

September 10, 2020

## Memorandum 2020-11

**Sentencing Enhancements: Overview**

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At its September 2020 meeting, the Committee on Revision of the Penal Code will address sentencing enhancements. This memorandum gives general background on sentencing enhancements — with a focus on the most commonly-used ones — and collects possible recommendations for the Committee’s consideration.

The information presented here reflects discussions that Committee staff have had with stakeholders across California on every side of these issues. In examining sentencing enhancements, the Committee’s goal should be how to best improve public safety while reducing unnecessary incarceration, improving equitable outcomes, and putting scarce state and local resources to their best use. There is no rigorous empirical research into how sentencing enhancements impact public safety, but other research has shown that long sentences — which are created in part by sentencing enhancements — have diminishing returns when measured by crime rates and the costs of incarceration.<sup>1</sup> In addition to surveying existing research, the Committee is also making extensive efforts to gather and analyze its own data on these and other issues.<sup>2</sup>

A supplement to this memorandum, which will be released shortly, will present written submissions from panelists for the meeting.

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1. See, e.g., Steven Raphael and Michael A. Stoll, *Why Are So Many Americans in Prison?*, Chapter 7: Incarceration and Crime (2013)

2. Government Code § 8286 (Committee’s data gathering statute).

## BACKGROUND

There are more than 100 sentencing enhancements spread across California’s laws.<sup>3</sup> As of September 2016, 80% of people in CDCR’s prisons had at least one sentencing enhancement and 25% had three or more.<sup>4</sup>

Sentencing enhancements are of two types: “conduct”<sup>5</sup> and “status” enhancements. Conduct enhancements involve how a criminal offense was committed — for example, if a gun was involved<sup>6</sup> or if serious injury was caused<sup>7</sup> — while status enhancements use a defendant’s criminal history, such as a prior conviction for a “serious” or “violent” felony offense.<sup>8</sup>

While sentencing enhancements often dramatically increase a sentence, they have less of an effect on non-violent felony offenses that are served in prison. This is because, under Proposition 57’s early parole rules, people serving prison sentences for non-violent felony offenses are eligible for release once they have completed their main prison term — which does not include any time added by enhancements.<sup>9</sup>

Some sentencing enhancements, such as gun, gang, and great bodily injury enhancements, can also have significant secondary effects because they cause the underlying offense to be classified as violent or serious. If an offense is reclassified as serious or violent, it can be used later as a “strike” under the Three Strikes law. And if an offense is reclassified as violent, it lessens the amount of good time someone can receive off their sentence<sup>10</sup> and may preclude early release under Proposition 57.<sup>11</sup>

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3. *CJER Felony Sentencing Handbook*, Enhancement Provisions (2020). The Penal Code used to list all the enhancements in one place in § 666.7, but that section was removed in 2006 because it was too difficult to keep it up to date. See Asm. Com. On Public Safety, Analysis of Sen. Bill No. 1422 (2005–2006 Reg. Sess.) June 27, 2006, p. 5.

4. Ryken Grattet, *Sentence Enhancements: Next Target of Corrections Reform?*, PPIC Blog, September 27, 2017 <<https://www.ppic.org/blog/sentence-enhancements-next-target-corrections-reform/>>.

5. Conduct enhancements are also known as “specific” enhancements. A partial list appears in Penal Code § 1170.11. See also California Criminal Law Procedure and Practice (Cal CEB) § 37.13 (listing conduct enhancements).

6. Penal Code § 12022(a)(1).

7. Penal Code § 12022.7(a).

8. Penal Code § 667(e). “Serious” offenses are defined in Penal Code § 1192.7(c). “Violent” offenses are defined in Penal Code § 667.5(c). “Violent” offenses include crimes from murder to burglary of an inhabited dwelling to criminal threats. Penal Code §§ 667.5(c)(1), (21), (38).

9. 15 CCR § 3490(f) & (d) (defining “nonviolent parole eligibility date” to exclude any time imposed by sentencing enhancements). See also Cal. Const., art. I, § 32(1)(A) (same).

10. 15 CCR § 3043.2(a)(2).

11. Cal. Const., art. I, § 32(1); 15 CCR § 3490(c) (“‘Violent felony’ is a crime or enhancement as defined in subdivision (c) of Section 667.5 of the Penal Code.”). See also *In re Mohammad*, 42 Cal.

Under Penal Code Section 1385, a court has discretion to ignore (or “strike”) many enhancements.<sup>12</sup> Beyond saying that a court should exercise this discretion “in furtherance of justice,” the Penal Code provides no guidance about how judges should make these decisions.<sup>13</sup>

#### EFFECTS ON INCARCERATION

Though there are dozens of sentencing enhancements available to prosecutors, just a handful appear to be adding significantly to how long people are incarcerated in California. Though there is no similar statewide information, an analysis of twelve years of data (2005 to 2017) from San Francisco concluded that while only 13% of cases were enhanced, sentencing enhancements caused 25% of *all* time spent in jail or prison.<sup>14</sup> Half of the time added by enhancements came from two criminal history enhancements, Three Strikes and a five-year enhancement for a prior serious felony conviction. The other half of the time added to sentences was largely driven by gun enhancements.<sup>15</sup>

While the San Francisco data may not be the best model for statewide trends, other data at a more general level shows similar trends.<sup>16</sup> As noted, the great majority of people in prison have at least one sentencing enhancement, and a

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App. 5th 719, 726–29 (2019) (if non-violent felony offense has been designated as the “principal” term by sentencing court, other convictions for violent offenses do not preclude early parole consideration).

