

September 10, 2020

First Supplement to Memorandum 2020-11

**Sentence Enhancements
Panelist Materials**

Memorandum 2020-11 gave an overview of sentencing enhancements, the topic for the September 17–18, 2020, meeting.

This supplement presents and summarizes written submissions from the panelists scheduled to appear before the Committee on September 17, 2020.

Exhibit

Sentence Enhancements Generally and Related Matters

- Professor Robert Weisberg, Stanford Criminal Justice CenterA
- Hon. Jeff Rosen, District Attorney, Santa Clara CountyB
- Lisa Roth, Los Angeles County Public DefenderC

Gang Enhancements

- Lisa Romo, Office of the State Public Defender.....D
- Sean Garcia-Leys, Civil Rights AttorneyE
- Kevin Rooney, San Joaquin County District Attorney’s Office.....F

Prison Issues

- J. Vasquez, Communities United for Restorative Youth JusticeG
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Discussion Panel 1

Sentence Enhancements and Related Matters Generally

Robert Weisberg, Edwin E. Huddleson, Jr. Professor of Law and Faculty Co-Director Stanford Criminal Justice Center, Stanford Law School

Professor Weisberg’s submission surveys the general law around sentencing enhancements — which number more than 150 — and details a number of particular enhancements. Of particular interest are three tables at the end of the submission, which are comprehensive lists of sentencing enhancements that could apply in a robbery or sale of cocaine case.

Professor Weisberg also refers the Committee to a study he co-authored about sentencing enhancements in San Francisco. The study concludes that a handful of enhancements — for prior serious felony convictions, Three Strikes, and guns — account for almost all of the additional incarceration caused by enhancements. The study is here: https://policylab.stanford.edu/media/enhancements_2019-10-17.pdf

District Attorney Jeff Rosen, Santa Clara County

DA Rosen’s submission explains that sentencing in California has become too complicated and that the time has come to reexamine the system. He recommends that the Committee reconsider the sentencing triads for criminal offenses. He also explains that sentencing enhancements have distorted the sentencing process and potentially magnify racial bias. He recommends that the Committee explore limiting enhancements to only doubling the sentence for the underlying offense or allowing prosecutors to pick only one enhancement even if multiple enhancements were possible to charge. Finally, DA Rosen suggests that the Committee examine the economic incentives that may perversely encourage counties to send people to state prison because the county is not responsible for those costs.

Lisa Roth, Deputy Public Defender, Los Angeles County Public Defender

Ms. Roth’s submission covers gun enhancements and *Estes* robberies. For guns, she explains the penalties for the most common enhancements and offers suggestions for changes to the Penal Code, including eliminating the the “10-20-life” enhancement.

For *Estes* robberies, Ms. Roth lists several examples of this type of offense — which are often shoplifting offenses that end with a brief altercation with security — and suggests that the Committee recommend eliminating *Estes* robberies or sharply curtailing when they can be filed (for example, if a weapon is involved).

**Discussion Panel 2
Gang Enhancements**

Lisa Romo, Director of Systemic Issues Litigation, Office of the State Public Defender

Ms. Romo’s submission details the history of California’s gang enhancement law from its original passage in 1988 to significant amendments via Proposition 21 in 2000, which made the law harsher and widened its scope. She also notes that

gang-related homicides have decreased 70% since their height in 1994 and the fears of “superpredators” — which drove enactment of the gang enhancement law — did not come to pass.

Ms. Romo also explains that gang allegations make every step of defending a case more difficult, from bail setting to presenting evidence to a jury. She also details problems with law enforcement gang experts, who essentially tell juries how to resolve important factual questions. Finally, Ms. Romo notes the extreme racial disparities in the use of the gang enhancement: 92% of people in CDCR with a gang enhancement are Latino or Black.

Sean Garcia-Leys, Civil Rights Attorney

Sean Garcia-Leys is a civil rights attorney who has extensive experience representing people who have been improperly included in the CalGang database. His submission describes the varying levels of involvement people may have in gangs — which are difficult to define with precision — and contrasts that understanding with the blunter approach taken by law enforcement. For example, in 1992, over half of all young black men in Los Angeles County were considered by law enforcement to be part of a gang. He concludes that if the gang enhancements are not going to be eliminated, their focus could be tightened to dangerous and coordinated groups that present more apparent dangers to public safety.

Kevin Rooney, Supervising Deputy District Attorney, Violent Criminal Enterprise Unit, San Joaquin County

Mr. Rooney’s submission gives background on his office’s Violent Criminal Enterprise Unit. His unit does not use gang enhancements indiscriminately and most of the cases resolved by his unit — which focuses on felony gun cases and violent offenses that are gang-motivated — did not result in prison sentences.

Mr. Rooney also explains the methods that the judiciary has for oversight of gang enhancements, including the ability of judges under Penal Code Section 1385 to strike gang enhancements and recent California Supreme Court decisions that have placed some limits on the use of gang enhancements. He also notes that his office has seen gangs shifting from drug trafficking to human trafficking — but the gang enhancement law has difficulty reaching this type of activity because human trafficking is not one of the offenses that can be used to show the existence of a gang.

Discussion Panel 3 Prison Issues

J. Vasquez, Participatory Defense & Policy Coordinator, Communities United for Restorative Youth Justice

Mr. Vasquez's submission details his personal journey, including 25 years spent in prison after being convicted of a gang-related homicide that he committed at age 16. He describes life at a high security prison, including the frequent violence that he observed, and explains how being labeled a gang member delayed his ability to reject and overcome that lifestyle.

Mr. Vasquez argues that gang enhancements are counterproductive and do not have any deterrent effect. Instead, they over-criminalize people of color and tell them they have no redeeming value. Mr. Vasquez says that gang enhancements should be abolished, with resources instead spent on helping people make transformative change.

Obed Gonzalez, California City Correctional Facility

Obed Gonzalez is currently incarcerated at California City Correctional Facility, a Level II prison. He is serving a 33-year sentence for his first offense, committed at age 21, for attempting to steal a large quantity of drugs as part of a sting operation orchestrated by law enforcement. His sentence includes a 25-year drug-weight enhancement.

Jared Lozano, California Department of Corrections and Rehabilitation, Associate Director, High Security, Males

CDCR's submission describes the classification process that determines what type of prison an incarcerated person will go to. The submission also includes diagrams and descriptions of high-security housing units and the programs offered at such facilities.

Respectfully submitted,

Thomas M. Nosewicz
Senior Staff Counsel

Exhibit A

Professor Robert Weisberg,
Stanford Criminal Justice Center

From: Robert Weisberg, Faculty Co-Director, Stanford Criminal Justice Center
To: Committee on Revision of the Penal Code
Subject: Sentencing enhancements material for September 17, 2020 meeting

Here are documents for the Committee meeting. The first is a memo on the structure and operation of sentencing enhancements in California, prepared by the Stanford Criminal Justice Center (SCJC).

One of its goals was to set a predicate for a statewide empirical study of the incidence of various combinations of base crimes and enhancements to gauge their frequency and their "contribution" to the prison population. Alas, that project proved to be quixotic because of an underlying problem — the very poor state of data collection and research access to data throughout California government. *See* Mikaela Rabinowitz, Robert Weisberg, and Jessica McQueen Pearce, *The California Criminal Justice Data Gap*, at https://www-cdn.law.stanford.edu/wp-content/uploads/2019/04/SCJC-DatagapReport_v07.pdf

Nevertheless, the Stanford Computational Lab, in consultation with SCJC, was able to run an empirical test of the enhancements based on data in one county, San Francisco. That study is at https://policylab.stanford.edu/media/enhancements_2019-10-17.pdf

A BRIEF GUIDE TO CALIFORNIA SENTENCING ENHANCEMENTS

Prepared by the Stanford Criminal Justice Center

I. DEFINING ENHANCEMENTS

An enhancement is an additional term of imprisonment that is added to the base term of a particular crime.¹ An enhancement does not constitute a separate crime.² In fact, “one cannot be punished for the enhancement separately from the underlying offense.”³ Instead, enhancements impose an additional prison term when a base crime is committed under certain factual circumstances.⁴ Enhancements “focus on an element of the commission of the crime or the criminal history of the defendant which is not present for all such crimes and perpetrators and which justifies a higher penalty than that prescribed for the offenses themselves.”⁵ These circumstances may relate to the crime itself, to priors, or to the status of the victim.

Enhancements are specified throughout the California Penal Code. They are distinct from aggravators because they do not alter the base term. Instead, they impose an additional penalty on top of the base term. They are often, though not always, specifically designated as “enhancements” or as “an additional term” in the Penal Code.⁶ When a statute does not use the that language, and when it “prescribe[s] confinement for one of three [possible] terms,” then it is not an enhancement.⁷ If an enhancement that alleges certain circumstances is pleaded and proven, then those circumstances may not be used or “double counted” as aggravators.⁸ That means that the same facts cannot constitute both an enhancement and the justification for imposing the upper term for the charged based crime.⁹

Enhancements may be based on circumstances of the charged crime, priors, or victim status. Those enhancements related to the circumstances of the crime alleged are “conduct” or “specific” enhancements.¹⁰ Specific enhancements are defined in California Penal Code §1170.11. Other sections of the Penal Code provide enhancements on the basis of priors and victim status.

¹ Cal. Rules of Court, rule 4.405(3).

² See *People v. Mustafaa*, 22 Cal. App. 4th 1305, 1311 (1994) (finding that enhancements are “not separate crimes and cannot stand alone” because enhancements are “dependent upon and necessarily attached to . . . underlying [felonies]”).

³ *People v. Smith*, 163 Cal.App.3d 908, 914 (1985).

⁴ *People v. Jefferson*, 21 Cal.4th 86, 101 (1999).

⁵ *People v. Hernandez*, 46 Cal.3d 194, 207-08 (1988).

⁶ *People v. Rayford*, 9 Cal.4th 1, 9 (1994).

⁷ *Id.* at 10.

⁸ Cal. Penal Code § 1170(b).

⁹ *Id.*

¹⁰ Cal. Penal Code § 1170.11.

A. Charging Enhancements

Enhancements are treated like any other charge, and so they normally must be pleaded in the information, indictment, or complaint.¹¹ Still, the prosecution might amend the information to charge an enhancement so long it presents during evidence of the alleged conduct at the preliminary hearing.¹²

Enhancements are limited by California Penal Code section 1170.1. For a single crime with a single victim, the prosecution may only ask for one weapon enhancement and one injury enhancement.¹³ These may both be imposed as enhancements, but the prosecution cannot ask for multiple weapons enhancements or multiple injury enhancements.¹⁴

For specified sex offenses, enumerated in California Penal Code section 667.6, the single crime/single victim rule mentioned above does not apply.¹⁵ The number of enhancements charged is not limited to one weapon enhancement and one injury enhancement.¹⁶

If multiple crimes are charged, then there may be multiple enhancements charged.¹⁷ Furthermore, an enhancement and the base crime charged may (and often will) contain overlapping elements.¹⁸ There is no double jeopardy problem. The only problem is when multiple enhancements that “focus on the same aspect of a criminal act” are pleaded and proven.¹⁹ In that case, the prosecution may only ask for one enhancement per aspect.²⁰

B. Proving Enhancements

The facts that lead to an enhancement must be found to be true beyond a reasonable doubt by a jury.²¹ In this way, an enhancement functions as if it is a separate crime. The only exception to this is “the fact of a prior conviction.”²²

C. Serving the Enhancement Term

A defendant who is convicted of a felony that results in a term in state prison will serve the entirety of his or her sentence in state prison.²³ Until recently, if an enhancement required that the additional term proscribed be served in state prison, then the entire sentence had to be served in state prison, even if “the underlying offense of which [the] defendant was convicted

¹¹ *People v. Superior Court (Mendella)*, 33 Cal.3d 754, 764 (1983), overruled on other grounds.

¹² Cal. Penal Code § 1009.

¹³ Cal. Penal Code § 1170.1(f); Cal. Penal Code § 1170.1(g).

¹⁴ *Id.*

¹⁵ Cal. Penal Code § 1170.1(h).

¹⁶ *Id.*

¹⁷ *People v. Ahmed*, 53 Cal.4th 156, 164 (2011).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“any fact that increases the penalty of a crime beyond the proscribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”).

²² *Id.*

²³ *People v. Vega*, 222 Cal.App.4th 1374, 1377 (2014).

would otherwise allow for a local jail commitment.”²⁴ If a criminal defendant is sentenced to probation, then an enhancement that was found true does not have to lead to prison time.²⁵

D. Discretion

1. Prosecutorial Discretion

The prosecutor has discretion to decide whether to charge an enhancement.²⁶ However, once an enhancement has been charged, the prosecutor does not have discretion to dismiss it.²⁷ The prosecutor, if he or she wants to dismiss the charge, must file a motion pursuant to *People v. Superior Court (Romero)* (a *Romero* motion).²⁸

2. Court Discretion

The court does not have discretion to sentence a defendant to a different enhancement than the one pleaded and proven, even if the court believes it is acting in furtherance of justice.²⁹ The court may only “impose the enhancement” or “strike it.”³⁰ The court may, however, strike the sentence of an enhancement without striking the finding of the facts that constitute the enhancement.³¹ Furthermore, for a singular enhancement that may be punished by multiple terms, the court may decide which term to impose in furtherance of justice.³²

A court may strike enhancements even if they have been pleaded and proven if there are mitigating circumstances.³³ A court may also strike an enhancement if it is “in furtherance of justice” under California Penal Code section 1385(a). The court may strike the enhancement itself or it may strike the punishment associated with the enhancement.³⁴ Under Section 1385, subdivision (a), the court has the power “to strike an enhancement” so long as “the minutes . . . state the circumstances justifying striking the additional term of imprisonment.”³⁵ If the court does not strike the enhancements or the punishment associated with them, then the defendant must be sentenced to a term of years that includes the enhancement(s). There are some enhancements that cannot be stricken.³⁶

²⁴ *Id.* This rule changed with the enactment into law on August 6, 2020, of SB 118, which overruled this holding of *Vega* and went into effect immediately.

²⁵ See *People v. Aubrey*, 65 Cal. App. 4th 279, 284 (1998) (holding that staying a mandatory enhancement as part of the condition for probation is legitimate).

²⁶ *People v. Roman*, 92 Cal. App. 4th 141, 145 (2001).

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *People v. Harvey*, 233 Cal. App. 3d 1206, 1231 (1991) (holding that a court cannot “impose a lesser degree” with respect to sentencing enhancements).

³⁰ *Id.*

³¹ *In re Pacheco*, 155 Cal.App.4th 1439 (2007).

³² See, e.g., Cal. Penal Code § 186.22(b)(1)(A).

³³ Cal. Penal Code § 1170(a)(3) (“The court, unless it determines that there are circumstances in mitigation of the punishment prescribed, shall also impose any other term that it is required by law to impose as an additional term”).

³⁴ Cal. Penal Code § 1385(b)(1).

³⁵ *People v. Vega*, 214 Cal. App. 4th 1387, 1397 (2013).

³⁶ Cal. Penal Code § 1385(b)(2).

II. THE MENU OF CALIFORNIA'S CURRENT ENHANCEMENTS

California law currently provides for at least 153 enhancements, spread across the Penal Code, Health & Safety Code, Insurance Code, and Vehicle Code.³⁷ The state's enhancements aren't grouped by statute in any logical way, and different authors have classified the state's enhancements differently.³⁸

Below you will see enhancements grouped into two broad categories — *general*, which apply to multiple types of crimes, and *specific*, which apply only to one or a few similar crimes. Within these two broad categories, general enhancements are grouped by the criteria on which they are based (e.g., gang membership, prior criminal record, etc.), and specific enhancements by the type of base crimes they are tied to (e.g., sex offenses, drug offenses, etc.). This classification is neither mutually exclusive (since there are enhancements that could fall into multiple sub-categories) nor collectively exhaustive (since a few enhancements do not fit well into any sub-category), but it gives the clearest overview of the types of enhancements currently on the books in California.

General enhancements typically apply to broad categories of offenses, such as all violent crimes or all felonies, and are often based on criteria that can apply to any type of offense, including the defendant's criminal record or motivations for committing the crime. These enhancements are generally written into the Penal Code in distinct sections. In contrast, specific enhancements apply to narrower sets of offenses, like DUIs or drug sales, and are typically based on criteria specific to those crimes (e.g., the total weight of drugs sold). They are often (but not always) enumerated in the same statute as the base crime to which they apply.

