged and found as an enhancement as a reason for imposing a particular term unless the court exercises its discretion to strike the punishment for the enhancement. (Cal. Rules of Court, rule 4.420(c).)
- (14) Prohibits the sentencing court from using a fact that is an element of the crime to impose a particular term. (Cal. Rules of Court, rule 4.420(d).)
- (15) Enumerates circumstances in aggravation, relating both to the crime and to the defendant, as specified. (Cal. Rules of Court, rule 4.421.)
- (16) Enumerates circumstances in mitigation, relating both to the crime and to the defendant, as specified. (Cal. Rules of Court, rule 4.423.)
- (17) Enumerates circumstances affecting concurrent or consecutive sentences, as specified. (Cal. Rules of Court, rule 4.425.)
- (18) Enumerates factors affecting imposition of enhancements, as specified. (Cal. Rules of Court, rule 4.428.)
- (19) Authorizes the court, generally, to dismiss or strike an enhancement. The court is expressly prohibited from striking prior serious felony conviction enhancements. (Pen. Code, § 1385.)
- (20) Provides that if a person was arrested for, or convicted of any nonviolent offense committed while he or she was a victim of human trafficking, the person may petition the court to vacate their convictions and arrests. (Pen. Code, § 236.14, subd. (a).)
- (21) Requires the petitioner to establish, by clear and convincing evidence, that the arrest or conviction was the direct result of being a victim of human trafficking. (Pen. Code, § 236.14, subd. (a).)
- (22) States that the petition to vacate conviction or arrest shall be submitted under penalty of perjury and shall describe all of the available grounds and evidence that the petitioner was a victim of human trafficking and the arrest or conviction of a nonviolent offense was the direct result of being a victim of human trafficking. (Pen. Code, § 236.14, subd. (b).)
- (23) Provides that if opposition to the petition is not filed by the applicable state or local prosecutorial agency, the court shall deem the petition unopposed and may grant the petition. (Pen. Code, § 236.14, subd. (d).)
- (24) States that if the petition is opposed or if the court otherwise deems it necessary, the court shall schedule a hearing on the petition, as specified. (Pen. Code, § 236.14, subd. (f)(1)-(3).)

- (25) Allows the court after considering the totality of the evidence presented, to vacate the conviction and expunge the arrests and issue an order if it finds all of the following:
- (a) That the petitioner was a victim of human trafficking at the time the nonviolent crime was committed;
 - (b) The commission of the crime was a direct result of being a victim of human trafficking;
 - (c) The victim is engaged in a good faith effort to distance himself or herself from the human trafficking scheme; and,
 - (d) It is in the best interest of the petitioner and in the interests of justice. (Pen. Code, § 236.14, subd. (g)(1)-(4).)
- (26) States that the order vacating a conviction or expunging and arrest shall do the following:
- (a) Set forth a finding that the petitioner was a victim of human trafficking when he or she committed the offense;
 - (b) Set aside the verdict of guilty or the adjudication and dismiss the accusation or information against the petitioner; and,
 - (c) Notify the Department of Justice (DOJ) that the petitioner was a victim of human trafficking when he or she committed the crime and of the relief that has been ordered. (Pen. Code, § 236.14, subd. (h)(1)-(3).)
- (27) Specifies that a petitioner shall not be relieved of any financial restitution order that directly benefits the victim of a nonviolent crime, unless it has already been paid. (Pen. Code, § 236.14, subd. (i).)
- (28) Specifies that when the court orders the conviction vacated, the court shall also order the law enforcement agency having jurisdiction over the offense, DOJ, and any law enforcement agency that arrested the petitioner or participated in the arrest of the petitioner to seal their records of the arrest and the court order to seal and destroy the records for three years from the date of the arrest, or within one year after the court order is granted, whichever occurs later, and thereafter to destroy their records of the arrest and the court order to seal and destroy those records. (Pen. Code, § 236.14, subd. (k).)
- (29) Requires the petition to vacate the conviction be made and heard within a reasonable time after the person has ceased to be a victim of human trafficking, or within a reasonable time after the petitioner has sought services for being a victim of human trafficking, whichever occurs later, subject to reasonable concerns for the safety of the petitioner, family members of the petitioner, or other victims of human trafficking who may be jeopardized by the bringing of the application or for other reasons consistent with the purposes of this section. (Pen. Code, § 236.14, subd. (l).)
- (30) States petitioner, or his or her attorney may be excused from appearing in person at a hearing for relief pursuant to this section only if the court finds a compelling reason why the petitioner cannot attend the hearing, in which case the petitioner may appear telephonically,

via videoconference, or by other electronic means established by the court. (Pen. Code, § 236.14, subd. (n).)