12. Penal Code § 1385(a). Some of the enhancements that cannot be struck include predicate circumstances for very serious sex offenses, Penal Code § 667.61(g), prior convictions for habitual sex offenders, Penal Code § 667.71(d), and enhancements that preclude serving a sentence in county jail. Penal Code § 1170(f), (h)(3). When a court strikes an enhancement, it may do so for all purposes or just for sentencing purposes. Penal Code § 1385(b)(1). If an enhancement is struck for all purposes, it is not considered when fashioning a sentence or when calculating good time credits. If an enhancement is struck only for sentencing purposes, the enhancement does not add to a sentence but may still reduce good time credit because the credits are calculated as if the enhancement was still in place. See *In re Pacheco*, 155 Cal. App. 4th 1439, 1444–45 (2007).

13. The California Rules of Court do provide some guidance: “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 California Supreme Court has also explained that “courts will exercise this power in a careful and thoughtful manner. The wise use of this power will promote the administration of justice by ensuring that persons are sentenced based on the particular facts of the offense and all the circumstances. It enables the punishment to fit the crime as well as the perpetrator.” *People v. Williams*, 30 Cal. 3d 470, 489 (1981).

14. Elan Dagenais, Raphael Ginsburg, Sharad Goel, Joseph Nudell, and Robert Weisberg, *Sentencing Enhancements and Incarceration: San Francisco, 2005–17*, Stanford Computational Policy Lab, October 17, 2019, 1.

15. *Id.*

16. This memo uses four different data sources to present the most recent information available for different classes of enhancement. All of the data pre-dates any COVID-19 prison releases..

significant number have three or more.<sup>17</sup> Aside from sentences made longer by California's Three Strikes law, the most common sentencing enhancement was an additional year for a prior prison or jail term<sup>18</sup> — an enhancement that was recently repealed.<sup>19</sup>

The next most common enhancements were:

- Having a prior serious felony conviction
- Gang enhancements
- Causing great bodily injury
- Gun enhancements<sup>20</sup>

Each of these, along with other relevant topics, is discussed below.

### **Conduct Enhancements Based on the Nature of the Offense**

The following conduct enhancements are addressed in the order of how many prisons sentences they impact.

#### *Gang Enhancements*

In 1988, the Legislature passed the Street Terrorism Enforcement and Prevention (STEP) Act.<sup>21</sup> Among other things, this law created “gang enhancements,” which allow adding 2 to 10 years to a felony sentence if the offense can be connected to a gang.<sup>22</sup> (The current version of this law is attached as Exhibit A.) As of September 2019, 10,535 people in CDCR custody had a gang enhancement and 92% of those people were either Black or Latinx.<sup>23</sup> Since 2011, the number of people with gang enhancements in CDCR has risen by more than 40% even as the overall prison population has dropped, which suggests that these

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17. Grattet, *Sentence Enhancements: Next Target of Corrections Reform?*

18. *Id.*

19. SB 136 (Weiner).

20. Grattet, *Sentence Enhancements: Next Target of Corrections Reform?*

21. Penal Code § 186.20. See generally *People v. Gardeley*, 14 Cal. 4th 605, 615 (1996). This memo does not discuss the CalGang database, which allows law enforcement to collect and share information about a person's alleged gang membership. The CalGang database has come under heavy scrutiny in recent years but presents issues distinct from a prosecutor's use of gang enhancements. See California State Auditor, *The CalGang Criminal Intelligence System* (2016).

22. Penal Code § 186.22(b). In passing the law, the Legislature explained — with language in the Penal Code to this day — that “California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.” Penal Code § 186.21. The goal of the STEP Act was “the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs.” *Id.*

23. Abené Clayton, *92% Black or Latino: the California Laws that Keep Minorities in Prison*, *The Guardian*, November 26, 2019 <<https://www.theguardian.com/us-news/2019/nov/26/california-gang-enhancements-laws-black-latinos>>.

enhancements are an important driver of the amount of incarceration in California's prisons.<sup>24</sup>

For non-serious and non-violent felonies, 2, 3, or 4 additional years may be added to a sentence for a gang enhancement.<sup>25</sup> If the offense is a serious one, the enhancement is 5 years; if the offense is violent, the enhancement is 10 years.<sup>26</sup> Any felony that has a gang enhancement is considered a "serious" felony and is therefore a strike<sup>27</sup> and requires the person to serve the sentence in state prison, not county jail.<sup>28</sup>

Much harsher penalties apply for a smaller subset of felonies. If the offense is extortion or threats to victims or witnesses, the sentence must be seven years to life.<sup>29</sup> And if the offense is a home invasion robbery or shooting at an inhabited house or vehicle, the sentence is fifteen years to life.<sup>30</sup>

The gang enhancement law also contains a provision allowing it to be applied to misdemeanors, such as a graffiti case,<sup>31</sup> which then allows punishment of one, two, or three years.<sup>32</sup> None of the other enhancements in this memo can be applied to misdemeanor offenses.<sup>33</sup>

For the enhancement to apply, an intricate set of requirements must be proved by the prosecution: (1) a felony was committed "for the benefit of, at the direction of, or in association" (2) with a "criminal street gang" and (3) the felony was committed with the "specific intent to promote, further, or assist in any criminal conduct by gang members."<sup>34</sup>

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24. *Id.*

25. Penal Code § 186.22(b)(1)(A). When the law was first passed in 1988, the penalties were one, two, or three years. See *Gardeley*, 14 Cal.4th at 615.

