

First Supplement to Memorandum 2001-91

Criminal Sentencing Statutes (Comments of California District Attorneys Association)

The Commission has received a letter from Charles E. Nickel, representing the California District Attorneys Association (CDAA), suggesting a number of reforms to the weapon and injury enhancement provisions of criminal sentencing law. The letter is attached. The staff has not had an opportunity to analyze the CDAA suggestions in detail. However, the suggestions are summarized below. All references in this memorandum are to the Penal Code.

Elimination of Redundant Sentencing Provisions Generally

CDAA identifies a number of provisions that state specific rules that are also stated elsewhere as general rules. For example, Section 12022.7(g) provides that an enhancement does not apply unless the fact of great bodily injury is charged in the accusatory pleading and admitted or found to be true by the trier of fact. This specific provision is redundant in light of general language in Section 1170.2(e) (“All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact.”). CDAA proposes that the redundant specific provisions be deleted.

Codification of Court Decisions

CDAA identifies three provisions that have either been interpreted by the California Supreme Court, or which raise issues that are the subject of ongoing litigation. CDAA proposes to amend two of these sections to codify the holding of the Supreme Court (Sections 12022.5(d) and 12022.5(f)), and to amend the third to resolve the question that is generating litigation (Section 12022.53(e)(1)).

Mark Overland, the Commission’s consultant representing the defense bar, questions the need to codify holdings of the Supreme Court. Mr. Overland also believes that the proposed change to Section 12022.53(e)(1) is premature, as there is ongoing litigation on the issue.

Elimination of Redundant Enhancements

CDAAs identifies six instances where the same set of facts would justify imposition of two different enhancement provisions. In one case, a specific enhancement carries the same term as a general enhancement and CDAAs recommends deletion of the specific provision. *Cf.* Sections 12022.5(a) & (c). In each of the other cases, the two applicable enhancements vary significantly in the sentence imposed and CDAAs proposes repeal of the lesser enhancement. For example, if a defendant is alleged to have fired a gun from a car with the intent to cause great bodily injury or death and to have caused great bodily injury or death, the defendant may be subject to an enhancement of five, six, or 10 years under Section 12022.55, or 25 years to life under Section 12022.53. CDAAs would repeal Section 12022.55.

The staff notes that there are minor differences between some of the pairs of applicable enhancements. For example, Section 12022.55 requires that there be an intent to cause great bodily injury or death. Section 12022.53(d) requires only that the defendant intentionally fire the gun. Such distinctions will need to be examined.

“Shall” and “May”

CDAAs notes that 145 of 150 enhancements provide that a person “shall” be punished by an additional term. Five sections provide that a person “may” be punished by an additional term. CDAAs characterizes the use of “may” as “incorrect” and inconsistent with the overwhelming majority of enhancements as well as the “controlling provision for imposing enhancements” in Section 1170.1(d). CDAAs proposes replacing the term “may” with “shall” in each of the five sections identified. Uncodified intent language would provide that these changes “are not intended to alter the existing authority and discretion of the court to strike those enhancements or to strike the additional punishment for those enhancements pursuant to Section 1385 of the Penal Code.”

Language Uniformity

The CDAAs draft of proposed legislation makes some changes to “clarify and conform the language of the enhancement statutes to make these provisions as uniform and consistent as possible.”

Conclusion

Many of the changes proposed by CDAA are nonsubstantive and would help to simplify or clarify existing law. If the Commission decides to pursue CDAA's suggestions for reform, the staff will prepare a detailed analysis for consideration at a subsequent meeting.

Respectfully submitted,

Brian Hebert
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PAUL J. PFINGST
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November 13, 2001

Brian Hebert
California Law Revision Commission
3200 Fifth Avenue
Sacramento, CA 95817

Dear Mr. Hebert:

Enclosed for the Law Revision Commission to consider are two C.D.A.A. proposals relating to enhancements.

The first proposal simplifies and improves the basic weapon and injury enhancement statutes, without renumbering the sections. It includes both a detailed explanation and the amended statutory provisions with legislative intent language.

The second proposal is much shorter. It involves conforming the few incorrect enhancement provisions using the word "may" to the standard language of "shall."

I hope this information is useful. Please call me at 619-531-3183 if you have any questions or comments. Thank you for your consideration.