In many (but not all) cases, general enhancements could *not* be crimes in and of themselves. For example, having a prior violent felony on one's record, hating persons of a particular race or religion, or being a member of a gang are all things that aren't (and can't be) criminalized in and of themselves — but they all are bases for enhancements. In contrast, many specific enhancements could just as easily be codified as standalone offenses. For example, California Penal Code section 186.10(a) prescribes a base punishment for money laundering, while section 186.10(c) establishes four potential enhancements: an additional one year of imprisonment for laundered amounts greater than \$50,000; two years for amounts greater than \$150,000; three years for amounts greater than \$1,000,000; and four years for amounts greater than \$2,500,000. This section could just as easily have been written to create five separate crimes: (a) laundering an amount less than \$50,000; (b) laundering an amount between \$50,000 and \$150,000; etc. Therefore, when any discussion of the effects of enhancements on California's criminal justice system, requires emphasis on general enhancements.

³⁷ See J. RICHARD COUZENS, TRICIA A. BIGELOW & GREGG L. PRICKETT, SENTENCING CALIFORNIA CRIMES, App'x 12(b)-(c) (2014).

³⁸ See, e.g., CALIFORNIA CRIMINAL SENTENCING ENHANCEMENTS, CONTINUING EDUCATION OF THE BAR CALIFORNIA (2014).

A. General Enhancements

1. Prior Criminal Record

Among the most severe enhancements are those that apply to defendants with prior criminal convictions. Defendants convicted of *violent* felonies who have previously served prison time for violent felonies receive an additional three years,³⁹ while those convicted of *serious* felonies who have previously been convicted of serious felonies receive an additional five years.⁴⁰

Many prior-conviction enhancements apply to specific types of crimes. Sex offenders receive an additional five or ten years for each prior conviction of a sex offense,⁴¹ while narcotics sale offenders receive an additional three years for each prior narcotics sale conviction.⁴² Similar laws apply to human trafficking,⁴³ auto theft,⁴⁴ petty theft,⁴⁵ and domestic violence.⁴⁶

Another common enhancement adds two years to the sentences of defendants who commit felonies during the period in which they are free on bail (or released on their own recognizance) while awaiting judgment for a *previous* felony charge.⁴⁷ The enhancement only applies, though, if the first charge results in a conviction.⁴⁸

All enhancements tied to prior crimes apply to both offenses committed in California and those committed in other states and countries.⁴⁹

2. Weapons (or “Instruments of Harm”)

Another common type of enhancement punishes the possession, use, or discharge of a weapon in commission of an offense. A number of offenses regulate firearms specifically: there are enhancements for personally using a firearm during commission of a felony,⁵⁰ supplying a firearm for commission of a felony,⁵¹ and discharging a firearm from a motor vehicle during commission of a felony.⁵² Using a firearm during commission of certain enumerated violent felonies (e.g., by pointing a gun at a victim) can add ten years to a sentence, while *discharging* a firearm can add twenty.⁵³

³⁹ Cal. Penal Code § 667.5(a).

⁴⁰ Cal. Penal Code § 667(a).

⁴¹ Cal. Penal Code § 667.6(a)-(b).

⁴² Cal. Penal Code § 11370.2(a)-(c).

⁴³ Cal. Penal Code § 236.4(c).

⁴⁴ Cal. Penal Code § 666.5.

⁴⁵ Cal. Penal Code § 666.

⁴⁶ Cal. Penal Code § 273.5(e).

⁴⁷ Cal. Penal Code § 12022.1(b).

⁴⁸ Cal. Penal Code § 12022.1(d).

⁴⁹ Cal. Penal Code § 668.

⁵⁰ Cal. Penal Code § 12022.5(a).

⁵¹ Cal. Penal Code § 12022.4(a).

⁵² Cal. Penal Code § 12022.55.

⁵³ Cal. Penal Code § 12022.53.

Other enhancements punish the use of any “dangerous or deadly” weapon — for example, in commission of a sex offense,⁵⁴ or when used personally in commission of certain serious crimes.⁵⁵ “Dangerous or deadly” has been found to include, in addition to firearms, pellet guns, ice picks, knives, pieces of broken glass, lumber, canes, hammers, large rocks, pencils, and dogs.⁵⁶ Lastly, a few enhancements punish the use of other specific instruments of harm, such as poison.⁵⁷

Typically, these enhancement statutes do not require a person to be armed themselves. If the defendant is a principal in a crime with the knowledge that his or her partner is armed, that is sufficient.⁵⁸ In some cases, the defendant need not even have the weapon on his or her person, or be present when it is found.⁵⁹

3. *Gang Membership*

A number of enhancements apply to defendants who commit offenses for the “benefit” of a street gang or simply are members of street gangs. Committing a felony after knowingly failing to register as a gang member can add one year of imprisonment.⁶⁰ Committing *any* felony for the *benefit* of a street gang is punishable by an additional two, three, or four years, with serious or violent crimes punishable by five or ten years, respectively.⁶¹ California law also provides several indeterminate sentencing options for gang members. Defendants who extort or threaten victims or witnesses for the benefit of a gang may receive seven years to life; those who commit one of a list of enumerated violent felonies (including home invasion or carjacking) for the benefit of a gang may receive fifteen years to life.⁶²

Most gang enhancements were created by the California Street Terrorism Enforcement and Prevention (“STEP”) Act of 1988, codified as California Penal Code sections 186.20–186.33. The Act defined a street gang as any “ongoing organization, association or group,” either “formal or informal,” that meets four requirements: (a) the group has three or more members; (b) members have a “common name or common identifying sign or symbol”; (c) the group has as “one of its primary activities” the commission of one or more of 33 enumerated criminal acts (including robbery, drug sale, burglary, any violent crime, or carrying loaded or concealed firearms); and (d) group members “have engaged in a pattern of criminal activity,” either together or separately.⁶³ A felony is committed for the benefit of a gang when the

⁵⁴ Cal. Penal Code § 12022.3(a).

⁵⁵ Cal. Penal Code § 667.61(a)-(b).

⁵⁶ See CALIFORNIA CRIMINAL SENTENCING ENHANCEMENTS, §§ 5.40 - 5.43 (listing cases).

⁵⁷ See Cal. Penal Code § 347(a)(2).

⁵⁸ Cal. Penal Code § 12022(a)(1).

⁵⁹ See, e.g., *People v. Bradford*, 38 Cal.4th 1733 (1995) (in which defendant was convicted under California Penal Code section 12022(c) for being armed during commission of a drug offense because a gun was found in his cabin, which was located in a marijuana cultivation area).

⁶⁰ Cal. Penal Code § 186.33(b)(1).

⁶¹ Cal. Penal Code § 186.22(b)(1).

⁶² Cal. Penal Code § 186.22(b)(4).

⁶³ Cal. Penal Code §§ 186.22(e)-(f).

defendant has a “specific intent to promote, further, or assist in any criminal conduct by gang members.”⁶⁴

4. *Victim Status*

Defendants may be subject to enhancements based on the status of their victim, or the relationship between them and their victim. Felonies committed against particularly vulnerable people or for especially despicable reasons are punished more severely.

Certain enumerated violent or sexual crimes are punished with an additional two years in prison when committed against elderly persons, disabled persons, or persons under the age of 14.⁶⁵ Any felony committed as a “hate crime” — i.e., due to the victim’s actual or perceived disability, gender, nationality, religion, sexual orientation, or other criteria — is punishable with an additional one to four years in prison.⁶⁶ A hate crime can be committed against a *place* as well as a person.⁶⁷ Many statutes specify more severe punishments for specific crimes when victims are young or old. For example, kidnapping for sexual purposes is subject to an enhancement when the victim is under 14 years of age.⁶⁸

5. *Harm of Crime*

Several enhancements levy increased penalties for crimes that result in increased harm to victims. For instance, inflicting great bodily harm during the commission of a felony results in three additional years of incarceration, with even more severe terms imposed for inflicting *severe* harm, or for inflicting harm against persons older than 70 or younger than 5.⁶⁹ Other statutes punish great bodily injury inflicted during the course of specific felonies, including human trafficking,⁷⁰ arson,⁷¹ elder abuse,⁷² and child abuse.⁷³

Enhancements also apply to particularly high levels of harm to property. Defendants who take, damage, or destroy property during the commission of a felony are subject to additional imprisonment depending on the property’s value, ranging from one additional year for theft or damage greater than \$65,000 to four years for theft or damage greater than \$3,200,000.⁷⁴

Some enhancement statutes require personal infliction of harm, while others simply require that the harm occurred over the course of the felony. Typically the law requires only general rather than specific intent.⁷⁵

⁶⁴ Cal. Penal Code § 186.22(b).

⁶⁵ Cal. Penal Code § 667.9(a).

⁶⁶ Cal. Penal Code § 422.75(a).

⁶⁷ *Id.*

⁶⁸ Cal. Penal Code § 667.8(b).

⁶⁹ Cal. Penal Code § 12022.7.

⁷⁰ Cal. Penal Code § 236.4(b).

⁷¹ Cal. Penal Code § 451.1(a)(2)(3).

⁷² Cal. Penal Code § 368(b)(3)(B).

⁷³ Cal. Penal Code § 12022.95.

⁷⁴ Cal. Penal Code § 12022.6(a).

⁷⁵ *People v. Verlinde* (2002), 100 CA4th 1146, 1166.

6. Other

A few other general enhancements scattered through the Penal Code don't fit into any of the categories above. For example, a defendant who impersonates a police officer during the commission of a felony is subject to an additional year of imprisonment.⁷⁶

B. Specific Enhancements

1. Drug Crimes

Drug sale offenses are subject to many enhancements tied to the age of individuals involved, the location of the offense, and the amount of drugs at issue. Defendants who induce others to commit certain drug sale offenses are subject to additional punishment depending on the value of the drugs involved,⁷⁷ with those who induce *minors* to violate the law subject to even further imprisonment.⁷⁸ Offenses that occur near a school are punishable by an additional three, four, or five years of imprisonment,⁷⁹ while those that occur near a drug treatment center or homeless shelter are subject to an additional year.⁸⁰

Additionally, crimes involving the sale of certain types of controlled substances are subject to quite severe enhancements depending on the amount of the substance involved. For example, defendants convicted of selling cocaine may receive an additional three years imprisonment for amounts over one kilogram, ranging up to an additional 25 years for amounts over 80 kilograms.⁸¹

2. Sex Crimes

Sex offenses are subject to enhancements tied to the victim's age, the defendant's relationship to the victim, the defendant's method of committing the offense, and other criteria. For example, defendants may receive additional time in prison if they are the primary caregiver of their victim,⁸² if they administer controlled substances to their victim,⁸³ if they commit a sexual assault knowing they are HIV-positive,⁸⁴ or if they flee the state to avoid prosecution after the crime.⁸⁵

⁷⁶ Cal. Penal Code § 667.17.

⁷⁷ Health & Safety Code § 11356.5(a)(2).

⁷⁸ Health & Safety Code § 11353.1(a).

⁷⁹ Health & Safety Code § 11353.6.

⁸⁰ Health & Safety Code § 11380.7.

⁸¹ Health & Safety Code § 11370.4(b)(1).

⁸² Cal. Penal Code § 674.

⁸³ Cal. Penal Code § 12022.75(b).

⁸⁴ Cal. Penal Code § 12022.85.

⁸⁵ Cal. Penal Code § 289.5(d).

3. Property Crimes

Property crimes are subject to enhancements tied to the value of property involved as well as defendants' priors. Both money laundering and general property theft/damage are subject to enhancements when particularly large amounts of property or money are involved.⁸⁶ Many property crimes are subject to enhancements for defendants who have previously been convicted of the same offense, including embezzlement and fraud,⁸⁷ as well as various types of false insurance claims.⁸⁸

4. DUIs

Several enhancements apply to defendants charged with DUIs. Defendants may be subject to additional punishment for fleeing the scene of an accident,⁸⁹ causing injury to others,⁹⁰ or causing great bodily injury after receiving four or more separate DUI violations in the last ten years.⁹¹

III. HOW ENHANCEMENTS OPERATE ON KEY BASE CRIMES

Using two representative base crimes, robbery and sale of cocaine, one can better understand how enhancements can affect the prison population. 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.”⁹² Robbery is useful because it is a relatively common crime with both property and violent elements. For purposes of the Three Strikes Law, robbery is listed as a serious but not violent felony. Standing alone, robbery in the first degree is punishable by three, four, or six years in state prison, while robbery in the second degree is punishable by two, three, or five years.⁹³ Although these sentences are significant, enhancements can still have a substantial effect on overall prison time. The sale of cocaine is also a useful example for mapping that apply exclusively to drug offenses.

The charting below rests on a canvass of every California enhancement to assess whether the enhancement *could* conceivably apply.⁹⁴ The linkages of base crime and enhancement is based on theoretical possibility under the statutes, not measured frequency. For example, the likelihood of a robbery committed by impersonating a police officer is exceptionally rare, but because robbery can be committed by “intimidation” and impersonating a police officer might be a form of intimidation to the victim, the enhancement is included.

⁸⁶ Cal. Penal Code §§ 186.10(c)(1), 12022.6(a)(3).

⁸⁷ Cal. Penal Code § 186.11(a).

⁸⁸ Cal. Penal Code §§ 548(b), 550(e); Insurance Code § 1871.4.

⁸⁹ Vehicle Code § 20001(c),

⁹⁰ Vehicle Code § 23588.

⁹¹ Vehicle Code § 23566.

⁹² Cal. Penal Code § 211.

⁹³ Cal. Penal Code § 213(a).

⁹⁴ Notably excluded are the Three Strike provision. Although these provisions can significantly increase the underlying sentence, there is already extensive literature about their effects. This report tries to isolate other enhancements, independently of Three Strikes, to identify their effect on prison systems.

Also noted are overlapping, and possibly mutually exclusive, enhancements. Section 654(a) of the California penal code specifies that, “An act or omission that is punishable in different ways by different provisions shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” But instead of calculating which enhancements would preclude others in practice, this analysis involves an exhaustive list of every possible enhancement that *could* apply to robberies, even if they could not all apply at the same time. Therefore, for example, the list includes all four enhancements for “excessive taking” under 12022.6(a)(1), even though a two-year enhancement for excessive taking over \$200,000 would preclude an additional one-year enhancement for excessive taking between \$65,000–\$200,000.

However, this analysis excludes enhancements that would fundamentally alter the base crime by adding new criminal elements. Thus, on the one hand, example, a gun enhancement is included because using a firearm does not alter the nature of the underlying act, *i.e.* taking money or goods from the possession of another by force or intimidation. It simply specifies the type of force used. And without the robbery, carrying a gun may be a legal activity. But by contrast enhancements for the solicitation of a minor or kidnapping would transform robbery into an entirely different criminal activity. Although robbery and kidnapping could overlap, kidnapping is punishable in isolation and therefore excluded from our enhancement chart.

This analysis also tries to separate aggravators from pure enhancements, although the distinction between the two is often blurred. Enhancements automatically impose additional prison time on a defendant's base sentence. Such an added penalty is statutorily imposed and triggered by either the nature of the defendant or of the offense itself. Aggravators focus on the sentencing for the base offense without tacking on separate sentences. The key practical difference is that an enhancement “must be pleaded and then proved beyond a reasonable doubt to a jury,” while an aggravating factor “may be considered by a court in its broad discretion.”⁹⁵ Accordingly, thus, this analysis focuses on the penal code’s text and labels to make the distinction.

Table 1 shows all possible enhancements for robbery. The table categorizes specific enhancements into general groups such as “Gang Enhancements” or “Gun Enhancements.” The left column gives a short description of the enhancement, as identified in the penal code. The right column gives the mandatory year or range of years for the enhancement. Table 2 translates the information into a flow chart. Table 3 follows a similar format for mapping applicable enhancements for sale of cocaine.

⁹⁵ Amy Righter, California Criminal Sentencing Enhancements § 2.5 (2014).