26. Penal Code § 186.22(b)(1)(B)–(C).

27. Penal Code § 1192.7(c)(28); *People v. Briceno*, 34 Cal.4th 451, 456 (2004) ("the definition of 'serious felony' in section 1192.7(c)(28) also includes 'any felony offense' that was committed for the benefit of a criminal street gang within the meaning of section 186.22(b)(1)").

28. Penal Code § 1170(h)(3).

29. Penal Code § 186.22(b)(4)(C).

30. Penal Code § 186.22(b)(4)(B).

31. *People v. Arroyas*, 96 Cal. App. 4th 1439 (2002)

32. Penal Code § 186.22(d); *Robert L. v. Superior Court*, 30 Cal. 4th 894 (2003).

33. As it does for most other enhancements, a court has the power under Penal Code § 1385 to strike a gang enhancement for all purposes. *People v. Fuentes*, 1 Cal. 5th 218, 221 (2016). But if the court wants to strike just "the additional punishment" required by the enhancement, it may do so only in the "unusual" case. Penal Code § 186.22(g).

34. Penal Code § 186.22(b)(1).

Those requirements have been applied broadly, sometimes in a counterintuitive way.<sup>35</sup> For example:

- A defendant need not be a member of a gang to be subject to the gang enhancement.<sup>36</sup> Indeed, one prosecutor has explained that a “non-gang member, an undocumented gang member, a hang-around, or an associate of a criminal street gang can also be subject to a gang enhancement.”<sup>37</sup>
- The gang enhancement has been applied to offenses that enhance a gang’s reputation.<sup>38</sup>

Some commentators have noted the difficulty of defining what a gang is with any specificity,<sup>39</sup> as well as problems that can arise when police officers testify as gang experts.<sup>40</sup>

#### *“Great Bodily Injury” Enhancement*

Seriously injuring someone during an offense can support a sentencing enhancement for causing “great bodily injury.”<sup>41</sup> Such an enhancement generally adds three years to a sentence.<sup>42</sup> It also elevates the offense to a violent one.<sup>43</sup>

Great bodily injury — which is defined as “significant or substantial physical injury”<sup>44</sup> that is “greater than minor or moderate harm”<sup>45</sup> — is shown by “evidence of the severity of the victim’s physical injury, the resulting pain, or the medical care required to treat or repair the injury.”<sup>46</sup> All that is required is “some physical pain or damage, such as lacerations, bruises, or abrasions.”<sup>47</sup>

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35. See, e.g., Martin Baker, *Stuck in the Thicket: Struggling with Interpretation and Application of California’s Anti-Gang STEP Act*, 11 Berkeley J. Crim. L. 101 (2007).

36. *People v. Valdez*, 55 Cal. 4th 82, 132 (2012).

37. Kimberly R. Dittrich, *Filing Decisions for Juvenile Gang Offenses: How to Make Gang Charges Stick*, 42 W. St. L. Rev. 193, 195 (2015).

38. *People v. Albillar*, 51 Cal. 4th 47, 63 (2010).

39. See, e.g., Zachariah D. Fudge, *Gang Definitions, How Do They Work?: What the Juggalos Teach Us About the Inadequacy of Current Anti-Gang Law*, 97 Marquette Law Review 979, 989–1037 (2014).

40. See, e.g., Christopher McGinnis and Sarah Eisenhart, *Interrogation is Not Ethnography: The Irrational Admission of Gang Cops as Experts in the Field of Sociology*, 7 Hastings Race & Poverty L.J. 111 (2010).

41. Penal Code § 12022.7(a).

42. Penal Code § 12022.7(a). There are other “great bodily injury” enhancements. For example, if the injury causes a coma or paralysis, the enhancement is five years. Penal Code § 12022.7(b). And if the victim is elderly or especially young, the enhancement ranges from 4 to 6 years. Penal Code § 12022.7(c) & (d). Great bodily injury caused during a domestic violence offense can add 3, 4, or 5 years to an offense, Penal Code § 12022.7(e), and great bodily injury caused during specified sex offenses typically adds 5 years. Penal Code § 12022.8

43. Penal Code § 667.5(c)(8)

44. Penal Code § 12022.7(f).

45. CALCRIM No. 3160.

46. *People v. Caudillo*, 45 Cal. 4th 58, 66 (2008).

47. *People v. Washington*, 210 Cal. App. 4th 1042, 1047 (2012).

### *Gun enhancements*

Almost any involvement of a gun in a criminal offense can support a sentencing enhancement — anywhere from 1 additional year to a life sentence. As of September 2019, 37,237 people in CDCR had some form of gun enhancement as part of their sentence.<sup>48</sup> More than 80% of these people were Black or Latinx.<sup>49</sup>

Being “armed” with a gun generally adds one year to a sentence.<sup>50</sup> But being armed “does not require that a defendant utilize a firearm or even carry one on the body.”<sup>51</sup> Instead, a gun must just be “available for use, either offensively or defensively.”<sup>52</sup>

Actually using a gun during a felony offense allows longer enhancements. Using a gun during most felonies can add 3, 4, or 10 years.<sup>53</sup> Use includes “displaying a firearm in a menacing manner.”<sup>54</sup> The offense also becomes a violent one.<sup>55</sup>

This use-of-a-gun enhancement does not apply to any offense where use of a gun is already part of the offense<sup>56</sup> — except for assaults committed with a gun.<sup>57</sup> In those cases, the same use of a gun is counted twice: for an element of the offense<sup>58</sup> and to increase the punishment by up to ten years.