- (31) Specifies that notwithstanding any other law, the records of the arrest, conviction, or adjudication shall not be distributed to any state licensing board. (Pen. Code, § 236.14, subd. (p).)
- (32) Defines a “nonviolent offense” for the purposes of vacatur relief, as one that does not appear on California’s violent felony list. (Pen. Code, § 236.14, subd. (t).)
- (33) Provides that, in addition to any other affirmative defense, it is a defense to a crime that the person was coerced to commit the offense as a direct result of being a human trafficking victim at the time of the offense and in reasonable fear of harm. (Pen. Code, § 236.23, subd. (a).)
- (34) States that this affirmative defense does not apply to a serious felony, a violent felony, or the offense of human trafficking, as specified. (Pen. Code, § 236.23, subd. (a).)
- (35) Establishes the standard of proof for the human trafficking affirmative defense as the preponderance of evidence standard. (Pen. Code, § 236.23, subd. (b).)
- (36) States that certifying records from federal, state, tribal, or local court or government certifying agencies for documents such as U or T visas, may be presented to establish the affirmative defense. (Pen. Code, § 236.23, subd. (c).)
- (37) Provides that the human trafficking affirmative defense can be asserted at any time before entry of plea or before the end of a trial. The defense can also be determined at the preliminary hearing. (Pen. Code, § 236.23, subd. (d).)
- (38) Entitles a person who successfully raises the human trafficking affirmative defense to the following relief:
 - (a) Sealing of all court records in the case;
 - (b) Release from all penalties and disabilities resulting from the charge, and all actions that led to the charge shall be deemed not to have occurred; and,
 - (c) Permission to attest in all circumstances that he or she has never been arrested for, or charged with the subject crime, including in financial aid, housing, employment, and loan applications. (Pen. Code, § 236.23, subd. (e).)
- (39) Provides that records sealed after prevailing on the human trafficking affirmative defense may still be accessed by law enforcement for subsequent investigatory purposes involving persons other than the defendant. (Pen. Code, § 236.23, subd. (e)(1)(B).)
- (40) States that, in any juvenile delinquency proceeding, if the court finds that the alleged offense was committed as a direct result of being a victim of human trafficking then it shall dismiss the case and automatically seal the case records. (Pen. Code, § 236.23, subd. (f).)

- (41) States that the person may not be thereafter charged with perjury or otherwise giving a false statement based on the above relief. (Pen. Code, § 236.23, subd. (e)(3)(C).)
- (42) Provides that in a criminal action expert testimony is admissible by either the prosecution or defense regarding the effects of human trafficking on its victims, including, but not limited to the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of human trafficking victims. (Evid. Code, § 1107.5.)
- (43) Provides that in a criminal action, expert testimony is admissible by either the prosecution or the defense regarding intimate partner battering and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge. (Evid. Code, § 1107, subd. (a).)
- (44) Defines “plea bargaining” to mean “any bargaining, negotiation, or discussion between a criminal defendant, or their counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant.” (Pen. Code, § 1192.7, subd. (b).)
- (45) Abolishes the defense of diminished capacity. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person’s intoxication, trauma, mental illness, disease, or defect is not admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged. (Pen. Code, § 25, subd. (a).)
- (46) Provides that all persons are capable of committing crimes except those belonging to specified classes which includes persons (unless the crime is punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused. (Pen. Code, § 26.)
- (47) Prohibits introducing evidence of mental disease, mental defect, or mental disorder to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged. (Pen. Code, § 28, subd. (a).)

FISCAL EFFECT: Unknown.

COMMENTS:

- 1) **Author’s Statement:** “We know that survivors of sexual violence, intimate partner violence, and other severe forms of trauma are more likely to be incarcerated. In fact, according to the ACLU, nearly 60% of female state prisoners nationwide and more than 90% of certain

female prison populations experienced physical or sexual abuse before being incarcerated. Yet, California's legal system currently lacks any consideration for the relevant experiences of survivors in the sentencing or resentencing process.

"AB 124 would provide a path for courts to consider the full context of the trauma that contributed to a survivor's actions or inactions. It would create a trauma-informed response to sentencing that provides just outcomes for survivors. Currently, the societal trauma caused by criminalizing these individuals spans generations and perpetuates cycles of abuse and trauma. can end. AB 124 ensures that survivors of sexual violence are able to receive justice through our legal system."

- 2) **Sentencing Factors:** In determining what term to impose where the statute specifies three possible terms (low term, middle term, high term), California Rules of Court, rule 4.420(b) allows the court to consider "circumstances in aggravation on or mitigation, and any other factor reasonably related to the sentencing decision. The relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing."