Table 1. Possible enhancements for robbery

Robbery (not into an inhabited dwelling)	
Gang	
Street gang crimes	1, 2, 3 years
Street gang crimes for serious felonies	5
Street gang crimes for violent felonies	10
Elder Abuse	
Elder abuse, vic <70 years	3 years
Elder abuse, vic > 70 years	5
Elder abuse, death, vic <70 years	5
Elder abuse, death, vic >70 years	7
Hate Crime	
Hate crime	1, 2, 3 years
Hate crime in concert	2, 3, 4
Vulnerable	
Vulnerable victim	1 years
Vulnerable victim with prior	2
Impersonation of police officer	
Impersonation of police officer	1 year
With gun	
Gang crime with gun/vehicle	1, 2, 3 years
Gang crime with gun/detached mag	2, 3, 4
Armed with gun	1
Vicarious armed assault weapon	3
Personal use of deadly weapon	1
Armor-piercing ammo	3, 4, 10
Bulletproof vest/12022.1(out on bail)	1, 2, 5
Furnishing firearm	1, 2, 3
Use of firearm	3, 4, 10
Use of assault weapon or machine gun	5, 6, 10
Use of firearm/specified crime (includes robbery)	10
Discharge of firearm/specified crime (includes robbery)	20
Discharge with death or GBI/or 246(a)/or 12034	25-life
12022.53+186.22(b) (committing robbery + actively engaging in street gang with knowledge of gang's criminal activity/further or assists any felonious crime)	Both
Manufacturing/possession of assault + crime	1
Excessive Taking	
Excessive taking, +65,000	1 year

Excessive taking, 200000	2
1.3 million	3
3.2 million	4
Great Bodily Injury	
GBI	3 years
GBI with coma or paralysis	5
GBI with victim 70+	5
GBI on child under 5	5
GBI terminating pregnancy	5
Administering Drugs with Force	
Administering drugs with force	3 years
Status Enhancements	
Hate crime with prior	1 years
Prior serious felony with current serious	5
Violent felony with prison prior	3
Prior prison term for sexually violent offense	1
Vulnerable victim with prior serious felony	2
Out on bail	2

Table. 2 Robbery Flow Chart

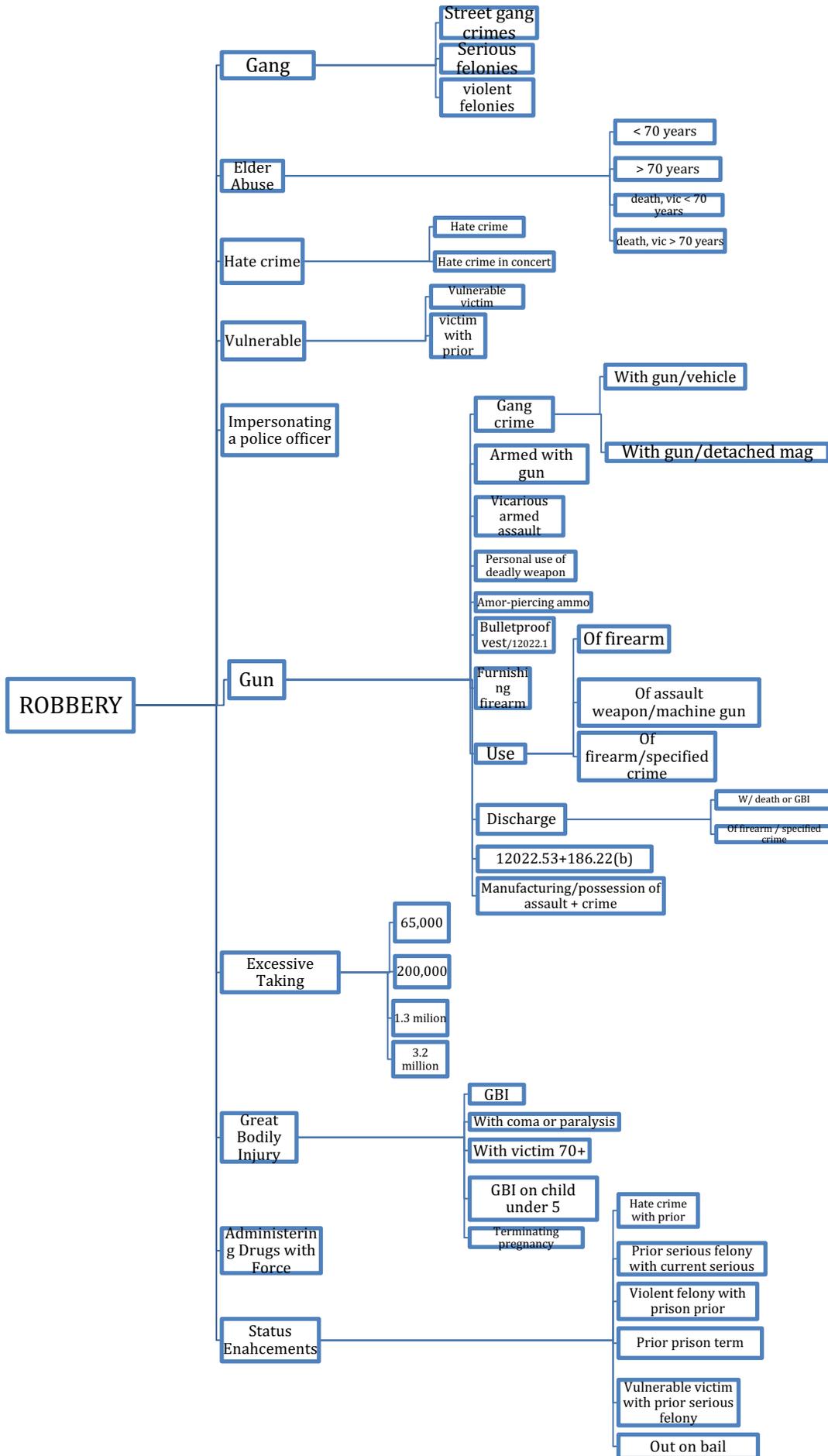


Table 3. Possible enhancements for sale of cocaine.

Base: Sale of Cocaine	
Triad	3, 4, 5
Triad with transport between non-contiguous counties	3, 6, 9
Crime Near School	
Within 1,000 feet of a school	3, 4, 5
Within 1,000 feet of a school and involving a minor 4+ years younger than defendant	6, 8, 10
Defendant Induced Another to Violate Law	
Value > \$500,000	1
Value > \$2 million	2
Value > \$5 million	3
Amount of Cocaine	
Amount > 1 kg	3
Amount > 4 kg	5
Amount > 10 kg	10
Amount > 20 kg	15
Amount > 40 kg	20
Amount > 80 kg	25
Prior Drug Convictions Involving Minors	
One prior conviction	3
Two prior convictions	6
Three prior convictions	9
Etc...
Gang	
Street gang crimes	1, 2, 3
Street gang crimes for serious felonies	5
Street gang crimes for violent felonies	10
Status Enhancements	
Prior serious felony with current serious	5
Violent felony with prison prior	3
Prior prison term for sexually violent offense	1
Out on bail	2
With gun	
Personally armed (in drug crime)	3, 4, 5
Vicarious armed (in drug crime)	1, 2, 3
Gang crime with gun/vehicle	1, 2, 3
Gang crime with gun/detached mag	2, 3, 4
Armed with gun	1
Vicarious armed assault weapon	3
Personal use of deadly weapon	1

Armor-piercing ammo	3, 4, 10
Bulletproof vest/12022.1(out on bail)	1, 2, 5
Furnishing firearm	1, 2, 3
Use of firearm	3, 4, 10
Firearm from vehicle w/ GBI	5, 6, 10
Great Bodily Injury	
GBI	3
GBI with coma or paralysis	5
GBI with victim 70+	5
GBI on child under 5	5
GBI terminating pregnancy	5

Exhibit B

District Attorney Jeff Rosen,
Santa Clara County

I have been a prosecutor for twenty-five years. I have served as the elected District Attorney for Santa Clara County since January 2011. One of my first acts when I took office was to implement a “Collateral Consequences Policy” which calls for prosecutors to look holistically at cases so that the punishment takes into account the unintended collateral consequences that often flow from a conviction. In addition, we greatly expanded our use of diversion, including our recent “Narcotics Public Safety Project” that immediately diverts recreational drug users out of the criminal justice system. I know that elected District Attorneys can make a major impact on the length of sentences and rates of incarceration. Nonetheless, our sentencing scheme in California has become so baroque and unwieldy that it is past time for the Committee on Revision of the Penal Code to rationalize our system and apply research and data to ensure we have a criminal justice system that balances public safety, accountability along with a recognition that over-incarceration damages individuals and communities and makes us all less safe. Ever since the murder of George Floyd, we must be mindful that the damage of over-incarceration does not affect us all the same. It disproportionately harms our communities of color. However, I do not think we need to view these goals in conflict. Public safety, accountability, rehabilitation, and decreased incarceration are not mutually exclusive goals. They are harmonious. In fact, I believe we can only truly achieve any one of these goals when we strive to achieve all four.

For example, in response to the Covid-19 pandemic, my office worked collaboratively to successfully reduce our local jail population by *over one-third*, so it is at historically low levels. This was done methodically, thoughtfully, and safely. It was also done in a matter of weeks. With guidance from this Committee, I think the State can achieve a more just, effective, and fair sentencing system that enhances public safety while reducing incarceration. That makes all communities safer while considering historic and structural racism that harms us all.

Let me suggest a few areas which this Committee might profitably consider.

First, I believe we need to review our standard sentencing triads to determine if they truly reflect our best evidence. For example, with most felonies a judge can sentence an individual to 16 months, 2 years or 3 years in prison. I think our prosecutors and judges do a good job in making sure that the most serious cases get longer sentences and our less serious cases get less. But, the original base numbers are basically made up. Do any of us really think that there is any real data that supports a presumptive 2-year sentence for stealing a car? What if we altered our standard triad of 16 months, 2-years or 3-years in prison to 12 months, 18 months or 2 years? Perhaps that would achieve the same or better results while reducing our incarceration rates by about 25%. Of course, I am not advocating for that particular outcome. My point is that we need the Committee to take a systematic and rigorous look at our present sentencing scheme to bring actual data and rationality to our system. I am confident that this will allow us to reduce incarceration rates, make our system more equitable and increase public safety.

Second, I believe we need to reform how we use enhancements. Sentencing enhancements can serve an important goal by distinguishing between cases that might look similar based on the charges alone. For example, who can doubt that a man who steals a bicycle with a gun poses a greater threat than someone who is unarmed? Yet, the system of enhancements has metastasized beyond all proportion. When I began my career, an enhancement was just that, it could moderately increase the underlying sentence. Now, enhancements routinely create punishments that are far greater than the underlying crime itself. This creates numerous problems. One, it distorts the trial process as everyone becomes far more concerned about the enhancement than the crime. Two, it converts our triad system, which was supposed to deliver consistency, into a completely indeterminate system where a person can effectively serve anywhere from probation to life. Three, it potentially magnifies the implicit bias that is already in the system making it less fair to people of color and other marginalized groups. Rather than get rid of all enhancements, I suggest this Committee explore methods of allowing the use of enhancements but limiting the maximum impact they could have on a case. For example, we used to limit enhancements to “double the base term”. This would mean that while an enhancement could increase a sentence, it was still bound by the basic sentencing scheme. Another idea might limit a prosecutor to choosing one enhancement even if multiple enhancements were possible. Again, it is my belief that study of actual evidence can steer us to a better system.

Finally, I hope the Committee will tackle the irrational economic incentive of our current system that privileges long prison sentences over local rehabilitation. If a county chooses to send an individual to State Prison, the State absorbs the entire cost. By contrast, if we choose to keep an individual locally and work towards his or her rehabilitation, the county must bear the costs alone. In this way, we have an unofficial but systematic policy of favoring long incarceration over local rehabilitation. And, we have gotten the system we have paid for – one that over-incarcerates but spends too little on local rehabilitation.

I am grateful for the opportunity to speak before the Committee, and I look forward to working with you on this vital issue.

Exhibit C

Lisa Roth, Deputy Public Defender,
Los Angeles County Public Defender

Honorable Chairperson and Members of the Committee:

Gun Enhancements:

Under California gun laws a sentence for a felony can be increased if a firearm was personally possessed or used, or if a principal or accomplice possessed or used a firearm during the commission or attempted commission of a felony. An enhancement provides for time in California state prison in addition and consecutive to the punishment for the commission or attempted commission of the underlying felony.

Sentencing enhancements for possession or use of a firearm during the commission of a felony include:

1. Penal Code 12022 PC — being armed with a firearm during the commission of a felony;
2. Penal Code 12022.2 PC — possessing ammunition designed to penetrate metal or armor;
3. Penal Code 12202.3 PC — using or possessing a firearm during the commission of certain sex offenses;
4. Penal Code 12022.4 PC — *furnishing... or attempting to furnish...* another with a firearm to aid that person in the commission of a felony;
5. Penal Code 12022.5 PC — personally using firearms, assault weapons, machine guns, or .50 BMG rifles during the commission of a felony;
6. Penal Code 12022.53 PC — *personally using* a firearm during the commission of a serious felony; and
7. Penal Code 12022.55 PC — *discharging* a firearm from a car during the commission of a felony.

The additional punishment for the above enhancements ranges from one year to life in prison depending on various circumstances such as: 1) the type of firearm involved; 2) whether the person charged personally used a firearm or was an aider and abettor; 3) whether the person charged used the firearm or was simply armed with it; and 4) the nature of the underlying felony offense.

When the underlying felony is a serious drug or sex offense or an enumerated violent offense the punishment will be increased even more.

All the above enhancements, except for PC 12022.53, authorize a judge to sentence a person to one of three specified prison terms, with an additional and

consecutive ten years in prison being the longest term. Generally, the judge will consider any aggravating or mitigating circumstances when determining which term to impose or whether to strike the enhancement all together.

Penal Code Section 12022.53, also known as California's "10-20-life 'use a gun and you're done'" law is one of the harshest sentencing schemes in the nation. A sentence is enhanced by an additional 10 years in prison for personally using a firearm; an additional 20 in prison for personally and intentionally discharging a firearm; or an additional 25 years to life for personally and intentionally discharging a firearm that causes great bodily injury or death. The "10-20-life" applies to gang members, even when the defendant didn't personally use or discharge the firearm, if the underlying felony is committed for the benefit of a criminal street gang (PC 186.22).

While the court cannot impose the enhancement and grant probation, nor can the court stay the enhancement, as of 2017 the court can strike or dismiss the enhancement in the interests of justice.

If more than one enhancement applies, the enhancement which carries the longest potential term of imprisonment will be imposed. However, firearm enhancements may be imposed for each felony count in which a firearm is carried or used. Therefore, if more than one felony count is charged, a person could receive multiple enhancements, even if they result from the same act or set of acts.

For example, if a person commits a robbery (PC 211) with 3 victims, the person can be charged with three separate counts of robbery with *each* count subject to a firearm enhancement to be additionally and consecutively applied. Because robbery is one of the enumerated felonies under PC 12022.53 this means that an additional thirty years of punishment (ten years for each victim/count) can be imposed for that single use of a firearm.

Examples and Suggested Changes:

Eliminate 12022.53 enhancements in favor of available existing enhancements such as 12022.5 and 12022.7

The Los Angeles County District Attorney's Office (DA) files gun enhancements pursuant to PC 12022.53. This complicates not only the ability to plea bargain but also to go to trial due to the significant sentence a defendant faces if found guilty.

For example:

1. A person is charged with one count of robbery with a gun. The crime of robbery carries a sentence scheme of two, three or five years in state prison and the firearm an additional ten years, making twelve years in state prison the lowest sentence possible. Often these are cases that could otherwise be settled if the DA filed the enhancement pursuant to PC 12022.5 where the sentencing scheme for the enhancement is an additional three, four or ten years.
2. A person commits a robbery of another while using a gun. The gun is discharged adding an additional twenty years of state prison even though no one was injured.
3. The person in #2 is injured when the firearm is discharged adding an additional twenty-five years to life.
4. The person in #2 is killed adding an additional twenty-five years to life.

The extreme punishment imposed pursuant to PC 12022.53 can be addressed by eliminating that section and imposing the punishment proscribed in PC 12022.5 where the sentencing scheme for the enhancement is an additional three, four or ten years. In examples #1 and #2 a person could be sentenced to a term as low as five years (two for the robbery and three for the firearm) or as high as fifteen years (five for the robbery and ten for the firearm). In example #3, the person could receive the same sentence as in example #1 and #2 or the DA could also file a great bodily injury enhancement (GBI) (PC 12022.7) where the sentencing scheme is an additional three years. The person could then receive a sentence as low as eight years (two for the robbery, three for the gun and four the GBI) or as high as twenty-one years (five for the robbery, ten for the gun and six for the GBI). In example #4 no enhancement is necessary as both first and second degree murder carry fifteen and twenty-five years to life sentences, respectively.

Submission of Lisa Roth, Los Angeles County Deputy Public Defender

The examples above still call for extremely harsh sentences but are less so than those imposed pursuant to PC 12022.53. If PC 12022.53 is eliminated the sentencing scheme for PC 12022.5 should be amended to allow for a lower sentencing scheme.