If a gun is used during certain violent felony offenses — such as a robbery — California’s “10-20-life” gun enhancement applies. A 10 year enhancement is available for any use of a gun, which rises to 20 years if the gun is discharged, and to 25-to-life if great bodily injury or death occurs.<sup>59</sup> This enhancement typically only applies to someone who personally uses a gun<sup>60</sup> — unless a gang

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48. This data comes from Abené Clayton, a reporter for The Guardian who obtained this information directly from the California Department of Corrections and Rehabilitation. The data from Ms. Clayton did not include the specific gun enhancements that each of these people had, but data provided by the Legislative Analyst’s Office shows that, as of September 2016, the specific most-used gun enhancements were, in order of frequency: personally using a firearm, Penal Code § 12022.5(a), personally using a firearm during a designated violent felony Penal Code § 12022.54(b), discharging firearm and causing great bodily injury or death while committing a designated violent felony, Penal Code § 12022.53(d), discharging a firearm during the commission of a designated violent felony, Penal Code § 12022.53(c), and being armed with firearm during the commission of any felony, Penal Code § 12022(b)(1).

49. CDCR data provided by Abené Clayton.

50. Penal Code § 12022(a)(1).

51. *People v. Bland*, 10 Cal. 4th 991, 997 (1995) (armed-with-gun enhancement allowed when defendant was not present when drugs and assault weapon were found by the police).

52. *Id.*

53. Penal Code § 12022.5(a).

54. *People v. Wardell*, 162 Cal. App. 4th 1484, 1494 (2008).

55. Penal Code § 667.5(c)(8).

56. Penal Code § 12022.5(a).

57. Penal Code § 12022.5(d).

58. Penal Code § 245(a)(2).

59. Penal Code § 12022.53(b)–(d).

60. Penal Code § 12022.53(b)–(d).

enhancement is also charged, which then allows the 10-20-life enhancement to apply to any principal involved in the offense, even if they did not personally use a gun.<sup>61</sup>

To summarize, the most commonly-used enhancements are presented in this chart:

<b>Gun enhancement</b>	<b>Years added</b>
“Armed” during felony	1
“Use” during felony	3, 4, 10
“Use” during designated violent felonies	10
Discharge during designated violent felonies	20
Discharge causing death or great bodily injury during designated violent felonies	25-to-life

For all of these enhancements, the gun doesn’t need to be physically recovered for the enhancement to apply. Testimony about the gun will suffice.<sup>62</sup> And if a gun is recovered, it doesn’t need to be loaded or operable for the armed and use enhancements to apply.<sup>63</sup>

#### *Estes Robberies*

Though not a traditional sentencing enhancement, the Committee may wish to consider what are known as *Estes* robberies — so-named because of an appellate decision that defined this type of offense.<sup>64</sup> These offenses typically occur when someone is shoplifting and has an encounter with a security officer that may involve pushing or other contact. California law considers these offenses to be robberies — and thus violent offenses — even though violence may not have been used when taking the stolen property. For example, in one recent case the defendant received an eleven-year prison term for an *Estes* robbery after he “stole a candy bar and a bottle of water from a convenience store and pushed the store manager [three times] to get away from her after she followed him outside and

61. Penal Code § 12022.53(e).

62. *People v. Law*, 195 Cal. App. 4th 976 (2011).

63. CALCRIM 3146; *People v. Nelums*, 31 Cal. 3d 355, 360 (1982); Penal Code § 12022.53(b).

64. *People v. Estes*, 147 Cal. App. 3d 24 (1983).

told him he had to pay for the items.”<sup>65</sup> When the responding police officer arrived, the store’s manager was “visibly shaken and had tears in her eyes” but no apparent injuries.<sup>66</sup>

Case law currently allows these offenses to be treated as full-blown robberies, which are violent offenses and eligible, for example, for a 10-year gang enhancement or use as a future strike. But these crimes are more like theft offenses that have been enhanced to robberies because of contact with a security guard. This enhancement occurs because California courts have allowed mild altercations with a security guard or other employee while leaving a store after shoplifting to be treated the same as someone committing a traditional pre-meditated robbery at gun or knifepoint.<sup>67</sup> States throughout the country appear to be about evenly split on whether similar fact patterns should be treated as robberies.<sup>68</sup>

The sentencing range for robbery is 2, 3, or 5 years,<sup>69</sup> while many shoplifting offenses would be misdemeanors.<sup>70</sup> The basic definition of robbery has not been amended in the Penal Code since 1872.<sup>71</sup>

Because *Estes* robberies do not have a specific Penal Code section associated with them and are lumped together with all robberies, it is difficult to obtain data on how many *Estes* robberies occur each year. One rough sense of the scope here is to consider the number of robberies of commercial establishments — in 2019, there were 14,093 — along with how many robberies overall involved someone who was unarmed (about 55%).<sup>72</sup> If that percentage holds true for commercial

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65. *People v. Trujillo*, 2018 WL 3099531 (2018). The eleven-year sentence was imposed because Mr. Trujillo had a prior serious felony conviction (apparently for another *Estes* robbery), so the three-year prison sentence for his robbery conviction was doubled and another five years was added under Penal Code § 667(a) because of the prior *Estes* robbery. *See id.* at \*1–\*3.