In *People v. Charron* (1987) 193 Cal.App.3d 981, the court "observed that '[the] essence of "aggravation" relates to the effect of a particular fact in making the offense distinctively worse than the ordinary.'" (*Id.* at p. 994.) Rule 4.421 allows the court to consider certain specified aggravating circumstances in its decision of which term to impose. (Cal. Rules of Court, rule 4.421.) These include factors relating to the crime – e.g., whether the crime involved great violence, whether the victim was particularly vulnerable, whether the defendant threatened witnesses, whether the defendant induced others to participate in the crime, etc. (Cal. Rules of Court, rule 4.421(a).) The aggravating factors specified in Rule 4.421 also includes factors relating to the defendant – e.g., whether the defendant has engaged in violent conduct that indicates a serious danger to society, whether the defendant has numerous prior convictions or prior convictions that are increasing in seriousness, whether the defendant has served a prior prison term, the defendant's prior performance on probation, parole, or mandatory supervision, etc. (Cal. Rules of Court, rule 4.421(b).) The court may also consider, "[a]ny other factors statutorily declared to be circumstances in aggravation or that reasonably relate to the defendant or the circumstances under which the crime was committed." (Cal. Rules of Court, rule 4.421(c).)

Similarly, the Rules of Court allow the court to consider certain specified mitigating circumstances in its decision of which term to impose. (Cal. Rules of Court, rule 4.423.) These include factors relating to the crime – e.g., whether the defendant was a passive participant or played a minor role in the crime, whether the victim was an initiator or willing participant or provoker of the incident, whether the crime was committed because of an unusual circumstance unlikely to recur like great provocation, the defendant suffered from repeated or continuous physical, sexual, abuse inflicted by the victim of the crime, and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; the abuse does not amount to a defense, etc. (Cal. Rules of Court, rule 4.423(a).) The mitigating factors specified in Rule 4.423 also include factors relating to the defendant – e.g., whether the defendant has no prior record or an insignificant prior record of criminal conduct, whether the defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime, whether the defendant

voluntarily acknowledged wrongdoing at an early stage, etc. (Cal. Rules of Court, rule 4.423(b).) And as with aggravating factors, the court may consider “[a]ny other factors statutorily declared to be circumstances in mitigation or that reasonably relate to the defendant or the circumstances under which the crime was committed.” (Cal. Rules of Court, rule 4.423(c).)

The Rules of Court allow the trial court to consider aggravating factors or mitigating circumstances in deciding whether to impose consecutive rather than concurrent sentences, with certain exceptions. (Cal. Rules of Court, rule 4.425(b).) The trial court may also consider facts relating to the crimes, including whether or not the crimes and their objectives were predominantly independent of each other; the crimes involved separate acts of violence or threats of violence; or the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior. (Cal. Rules of Court, rule 4.425(a).)

If an enhancement is punishable by one of three terms, under the Rules of Court, the court has the discretion to impose the term that best serves the interest of justice. In exercising its discretion in selecting the appropriate term, the court may consider aggravating and mitigating factors as described in these rules or any other factor reasonably related to the decision being made. (Cal. Rules of Court, rule 4.428(a).)

If the court has discretion to strike an enhancement or its punishment in the interests of justice, in making that determination, 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).) The court may also consider any other criteria reasonably related to the decision being made. (*Ibid.*; Cal. Rules of Court, rule 4.408(a); see also Pen. Code, § 1170.1, subd. (d)(1) [as of January 1, 2022, the court must impose the middle term unless there are circumstances in aggravation or mitigation].)

This bill would require the court to consider additional criteria in making these sentencing decisions – whether trauma, youthfulness, or being a victim of human trafficking or intimate partner violence was a factor contributing to the commission of the offense. The bill defines youthfulness as including any person who was under 26 years of age at the time of the offense.

- 3) **The United States Supreme Court’s Decision in *Cunningham*:** The Sixth Amendment right to a jury applies to any factual finding, other than that of a prior conviction, necessary to warrant any sentence beyond the presumptive maximum. [*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *Blakely v. Washington* (2004) 524 U.S. 296, 301, 303-04.]

In *Cunningham v. California* (2007) 549 U.S. 270, the United States Supreme Court held California's Determinate Sentencing Law (DSL) violated a defendant's right to trial by jury by placing sentence-elevating fact finding within the judge's province. (*Id.* at p. 274.) The DSL authorized the court to increase the defendant's sentence by finding facts not reflected in the jury verdict. Specifically, the trial judge could find factors in aggravation by a preponderance of evidence to increase the offender's sentence from the presumptive middle term to the upper term and, as such, was constitutionally flawed. The Court stated, “Because

the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the sentence cannot withstand measurement against our Sixth Amendment precedent.” (*Id.* at p. 293.)