Sincerely,

CHARLES E. NICKEL
DDA, San Diego County

CEN:kls
Enclosure

WEAPON AND INJURY ENHANCEMENTS: EXPLANATION

Purpose

Enhanced penalties for the use of deadly weapons and firearms and for the infliction of great bodily injury are one of the major features of our sentencing statutes. The purpose of this bill is to simplify and improve the weapon and injury enhancement statutes in two important ways, without changing the basic numbering scheme:

- This bill would clarify and conform the language of the enhancement statutes to make these provisions as uniform and consistent as possible.
- This bill would eliminate various weapon and injury enhancements that have become unnecessary and obsolete in light of new enhancement provisions and penalties.

Clarification of Language

The statutory language used in the various weapon and injury enhancement provisions is inconsistent, confusing, and redundant. Moreover, these enhancements contain unnecessary specific provisions that are completely covered by explicit general provisions. These problems with language make the enhancement provisions more difficult to understand and more open to misinterpretation.

This bill would clarify and simplify the language of the weapon and injury enhancement statutes in four significant ways:

- This bill would make the language of these provisions as uniform and consistent as possible.
- This bill would eliminate unnecessary specific provisions that are completely covered by existing general provisions.
- This bill would expressly conform two aspects of the firearm enhancement statute to the controlling decisions of the California Supreme Court and other court decisions.
- This bill would clarify the vicarious application of the "10-20-Life" enhancement in gang cases.

The goal of clarification is to make the language of these statutes both legally proper and also simpler and easier to understand. This bill eliminates certain archaic and redundant statutory phrases. It uses the same or similar language to express the same concepts without unnecessary repetition. It makes these enhancement provisions as uniform and consistent with one another as possible.

This bill also deletes several specific provisions in the weapon and injury enhancement statutes because they are completely unnecessary and they needlessly duplicate existing general provisions of the sentencing law. Where a general provision explicitly and completely covers a particular point, it is both unnecessary and potentially confusing to have a specific provision on the same point in a particular statute.

This bill deletes the following unnecessary specific provisions and includes uncodified intent language to confirm the controlling authority of the general provisions:

1) PC 12022(e): This specific provision regarding the imposition of a single weapon enhancement is covered by the general provision of PC 1170.1(f).

2) PC 12022(f): This specific provision regarding the court's power to strike the punishment for two of the six enhancements in PC 12022 is covered by the general provision of PC 1385.

3) PC 12022.5(f): This specific provision regarding the imposition of a single firearm enhancement is covered by the general provision of PC 1170.1(f).

4) PC 12022.53(f): This specific provision regarding the imposition of a single firearm enhancement is covered by the general provisions of PC 1170.1(f) & (g).

5) PC 12022.7(g): This specific provision regarding pleading and proving the enhancement is covered by the general provision of PC 1170.1(e) (see also *People v. Hernandez* (1988) 46 Cal.3d 194, and *Apprendi v. New Jersey* (2000) 530 U.S. 466).

6) PC 12022.7(h): This specific provision regarding the imposition of a single injury enhancement is covered by the general provision of PC 1170.1(g).

7) PC 12022.9(a): This specific provision regarding pleading and proving the enhancement is covered by the general provision of PC 1170.1(e) (see also *People v. Hernandez, supra*, and *Apprendi v. New Jersey, supra*).

This bill also makes two changes in the firearm enhancement statute (PC 12022.5) to conform that statute to the controlling decisions of the California Supreme Court and other court decisions. Uncodified intent language is included to explain these changes. These two provisions are as follows:

1) PC 12022.5(d) [amended]: This provision regarding the application of the enhancement to PC 245 (ADW) is conformed to the Supreme Court's decision in *People v. Ledesma* (1997) 16 Cal.4th 90 and other court decisions.

2) New PC 12022.5(f) [added]: This provision regarding the court's lack of authority to strike this firearm enhancement conforms the statute to the Supreme Court's decisions in *People*

v. *Thomas* (1992) 4 Cal.4th 206, and *People v. Ledesma* (1997) 16 Cal.4th 90 (see also Stats. 1989, ch. 1044 § 1).