Remove the Exceptions Which Allow the 12022.5 enhancement to be attached to Charges which Necessarily Include Firearms Use

Generally, PC 12022.5 does not apply to offenses that necessarily *require* the use of a gun as an element of the crime. However, the statute creates two exceptions – allowing the enhancement to be alleged in assault with a firearm (PC 245(a)(2)) or murder during the commission of a drive-by cases. This enhancement effectively allows the defendant to be “double-punished” for the same conduct – that is, under the current enhancement a defendant is convicted of “assault with a gun with an enhancement for using...a gun.” These exceptions should be eliminated.

In the alternative, create a tiered sentencing scheme for 12022.53 and limit its use

If PC 12022.53 is not eliminated the following suggestions should be implemented:

1. Create a 3 tiered sentencing structure for 12022.53(b)- personal use of a weapon.
2. Prohibit the use of the enhancement for anyone other than the individual who personally used or discharged the firearm, including gang members.
3. Prohibit the ability to impose the enhancement fully and consecutively per victim in a single incident.

Require that the gun be loaded and operable

Current law does not require that the “gun” in question be loaded or operable – meaning that a defendant who brandishes an empty non-functional gun during a robbery is treated as harshly as a defendant who brandishes a working, loaded firearm. The one year weapons enhancement (PC 12022(b)(1)) should be permitted when the evidence is insufficient to establish that the gun was loaded or functional.

Estes Robbery:

In California, when a normal person is asked to describe a robbery, they will talk about an armed robber stopping them in the street and demanding their wallet.

In many cases, this popular perception of the law is correct, that is, a “normal” robbery requires evidence that the defendant took the property of another by force or fear.

What most members of the public do not realize, however, is that the judiciary has created its own, additional version of robbery, now known as an *Estes* robbery.

Typically, an “Estes” robbery occurs when a defendant attempts to shoplift an item from a store and then resists an attempt by a security guard or employee to detain them. Under judicial precedent, the use of force or threats in the course of a shoplifting elevates those minor offenses to the far more serious crime of robbery.

The term “*Estes* Robbery” is used to describe the crime because in 1983 a California court found Curtis Estes guilty of robbery for stealing a coat and pulling a knife on the security guard who followed him out of the store and confronted him. Thus, the crime of petty theft was elevated to a felony robbery due to the use of force or fear.

Unfortunately, since the court’s original decision, courts have upheld robbery convictions for defendants who did nothing worse than using words, pushing or struggling with security guards while trying to shoplift clothing, hygiene products, or food.

This is not to suggest that struggling with a security guard should not, on occasion be subject to increased punishment. Under current law, shoplifting and battery are both misdemeanors and are both punishable by six months in county jail.

What is grossly disproportionate, however, is the conflation of verbal threats, a push or a shove shoplifting with an actual robbery.

The differences in effect and punishment, for example, are severe. While shoplifting and battery are punishable by a combined year in county jail, robbery is a felony punishable by two, three or five years in state prison. Furthermore, a robbery is considered a violent strike - requiring that 85% of the sentence (rather than 50%) be served. Finally, because an *Estes* robbery counts as a strike, people can and have received life sentences as “third strikers” for conduct no more offensive than struggling with a guard during the course of a minor shoplifting.

Submission of Lisa Roth, Los Angeles County Deputy Public Defender

The creation of *Estes* robberies severely impacts our ability to plea bargain or go to trial. While the facts and circumstances in *Estes* were serious more often than not what we see is a simple petty theft where either words are exchanged or the force at most is a push or shove and is generally in response to a plain cloth's security guard grabbing the shoplifter from behind. Further it disproportionately targets people of color, those who are impoverished, and/or those under the influence of alcohol or narcotics.

For example:

People v. Robins (2020) 44 Cal.App.5th 413

Facts: D tries to shoplift clothes from the store. Before D leaves store, she is confronted by a security guard and she "swings" clothing at security guard (no injury, obviously). All of clothing falls to the ground and D runs away. D convicted of "attempted" *Estes* robbery. Court also suggests it would have been fine to convict D of a completed *Estes* robbery.

People v. Edwards (2018) 2018 WL 1516955

Facts: D allegedly tries to walk out of store with shoplifted booze in his pants. Security guard stands in front of D, D pushes him and walks out. Robbery conviction.

People v. Dean (2008) 2008 WL 4917565

Female D tries to shoplift a stick of "deodorant, cheese, meat, and two avocados." She is grabbed by two male security guards who try to handcuff her. She resists, robbery conviction.

People v. Garcia (2004) 2004 WL 886377

Facts: "On July 1, 1994, defendant took more than 10 bottles of cologne from Sav-On Drugstore in La Puente. When he was [hailed] by the manager as he was leaving the store, defendant ran. The manager and a security guard pursued defendant. When they apprehended him, defendant struggled. He grabbed the manager's shirt sleeve in an attempt to free himself." D convicted of robbery.

People v. Trujillo (2018) 2018 WL 3099531

Facts: "Robert Trujillo stole a candy bar and a bottle of water from a convenience store and pushed the store manager several times to get away from her after she followed him outside and told him he had to pay for the items. A jury convicted Trujillo of second degree robbery."

Suggested Changes:

Suggested changes are as follows:

1. Eliminate *Estes* robberies.
2. If *Estes* robberies are not eliminated:
 - a. Create a non-strike crime of “aggravated shoplifting” punishable only by county jail and/or a lower state prison state prison scheme that must be filed in lieu of an *Estes* robbery.
 - b. Prohibit the use of *Estes* where the defendant’s use of force is solely in response to the use of force by the alleged victim.
 - c. Limit *Estes* filings to cases involving the use of a weapon.

Exhibit D

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September 4, 2020

STATEMENT OF LISA M. ROMO TO THE COMMITTEE FOR REVISION OF THE PENAL CODE.

Introduction.

Gang-related homicides are down 70% from their peak in 1994. Yet California continues to impose severe sentence enhancements for offenses deemed gang related, whether or not they occurred as a result of criminal street gang activity. These enhancements were originally adopted over 30 years ago when crime rates were exceptionally high. In the intervening decades, no empirical study has been conducted to determine whether gang enhancements reduce crime. Although there is no proof the enhancements are necessary, there is data showing they are imposed primarily on Latinos and African Americans. There is also reason to believe the evidence introduced to support the enhancements is highly prejudicial and may lead to wrongful convictions. Moreover, the concerns that drove enactment of the enhancement scheme were based on misconceptions of the nature of gangs and gang crime. For all of these reasons, it is time to reconsider the value of gang enhancements.

Enactment of the STEP Act.

The Street Terrorism Enforcement and Prevention (STEP) Act was enacted in 1988.¹ It created a substantive street gang participation crime

¹ See *People v. Jones* (2009) 47 Cal.4th 566, 570.

and an enhancement provision.² The enhancement originally added one, two, or three years to a felony sentence if it was 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”³ It required anyone sentenced to life in prison to serve a minimum of 15 years before becoming eligible for parole.⁴

The legislative findings and declarations of the STEP Act demonstrate it was motivated by certain beliefs about street gangs and the dangers they posed. The Legislature declared that “the State of 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.” Pointing to a substantial increase in gang-related murders, the Legislature concluded that gang activity “present[ed] a clear and present danger to public order and safety”⁵

The STEP Act was designed to strike at the core of how criminal street gangs operated, “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.” The Legislature also concluded that seizing gangs’ crime proceeds would deter gang violence.⁶

The Act required the Los Angeles District Attorney’s Office to report, prior to January 1, 1991, on the impact of the legislation, including the resulting number of trials and plea bargains and the number of enhancements sought and imposed.⁷ The STEP Act was to sunset in 1992, unless specifically extended.⁸

² Pen. Code, §§ 186.22, subs. (a) (gang participation) & (b)(1) (gang enhancement). (All further citations are to the Penal Code unless otherwise noted.)

³ Stats. 1988, ch. 1242, § 1; see § 186.22, subd. (b).

⁴ *Id.*, § 186.22, subd. (b)(3).

⁵ § 186.21.

⁶ *Ibid.*

⁷ Stats. 1988, ch. 1242, § 1; see § 186.26.

⁸ *Id.*; see § 186.27.

It is not clear whether the DA's Office actually collected or reported the mandated data. However, in May 1992 it published *Gangs, Crime and Violence in Los Angeles: Findings and Proposals from the District Attorney's Office*.⁹ This report was a comprehensive discussion of the nature of street gangs based on interviews of more than three dozen local gang experts, including academic researchers, prevention workers, ex-gang members, and law enforcement officers.¹⁰

The report's findings contradicted much of what was then commonly believed to be true about gangs, gang members, and gang crimes. Street gangs were not organized or cohesive. They had weak leadership, constant rotation in membership, and little if any over-arching structure.¹¹ Crimes committed by gang members were rarely gang activities nor were proceeds shared. In fact, gang violence was usually spontaneous and impulsive, committed by individuals for their own purposes. The large majority of victims were other gang members, not innocent bystanders.¹²

In short, the report demonstrated the STEP Act was ill-suited to address street gang violence.¹³ It acknowledged that education and job

⁹ Hereafter *Gangs, Crime and Violence*.

¹⁰ *Id.* at p. i.

¹¹ *Id.* at pp. 36-37, 65.

¹² *Id.* at pp. 57-58, 66, 107. The DA's Office also acknowledged there was no universal agreement on what counted as a gang-related crime. Some jurisdictions only included crimes believed to be motivated by gang activity. Others, including Los Angeles County law enforcement agencies, used a broad definition that included any offense in which the perpetrator or victim was alleged to be gang-involved. This reporting scheme tended to "overstate gang crime in Los Angeles" compared to other large cities. The report further recognized that determining who was a gang member could be difficult, as there was no widely agreed-upon definition of gang membership. The report candidly stated: "In truth, law enforcement agencies tend to operate on an 'I know 'em when I see 'em' basis" (*Id.* at pp. 93-95.)

¹³ The inaccurate image of gangs that emerged during the 1980s has "manifestly misled major public policy initiatives." (Klein & Maxson, *Gang Structures in the Modern Gang Reader* (Maxson et al., eds., 2014) p. 138.

programs were essential in combating gang violence.¹⁴ It also recognized that gang scholars believed heavy-handed gang suppression tactics could be counterproductive.¹⁵ Yet the DA's Office endorsed exactly such tactics, including the expanded use of the STEP Act.¹⁶

The STEP Act Amended and Extended.

Homicide rates in the United States increased sharply from the late 1980s to the early 1990s. The number of killings committed by juveniles and by gang-involved individuals particularly spiked during this period. Some academics interpreted this data as indicative of a fundamental cultural and social shift that had created a generation of remorseless and amoral delinquents, dubbed "superpredators."¹⁷ In 1994, gang-related homicides in California hit an all-time high.¹⁸ In 1995, it was predicted that the number of juvenile offenders would triple in a short period.¹⁹

Driven by fear of increased crime, the STEP Act was repeatedly amended to expand its scope and severity. Most notably, California voters passed Proposition 21 in 2000 in order to preempt the expected tsunami of juvenile and gang crime. The ballot pamphlet for Prop. 21 warned: "Dramatic changes are needed in the way we treat juvenile criminals [and] criminal street gangs . . . if we are to avoid the predicted, unprecedented surge in juvenile and gang violence."²⁰

As a result of these amendments, the section 186.22 (b)(1) enhancement now adds two, three, or five years to a felony conviction. It

¹⁴ *Gang, Crime and Violence, supra*, p. viii. The report stated: "Improving the public schools is by far the most significant long-term anti-gang strategy that Los Angeles can pursue." (*Ibid.*)

¹⁵ *Id.* at pp. 145-146, 153 and fn. 306.

¹⁶ *Id.* at p. 163.

¹⁷ Amici Curiae brief filed by Fagan, et al, in *Miller v. Alabama* (2012) 567 U.S. 460, pp. 9-12.

¹⁸ See Cal. Dept. of Justice, *Homicide in California, 2000*, p. 70.

¹⁹ *Miller* Amici Curiae brief, *supra*, p. 14.

²⁰ *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 905-906, quoting Ballot Pamp, Primary Elec. (Mar. 7, 2000) text of Prop. 21, §2, subd. (k), p. 119.

adds five years for a “serious” felony and ten years for a “violent” felony. Section 186.22(d) mandates that a misdemeanor committed to benefit a gang be punished as a felony,²¹ which then may be enhanced by a prior strike conviction.²² And 186.22(b)(4) requires indeterminate life sentences for certain gang-related crimes.²³

The amendments also made it much easier to establish the existence of a “criminal street gang” pursuant to section 186.22. Under the STEP Act, a group cannot be designated as a criminal street gang unless one of its “primary activities” is a crime listed in the statute.²⁴ The prosecution must also establish a “pattern of criminal gang activity” by proving two “predicate offenses” or crimes from the same list.²⁵ Originally, this list of crimes included only seven offenses, most of them violent. Now, it includes 33 offenses, many of which are nonviolent and relatively minor, such as grand theft, felony vandalism and unlawful taking of a vehicle (or “joyriding”).²⁶ So, for example, a group that does nothing more serious than “tagging” can now be designated a criminal street gang.²⁷ Moreover, there are close to no limits on how predicate offenses can be established. They need not be gang-related.²⁸ The prosecution may rely exclusively on the charged offenses.²⁹

²¹ *Robert L. v. Superior Court, supra*, 30 Cal.4th 894. Note that § 186.22, subd. (d) is an alternate penalty provision rather than a sentence enhancement. (*Ibid.*)

²² *People v. Rocco* (2012) 209 Cal.App.4th 1571.

²³ See, e.g., *People v. Jones, supra*, 47 Cal.4th 566 (§ 246 shooting at inhabited dwelling, which ordinarily carries 7-year sentence, elevated to life sentence). Again, this provision is an alternate penalty provision rather than an enhancement. There are other gang-related enhancements in other Penal Code provisions, including a gang-related gun enhancement (§ 12022.53, subd. (e)(1)) and a gang-murder special circumstance (§ 190.2, subd. (a)(22)).

²⁴ § 186.22, sub. (f).

²⁵ § 186.22, subd. (e).

²⁶ § 186.22, subd. (e)(1)-(33).

²⁷ See, e.g., *People v. Superior Court (Johnson)* (2004) 120 Cal.App.4th 950.

²⁸ *People v. Gardeley* (1996) 14 Cal.4th 605, 620-625.

²⁹ *People v. Loeun* (1997) 17 Cal.4th 1, 11.

Even one crime will suffice in proving a “pattern” of criminal activity if it was committed by more than one gang member.³⁰

The Decline of Gang Crime and the No-Show of Superpredators.

The perception of a crisis was understandable at the time the STEP Act was enacted and later expanded. However, the epidemic of gang violence the Legislature sought to combat has subsided, while the expected onslaught of juvenile offenders failed to materialize.

Nationally, gang crimes have been declining.³¹ California is no exception: gang-related homicides have decreased 70% since 1994.³² The number of gang members has also decreased.³³ In California, the number of persons included in the statewide gang database has plummeted over 61% since 2012.³⁴

The superpredator prediction was empirically flawed. In fact, the rate of violent youth crime, including homicides, has dropped dramatically.³⁵

Despite this drop in crime, use of STEP enhancements appears to be robust. California reduced its prison population from about 163,000 in 2011

³⁰ *Id.* at p. 10.

³¹ Egley & Howell, Highlights of the 2011 National Youth Gang Survey (OJJDP, Sept. 2013) pp. 1-2; Hayat, *Preserving Due Process: Applying Monell Bifurcation to State Gang Cases* (2019) 88 U. Cincinnati L. Rev. 129, 136. (Hereafter *Preserving Due Process*.)

³² The California Department of Justice reported 880 gang-related homicides in 1994 and 256 in 2019. (See fn. 18, *supra*; Cal. Dept. of Justice, *Homicide in California, 2019*, p. 32.)

³³ *Preserving Due Process, supra*, p. 136.

³⁴ There were 201,094 individuals in the CalGang database in 2012. (Youth Justice Coalition, *Tracked and Trapped: Youth of Color, Gang Databases, and Gang Injunctions* (Dec. 2012) p. 8.) In 2019, 78,096 people were in CalGang. (Cal. Dept. of Justice, *Attorney General’s Annual Report on CalGang for 2019*, p. 3.)