The Supreme Court provided direction as to what steps the Legislature could take to address the constitutional infirmities of the DSL:

As to the adjustment of California's sentencing system in light of our decision, the ball . . . lies in [California's] court. We note that several States have modified their systems in the wake of *Apprendi* and *Blakely* to retain determinate sentencing. They have done so by calling upon the jury - either at trial or in a separate sentencing proceeding - to find any fact necessary to the imposition of an elevated sentence. As earlier noted, California already employs juries in this manner to determine statutory sentencing enhancements. Other States have chosen to permit judges genuinely to exercise broad discretion . . . within a statutory range, which, everyone agrees, encounters no Sixth Amendment shoal. California may follow the paths taken by its sister States or otherwise alter its system, so long as the State observes Sixth Amendment limitations declared in this Court's decisions.

(*Cunningham, supra*, 549 U.S. at pp. 293-294.)

Following *Cunningham*, the Legislature amended the DSL, specifically Penal Code Sections 1170 and 1170.1, to make the choice of lower, middle, or upper prison term one within the sound discretion of the court. (See SB 40 (Romero), Chapter 3, Statutes of 2007; SB 150 (Wright), Chapter 171, Statutes of 2009.) This approach was embraced by the California Supreme Court in *People v. Sandoval* (2007) 41 Cal.4th 825, 843-852. The new procedure removes the mandatory middle term and the requirement of weighing aggravation against mitigation before imposition of the upper term. Now, the sentencing court is permitted to impose any of the three terms in its discretion, and need only state reasons for the decision so that it will be subject to appellate review for abuse of discretion. (*Id.* at pp. 843, 847.)

SB 40 included legislative intent language stating that its purpose was to address *Cunningham*, and to stabilize the criminal justice system while sentencing and correctional policies in California are being reviewed. Thus, SB 40, by its own terms, was intended to be a temporary measure. The provisions of SB 40 originally were due to sunset on January 1, 2009, but were later extended to January 1, 2011. Since then, the Legislature has extended the sunset provisions several times. The provisions of SB 40 currently sunset on January 1, 2022. The provisions of SB 150 have also been extended but are currently due to sunset on January 1, 2022.

This bill would require the court to impose the lower term where any of specified factors was a contributing factor in the commission of the offense, unless the court finds that the aggravating circumstances so far outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice. The specified factors are trauma, youthfulness, or having been a victim of human trafficking or intimate partner violence. Does the presence of any one of these factors create a presumptive lower term? To the extent any aggravating factor in this calculation is viewed as “sentence-elevating fact finding,” it will be within the province of the fact-finder/jury.

This bill would also prohibit, the court from imposing consecutive sentences or enhancements where one of the aforementioned factors was a contributing factor, unless doing so would be contrary to the interests of justice, contrary to other law (in the case of consecutive sentences), or contrary to an initiative (in the case of enhancements). Does the presence of any one of the factors create a presumption against imposing consecutive sentences or an enhancement? Again, to the extent any aggravating factor in this calculation is viewed as “sentence-elevating fact finding,” it will be within the province of the fact-finder/jury.

- 4) **Jurisdiction to Recall and Resentence:** As a general matter, a court typically loses jurisdiction over a sentence when the sentence begins. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 455.) Once the defendant has been committed on a sentence pronounced by the court, the court no longer has the legal authority to increase, reduce, or otherwise alter the defendant’s sentence. (*Ibid.*)

Penal Code section 1170, subdivision(d)(1) authorizes the court, “within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings in the case of state prison inmates, the county correctional administrator in the case of county jail inmates, or the district attorney of the county in which the defendant was sentenced, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if they had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence.” This provision thus creates “an exception to the common law rule that the court loses resentencing jurisdiction once execution of sentence has begun.” (*Dix, supra*, 53 Cal.3d at p. 455; accord, *People v. McCallum* (2020) 55 Cal.App.5th 202, 210.)

In resentencing a defendant, the court must apply the sentencing rules of the Judicial Council in order to eliminate disparity of sentences and to promote uniformity of sentencing. (Pen. Code, § 1170, subd. (d)(1).) The court may also consider postconviction factors. These include, but not limited to, the incarcerated person’s disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the incarcerated person’s risk for future violence, and evidence that reflects that circumstances have changed since the incarcerated person’s original sentencing so that continued incarceration is no longer in the interest of justice. (Pen. Code, § 1170, subd. (d)(1).)