Additionally, this bill amends the "10-20-Life" firearm enhancement statute in PC 12022.53(e)(1) to clarify the vicarious application of the enhancement in gang cases. The current language has raised questions regarding this application (see *People v. Garcia* (2001) 88 Cal.App.4th 794, review granted 8/8/01 [not citable]; *People v. Tillett* (2001) 89 Cal.App.4th 1139, 1162-1165, decertified 9/12/01 [not citable]; and *People v. Salas* (2001) 89 Cal.App.4th 1275, modified 90 Cal.App.4th 886a [not final]). The amended language conforms this provision to the original intent of the statute.

Repeal of Enhancements

Over the years, the Legislature has enacted many enhancements involving weapons and injury. The Legislature has also provided for increased punishment, particularly with regard to the use of firearms. As a result, there are some excellent penalty provisions currently in place. Unfortunately, there are also a number of provisions that are no longer necessary or useful. These provisions have simply become obsolete because of other superior enhancements, such as "10-20-Life," being enacted.

This bill directly addresses the problem of unnecessary and obsolete weapon and injury enhancements by eliminating them in their entirety. Of course, the bill also contains uncodified language regarding legislative intent to explain the purpose of the repeal and to prevent any unwarranted benefit from being granted. Specifically, this bill would repeal the following six weapon and injury enhancements:

1) PC 12022.5(a)(2): This special provision regarding use of a firearm during a carjacking has been replaced by the better provision in PC 12022.53(b) ["10-20-Life"].

2) PC 12022.5(b)(1): This special provision regarding discharging a firearm at a motor vehicle causing injury or death has been replaced by the better provision in PC 12022.53(d) ["10-20-Life"].

3) PC 12022.5(c): This special provision regarding use of a firearm in certain drug crimes is now covered by the same penalty in the general provision of PC 12022.5(a).

4) PC 12022.55: This special provision regarding discharging a firearm from a motor vehicle causing injury or death has been replaced by the better provision in PC 12022.53(d) ["10-20-Life"].

5) PC 12022.9(b)(1): This special provision regarding discharging a firearm from a motor vehicle causing certain injuries has been replaced by the better provision in PC 12022.53(d) ["10-20-Life"].

6) PC 12022.9(b)(2): This special provision regarding discharging a firearm at a motor vehicle causing certain injuries has been replaced by the better provision in PC 12022.53(d) ["10-20-Life"].

All of these weapon and injury enhancement provisions are now unnecessary and obsolete. There is no valid reason to retain any of these provisions; they should be simply and completely eliminated from the code.

Finally, if this bill is enacted, it would have to be followed next year by a technical cleanup bill to conform other provisions of law to the amended versions of the weapon and injury enhancement statutes. In particular, references to any repealed provisions would have to be deleted. Fortunately, this technical cleanup does not have to be done until next year.

Conclusion

This bill would significantly simplify and improve our basic weapon and injury enhancement statutes. It would clarify statutory language and eliminate obsolete provisions, without changing the basic numbering scheme. It deserves to have widespread, bipartisan support in the Legislature and the legal community.

Nickel (11/01)

WEAPON AND INJURY ENHANCEMENTS: STATUTES

PC 12022.

(a)(1) Except as provided in subdivisions (c) and (d), any person who is armed with a firearm in the commission or attempted commission of a felony shall, ~~upon conviction of that felony or attempted felony,~~ in addition and consecutive to the punishment prescribed for the ~~felony or attempted felony~~ offense of which ~~he or she~~ the person has been convicted, be punished by an additional term of imprisonment in the state prison for one year, unless the arming is an element of the that offense of which ~~he or she was convicted~~. This additional term shall apply to any person who is a principal in the commission or attempted commission of a felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm.

(2) Except as provided in subdivision (c), and notwithstanding subdivision (d), if the firearm is an assault weapon, as defined in Section 12276 or Section 12276.1, or a machinegun, as defined in Section 12200, the additional term described in this subdivision shall be three years whether or not the arming is an element of the offense of which ~~he or she~~ the person was convicted. The additional term provided in this paragraph shall apply to any person who is a principal in the commission or attempted commission of a felony if one or more of the principals is armed with an assault weapon or machinegun whether or not the person is personally armed with an assault weapon or machinegun.

(b)(1) Any person who personally uses a deadly or dangerous weapon in the commission or attempted commission of a felony shall, ~~upon conviction of that felony or attempted felony,~~ in addition and consecutive to the punishment prescribed for the ~~felony or attempted felony~~ offense of which ~~he or she~~ the person has been convicted, be punished by an additional term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of the that offense of which ~~he or she was convicted~~.