66. *Id.* at \*2.

67. *See, e.g., People v. Edwards*, 2018 WL 1516955 (2018) (*Estes* robbery where defendant stole two bottles of liquor from a CVS and shoved the store manager after being confronted); *People v. Dean*, 2008 WL 4917565, \*1 (2008) (*Estes* robbery where female defendant was “uncooperative” with two male security guards, including one who had “grabbed her by both arms and took her back into the store” after she had stolen “deodorant, cheese, meat, and two avocados”); *People v. Garcia*, 2004 WL 886377, \*1 (2004) (affirming 35-years-to-life sentence for an *Estes* robbery where the defendant stole 10 bottles of cologne, ran from a store manager and security guard, and tore the manager’s shirt sleeve in a struggle after they caught the defendant).

68. *See Use of force or Intimidation in Retaining Property or in Attempting to Escape, Rather than in Taking Property, as Element of Robbery*, 93 A.L.R.3d 643, §§ 3, 4[a], 4[b].

69. Penal Code § 213(a)(2) (second-degree robbery).

70. Penal Code § 459.5(a) (shoplifting under \$950).

71. Penal Code § 211 (“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.”).

72. California Department of Justice, *Crime in California 2019*, July 2020, Table 6. In that same year, 90,309 shoplifting crimes were reported. *Id.* at Table 11.

robberies, some number of the 7,750 unarmed commercial robberies may be *Estes* robberies.

### *Drug-Weight Enhancements*

Drug offenses can receive steep additional punishment based on the quantity of drugs involved. Many states specify different substantive offenses based on drug quantity, but California addresses this issue with sentencing enhancements that add time to a sentence based on the weight of drugs involved. For example, drug-weight enhancements begin to apply when heroin or cocaine is over a kilogram, where the enhancement is 3 years.<sup>73</sup> The enhancement increases with weight and tops out at 25 years for more than 80 kilograms.<sup>74</sup>

Unlike the other enhancements discussed in this memo, these enhancements do not need to be imposed consecutively to the sentence for the underlying offense.<sup>75</sup>

### **Status Enhancements Based on Conviction History**

The most significant status enhancements — those that use criminal history to increase a sentence for a new offense — are “nickel priors” and Three Strikes.

#### *Nickel Priors*

A nickel prior is so-named because it adds five years to a sentence based on a prior conviction. It applies when a defendant has a prior conviction for a felony offense classified as “serious” — such as robbery — and is convicted of a new “serious” felony offense.<sup>76</sup>

As of December 2017, almost 20,000 sentences of people in CDCR had nickel priors added to them — close to an additional 100,000 years of incarceration.<sup>77</sup> This enhancement was added by Proposition 8 in 1982 and cannot be modified without another initiative or two-thirds vote by the Legislature.<sup>78</sup>

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73. Health & Safety Code § 11370.4(a)(1).

74. Health & Safety Code § 11370.4(a)(6).

75. Health & Safety Code § 11370.4(a), (d).

76. Penal Code § 667(a)(1). In addition to the nickel priors, someone who has a prior felony conviction for a “violent” offense and is convicted of a new violent offense may have three years added to their sentence for each prior violent conviction. Penal Code § 667.5(a). Unlike the nickel priors, any violent conviction more than a decade old cannot be used as the basis for this enhancement. *Id.* This enhancement appears to be rarely used as any conviction that could be enhanced in this fashion could also be enhanced with the harsher nickel prior.

77. Editorial Board, *SB1392 and SB1393 Are Needed Fixes to California’s Overuse of Sentence Enhancements*, Orange County Register, April 24, 2018 (“According to the California Department of Corrections and Rehabilitation, the one- and five-year enhancements, respectively, impacted 16,177 and 19,677 sentences as of Dec. 1, 2017.”).

78. Penal Code § 667(j).

### *Three Strikes*

California’s most extreme use of criminal history is its Three Strikes law.<sup>79</sup> In general, this law applies in two situations:

- Anyone who has been convicted for a violent or serious felony in the past and is convicted of a new felony offense — even if not violent or serious — must go to prison<sup>80</sup> and have their sentence doubled.<sup>81</sup>
- Anyone who is convicted of a new serious or violent felony and has two prior convictions for a serious or violent offense will go to prison for life.<sup>82</sup>

Someone with a prior strike offense also gets less good time off their sentence while in prison — in other words, a prior strike makes a sentence longer not just by doubling the years imposed but also in the actual amount time that will need to be served in prison.<sup>83</sup>

As of December 2018, CDCR classified more than 33,415 people in custody as “second strikers” and 6,901 as “third strikers.”<sup>84</sup>

The Three Strikes law was created by Proposition 184 in 1994 and modified to be less harsh by Proposition 36 in 2012.<sup>85</sup> Like the nickel priors created by Proposition 8, it cannot be directly modified without another initiative or two-thirds vote by the Legislature.<sup>86</sup>

The Three Strikes law and nickel priors are not mutually exclusive — someone may receive both a doubled sentence under the Three Strikes law and an additional 5 year term based on the same prior conviction.<sup>87</sup>

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79. At a technical level, the Three Strikes law is not considered a sentencing enhancement but an “alternative sentencing scheme.” Cal. Crim. Sentencing § 2.6 (Cal CEB); *In re Edwards*, 26 Cal. App. 5th 1181, 1187 (2018). This distinction is irrelevant for the Committee’s consideration of these issues at this time.