This bill would require the court, when recalling and resentencing an incarcerated person, to consider whether trauma, youthfulness, or being a victim of intimate partner violence or human trafficking was a contributing factor in the commission of the offense.

- 1) **Human Trafficking Affirmative Defense:** Penal Code section 236.23 provides an affirmative defense to a crime that is not serious or violent if the person accused establishes by a preponderance of evidence that they were “coerced to commit the offense as a direct result of being a human trafficking victim at the time of the offense and had a reasonable fear of harm.” (Pen. Code, § 236.23, subs. (a), (b).) In addition to being a non-violent offense, the following elements must be met for the defense to apply: “(i) the accused was a victim of human trafficking at the time the offense was committed, (ii) the accused was coerced to commit the offense as a direct result of being a human trafficking victim, (iii) the accused

had a reasonable fear of harm when the offense was committed.” (*In re D.C.* (2021) 60 Cal.App.5th 915, 920.)

Notably, the human trafficking affirmative defense is much broader than California’s duress defense. The duress “is available as a defense to defendants who commit a crime ‘under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.’ (Pen. Code, § 26, subd. Six; *People v. Otis* (1959) 174 Cal.App.2d 119, 124-125 [(*Otis*)].)” (*People v. Saavedra* (2007) 156 Cal.App.4th 561, 567.) However, duress is not a defense to murder. (Pen. Code, § 26, subd. Six.) The policy behind that is that it isn’t better to murder an innocent person to prevent being murdered yourself. (*People v. Anderson* (2002) 28 Cal.4th 767, 772.)

This bill would extend the human trafficking affirmative defense to serious and violent crimes, and would create a new affirmative defense for victims of intimate partner violence and sexual violence. As proposed by this bill, these defenses would be available to defendants who are coerced to commit a serious or violent offense as a direct result of being a victim of human trafficking, as long as they had a “reasonable fear of harm.” The harm they fear need not be serious nor violent.

- 2) **Vacatur Relief:** Penal Code. Section 236.14 allows a person arrested for, or convicted of, a nonviolent offense committed while a victim of human trafficking to petition the court for vacatur relief. The statute was intended to provide relief for nonviolent offenses a human trafficking victim commits “at the direction of the victim’s trafficker” or for such offenses the trafficking victim was “forced to commit during [her] exploitation.” (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analyses of Sen. Bill No. 823 (2015-2016 Reg. Sess.) as amended May 31, 2016; Sen Rules Com., Off. of Sen. Floor Analyses, unfinished business of Sen. Bill No. 823 (2015-2016 Reg. Sess.) as amended Aug. 23, 2016.)

This bill would extend the vacatur relief for victims of human trafficking to include violent crimes. This bill would also create vacatur relief for victims of intimate partner violence or sexual violence which mirrors the relief available to human trafficking victims.

- 3) **Plea Bargains:** “[P]lea bargaining” is statutorily defined as “any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant.” (Pen. Code, § 1192.7, subd. (b).) A plea bargain is a contract between the accused and the prosecutor. (*People v. Vargas* (2001) 91 Cal.App.4th 506, 533.) Both these parties are bound to the terms of the agreement; when the court approves the bargain, it also agrees to be bound by its terms. (*People v. Armendariz* (1993) 16 Cal.App.4th 906, 910-911.)

This bill would require the prosecution, in so negotiating and bargaining, to consider whether trauma, youthfulness, or being a victim of human trafficking or intimate partner violence was a contributing factor in the commission of the offense.

- 4) **Penal Code section 28 and Admissibility of Mental State Evidence:** Generally “every crime has two components: (1) an act or omission, sometimes called the *actus reus*; and (2) a necessary mental state, sometimes called the *mens rea*.” (*People v. Williams* (2009) 176

Cal.App.4th 1521, 1528.) “In criminal law, there are two descriptions of criminal intent: general intent and specific intent. ‘A crime is characterized as a “general intent” crime when the required mental state entails only an intent to do the act that causes the harm; a crime is characterized as a “specific intent” crime when the required mental state entails an intent to cause the resulting harm.’ (*People v. Davis* (1995) 10 Cal.4th 463, 518-519, fn. 15, 41 Cal. Rptr. 2d 826, 896 P.2d 119.) ‘General criminal intent thus requires no further mental state beyond willing commission of the act proscribed by law.’” (*People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1172-1173, quoting *People v. Sargent* (1999) 19 Cal.4th 1206, 1215.)

Evidence of a mental disease, mental defect, or mental disorder is not admissible “to show or negate the capacity to form any mental state” including intent, but it may be admissible to show whether the defendant actually formed a required specific intent. (Pen. Code, § 28, subd. (a).)