(2) If the person described in paragraph (1) has been convicted of carjacking or attempted carjacking, the additional term shall be one, two, or three years.

(3) When a person is found to have personally used a deadly or dangerous weapon in the commission or attempted commission of a felony as provided in this subdivision and the weapon is owned by that person, the court shall order that the weapon be deemed a nuisance and disposed of in the manner provided in Section 12028.

(c) Notwithstanding the enhancement set forth in subdivision (a), any person who is personally armed with a firearm in the commission or attempted commission of a violation of Section 11351, 11351.5, 11352, 11366.5, 11366.6, 11378, 11378.5, 11379, 11379.5, or 11379.6 of the Health and Safety Code, shall, ~~upon conviction of that offense and~~ in addition and consecutive to the punishment prescribed for that offense of which ~~he or she~~ the person has been convicted, be punished by an additional term of imprisonment in the state prison for three, four, or five years ~~in the court's discretion~~. The court shall order impose the middle term unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its enhancement choice on the record at the time of ~~the sentence~~ sentencing.

(d) Notwithstanding the enhancement set forth in subdivision (a), any person who is not personally armed with a firearm, who, knowing that another principal is personally armed with a firearm, is a principal in the commission or attempted commission of an offense specified in subdivision (c), shall, ~~upon conviction of that offense,~~ be punished by an additional term of imprisonment in the state prison for one, two, or three years in the court's discretion. The court shall ~~order~~ impose the middle term unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its enhancement choice on the record at the time of ~~the~~ sentencing.

~~(e) For purposes of imposing an enhancement under Section 1170.1, the enhancements under this section shall count as one, single enhancement.~~

~~(f) Notwithstanding any other provision of law, the court may strike the additional punishment for the enhancements provided in subdivision (e) or (d) in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition.~~

PC 12022.5.

(a)~~(1)~~ Except as provided in subdivisions subdivision (b) and ~~(e)~~, any person who personally uses a firearm in the commission or attempted commission of a felony shall, ~~upon conviction of that felony or attempted felony,~~ in addition and consecutive to the punishment prescribed for the ~~felony or attempted felony~~ offense of which ~~he or she~~ the person has been convicted, be punished by an additional term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of the that offense of which he or she was convicted.

~~(2) If the person described in paragraph (1) has been convicted of carjacking or attempted carjacking, the additional term shall be 4, 5, or 10 years. The court shall order imposition of the middle term unless there are circumstances in aggravation or mitigation. The court shall state its reasons for its enhancement choice on the record at the time of sentencing.~~

~~(b)(1) Notwithstanding subdivision (a), any person who is convicted of a felony or an attempt to commit a felony, including murder or attempted murder, in which that person discharged a firearm at an occupied motor vehicle which caused great bodily injury or death to the person of another, shall, upon conviction of that felony or attempted felony, in addition and consecutive to the sentence prescribed for the felony or attempted felony, be punished by an additional term of imprisonment in the state prison for 5, 6, or 10 years.~~

(2) Notwithstanding subdivision (a), any person who personally uses an assault weapon, as specified in Section 12276 or Section 12276.1, or a machinegun, as defined in Section 12200, in the commission or attempted commission of a felony, shall, ~~upon conviction of that felony or attempted felony,~~ in addition and consecutive to the sentence prescribed for the ~~felony or attempted felony~~ offense, be punished by an additional term of imprisonment in the state prison for 5, 6, or 10 years.

~~(c) Notwithstanding the enhancement set forth in subdivision (a), any person who personally uses a firearm in the commission or attempted commission of a violation of Section~~

~~11351, 11351.5, 11352, 11366.5, 11366.6, 11378, 11378.5, 11379, 11379.5, or 11379.6 of the Health and Safety Code, shall, upon conviction of that offense and in addition and consecutive to the punishment prescribed for the offense of which he or she has been convicted, be punished by an additional term of imprisonment in the state prison for 3, 4, or 10 years in the court's discretion. The~~ For the enhancements provided in this section, the court shall order the imposition of impose the middle term unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its enhancement choice on the record at the time of sentencing.