80. Penal Code § 1170(h)(3).

81. Penal Code § 667(e)(1). The doubling of the sentence applies only to the imprisonment imposed for substantive offenses, not any sentencing enhancements.

82. Penal Code § 667(e)(2).

83. 15 CCR § 3043.2(a)(3).

84. CDCR Office of Research, *Offender Data Points — Offender Demographics For The 24-Month Period Ending December 2018, January 2020*, Table 1.10.

85. Prop. 184, as approved by voters, General Elec. (November 8, 1994); Prop. 36 as approved by voters, General Elec. (November 6, 2012).

86. Penal Code § 667(j). The Legislature also passed a version of the Three Strikes law around the time of Prop 184. See *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 504–06 (1996).

87. *People v. Nelson*, 42 Cal. App. 4th 131, 136–42 (1996); California Criminal Sentencing Enhancements (Cal CEB) § 15.38.

## RECENT CHANGES TO SENTENCING ENHANCEMENTS

The Legislature has taken several significant steps in the last few years to limit the impact from sentencing enhancements:

- As of January 1, 2018, courts have the discretion to strike gun use-enhancements, which they had previously been unable to do.<sup>88</sup>
- As of January 1, 2018, a three-year enhancement for prior drug convictions was repealed in almost all circumstances.<sup>89</sup>
- As of January 1, 2019, courts again have the discretion to strike the nickel prior, power the Legislature had removed in 1986.<sup>90</sup>
- As of January 1, 2020, a one-year enhancement for prior prison or jail terms was repealed in almost all cases.<sup>91</sup>

None of these changes appear to affect sentences that became final — meaning the usual course of appeals in state court were done — before the law was changed.<sup>92</sup>

## AREAS FOR FURTHER EXPLORATION

This part of the memo notes possible changes to the Penal Code that could be enacted with a majority vote in the Legislature. Because a number of the most significant sentencing enhancements — Three Strikes, nickel priors, elements of the gang enhancement — were passed or modified by voter initiative, they cannot be changed without further voter initiative or a two-thirds vote in the Legislature.

### General Reforms

#### *Limit Enhancements to Twice the Base Term*

The Penal Code used to limit how much a sentence could be increased by enhancements: no more than double what was imposed for the main offense.<sup>93</sup>

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88. SB 620 (Bradford) (2017).

89. SB 180 (Mitchell) (2017). The only prior drug convictions that still trigger this enhancement are those involving minors. See Health & Safety Code § 11370.2. The impact of this repeal was expected to be modest. See Ryken Grattet, *Sentence Enhancements: Next Target of Corrections Reform?*, PPIC Blog, September 27, 2017 <<https://www.ppic.org/blog/sentence-enhancements-next-target-corrections-reform/>> (“The repeal would affect just 2.3% of the people who entered prison between October 2015 and September 2016.”).

90. SB 1393 (Mitchell) (2018).

91. SB 136 (Weiner) (2019). The enhancement now only applies to a prior conviction for a “sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.” Penal Code § 667.5(b).

92. See generally Penal Code § 3; *People v. McKenzie*, 9 Cal. 5th 40 (2020); *In re Estrada*, 63 Cal. 2d 740, 744 (1965). See, e.g., *People v. Hernandez*, 34 Cal. App. 5th 326 (2019) (SB 620); *People v. Chamizo*, 32 Cal. App. 5th 696, 700–01 (2019) (SB 180).

93. *People v. Magill*, 41 Cal. 3d 777, 779 (1986) (describing former Penal Code § 1170.1(g)). The limit did not apply to violent felony offenses. *Id.*

This restriction became riddled with exceptions and was eventually repealed.<sup>94</sup> This restriction could be restored, though if passed only with a majority vote in the Legislature, many of the most significant sentencing enhancements — including nickel priors and Three Strikes — might not be covered by it because of the mandatory nature of those enhancements.<sup>95</sup>

*Permit Only One Enhancement Per Case*

Another limitation on the use of enhancements would be to limit a prosecutor to charging a single enhancement in a case. As with the double-the-base-term limitation, many significant sentencing enhancements may not be covered by this restriction if it is enacted with only a majority vote in the Legislature. As previously noted, as of September 2016, 25% of people in CDCR custody had three or more sentencing enhancements.<sup>96</sup>

*Add Guidance to Judge's Discretion Under Penal Code Section 1385*

Judges have the discretion in Penal Code Section 1385 to ignore almost all sentencing enhancements. The Penal Code does not currently have any guidelines for how that discretion should be exercised, except for, as the California Supreme Court put, “the amorphous concept” of the statutory phrase “in furtherance of justice.”<sup>97</sup> The Penal Code could be updated to provide more specific guidance. Potential guidance could include accounting for the age of a prior conviction, if it was obtained while the defendant was a juvenile, and if there is any evidence of disparate racial impact caused by a sentencing enhancement.

*Apply Recent Repeals Retroactively*

Two sentencing enhancements — for prior drug convictions and prior jail or prison terms — were recently removed from the Penal Code. But people in prison or jail whose appeals were completed did not get the benefit of these repeals. In 2017, in prison alone, 16,177 sentences had the one-year prior prison or jail term enhancement.<sup>98</sup>

The repeal of those enhancements could be given automatic retroactive effect. This would extend already established policy, without clogging the courts with pro forma resentencings.

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94. SB 721 (Lockyer) Ch. 750, Stats. 1997.