While current law restricts mental state evidence to specific intent cases, prior to a 1982 amendment, this evidence was admissible in general intent cases. (See *People v. Whisett* (1983) 149 Cal.App.3d 213.) This bill would essentially restore the law to its pre 1982. It expands the admissibility of this evidence to the issue of whether or not the defendant formed the required mental state for the crime, generally. This includes whether or not the defendant committed a willful act.

- 5) **Argument in Support:** According to the *National Center for Youth Law*, a co-sponsor of this bill: “According to the ACLU, nearly 60% of female state prisoners nationwide and as many as 94% of certain female prison populations have a history of physical or sexual abuse before being incarcerated (The American Civil Liberties Union, “Prison Rape Elimination Act of 2003”). Black women make up 25% of the incarcerated population in California, which when considered alongside the reality that Black women are only 5% of the adult population yet are incarcerated at five times the rate of white women, demonstrates a deplorable overrepresentation of Black women in prison (Public Policy Institute of California, “California’s Prison Population”). Similar disparities exist for other individuals of color, including Latinx, Asian and Pacific Islander, and indigenous communities. Also, transgender, lesbian, and bisexual women, trans men, and gender non-conforming people are disproportionately survivors of violence and overrepresented in prisons, though little quantitative research is available to highlight these disparities.

“Despite the body of research showing that the effect of trauma and abuse drives girls into the juvenile and criminal justice systems, the system itself typically overlooks the context of abuse when determining whether to arrest or charge a girl. Many trafficking survivors are incarcerated for crimes committed to protect themselves from further violence. Numerous studies show that survivors of coerced into participating in illegal activities by their abusive partners (Survived and Punished, “Research Across the Walls: A Guide to Participatory Research Projects and Partnerships to Free Criminalized Survivors”). Additionally, many survivors may be hesitant to disclose their experiences of abuse or exploitation, due to distrust of systems, fear of how an abusive partner may respond, or a belief that they are not a survivor (Institute of Medicine and National Research Council, *Confronting Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States: A Guide for the Health Care Sector*).

“When law enforcement does not identify trauma victims as victims in cases, and instead labels them and treats them as the perpetrators, it compounds the existing trauma instead of healing it. Further, when cases aren’t dismissed or diverted, but instead enhanced with more punitive sentences, a twofold injustice occurs: their abusers are shielded from accountability, and the trauma that is the underlying cause of their behavior is left unaddressed. The choice to punish instead of support sets in motion a cycle of abuse and imprisonment that has harmful consequences for victims of trauma and their families as well as society more broadly (Human Rights Project for Girls, Georgetown Law Center on Poverty and Inequality, and Ms. Foundation for Women, “The Sexual Abuse to Prison Pipeline: The Girls’ Story”).

“Moreover, judges often lack the discretion to dismiss charges, reduce harsh sentences, and strike sentence enhancements to tailor court responses to adequately serve vulnerable populations in the interest of justice. Too often, limited opportunities to present relevant mitigating evidence and limited judicial discretion to make fair and balanced decisions lead to inequitable outcomes for trauma victims.

“AB 124 would create just outcomes moving forward, provide full context of the experiences that contributed to a survivor’s actions or inactions, and use a more humanizing and trauma-informed response to criminal adjudication. This legislation will:

1. Expand a survivor’s access to the human trafficking affirmative defense;
 2. Grant judges the discretion to avoid imposing sentencing enhancements when the court finds that circumstances, such as human trafficking and intimate partner violence, contributed to the survivor’s criminal behavior;
 3. Require judges to give “great weight” to youthfulness, trauma, sexual violence, and victimization through intimate partner violence and human trafficking when exercising discretion at sentencing stages;
 4. Allow courts to consider whether the survivor’s experience of childhood trauma, intimate partner violence, sexual violence, and human trafficking was a contributing factor in the commission of the offense when evaluating whether to grant a reduced sentence; and
 5. Expand the vacatur law to allow survivors to petition the court to vacate convictions and expunge arrests for any crime that was the direct result of being a victim of human trafficking, intimate partner violence, or sexual violence.”
- 6) **Argument in Opposition:** According to the *California District Attorneys Association*, “AB 124 requires the court, when determining sentencing, to consider if the inmate experienced intimate partner violence, commercial sex trafficking, and if the trauma of those experiences was a contributing factor to the defendant’s criminal behavior that would make a sentence other than the lowest possible sentence unduly harsh. While we support this consideration, there is no mention of the evidence required to prove the inmate’s experience and whether the trauma was a contributing factor to their crime.”