³⁵ *Miller Amici Curiae* brief, *supra*, pp. 19-26.

to about 125,000 in 2019. Yet during these years the number of prison inmates serving a gang enhancement increased by almost 40%.³⁶

While it might be tempting to attribute the drop in violent gang-related crimes to vigorous enforcement of the STEP Act, no empirical study supports that proposition. More likely it is due to the cyclical nature of crime and the current overall decrease in offending.³⁷ Successful street gang violence interruption and prevention efforts likely also play a role.³⁸ Moreover, no empirical research suggests gang members cannot be prosecuted successfully without the STEP Act.³⁹ In fact, years before the STEP Act was enacted, gang evidence was admitted if it was relevant to the charged crimes.⁴⁰

Unfair Trials in the Face of Severe Sentences and Prejudicial Evidence.

Gang allegations affect every aspect of a criminal proceeding.⁴¹ Defense attorneys report that gang enhancement allegations make bail more difficult to secure, even in misdemeanor cases.⁴² Gang allegations create

³⁶ Clayton, *92% black or Latino: the California laws that keep minorities in prison*, The Guardian (Nov. 26, 2019). (Hereafter *92% black or Latino*.)

³⁷ For example, gang violence peaked in 1980, and then fell sharply over next four years. Some scholars believed this decrease was not causally linked to law enforcement gang suppression efforts but rather reflected a cycle of violence that had run its course. Although the Los Angeles DA's Office disagreed, the decline obviously was not due to the STEP Act, which was not enacted until 1988. (See *Gangs, Crime and Violence*, *supra*, pp. 173-174.)

³⁸ See, e.g., Urban Peace Institute's discussion of successful efforts in Los Angeles's GRYD program, at <https://www.urbanpeaceinstitute.org/our-results>.

³⁹ *Preserving Due Process*, *supra*, at p. 140. Note also the Los Angeles DA's Office "Hardcore" prosecution unit claimed to have substantially improved conviction rates in gang homicide cases years before STEP was enacted. (*Gangs, Crimes and Violence*, *supra*, p. 168 and fn. 318.)

⁴⁰ See, e.g., *People v. McDaniels* (1980) 107 Cal.App.3d 898, 905-906.

⁴¹ B. Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention* (2011) 23 St. Thomas L. Rev. 620, 623. (Hereafter *Fear Itself*.)

⁴² *Id.* at pp. 632-633.

great pressure on defendants to accept deals rather than risk trials where prejudicial evidence may tilt the jury toward conviction and sentences are lengthened substantially by gang enhancements.⁴³ Perhaps counterintuitively, the pressure for a defendant to plead is greatest when the charge is relatively minor or the state's evidence is weak.⁴⁴

Gang evidence may affect a jury's determination of guilt or innocence. California courts have long recognized how prejudicial gang evidence is.⁴⁵ Stereotypes of "menacing minority gang members" are "deeply embedded in the public mind."⁴⁶ These stereotypes are triggered when jurors hear evidence of crimes and police contacts by the defendant and/or other alleged gang members offered to prove predicate offenses.

Prejudice from gang evidence matters: in a study with mock jurors, defendants were found guilty substantially more often when gang evidence was presented even though the evidence concerning culpability for the charged crimes was held constant. In a second study, designed specifically to present a reasonable doubt as to guilt, mock jurors who heard gang evidence were more willing to convict than those who did not. Together these studies suggest evidence of gang involvement increases the likelihood of erroneous guilty verdicts.⁴⁷

⁴³ *Id.*, pp. 631-635; *California's Criminal Gang Enhancements*, *supra*, at pp. 136-140; Wright, *The Constitutional Failure of Gang Databases* (2005) 2 Stan. J. Civ. Rts. & Civ. Liberties 115, 117, 136.

⁴⁴ *Fear Itself*, *supra*, at p. 635.

⁴⁵ See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905.

⁴⁶ Hagedorn & MacLean, *Breaking the Frame: Responding to Gang Stereotyping in Capital Cases* (2012) 42 U. Memphis L. Rev. 1027, 1047. (Hereafter *Breaking the Frame*.)

⁴⁷ Eisen, et al., *Examining the Prejudicial Effects of Gang Evidence* (2013) 13 J. Forensic Psychol. Pract. 1; Eisen, et al., *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?* (2014) 62 UCLA L. Rev. Disc. 2.

Problems Arising from Law Enforcement Officers Testifying as Gang Experts.

The STEP Act has resulted in the ubiquitous use of law enforcement officers as gang expert witnesses. Although officers are agents of the prosecution, their testimony can supply sufficient evidence of the elements the state must prove under STEP. An officer may opine on whether a “criminal street gang” exists and on whether a defendant or others were active participants or members.^{48,49} In response to a hypothetical matching the prosecutor’s version of the facts, an officer may testify that the crime was gang related and committed with the requisite intent.⁵⁰

Legal scholars have criticized the outsized impact law enforcement officers have as experts in gang cases, which allows them to become “the ultimate source of knowledge for judges and juries.”⁵¹ The Honorable Jack Nevin, a trial judge in Washington state, explains that gang officer testimony “can be used to unfairly disadvantage the defendant and even to threaten the constitutional right to a fair trial. [Fn.] This is harmful to both a defendant and to the criminal justice system.”⁵²

The extensive use of officers as gang experts is problematic in part because their training can lead to misidentification of individuals as gang members. Officers learn about gangs and gang members from fellow officers, not sociologists and other academic experts who have a broader

⁴⁸ See *People v. Gardeley*, *supra*, 14 Cal.4th at p. 620 (existence of group of three or more who identify with common name, symbol or sign); *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324 (group’s primary activities); *People v. Albillar* (2010) 51 Cal.4th 47, 53 (pattern of criminal gang activity). An officer can even opine that a group *is* a criminal street gang under § 186.22, subdivision (e). (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1112.)

⁴⁹ See, e.g., *People v. Castenada* (2000) 23 Cal.4th 743, 745-746.

⁵⁰ *People v. Vang* (2011) 52 Cal.4th 1038, 1041.

⁵¹ Rios & Navarro, *Insider Gang Knowledge: The Case for Non-Police Gang Experts in the Courtroom* (2010) 8 Crit. Crim. 21, 35.

⁵² Nevin, *Conviction, Confrontation and Crawford: Gang Expert Testimony as Testimonial Hearsay* (2011) 34 Seattle U. L. Rev. 857, 873-874; see also Klein, *Gang Cop: The Words and Ways of Officer Paco Domingo* (2004) pp. 168, 173.

understanding of gangs. They often rely on criteria that might have once signaled gang involvement – such as wearing certain types of clothing or having particular tattoos – but are now widespread in certain communities or so vague as to be meaningless.⁵³

Extreme Racial Disparities.

Liberal use of the STEP Act has had a tremendous impact on non-White defendants.⁵⁴ In August 2019, there were 11,454 individuals in California prisons with a gang enhancement; 10,535, or 92% of them, were Latino or Black.⁵⁵

Survey data indicates that gang-involved youth are representative of their communities' demographics: “[G]ang members were white in primarily white communities and gang members were African-American in predominantly African-American communities.”⁵⁶ And, youth who admitted

⁵³ For example, the Los Angeles Police Department website currently states that “wearing baggy or ‘sagging’ pants or having baseball caps turned at an angle” is “easily identified” as styles preferred by Black gang members. The website states the “uniform of Hispanic gangs,” which includes white T-shirts, baggy pants and a beanie or bandana, “is standard and easily recognized”. Female gang members are identified by their “heavy eye makeup and dark lipstick” Such criteria are both overinclusive and tinged with racism.

(https://www.lapdonline.org/la_gangs/content_basic_view/23468.)

⁵⁴ Several authors have highlighted the disproportionate impact STEP has had on minority and disadvantaged youth. (See, e.g., Van HofWegen, *Unjust and Ineffective: A Critical Look at California's STEP Act* (2009) 18 So. Cal. Interdisc. L. J. 679, 682-683; Taylor, *California's Proposition 21: A Case of Juvenile Injustice* (2002) 75 So. Cal. L. R. 1011, 1013-1015; see also Ludeke, *Malibu Locals Only: “Boys Will Be Boys,” or Dangerous Street Gang? Why the Criminal Justice System’s Failure to Properly Identity Suburban Gangs Hurts Efforts to Fight Gangs* (2007) 43 Cal. W. L. Rev. 309, 311-317.)

⁵⁵ 92% black or Latino, *supra*.

⁵⁶ Esbensen et al., *Street Gangs, Migration and Ethnicity* (2008) pp. 118-119.

to gang involvement also self-reported statistically similar rates of committing crimes.⁵⁷

Police fail to recognize Whites as gang involved, however, because they have been trained to believe that gang members are young men of color.⁵⁸ Police therefore concentrate their gang enforcement efforts in communities of color. Minority youth, subject to the over-policing of their neighborhoods, may be unfairly characterized as gang involved based on their style of dress, associations with friends and family and presence in particular areas.⁵⁹ Alternatively, young males in these communities who are gang members may have joined for benign reasons. In fact, joining a neighborhood clique is a “normal deviance” for many youth.⁶⁰

The disparate application of gang enhancements to minorities, who are especially scrutinized and labeled as gang members, is clearly unjust. However, even if it is assumed for the sake of argument that gang members *are* mostly Brown and Black, and that law enforcement *accurately* identifies who participates in gangs, designating a kind of offense committed primarily by people of color for harsher treatment is morally and constitutionally repugnant.⁶¹ This principle was recognized when the enormous sentence disparities between crimes involving crack cocaine versus powder cocaine were ameliorated. There was no constitutionally defensible reason for proscribing stiffer punishment for possessing or selling crack cocaine, which was used more often by Blacks, than for possessing or selling powder cocaine,

⁵⁷ Greene & Pranis, *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies* (Justice Policy Inst. 2007) p. 38. (Hereafter *Gang Wars*.)

⁵⁸ *Id.*, at p. 43, quoting Esbensen, who explains: “You find what you’re looking for. The training manuals for police departments, law enforcement experts that lecture to community groups and go to the police officer trainings – they all perpetuate the myth that gang members are racial and ethnic minorities. Cops are trained to look and that’s what they find.”

⁵⁹ *Gang Wars, supra*, at p. 43.

⁶⁰ *Breaking the Frame, supra*, at p. 1059.

⁶¹ Indeed some legal scholars have branded gang enhancements as inherently racist. (See *Preserving Due Process, supra*, at p. 138.)

which was used more often by Whites.⁶² Singling out gang-related crimes for special prosecution-friendly trial procedures and enhanced punishment – while knowing that Latino and Black defendants will be disparately impacted – is equally unjust.

Sincerely,

/s/ Lisa M. Romo

Lisa M. Romo
Director of Systemic Issues Litigation

⁶² See, e.g., Karakatsanis, *The Punishment Bureaucracy: How to Think About “Criminal Justice Reform”* (Mar. 2019) Yale Law J. Forum 848, 862-863.

Exhibit E

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Memorandum Regarding Gang Sentence Enhancements

- A. Sociology of Criminal Street Gangs
 - 1. Definition of Criminal Street Gangs
 - 2. Gang Structure
- B. Sociologists' and Interventionists' Understanding of Gangs Compared to Law Enforcement's Understanding of Gangs
 - 1. Differences in Understanding of Gang Structure
 - 2. Differences in Identification of Gang Members
- C. Gang Law
 - 1. Constitutional Protections
 - 2. Elements of Gang Enhancements and Law Enforcement Gang Expert Testimony
- D. Recommendations

The purpose of this memorandum is to help inform the members of the Committee on Revision of the Penal Code by providing a written supplement to my upcoming September 17, 2020 virtual presentation and panel discussion. Because this memorandum focuses on gang enhancements, it does not address several other issues in dire need of this committee's attention – gang injunctions, gang databases and registries, and gang participation as a substantive crime.

A. Sociology of Criminal Street Gangs¹

1. Definition of Criminal Street Gangs

Scholars have struggled with and disagreed over the definitions of gangs for decades. This is not merely a semantic debate since the definition of gangs will often determine the findings of any studies of gangs, just as the legal definition of a gang will often determine whether an action constitutes a gang crime or not. The inability to define gangs in any precise way has led many researchers to abandon the effort entirely.²

Since there is no adequate definition of a gang, I find it most helpful to think of gangs in terms of individuals' self-identification as gang members, and separately, their varying degrees of participation in criminal activity. According to this approach, gang membership and activity can be diagrammed as follows:

		Self-identification as gang member high ←→ low	
Participation in criminal activity low ←→ high	high	<u>Hardcore gang member</u> Participates in frequent, serious crime / self-identifies as gang member	<u>Independent criminal</u> Participates in frequent, serious crime / does not self-identify as gang member
	low	<u>Peripheral gang member</u> Participates in only minor crimes / self-identifies as gang member	<u>Uninvolved</u> Participates in only minor crime or no crime / does not self-identify as gang member

Figure 1: Diagram of categories of people as relates to gang involvement.

¹ The best compendium of research into the sociology and criminology of gangs is The Handbook of Gangs. (Scott Decker and David Pyrooz, eds., The Handbook of Gangs (2015).) The Handbook of Gangs is a collection of essays, each summarizing the research on a different aspect of gangs, each written by the academic scholar who is best known for their work on that aspect. I highly recommend that book for further research.

² For example, the U.S. Department of Justice's National Gang Center, in its longitudinal national survey of law enforcement data on youth gangs, decided to operate without any definition at all, instead simply asking agencies for information about any "group of youths or young adults in your jurisdiction that you or other responsible persons in your agency or community are willing to identify as a "gang" ... exclude[ing] motorcycle gangs, hate or ideology groups, prison gangs, and exclusively adult gangs" (<https://www.nationalgangcenter.gov/Survey-Analysis>)

2. Gang Structure

Looking at the neighborhood context for gang self-identification and criminal activity reveals overlapping categories of neighborhood residents. Much of the controversy over gang suppression stems from disagreements over which of these categories should be targeted and mistakes over which of these categories the people targeted for gang suppression actually belong.

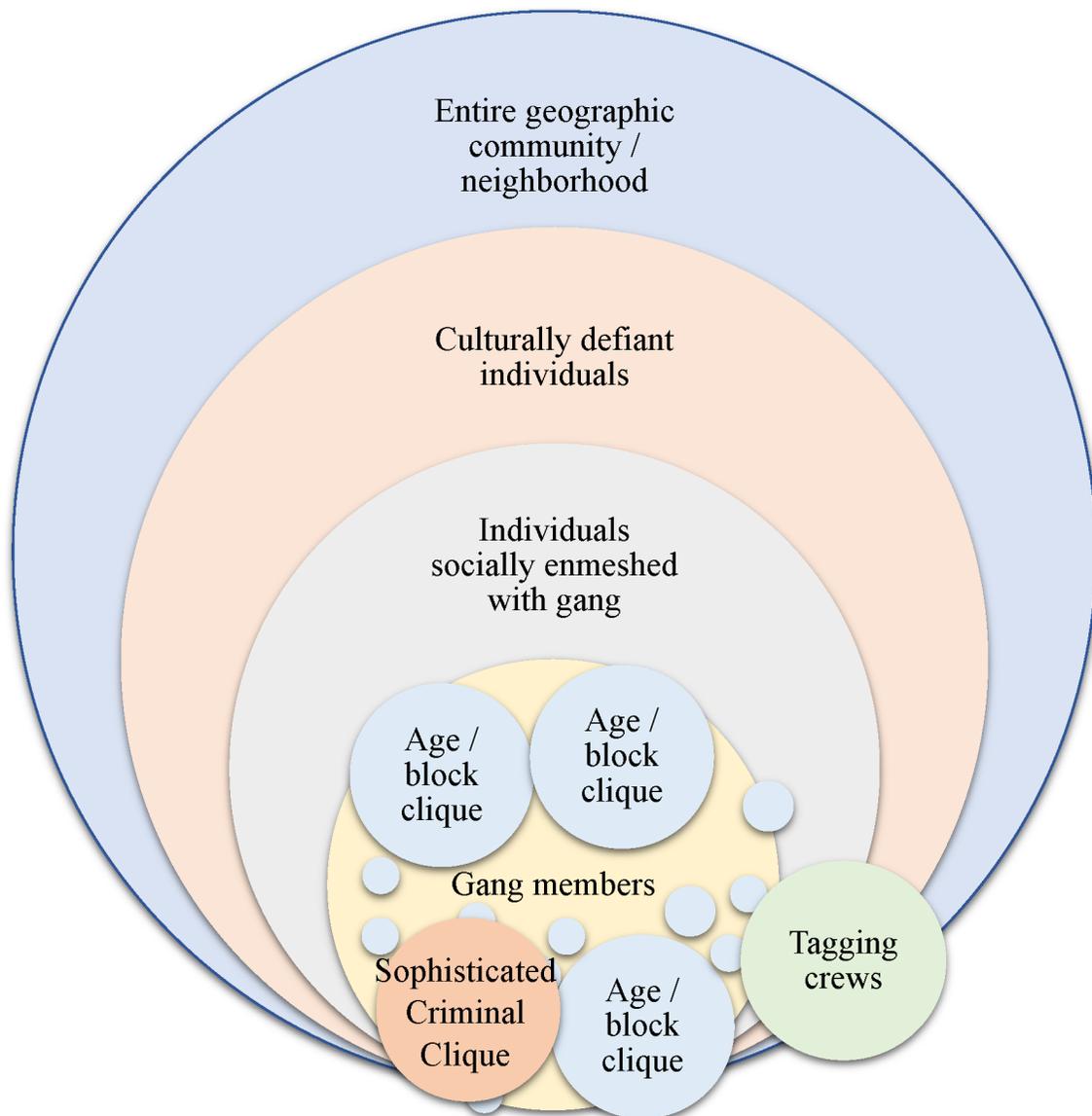


Figure 2: Diagram of typical gang structure within context of a neighborhood

In this diagram, the outer circle is the entire neighborhood community. The next circle within the neighborhood-at-large includes socially defiant individuals, those people who are not necessarily involved with criminal activity but who view the police with distrust and identify with socially defiant culture. These individuals are frequently described by law enforcement officers as “gang types” and targeted for gang suppression even when not members or participants in a gang. The next circle is socially defiant individuals who are also socially enmeshed with a gang. Law enforcement officers often call people in this circle “gang associates.” This would include people who are connected to active gang members by family or who actively socialize with gang members, but have not been initiated into the gang. It also includes people who were active gang members but have matured out of their involvement in their gang.