95. SB 1279 (Bradford) unsuccessfully tried to enact a similar limitation in 2018.

96. Grattet, *Sentence Enhancements: Next Target of Corrections Reform?*

97. *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 530 (1996).

98. Editorial Board, *SB1392 and SB1393 Are Needed Fixes to California's Overuse of Sentence Enhancements*, Orange County Register, April 24, 2018.

## **Gun Enhancements**

### *Reduce Length of Enhancements*

The length of the most commonly-used gun enhancements could be reduced with a majority vote in the Legislature.

### *Require a Working Gun to Support a “Use” Enhancement*

Current law allows a sentence to be enhanced for “using” a gun — which can add 3, 4, or 10 years to a sentence — even if that gun does not work or was not loaded.<sup>99</sup> The “use” enhancements could be modified to impose less punishment if the gun was not loaded or inoperable.

## **Great Bodily Injury Enhancements**

### *Update Definition Of “Great Bodily Injury”*

The definition of “great bodily injury” could be modified to more clearly specify when it should apply. In doing so, it could be made clear that a great bodily injury is one that is severe. For example, in New York, “serious physical injury” is defined as “impairment of a person’s physical condition which creates a substantial risk of death or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.”<sup>100</sup>

### *Restore Prohibition on Injury and Gun Enhancements for the Same Offense*

Until 1997, a single offense could not be enhanced with both a gun and injury enhancement. This restriction — which is no longer in place<sup>101</sup> — could be restored.

## **Gang Enhancements**

Parts of the gang enhancement law were modified by Proposition 21 in 2000 — including allowing its application to misdemeanor offenses — but some parts of the law were not, including how a gang is defined, and what level of participation

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99. CALCRIM 3146; *People v. Nelums*, 31 Cal. 3d 355, 360 (1982); Penal Code § 12022.53(b).

100. New York Penal Law § 10. See also *People v. Stewart*, 18 N.Y.3d 831, 832 (2011) (no “serious physical injury” under New York law when injuries caused by attack with a “sharp instrument” required only one day in the hospital and stitches to a six-to-seven centimeter wound that caused “daily pain” while healing). New York’s definition comes from the Model Penal Code. Model Penal Code § 210.00(3). See also *People v. Escobar*, 3 Cal. 4th 740, 747–48 (1992) (explaining how California came close to adopting a similar definition).

101. Penal Code § 1170.1(f) & (g).

in the gang is required for the enhancement to apply.<sup>102</sup> These parts of the law, and some others, may be subject to modification by a majority vote in the legislature.<sup>103</sup>

#### *Update Definition Of “Criminal Street Gang”*

The definition of “criminal street gang” in the Street Terrorism Enforcement and Prevention Act has not changed since 1988.<sup>104</sup> The definition could be updated to more accurately reflect the organization and methods of violent street gangs, the target of the law’s enhancements. For example, current law allows a gang to be an “informal” association of just three people that has committing certain enumerated crimes as “one of its primary activities.” A more precise definition could better match the STEP’s act focus on organized gangs by requiring larger membership and having commission of the enumerated offenses be *the* primary activity of the gang, not just one of its activities.

#### **Estes Robberies**

An “*Estes* robbery” is significantly less severe than a traditional robbery. It does not involve a premediated intention to use force to intimidate a person and take property from their person. The definition of robbery in Penal Code § 211 — unchanged since 1872 — could be updated to remove *Estes* robberies from its scope. A new offense could be created — something like aggravated shoplifting — that better reflects the seriousness of these types of offenses.

### CONCLUSION

Sentencing enhancements play a large role in how long people are incarcerated in California. But with the current state of data, it is impossible to know with specificity how much each specific enhancement is contributing to improving public safety, increasing incarceration, or other outcomes.<sup>105</sup> Obtaining and

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102. Ballot Pamp., Primary Elec. (Mar. 2000) text of Prop. 21, at pp. 119–20.

103. See *People v. Superior Court (Gooden)*, 42 Cal. App. 5th 270 (2019) (addressing rules for whether legislative changes amend a statute modified by initiative).

104. The current definition: “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity.” Penal Code § 186.22(f). As noted, the full text of the gang enhancement law is Exhibit A.

105. Mikaela Rabinowitz, Robert Weisberg, and Jessica McQueen Pearce, *The California Criminal Justice Data Gap*, Stanford Criminal Justice Center, 19 (2019) (detailing failed efforts — undertaken at the direction of California Chief Justice Tani Cantil-Sakauye — to obtain data on sentencing enhancements).

analyzing that information is a key goal for the Committee's on-going data collection project.

Respectfully submitted,

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Exhibit A  
Text of Penal Code § 186.22

Penal Code § 186.22

- (a) Any person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.
- (b)
  - (1) Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows:
    - (A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion.
    - (B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years.
    - (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years.
  - (2) If the underlying felony described in paragraph (1) is committed on the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school, during hours in which the facility is open for classes or school-related programs or when minors are using the facility, that fact shall be a circumstance in aggravation of the crime in imposing a term under paragraph (1).
  - (3) The court shall select the sentence enhancement that, in the court's discretion, best serves the interests of justice and shall state the reasons for its choice on the record at the time of the sentencing in accordance with the provisions of subdivision (d) of Section 1170.1.
  - (4) Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