7) **Related Legislation:**

- a) AB 262 (Patterson) prohibits a court from denying a petition to set aside a conviction of a non-violent offense alleging the person was a victim of human trafficking on the basis that the petitioner has outstanding fine or fees, among other things. AB 262 is pending in the Assembly Committee on Appropriations.
- b) AB 560 (Quirk-Silva) makes a person who causes, induces, or persuades, or attempts to cause, induce, or persuade, an adult, whom the person reasonably believes to be a minor at the time of commission of the offense, to engage in a commercial sex act with the intent to effect or maintain a violation of specified other offenses, including child pornography and extortion, guilty of human trafficking. AB 560 is pending in this committee.
- c) AB 1245 (Cooley) authorizes a petition for recall and resentencing by a defendant who has served at least 15 years of their sentence and has at least 24 months of their sentence remaining. AB 1245 is pending in this committee.
- d) AB 1540 (Ting) requires the court to provide notice to the defendant of a request to recall and resentence, set an initial conference within 60 days of the request, and appoint counsel for the defendant; additionally creates a presumption favoring recall and resentencing the defendant in those hearings, as specified. AB 1540 is pending in this committee.
- e) SB 382 (Caballero) requires a court, if protective orders are not issued in a case involving the commercial sexual exploitation of a minor, to consider issuing an order restraining the defendant from possessing a firearm. SB 382 is pending in the Senate Committee on Appropriations.
- f) SB 481 (Durazo) extends the applicability of resentencing provisions, as specified, to any inmate serving a sentence of life without the possibility of parole for an offense that was committed when the inmate was under 26 years of age, and makes the process available to those inmates serving a sentence for murder in which the inmate tortured their victim, or in which the victim was a public safety official, including a firefighter or peace officer. SB 481 is scheduled to be heard in the Senate Committee on Public Safety on April 27, 2021.
- g) SB 567 (Bradford) requires the court to impose a term of imprisonment not exceeding the middle term unless there are circumstances in aggravation that, in the case of a trial by jury, are submitted to a jury and proved beyond a reasonable doubt or are stipulated by the defendant. SB 567 is pending in the Senate Committee on Appropriations.

8) Prior Legislation:

- a) AB 2868 (Patterson), of the 2019-2020 Legislative Session, would have provided additional legal rights in the judicial process when a victim of human trafficking petitions the court to vacate a conviction for a non-violent crime that was committed while the petitioner was a victim of human trafficking. AB 2868 was not heard in this committee.
- b) AB 2869 (Patterson), of the 2019-2020 Legislative Session, would have allowed a petitioner, on a petition to vacate a non-violent conviction because the petitioner was

victim of human trafficking and the conviction that was a direct result of being a victim of human trafficking, to appear at the court hearings by counsel. AB 2869 was not heard in this committee.

- c) AB 2942 (Ting), Chapter 1001, Statutes of 2018, allowed the district attorney of the county where a defendant was convicted and sentenced to make a recommendation that the court recall and resentence the defendant.
- d) SB 1016 (Monning), Chapter 887, Statutes of 2016, extended the sunset date from January 1, 2017 to January 1, 2022 for provisions of law which provide that the court shall, in its discretion, impose the term or enhancement that best serves the interest of justice as required by SB 40 (Romero), Chapter 40, Statutes of 2007; SB 150 (Wright), Chapter 171, Statutes of 2009; and *Cunningham vs. California* (2007) 549 U.S. 270.
- e) SB 823 (Block), Chapter 650, Statutes of 2016, allowed a person arrested or convicted of a nonviolent crime while he or she was a human trafficking victim to apply to the court to vacate the conviction and seal and destroy records of arrest.
- f) AB 1761 (Weber), Chapter 636, Statutes of 2016, created a human trafficking affirmative defense applicable to non-violent, non-serious, non-trafficking crimes.
- g) SB 1202 (Leno), of the 2015-2016 Legislative Session, would have provided that aggravating factors relied upon by the court to impose an upper term sentence must be tried to the jury and found to be true beyond a reasonable doubt. SB 1202 was held in the Assembly Committee on Appropriations.
- h) AB 1156 (Brown), Chapter 378, Statutes of 2015, provided, in pertinent part, that when a defendant is sentenced to the county jail under the 2011 Realignment Act, the court may, within 120 days of the date of commitment on its own motion, or upon the recommendation of the county correctional administrator, recall the sentence previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the original sentence.
- i) SB 463 (Pavley), Chapter 598, Statutes of 2013, extended to January 1, 2017 provisions of law that provide that the court shall, in its discretion, impose the term or enhancement that best serves the interest of justice.
- j) AB 593 (Ma), Chapter 803, Statutes of 2012, expanded the provisions allowing a habeas corpus petition in cases where intimate partner battering was not introduced into evidence to include cases where the evidence was not competent or substantial and where such evidence may have changed the sentence not just the conviction.
- k) AB 1593 (Ma), Chapter 809, Statutes of 2012, required the Board of Parole Hearings (BPH), when reviewing a prisoner's suitability for parole, to give great weight to any information or evidence that, at the time of the commission of the crime, the prisoner had experienced intimate partner battering and provide that they cannot use the fact that the prisoner brought in the evidence to find that a prisoner lacks insight to his or her crime.