The next circle is made of people who self-identify as current, active gang members, the group generally meant to be targeted for gang suppression. But even within this category, there are important differences that determine which suppression strategies will be effective and which are likely to perversely promote gang identification and criminal activity. While all gangs differ, there are typical structures within this category. The first is that gang members will usually form “cliques” within a gang based on either age or very small geographic areas, such as a single street or apartment complex. Cliques are typically around a dozen people and often have an initiation ritual, though they typically do not have an exit ritual. Cliques usually have their own name, in addition to the name of the gang/neighborhood. The vast majority of these gang members are adolescent gang members,³ most of which are not involved in serious crime, and who self-identify as active gang members for only one to three years.⁴ Members of a clique usually socialize with each other daily. Members of different cliques are usually aware of each other, but their relationships are usually informal.

In addition to the typical age or block-based clique, there are often adult gang members who are involved in serious crime and who typically have connections to prison gangs and older members from other neighborhood gangs. Sometimes, these individuals will form their own sophisticated criminal cliques and will recruit members from cliques of younger gang members who have both the will and competence to engage in serious

³ For the purposes of this memorandum, I consider anyone between the ages of 14 and of 25 years old to be an adolescent.

⁴ Todd C. Hiestand, *Gang Membership, Duration, and Desistance: Empirical Literature Review* (2019) California Department of Justice, at p. 20-21 [available at <https://oag.ca.gov/sites/all/files/agweb/pdfs/Ab90-Literature-Review-FINAL.pdf>].

and sophisticated crime.⁵ These older gang members are typically idolized and feared by the younger gang members who look up to them. Older gang members will sometimes organize meetings of the different cliques in the neighborhood to pass on information from umbrella gangs, address crises that face the entire neighborhood/gang, or enforce discipling on gang members who have violated the gang's normative rules. Though their influence over younger gang members is generally informal, it can be extremely coercive and powerful, and the entire character of a gang's criminal activity can depend on which of these individuals is incarcerated at any given time. If a gang is involved in criminal activity like coordinated drug sales, collecting "taxes" from neighborhood street vendors, or sex trafficking, it is nearly always these older individuals coordinating the activity. Though these older gang members are often responsible for coordinating serious crime, they will also frequently discourage impulsive violence by younger gang members as being "bad for business," and their presence can reduce neighborhood versus neighborhood violence.

B. Sociologists' and Interventionists' Understanding of Gangs Compared to Law Enforcement's Understanding of Gangs

The understanding of gangs described above is in marked contrast to the descriptions of gangs presented in law enforcement gang experts' testimony to courts. This difference is important for the work of this Committee because the Penal Code's attempts to address gangs relies heavily on law enforcement's understanding of gangs. Also, teaching gang unit officers how to provide testimony that satisfies the legal elements in the Penal Code is one of the main drivers of the curriculum taught to law enforcement gang officers. In other words, the Penal Code is shaped by officers' understanding of gangs and officers' understanding of gangs is shaped by the Penal Code. This circular feedback loop has determined gang law to a much greater degree than either empirical research or the experiences of those working in the field of gang intervention / street outreach. This has been to the detriment of public safety.

1. Differences in Understanding of Gang Structure

In live testimony and affidavits, law enforcement gang experts describe gangs as paramilitary organizations where "shot callers" control the activities of direct underlings and are themselves directed by formal organizations such as the Crips or Mara Salvatrucha that are described as national or even transnational. The number of people

⁵ It is often noted by gang intervention and street outreach workers that gangs disproportionately include individuals who are learning disabled, developmentally disabled, or whose mental capacity has been inhibited by frequent and sustained drug use. Most gang members are simply not competent to successfully operate a sophisticated criminal operation like a drug sales conspiracy of any significant size.

law enforcement officers describe as active gang members can be as many as 10 times the number that academic researchers or interventionist/outreach workers describe. Law enforcement gang experts will often describe all gang members as being involved in all serious, sophisticated criminal activity conducted by any members of the gang. In the case of Latino and Chicano gangs, law enforcement gang experts will describe all levels of gang members as being directly controlled by the umbrella Sureño or Norteño gangs. The result of all of this is to overstate the organization of street gangs, effectively erase the important distinctions between cliques within a gang, and to erase important distinctions between individual gang members despite individuals' often radically different criminal behaviors.

2. *Differences in Identification of Gang Members*

Identifying who is and is not a currently active gang member is a difficult, if not impossible, task for outsiders. Empirical researchers tend to only trust recent gang convictions or self-identification as reliable methods for identifying gang members. In contrast, law enforcement officers typically document people as gang members based only little more than hunches formed during brief encounters in public, often when there is no suspicion of any criminal wrongdoing.⁶ The result of law enforcement officers' unreliable gang identification practices is that individuals who are not gang members are often swept into gang investigations and treated by the criminal justice system as gang

⁶ Officers essentially guess at gang membership based on their own experience and biases, and then rationalize that guess *post hoc* using a checklist of vague criteria like “in a gang area,” and “wearing gang dress.” (Sean Garcia-Leys, Meigan Thompson, and Christyn Richardson, *Mislabeled: Allegations of Gang Membership and Their Immigration Consequences* (2016) University of California at Irvine Immigrant Rights Clinic, pp. 5-8 [available at <https://www.law.uci.edu/academics/real-life-learning/clinics/ucilaw-irc-MislabeledReport.pdf>].) At the height of this practice in 1992, over 50% of all young, Black men in the Los Angeles County were documented as gang members. (Reiner, *Gangs, Crime and Violence in Los Angeles: Findings and Proposals from the District Attorney's Office* (1992) Office of the Los Angeles County District Attorney, p. 121.) Legislative and law enforcement agency reforms attempting to reduce the number of people wrongly documented as gang members have had a great deal of success, but the same procedures that led to the overinclusion of people in 1992 are still used by most departments today. (Sean Garcia-Leys and Nicole Brown, *Analysis of the Attorney General's Annual Report on CalGang for 2018* (2019) Urban Peace Institute.) Notably, the Los Angeles Police Department is currently revising their approach to documenting gang members after a recent audit described LAPD's gang documentation practices as “haphazard at best,” (Interdepartmental Correspondence from LAPD Director of Constitutional Policing and Policy Lizabeth Rhodes to LAPD Chief of Police Michel Moore, July 9, 2020, at p. 6 [available at http://www.lapdpolicecom.lacity.org/071420/BPC_20-0078.pdf]), and after a number of officers were found falsifying documents to add innocent people to a gang database, allegedly to meet informal quotas for documenting gang members, (Eric Leonard, *LAPD Metro Officer Claims Quotas Drove False Gang Reports*, NBC Los Angeles (Aug. 28, 2020)).

members.⁷ Put in terms of Figure 2 above, a law enforcement officer might document a person from any circle as a gang member, regardless of actual gang involvement, so long as the person is a “gang type” according to officers’ experience and biases.

C. Gang Law

1. *Constitutional Protections*

The First Amendment protects a person’s right to join an organization as a form of protected association. Accordingly, the U.S. Supreme Court has expressly held that gang membership is constitutionally protected under the First Amendment.⁸ However, under *Scales v. United States*⁹ and its progeny, there is an exception to the First Amendment’s protection of association when a person participates in a criminal organization with knowledge of the organization’s criminal purpose and that participation furthers the organization’s criminal purpose.¹⁰ This exception has led law enforcement gang experts to routinely offer boilerplate testimony that satisfies the elements of the *Scales* exception but is at odds with the reality of gangs.

2. *Elements of Gang Enhancements and Law Enforcement Gang Expert Testimony*

Law enforcement officers who testify as gang experts give strikingly similar testimony across the state. This testimony will typically go as follows.

- a. Gangs operate through intimidation. If a gang successfully intimidates their neighbors, they are allowed to conduct criminal activity with impunity.
- b. Any crime attributed to a gang member will further intimidate the neighborhood, thus will further enable the gang to conduct criminal activity with impunity.
- c. Gangs also operate through earning the respect of other gangs and gang members to rise through a gang’s hierarchy by committing crimes

⁷ California State Auditor (2016) *The CalGang Criminal Intelligence System: As the Result of Its Weak Oversight Structure, It Contains Questionable Information that May Violate Individuals’ Privacy Rights* [available at <https://www.auditor.ca.gov/pdfs/reports/2015-130.pdf>].

⁸ *Dawson v. Delaware* (1992) 503 U.S. 159, 161.

⁹ *Scales v. United States* (1961) 367 U.S. 203.

¹⁰ This exception is written into the S.T.E.P. Act section that provide for gang enhancements. For example Penal Code section 186.22(b)(1) includes the language that, “... 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 ... be punished”

- d. Any crime committed by a gang member raises the stature of the gang member and his or her gang in the eyes of higher-ups and rivals, thus increasing their capacity to commit more serious crimes.

While there is quite a bit of truth to this, it generalizes in a way that blurs important factual issues and effectively substitutes gang membership for gang participation.

First, this testimony blur whether the prosecution is even dealing with one, single criminal organization. As described in the first section above, gangs are more often an informal network of cliques that just happen to share a geographical neighborhood. This testimony also blurs whether a person had any actual intent of benefitting a gang when committing a crime or whether the gang actually benefitted. While the law enforcement gang expert testimony described above might be true about adult sophisticated criminal cliques, it is usually untrue about adolescent age-group cliques whose purpose is merely to create an empowered social identity for members and to provide opportunities for anti-social behavior like drug abuse. Finally, the de facto substitution of gang membership for gang participation is particularly troubling because law enforcement officers have a terrible track record for accurately assessing whether a person is an actual current, active gang member.

The result of blurring each of these factual details is that people who are not serious criminals and crimes that are not for the benefit of the gang can be charged with gang sentence enhancements and these sentence enhancements will survive challenge during a preliminary hearing. They may then be used as bargaining chips by prosecutors for plea deals. In cases that do go to trial with the threat of gang sentence enhancements, juries will often accept the testimony of law enforcement gang experts even when that testimony is boiler-plate and inaccurate. And upon review, the substantial evidence standard will mean that the gang expert testimony will go unquestioned.

D. Recommendations

1. The S.T.E.P. Act's sentence enhancement provisions should be repealed.
2. The definition of a gang should be narrowed so that only individuals who collectively engage in criminal activity *with each other* can be said to be members of that gang. Furthermore, a level of organization should be required before a gang can satisfy the definition so that just associating with other "gang types" from the same neighborhood does not create a gang, even if those other people engage in felonious conduct.

3. The ways that a crime can benefit a gang should be narrowed so that abstract benefits like reputation do not satisfy the law. Membership in a gang should not be allowed to become a de facto substitute for gang participation that concretely benefits the gang.

4. The requirement of a benefit to a gang should be narrowed so that is not satisfied by a benefit to an ill-defined group of fellow gang members. Before the requirement of a benefit to the gang is satisfied, the beneficiaries should be identified with particularity and their membership should be proved with more evidence than is typically found in current gang prosecutions.

Sincerely,

A handwritten signature in black ink, appearing to read 'SGL', followed by a long horizontal line extending to the right.

Sean Garcia-Leys, Esq.

Exhibit F

Kevin Rooney, Supervising Deputy District
Attorney, Violent Criminal Enterprise Unit,
San Joaquin District Attorney

Committee on the Revision of the Penal Code
September 17, 2020
Gang Enhancement

Chairman Romano and Esteemed Members of the Committee:

My name is Kevin Rooney. I currently serve as the Supervising Deputy District Attorney for the Violent Criminal Enterprise Unit (VCEU) in San Joaquin County. Thank you for the invitation to join the conversation regarding possible revisions to the gang statutes, particularly the gang enhancement under Penal Code section 186.22(b).

Background

I returned to my hometown of Stockton seven years ago after three years in New York City with the Manhattan District Attorney's Office. Since then, I have learned about gangs and gang culture in our county and throughout the state in a number of ways. In addition to reading police reports, speaking with investigators, and reviewing wiretapped conversations, I have also spoken with victims and their families, offenders and their families, and witnesses and their families. I have debriefed self-proclaimed gang members about the crimes they have committed, witnessed, and been the victims of, as well as about the ways in which their gangs and other gangs operate both on the street and in jails and prisons.

Anecdotes of tragic gang violence are not particularly useful in policy-making, but the reality is that gang, group, and gun violence are issues that affect many people in our community on a daily basis. To try to improve life for everyone who lives and works in our county, we work very closely with our partners in law enforcement and in the rest of the community on gang crime prevention and intervention. Collectively, we aim to reach young people who are at risk and formerly incarcerated people returning to the community so that we can minimize their future contact with the system and improve public safety at the same time. Where those prevention and intervention efforts fall short, we work to investigate gang crimes, solve them, and hold the responsible parties accountable.

Charging and Resolving Gang Cases in San Joaquin County

The gang enhancement is far from the most important tool in our toolbox as we seek to make our community safer. As Stockton Police Chief Eric Jones likes to say, "We know we cannot arrest our way out of our gun violence problem." Neither can we prosecute and sentence our way to peace. In our office, we do not charge the gang enhancement whenever and wherever we can meet the requirements of the statute. Attorneys in VCEU understand that our mission is to seek the appropriate outcome in each case. Our goal in each case is determined only after considering everything we know—not just what we can prove that a defendant did on a particular date, but how they got there, where they have been before, and, to the extent we can determine, what risks they pose to themselves and others in the future. We invite input from the

defense in this process, and we pursue resolutions including the gang enhancement only where doing so serves the goals of justice, fairness, and public safety.

However, in addressing the relatively very small number of people in our community who commit and instigate the vast majority of violent incidents, the gang statutes can be critical when used appropriately and with discretion. For example, over the last several years, our office has worked closely with the Stockton Police Department and other partners on narrowly focused investigations into feuding gangs and the shootings and homicides related to their violent rivalries. These investigations and the resulting prosecutions were aided by Penal Code section 186.22 and by the wiretap regulations under Penal Code section 629.50 et. seq. and contributed to significant decreases in homicides and injury shootings. In 2018 and 2019, the Stockton Police Department investigated 33 and 34 homicides, respectively. For comparison, that number was 71 in 2012 and averaged 51 from 2015-2017.

Discretion is key in any conversation about the criminal justice system, but particularly when speaking about the gang enhancement here in California. To give you a general sense of how we use our discretion in VCEU, I did some informal data analysis earlier this summer of all of the outcomes reached since I became supervisor of the unit in February of 2018.