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- (A) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 3046, if the felony is any of the offenses enumerated in subparagraph (B) or (C) of this paragraph.
  - (B) Imprisonment in the state prison for 15 years, if the felony is a home invasion robbery, in violation of subparagraph (A) of paragraph (1) of subdivision (a) of Section 213; carjacking, as defined in Section 215; a felony violation of Section 246; or a violation of Section 12022.55.
  - (C) Imprisonment in the state prison for seven years, if the felony is extortion, as defined in Section 519; or threats to victims and witnesses, as defined in Section 136.1.
- (5) Except as provided in paragraph (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served.
- (c) If the court grants probation or suspends the execution of sentence imposed upon the defendant for a violation of subdivision (a), or in cases involving a true finding of the enhancement enumerated in subdivision (b), the court shall require that the defendant serve a minimum of 180 days in a county jail as a condition thereof.
  - (d) Any person who is convicted of a public offense punishable as a felony or a misdemeanor, which is committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall be punished by imprisonment in a county jail not to exceed one year, or by imprisonment in a state prison for one, two, or three years, provided that any person sentenced to imprisonment in the county jail shall be imprisoned for a period not to exceed one year, but not less than 180 days, and shall not be eligible for release upon completion of sentence, parole, or any other basis, until he or she has served 180 days. If the court grants probation or suspends the execution of sentence imposed upon the defendant, it shall require as a condition thereof that the defendant serve 180 days in a county jail.
  - (e) As used in this chapter, “pattern of criminal gang activity” means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses

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occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons:

- (1) Assault with a deadly weapon or by means of force likely to produce great bodily injury, as defined in Section 245.
- (2) Robbery, as defined in Chapter 4 (commencing with Section 211) of Title 8.
- (3) Unlawful homicide or manslaughter, as defined in Chapter 1 (commencing with Section 187) of Title 8.
- (4) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances as defined in Sections 11054, 11055, 11056, 11057, and 11058 of the Health and Safety Code.
- (5) Shooting at an inhabited dwelling or occupied motor vehicle, as defined in Section 246.
- (6) Discharging or permitting the discharge of a firearm from a motor vehicle, as defined in subdivisions (a) and (b) of Section 12034 until January 1, 2012, and, on or after that date, subdivisions (a) and (b) of Section 26100.
- (7) Arson, as defined in Chapter 1 (commencing with Section 450) of Title 13.
- (8) The intimidation of witnesses and victims, as defined in Section 136.1.
- (9) Grand theft, as defined in subdivision (a) or (c) of Section 487.
- (10) Grand theft of any firearm, vehicle, trailer, or vessel.
- (11) Burglary, as defined in Section 459.
- (12) Rape, as defined in Section 261.
- (13) Looting, as defined in Section 463.
- (14) Money laundering, as defined in Section 186.10.
- (15) Kidnapping, as defined in Section 207.
- (16) Mayhem, as defined in Section 203.
- (17) Aggravated mayhem, as defined in Section 205.
- (18) Torture, as defined in Section 206.
- (19) Felony extortion, as defined in Sections 518 and 520.

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- (20) Felony vandalism, as defined in paragraph (1) of subdivision (b) of Section 594.
- (21) Carjacking, as defined in Section 215.
- (22) The sale, delivery, or transfer of a firearm, as defined in Section 12072 until January 1, 2012, and, on or after that date, Article 1 (commencing with Section 27500) of Chapter 4 of Division 6 of Title 4 of Part 6.
- (23) Possession of a pistol, revolver, or other firearm capable of being concealed upon the person in violation of paragraph (1) of subdivision (a) of Section 12101 until January 1, 2012, and, on or after that date, Section 29610.
- (24) Threats to commit crimes resulting in death or great bodily injury, as defined in Section 422.
- (25) Theft and unlawful taking or driving of a vehicle, as defined in Section 10851 of the Vehicle Code.
- (26) Felony theft of an access card or account information, as defined in Section 484e.
- (27) Counterfeiting, designing, using, or attempting to use an access card, as defined in Section 484f.
- (28) Felony fraudulent use of an access card or account information, as defined in Section 484g.
- (29) Unlawful use of personal identifying information to obtain credit, goods, services, or medical information, as defined in Section 530.5.
- (30) Wrongfully obtaining Department of Motor Vehicles documentation, as defined in Section 529.7.
- (31) Prohibited possession of a firearm in violation of Section 12021 until January 1, 2012, and, on or after that date, Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.
- (32) Carrying a concealed firearm in violation of Section 12025 until January 1, 2012, and, on or after that date, Section 25400.
- (33) Carrying a loaded firearm in violation of Section 12031 until January 1, 2012, and, on or after that date, Section 25850.

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- (f) As used in this chapter, “criminal street gang” means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity.
- (g) Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition.
- (h) Notwithstanding any other law, for each person committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities for a conviction pursuant to subdivision (a) or (b) of this section, the offense shall be deemed one for which the state shall pay the rate of 100 percent of the per capita institutional cost of the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, pursuant to former Section 912.5 of the Welfare and Institutions Code.
- (i) In order to secure a conviction or sustain a juvenile petition, pursuant to subdivision (a) it is not necessary for the prosecution to prove that the person devotes all, or a substantial part, of his or her time or efforts to the criminal street gang, nor is it necessary to prove that the person is a member of the criminal street gang. Active participation in the criminal street gang is all that is required.
- (j) A pattern of gang activity may be shown by the commission of one or more of the offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), and the commission of one or more of the offenses enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e). A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone.
- (k) This section shall remain in effect only until January 1, 2022, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2022, deletes or extends that date.