- l) SB 576 (Calderon), Chapter 361, Statutes of 2011, extended to January 1, 2014 provisions of law that provide that the court shall, in its discretion, impose the term or enhancement that best serves the interest of justice.
- m) AB 2263 (Yamada), Chapter 256, Statutes of 2010, extended to January 1, 2012 provisions of law that provide that the court shall, in its discretion, impose the term or enhancement that best serves the interest of justice.
- n) SB 150 (Wright), Chapter 171, Statutes of 2009, eliminated the presumption of the middle term relating to sentencing enhancements found in Penal Code Section 1170.1, subdivision (d).
- o) SB 1701 (Romero), Chapter 416, Statutes of 2008, extended to January 1, 2011, the provisions of SB 40 which were originally due to sunset on January 1, 2009.
- p) SB 40 (Romero), Chapter 3, Statutes of 2007, amended California's DSL to eliminate the presumption for the middle term and to state that where a court may impose a lower, middle or upper term in sentencing a defendant, the choice of appropriate term shall be left to the discretion of the court.
- q) AB 1385 (Burton), Chapter 609, Statutes of 2004, allowed a writ of habeas corpus in specified domestic violence cases to be brought on offenses that occurred prior to August 26, 1996, rather than January 1, 1992, and replaced the phrase "battered women's syndrome" with "intimate partner battering and its effects."
- r) SB 799 (Karnette), Chapter 858, Statutes of 2001, allowed women who were convicted of homicide prior to the enactment of the Evidence Code provision providing for the admissibility of evidence relating to battered women's syndrome to bring a writ of habeas corpus when there is a reasonable probability that the result of the case may have been different had evidence of battered women's syndrome been admissible in the original trial.

REGISTERED SUPPORT / OPPOSITION:

Support

California Coalition for Women Prisoners (Sponsor)
National Center for Youth Law (Sponsor)
Survived and Punished (Sponsor)
Young Women's Freedom Center (Sponsor)
3strands Global Foundation
Alliance for Children's Rights
American Civil Liberties Union
Anti-recidivism Coalition
Asian Prisoner Support Committee
California Against Slavery
California Attorneys for Criminal Justice
California Catholic Conference
California Legislative Women's Caucus

California Partnership to End Domestic Violence
California Prison Focus
California Public Defenders Association (CPDA)
Center for Community Action & Environmental Justice
Center for Public Interest Law/children's Advocacy Institute/university of San Diego
Ceres Policy Research
Children's Defense Fund - CA
Children's Law Center of California
Citizens for Choice
Coleman Advocates for Children & Youth
Communities United for Restorative Youth Justice (CURYJ)
Community Against Sexual Harm
Community Works
ConXion to Community Center for Training & Careers INC
Crime Survivors for Safety and Justice
Cure Violence Global
Ella Baker Center for Human Rights
Empowering Pacific Islander Communities (EPIC)
Essie Justice Group
Forever Found
Free to Thrive
Fresno Barrios Unidos
I-5 Freedom Network
Initiate Justice
John Burton Advocates for Youth
Journey House
Journey Out
Kern County Participatory Defense
Legal Services for Prisoners with Children
Los Angeles Center for Law and Justice
Los Angeles County Democratic Party
Los Angeles LGBT Center
Mental Health Advocacy Services
National Association of Social Workers, California Chapter
National Institute for Criminal Justice Reform
North County Lifeline
Palms Empowerment Women's Network
Point Loma Nazarene University
Prison Yoga Project
Prisoner Advocacy Network
Public Law Center
Re:store Justice
Rights4girls
San Diego City Attorney's Office
San Diego Human Trafficking & Csec Advisory Council, Health Subcommittee
San Diego Workforce Partnership, INC.
San Diego Youth Services
San Francisco Public Defender
Shared Hope International

Showing Up for Racial Justice (SURJ) Bay Area
Sonoma County Black Coalition
Starting Over INC.
The Transformative In-prison Workgroup
The Unity Council
Time for Change Foundation
Transgender Advocacy Group (TAG)
Treasures
Uncommon Law
Underground Grit
Women's Foundation California

7 private individuals

Opposition

California District Attorneys Association
California Narcotic Officers' Association
California State Sheriffs' Association

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