First, some background on the cases we handle:

- VCEU handles only felony cases. **We do not use Penal Code section 186.22(d) to charge misdemeanors as felonies.**
- This means that each case we handle has a maximum sentence of at least three years in prison (or “county jail prison” pursuant to Penal Code section 1170(h)).
- VCEU focuses on felony gun offenses and violent crimes (including home invasions, street robberies, shootings, and homicides) that are either gang- or group-motivated or are committed by multiple members or a gang or similar group.
- When we charge the gang enhancement, the maximum sentence becomes at least 7 years in state prison (with ineligibility for “county jail prison”) and often considerably longer or even indeterminate (life sentences).
- Project Navigate Constructive Change (PNCC) is a diversion program led by our office for younger offenders with minimal prior criminal justice system contacts. (For more info, see <https://www.sjgov.org/da/pncc>.)

With that background, of the over 700 case outcomes reached between February of 2018 and the middle of June of 2020, these were the results:

- 53% were non-prison resolutions (probation, PNCC or other program, dismissal, etc.)
- 47% resulted in prison sentences
 - 68% of prison sentences were between 1 and 5 years
 - Only 16% of all prison sentences were longer than 10 years

Current Legal and Practical Landscape

As the Committee seeks to improve upon the gang statutes, and particularly the enhancement provisions under section 186.22(b), I ask you to keep the following in mind:

- **Recent court decisions:** The California Supreme Court and lower appellate courts have struck down inappropriate uses of the gang statutes in recent years. In cases like *People v. Sanchez* (2016) 63 Cal.4th 665, *People v. Prunty* (2015) 62 Cal.4th 59, and *People v. Rodriguez* (2012) 55 Cal.4th 1125, the California Supreme Court has rejected attempts by law enforcement to stretch the gang statutes beyond their intended use and tightened the limits on the types of evidence used in gang cases.
- **The rise of human trafficking and pimping:** In San Joaquin County, we have seen a shift from drug trafficking to human trafficking and pimping as the primary source of illegal funds for criminal street gangs and gang members. Victims of human trafficking are often subject to serious physical violence and violent threats and rarely cooperate with law enforcement for fear of retaliation, if not by their pimps and traffickers, then by other gang members. The Committee should consider adding Penal Code sections 236.1 and 266h to the list of enumerated crimes under section 186.22(e) to reflect this development.
- **The proliferation of automatic weapons and unregistered firearms:** Though California has strong gun laws, in our county we have seen a huge increase in the number of unserialized or “ghost” guns as well as guns manufactured for and modified into automatic weapons. Automatic weapons are particularly popular among gangs in our community who prefer to shoot from moving vehicles to facilitate flight and minimize the risk of being hit with return fire.
- **Trial courts’ discretion:** The trial courts have discretion under 186.22(g) to strike the additional punishment under 186.22(b). Moreover, the court may strike the enhancement entirely under Penal Code section 1385(a). These avenues for the courts act as checks against prosecutorial overreach in cases where the imposition of the additional punishment would lead to an unreasonably long sentence or where the gang enhancement, while technically satisfied by the facts, does not serve the interests of justice in a particular case or as to a particular defendant.
- **Bifurcation:** Critics of the gang statutes often cite the concern that the introduction of gang evidence unrelated to the underlying crime can and does lead juries to convict in cases where they otherwise would not. Where that risk is apparent, and where the gang evidence is not relevant for another purpose such as motive, identity or intent, the trial court can and should bifurcate the trial of the enhancement from the trial on the underlying charged offense(s).

I hope this helps frame the issues by giving some real world background to the gang enhancement as it exists currently in a county that has long been plagued by gang crime and gang violence. I look forward to our discussion.

Exhibit G

J. Vasquez, Participatory Defense & Policy
Coordinator, Communities United for
Restorative Youth Justice

John Vasquez

“Once a gang member, always a gang member.” A Sacramento County DA adamantly made this statement, when, in 1993, at 16 years old, I was processed through adult court and charged with two counts of gang enhancements and two counts of gun enhancements in conjunction with a homicide and assault with a deadly weapon. In my youth, I was heavily involved in a neighborhood street gang and served 25 years in prison as a direct result of my actions. The Franklin Boys street gang became my surrogate family and gave me a sense of belonging and protection. I grew up in a dysfunctional household with little parental supervision. My younger brother and I were raised by a single mother who struggled with drug addiction since her youth. My father was in and out of my life and died of alcoholism when I was 15. At the time, my mother was strung out on heroin so I looked to the Franklin Boys for support. For the first time in my life I felt like I was somebody important. I fully embraced the gang identity, and it was easy to form bonds with the Franklin Boys because many of them were my childhood friends long before they became gang members.

I consider myself a community expert regarding gangs, including gang enhancements, based on my lived experience as a former gang member as well as a person who has actively worked with people getting out of gangs. I have facilitated *Dismantling Gang Associations* workshops and mentored incarcerated youth as they navigated the challenges of reinventing their gang identity and disassociating from a gang lifestyle.

The labeling of gang enhancements often puts newcomers in the prison system on maximum-security yards with little to no rehabilitative incentives or programs. Two months after my 19th birthday I was transferred from Tracy Reception Center to Mule Creek State Prison (MCSP), Level 4, A-Yard. I was recently married and wanted to turn my life around. MCSP was only about a 45 minute drive from my wife and family members. Plus, the prison had several rehabilitative programs. Unbeknownst to me, due to my gang enhancements, I was required to do a minimum of three years at a Level 4 180 design, which I soon learned is where they send Security Housing Unit (SHU) kick-outs after they've served their time in the hole for violent disciplinary misconduct. Unlike the 270 degree design of MCSP housing units which form a horseshoe shape, the 180 degree design of Salinas Valley State Prison (SVSP) C-Yard, where I was transferred to, divides the housing unit into three walled-off sections and allows the control booth officer/gun tower to easily monitor inmates while in the dayroom. In addition, rather than just having one chow hall and five housing units like a typical 270 yard, a 180 yard has eight housing units and a connecting chow hall between two units, thus four mini chow halls total, which effectively limits inmate movement. A dividing wall splits the yard in two to reduce the number of inmates on the yard at any given time. In fact, high concrete walls surround the entire yard so that all you can basically see is the sky. It really is quite a depressing place, even for prison standards, and you can literally feel the tension whenever you hit the yard because nearly everyone is on edge. Most of the people at SVSP, C-Yard, came from Pelican Bay, Corcoran SHU, or administrative segregation from other prisons where they were schooled in prison politics by seasoned gang members who had spent years in the SHU. C-Yard had just opened up when I arrived in the summer of 1996, and was in the process of getting established by different prison gangs. It was at SVSP where I first saw a man violently stabbed, saw my first prison riot, and was “educated” in prison politics. A few people refused to go along with the prison politics and were subsequently stabbed for their refusal. I wasn't as brave. I gradually became more involved in prison politics. That and the long distance from my loved ones, particularly my wife, created a lot of strain on my marriage, and about a year later we got divorced. At SVSP, I spent several months on lockdown due to the multiple stabbings and other violence on the yard, but I didn't mind because being locked in my cell was the only time I felt somewhat safe. One time while walking through the rotunda on the way to chow I saw a man beat so badly with a hard plastic state issued coffee mug that he was taken away in an ambulance and it took three porters to mop up the blood. I wish that I could forget some of the things I saw behind the wall.

John Vasquez

It's up to the individual to turn their life around, but it's imperative that we put them in an environment that promotes healing and transformation. Otherwise, they will come out worse than when they went in. Effective tools must be provided to people on the inside that promote healing and positive change rather than merely warehousing them on violent prison yards.

I made my own change while in solitary confinement in 2001 for participating in gang activity and a prison riot. It was the first time I was left alone with my thoughts and four walls. I did a lot of soul-searching and I did not like what I had become. I wanted something different but didn't know how to change. It was one of the most difficult decisions I ever made. I was scared, not because of the retaliation I was sure to receive from my former gang associates; I was scared because I didn't know what I was to become. The gang lifestyle was all I knew and I had made the gang identity my own. Besides, once a gang member, always a gang member. I had internalized this false belief. I prayed and asked God to help me change. At that moment I felt a huge weight lift from my shoulders. Back then, there weren't many self-help programs, and there were year-long waiting lists for the ones that existed, so I read self-help books and did correspondence courses. Eventually I had the opportunity to attend self-help groups and take college courses. Seeing the positive changes I had made in my own life and realizing that gang members such as myself can change, I wanted to help others do the same. I facilitated self-help groups, created curriculum from the books I had read, tutored people for the GED test, signed people up for college courses, wrote for the prison newsletter, and mentored incarcerated youth. I was also handpicked by Facility-B, Captain Snell at Avenal State Prison (ASP) and given a newly created job position as Offender Self-Help Coordinator which allowed me to establish and organize new self-help programs for the entire facility. The environment at ASP was a complete contrast from my experience at SVSP. There were many staff who helped me on my journey of transformation. For example, while pursuing higher education, there were several times when I couldn't afford the required textbook. Fortunately, Ms. Blanton, a teacher at the prison, purchased the books I needed, and eventually I earned six associate degrees with honors.

My lived experience has convinced me that gang enhancements serve no useful purpose other than creating longer prison sentences and reinforcing the false narrative that "once a gang member, always a gang member." Gang enhancements are not a deterrent. I've never met anyone who was deterred from committing a crime or participating in gang activity because they feared the repercussions of gang enhancements. Moreover, gang enhancements are disproportionately applied to communities of color, with 9 out of 10 people with a gang enhancement in CDCR being Black or Latinx¹. It is not uncommon for Black and Brown youth to be labeled as gang members simply because of the style of clothes they wear or the people they hang out with, even if those people are childhood friends or family members.

With an average of \$81,000 per year to incarcerate a person in CDCR², gang enhancements are also a waste of taxpayer dollars. These funds can be better spent on resources that actually deter gang membership, such as peer-to-peer mentorship programs (including former gang members), youth empowerment building, healing-centered and culturally-rooted programs, vocational training, organized sports, community infrastructure improvements, direct intervention counselors, and access to quality education and jobs.

If the intent of 1988's STEP Act was to create a tool that gives local DA's considerable leverage regarding plea bargaining or to label people as gang members in order to infuriate the hearts and minds of jurors, or to simply punish people with longer prison sentences, then gang enhancements have served their purpose. A couple of potential jurors from my own trial recused themselves because they admitted that they could not be impartial to a gang member. People can be held accountable through fair sentencing by the crimes they commit and without the

John Vasquez

use of gang enhancements. Even without gang enhancements, I would have still received a life sentence for the murder I committed at 16. For those who commit lesser crimes, I have often seen people serve more time for an enhancement than for the actual crime itself. To me, this seems unjust because gang enhancements are disproportionately meted out to Black and Brown youth.

The creation and implementation of gang enhancements in California is the direct result of fearful reactions and anger toward so-called “superpredators” and record youth violence in the late ’80s and early ’90s. This shortsighted goal sought to address the problem through mass incarceration and inmate warehousing, with no thought of gang prevention or of addressing the root causes of gang membership, particularly by youth. However, three decades of implementing such an overtly racial discriminatory law has created harmful consequences that can no longer be ignored. Ninety-five percent of incarcerated people will eventually return to the free community³. High recidivism rates demonstrate that long prison sentences in part by tacking on punitive gang enhancements are not the answer.

We need to ask ourselves how we can prevent youth gang involvement in the first place. When I was sentenced with gang enhancements and told that I would always be a gang member, my young mind believed that to be true. My gang identity was not my authentic self. It was a mask I wore to hide my childhood trauma and insecurities. Gang enhancements and gang labeling reinforce false identities and false narratives, thus making it harder, psychologically, for individuals to make positive changes. Gang enhancements also reinforces to the public that gang members, specifically Black and Brown youth, are the worst of the worst and thus seen as having no redeeming value.

I think that proponents of gang enhancements and I share one thing in common, we want gang violence to cease and we want safer communities. Gang enhancements have failed in this regard and have overcriminalized a generation of Black and Brown youth. I think it comes down to the way people perceive gang members. If we see them as superpredators with no redeeming value, then it makes a lot of sense to utilize gang enhancements. But if we want smart solutions that effectively address the root causes of gang membership and see gang members as people who can change, then gang enhancements need to be abolished and resources must be allocated to help people make transformative changes.

Gang members will not always be gang members. Some people do not change, but everyone has the capacity to do so. In hindsight, I see that gang enhancements created a situation that prolonged my change process. I am not the man I am today because of that experience; I made changes in my life in spite of that experience and because people saw through the mask and believed in me.

Today, I am the participatory defense & policy coordinator for Communities United for Restorative Youth Justice (CURYJ) and in my senior year at San Francisco State University with a 3.98 GPA. I am majoring in sociology and minoring in criminal justice. I am a Willie L. Brown Jr. Fellowship Alumni and a recent frontline worker serving the homeless population during COVID-19.

1. <https://www.theguardian.com/us-news/2019/nov/26/california-gang-enhancements-laws-black-latino>

2. https://www.google.com/search?q=how+much+does+it+cost+to+incarcerate+someone+for+a+year&rlz=1C5CHEA_enUS915US915&oq=how+much+to+incarcerate&aqs=chrome.5.0i69i57j0l6.19809i0j9&sourceid=chrome&ie=UTF-8

3. https://www.google.com/search?q=percentage+of+people+that+return+to+society+after+incarceration&rlz=1C5CHEA_enUS915US915&oq=percentage+&aqs=chrome.1.69i57j35i39j2j0l5.623l1j0i7&sourceid=chrome&ie=UTF-8

Exhibit H

Jared Lozano, California Department of
Corrections and Rehabilitation, Associate
Director, High Security, Males

Committee on Revision of the Penal Code

California Department of Corrections and Rehabilitation

The classification process is utilized to appropriately place newly received inmates committed to the custody of the Secretary of California Department of Corrections and Rehabilitation (CDCR). The classification process commences as offenders are received from county facilities. CDCR's classification process takes into consideration the inmate's needs, interests and desires, their behavior and placement score in keeping with the Department and institution's/facility's program and security missions and public safety. Once an inmate is received at one of the department's Reception Centers, the inmate undergoes Mental Health, Medical and Dental screening, completion of a Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) assessment, California Static Risk Assessment (CSRA) and a Test of Adult Basic Education (TABE) is completed. The inmate is interviewed to discuss the inmate's needs, wants, and goals while incarcerated.

Upon review and consideration of all of the inmate's case factors, classification staff refer the inmate for transfer to an appropriate institution based on the totality of the inmate's assessment, which is based on a point system that is primarily reflective of an institution's level of security, which is Level I through Level IV.

Institutional security levels are ranked as follows:

- Level I Institution/Facility is for inmates with 1 to 18 points;
- Level II Institution/Facility is for inmates with 19 to 35 points;
- Level III Institution/Facility is for inmates with 36 to 59 points;
- Level IV Institution/Facility is for inmates with 60 or more points.

Listed below are some regulatory factors that are utilized to determine how an inmate will be classified to a specific security level, which is weighted with a scoring system of points:

- **Background factors:**
 - *Age at first arrest. (0 to 17 = 12pts, 18 to 21 = 10pts, 22 to 29 = 8pts, 30 to 35 = 4pts, 36+ = 0 points)*
 - *Age at Reception. (16 to 20 = 8pts, 21 to 26 = 6pts, 27 to 35 = 4pts, 36+ = 0 points.)*
 - *Term points (term in years x 2): Max is 50 points.*
 - *Street gang/disruptive group. For the purpose of preliminary score evaluation, if there is information that the inmate is or has been involved in gang activity, enter 6 points. (The CCI must list the verification code that is most indicative of STG activity i.e. Self-admission, tattoos and symbols, written material, photographs, staff information, other agencies, association, offenses, legal documents and communications)*
 - *Prior Jail or County Juvenile Sentence of 31+ days (1pt).*
 - *Prior incarceration (s):*
 - *CYA Juvenile State/ Federal Level (1pt)*
 - *CDCR, CRC, Adult State/ Federal Level (1pt)*
- **Prior Incarceration Behavior:**
 - *Last 12 months of incarceration [favorable (-4pts) or unfavorable (+4pts)]*
 - *Serious Disciplinary History (Battery or Attempted Battery on a Non-Prisoner (8pts), Battery or Attempted Battery on an Inmate (4pts), Distribution of Drugs (4pts),*

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California Department of Corrections and Rehabilitation

Possession of a Deadly Weapon (4pts), Inciting a Disturbance (4pts), Battery Causing Serious Injury (16pts)]

- **Violent offenses with firearm and gang enhancements:**
 - *The following violent offenses require an automatic VIO (Violent) Administrative Determinant (AD) which results a mandatory minimum placement score of 19 points:*
 - *PC 136.1 with PC 186.22 threatening victim and /or witnesses only with pled and proven gang allegation per PC 186.22 offense or enhancement, PC246 with PC 186.22 gang shooting into vehicle building only with pled and proven gang allegation per PC 186.22 offense enhancement.*
 - *The following violent offenses that require a Case by Case review for a VIO AD:*
 - *Any felony in which there is a conviction for the following enhancement is a violent felony.*
 - *PC 211/ 212.5 (a) with 12022(b) Robbery 1st only of an inhabited dwelling, vessel floating home, trailer coach, etc., and only with PC 12022 (b)*
 - *PC 215 (a) with PC 12022(b) Carjacking with PC 12022(b)*
 - *PC 12022.3(a) Use of Firearm or Deadly Weapon in violation or attempted of PC 261, 262, 264.1, 286, 288, 288a or 289., PC 12022.5 Use of Firearm (all subsections), PC 12022.53 Use or Discharge of Firearm in Specified Felonies (all subsections), PC 12022.55 Discharging Firearm from Motor Vehicle, PC12022.9 Injury Causing Termination of Pregnancy or Discharge of Firearm Causing Paralysis or Paraphrases (all subsections)*
 - *PC 518/519/520 with PC 186.22 Extortion only with pled and proven gang allegation per PC 186.22 offense or enhancement*

Inmates who work hard to rehabilitate themselves may be eligible for consideration for resentencing pursuant to Penal Code, section 1170(d)(1). The departmental follows the Title 15, section 3076.1 when applying this process.

If the incarcerated person is deemed as needing a level IV security institution, this person will be placed in either a Level IV 270 degree or Level IV 180 degree facility. Every incarcerated person with a level IV classification score is appropriate for a 270-design housing unit unless they meet the departmental 180-design criteria, which provides more security and control.

LEVEL IV 270 BUILDING DESIGN:

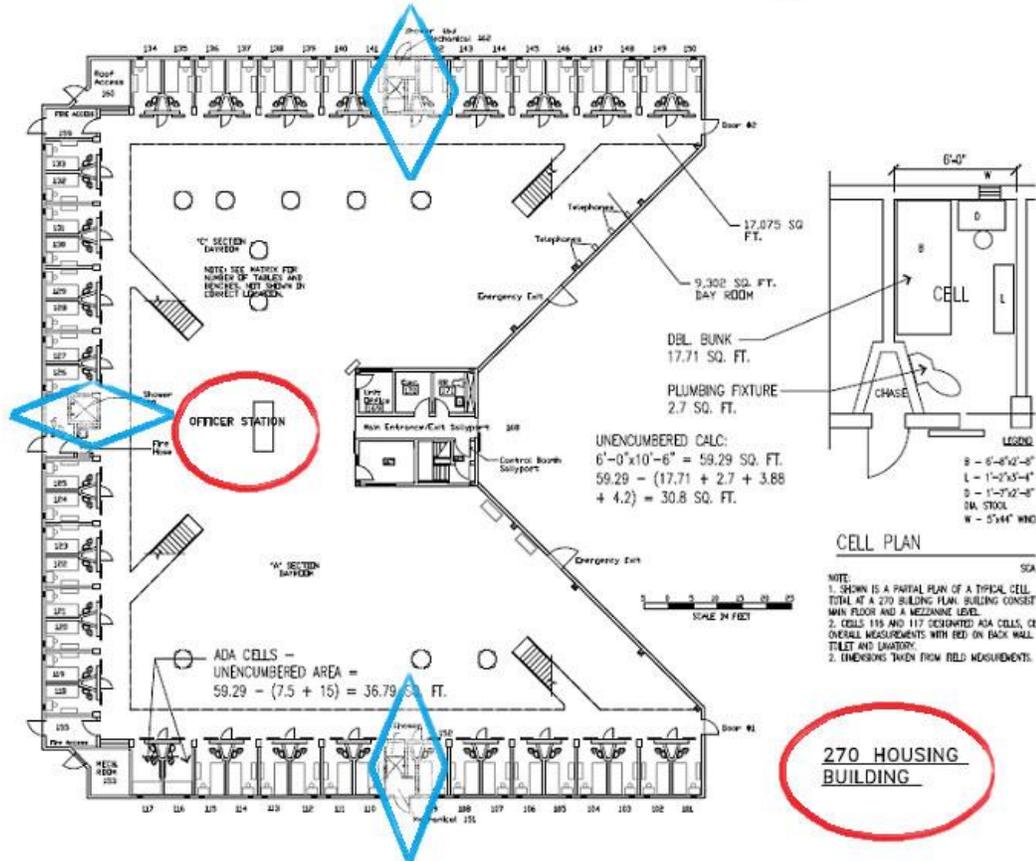
The 270-design housing units have more of a wraparound configuration, and while very secure, leave more opportunity for criminal acts to be committed and/or go undetected.

- The 270 building has the following security design characteristics:
 - Utilizes same floor plan layouts as Level III with modifications to improve security.

Committee on Revision of the Penal Code California Department of Corrections and Rehabilitation

- The Level IV Housing Units contain individual cells providing highly secure features for the increased level of control (e.g. the control booth is usually able to open and close each door, food ports with the cell door, etc.) that is required.
- All Level IV Housing Unit Control Rooms have an entrance/egress Staff Sallyport. The sallyport will be contiguous to the housing unit entrance/egress Inmate Sallyport. The Control Room Sallyport is located in the Control Room stairwell.

Showers



LEVEL IV 180 HOUSING CRITERIA:

- *Level IV facilities; include 180-design and 270-design housing. An inmate with a Level IV placement score may be housed in a Level IV 180-design facility in accordance with the following criteria:*
 - *Inmates who have an assessed and imposed, suspended, and/or commuted determinate Security Housing Unit (SHU) term for a Division A-1, A-2, or B*

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offense, which involves assaultive/violent behavior, weapons, or distribution of a controlled substance, pursuant to section 3323, within the last three incarcerated years, shall be excluded from Level IV 270-design housing for three years from the Minimum Eligible Release Date (MERD) or the date of the Institution Classification Committee (ICC) action suspending and/or commuting the SHU term, whichever comes first. If the inmate was not placed into Administrative Segregation Unit (ASU) for the offense, the inmate is not excluded from 270-design housing.

- *Inmates found guilty of any of the following Rules Violation Reports (RVRs) within the last a twelve months of incarceration shall be excluded from Level IV 270-design housing for one year from the MERD or the date of the ICC action suspending and/or commuting the SHU term for the most current offense, whichever occurs first. If the inmate was not placed into ASU for the offense, the inmate is not excluded from 270-design housing.*
- *One RVR for Inciting a Riot.*
- *One RVR for Participation in a Riot with a direct Security Threat Group (STG) nexus.*
- *Two or more RVR's for Participation in a Riot.*
- *One RVR for Assault on Non-Inmate.*
- *One RVR for Battery on an Inmate with a direct STG nexus.*
- *Two or more RVRs for Battery on an Inmate.*
- *Inmates released from SHU or a Psychiatric Services Unit (PSU) after serving an Administrative SHU Term shall be reviewed by DRB, in accordance with Section 3376.1(d) for appropriate housing.*
- *If during Reception Center processing, and inmate is deemed a security concern and is potentially an ongoing threat to institutional safety and security, warranting more direct and constant supervision, the inmate shall be excluded from Level IV 270-design housing for one year from the date of the Classification Staff Representative endorsement.*
- *Inmates excluded from Level IV 270-design housing but requiring exceptional placement may be housed in a Level IV 270-design facility. Exceptional placements, for purposes of this subsection, are inmates who are in medical or mental health treatment programs, such as a developmental disability, Americans with Disabilities Act mobility impairment that impacts placement, or in need of specific medical programs which may not be available in Level IV 180-design facilities.*
- *The ICC may temporarily exclude an inmate from Level IV 270-design housing pending adjudication of an RVR listed in subsections 3375.1(a)(4)(A) 1 through 2.*
- *(D) The ICC may override placement of an inmate into 180-design or 270-design housing based upon: Department and institution's/facility's program security mission; public safety; and the inmate's needs and behavior.*

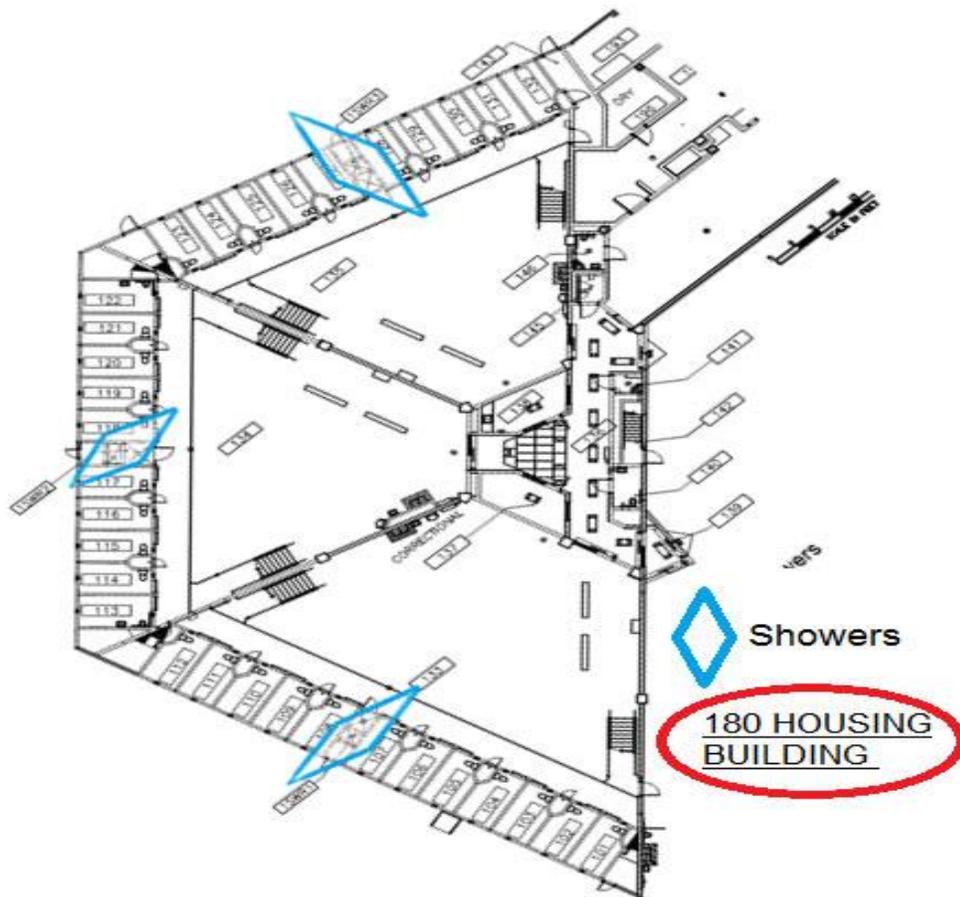
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California Department of Corrections and Rehabilitation

LEVEL IV 180 BUILDING DESIGN:

The 180 degree design housing units restrict movement, reduce blind spots, and provide more security than 270-degree housing units. Its design was to ensure the most restrictive housing remains designated for those offenders who, based on their behavior, require more controlled movement and additional security measures.

- The 180 building has the following security design characteristics:
 - Level IV Housing Unit contains two wings of 64 cells of 80 square feet minimum each, for a total of 128 cells per building.
 - The plan consists of two wings—each comprising three “pods.”
 - The linking central element contains dining facilities and other ancillary areas.
 - A “pod” is a separate unit with its own dayroom and serves to break up the prison population into smaller, more manageable groups.
 - There are two levels of cells, with each level having 32 cells in each wing, separated by full height walls into groups of 10, 10 and 12 cells per floor in each “pod.”
 - Each wing provides access through the main level Sallyport, with a projecting extension of the Control Room above.
 - Each wing has a Control Room that allow surveillance of all three “pods” and a separate control console is provided for each.



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California Department of Corrections and Rehabilitation

CURRENTLY OFFERED PROGRAMS AT TWO LEVEL 270 DESIGN FACILITIES:

Institution 1 Facility D

- Education:
 - ABE I, II and III; GED and High School Diplomas;
 - College Courses (face to face and correspondence); Electrical works; Peer Literacy Mentor Program; Student Support Services (EOP, DDP, DPP and ESSA); Transition Reentry Class; and Career Technical Education Classes
- Division of Rehabilitative Programs:
 - ISUDT Intensive; ISUDT Outpatient; Cognitive Behavioral Interventions; eLearning (The Human Condition, Career Resources and Preparing for success after Prison); Recreation and Physical Education
- Inmate Activity Groups:
 - Alcoholics Anonymous (Spanish/English); Criminal Gang Anonymous; How it works; Lifer Support Group; Narcotics Anonymous; Prison Fellowship Academy; Substance Abuse Recovery Support Groups; Transgender and Alternative Lifestyle Support Groups; Veterans Support Group; Restorative academic mentorship program; Transcending our personal struggles; and Turning point/partnership for re-entry program
 - IAGs (Grant Funded):
 - Ahimsa Collective–Realize; Getting-out-by Going in; Inside out writers
- Patient Education Nursing Groups:
 - Substance Abuse; Mental Health and Wellness; Physical Health and Wellness, Expressive; and Life Skills

Institution 2 Facility B

- Education:
 - Adult Basic Education Classes; General Education Development Classes;
 - Transitions Class; College (AA Degree through Face 2 Face (pre-COVID) and Correspondence); and Recreational Coordinator available for the yard/housing
- Division of Rehabilitative Programs:
 - ISUDT CBI classes Substance Use Disorder Treatment (ISUDT), CBI
- Inmate Activity Groups:
 - Alcoholics Anonymous; Alternative to Violence; Narcotics Anonymous, Criminal Gang members Anonymous; Houses of Healing; Inmate Council Program, Islamic Theology; Kid Cat; Lancaster’s Account Workshop; Paving the Way; Strindberg Laboratory, Transformative Justice; Veterans Embracing the Truth; Visionary Art Program; and Youth Offenders United in Growth
 - IAGs (Grant Funded):
 - No Joke Theatre; Creative Writing; Healing Dialogue and Action; Community Base Art program, Fugitive Kind; Defy ventures; Insight Gardening; Jail Guitars; Mucken: African Drumming; Mucken: Painting and Sculpting; and Mucken: Storytelling

Committee on Revision of the Penal Code

California Department of Corrections and Rehabilitation

CURRENTLY OFFERED PROGRAMS AT TWO LEVEL 180 DESIGN FACILITIES:

Institution 3 Facility C

- Education:
 - Four Classes ABE – High School; Alternative Learning; College courses; Computer resources; Plumbing; Electronics; Building Maintenance; and Literacy Program
- Division of Rehabilitative Programs:
 - Long Term Offender Program LTOP; iSUDT; Criminal Thinking; Anger Management; Family Relationship; Denial Management; Victim impact
- Inmate Activity Groups:
 - Alcoholics Anonymous; Narcotics Anonymous; Alcoholics Anonymous-Grapevines, Kairos Prayer and Share – Thursday; and Kairos Prayer and Share – Saturday
 - IAGs (Grant Funded):
 - Actors' Gang; Arts In Correction, Classical Guitar; Arts In Correction (AIC) Beginning Guitar; Arts In Corrections, Creative Writing Poetry; AIC Room Arts Workshop; Arts In Corrections - AIC Arts Workshop; Gogi-Anger Management; Gogi-Release Preparation; Gogi-With Love Coach; Gogi-Insight; and Lionheart - Houses of Healing

Institution 4 Facility C

- Education:
 - ABE I, ABE II, ABE III; College correspondence; Building Maintenance Vocational program; E-learning- The Human Condition and Preparing for Success After Prison; and Tablet E-learning-Preparing for Success After Prison.
- Division of Rehabilitative Programs:
 - Integrated Substance Use Disorder Treatment (ISUDT) (Cognitive behavioral Program) - Intensive Out Patient, Out Patient, Life Skills
- Inmate Activity Groups:
 - Al-Anon; Alcoholic Anonymous; Criminal Gangs Anonymous; PowerUP GOGI; Actors' Gang; Initiate Justice; Hustle 2.0; Lifers' Group; Narcotics Anonymous; Kid CAT; Victims Impact; Prison Fellowship Academy; Alternative to Violence Project: Basic and Advanced; Lifers Hearing Prep; The STOP Domestic Violence Program; and Timelist Group
 - IAGs (Grant Funded):
 - Center For Council; Center For Council; Song Writing; Beginning & Advanced Guitar; Song Writing; Beginning Writing Class; Creative Writing; Father to Child Literacy Project; Path2Restoration; and Marin Shakespeare Company