(d) The Notwithstanding the limitation in subdivision (a) involving an element of the offense, the additional term provided by this section may shall be imposed in cases of assault with a firearm under paragraph (2) of subdivision (a) of Section 245, or assault with a deadly weapon which is a firearm under for any violation of Section 245 if a firearm is used, or for murder if the killing was is perpetrated by means of shooting a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict great bodily injury or death.

(e) When a person is found to have personally used a firearm, an assault weapon, or a machinegun in the commission or attempted commission of a felony as provided in this section and the firearm, assault weapon, or machinegun is owned by that person, the court shall order that the firearm be deemed a nuisance and disposed of in the manner provided in Section 12028.

(f) ~~For purposes of imposing an enhancement under Section 1170.1, the enhancements under this section shall count as one, single enhancement~~ Notwithstanding Section 1385 or any other provision of law, the court shall not strike any allegation, admission, or finding under this section.

PC 12022.53.

- (a) This section applies to the following felonies:
- (1) Section 187 (murder).
 - (2) Section 203 or 205 (mayhem).
 - (3) Section 207, 209, or 209.5 (kidnapping).
 - (4) Section 211 (robbery).
 - (5) Section 215 (carjacking).
 - (6) Section 220 (assault with intent to commit a specified felony).
 - (7) Subdivision (d) of Section 245 (assault with a firearm on a peace officer or firefighter).
 - (8) Section 261 or 262 (rape).
 - (9) Section 264.1 (rape or sexual penetration in concert).
 - (10) Section 286 (sodomy).
 - (11) Section 288 or 288.5 (lewd act on a child).
 - (12) Section 288a (oral copulation).
 - (13) Section 289 (sexual penetration).
 - (14) Section 4500 (assault by a life prisoner).
 - (15) Section 4501 (assault by a prisoner).
 - (16) Section 4503 (holding a hostage by a prisoner).

- (17) Any felony punishable by death or imprisonment in the state prison for life.
- (18) Any attempt to commit a crime listed in this subdivision other than an assault.

(b) Notwithstanding any other provision of law, any person who is convicted of a felony specified in subdivision (a), and who in the commission of that felony personally used a firearm, shall be punished by a term of imprisonment of 10 years in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony. The firearm need not be operable or loaded for this enhancement to apply.

(c) Notwithstanding any other provision of law, any person who is convicted of a felony specified in subdivision (a), and who in the commission of that felony intentionally and personally discharged a firearm, shall be punished by a term of imprisonment of 20 years in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony.

(d) Notwithstanding any other provision of law, any person who is convicted of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, and who in the commission of that felony intentionally and personally discharged a firearm and proximately caused great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by a term of imprisonment of 25 years to life in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony.

(e)(1) The enhancements specified in this section shall apply to any person charged as who is a principal in the commission of an offense that includes an allegation pursuant to this section when a violation of both this section and subdivision (b) of Section 186.22 are pled and proved. if both of the following are pled and proved:

- (A) The person violated subdivision (b) of Section 186.22.
- (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d).

(2) An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense.

~~(f) Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. An enhancement involving a firearm specified in Section 12021.5, 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section. An enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d).~~

(g) Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person found to come within the provisions of this section.

(h) (g) Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section.

(i) (h) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 or pursuant to Section 4019 or any other provision of law shall not exceed 15 percent of the total term of imprisonment imposed on a defendant upon whom a sentence is imposed pursuant to this section.

(j) (i) For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the information or indictment and either admitted by the defendant in open court or found to be true by the trier of fact. When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment.

(k) (j) When a person is found to have used or discharged a firearm in the commission of an offense that includes an allegation pursuant to this section and the firearm is owned by that person, a coparticipant, or a conspirator, the court shall order that the firearm be deemed a nuisance and disposed of in the manner provided in Section 12028.

(l) (k) The enhancements specified in this section shall not apply to the lawful use or discharge of a firearm by a public officer, as provided in Section 196, or by any person in lawful self-defense, lawful defense of another, or lawful defense of property, as provided in Sections 197, 198, and 198.5.

PC 12022.55.

~~Notwithstanding Section 12022.5, any person who, with the intent to inflict great bodily injury or death, inflicts great bodily injury, as defined in Section 12022.7, or causes the death of a person, other than an occupant of a motor vehicle, as a result of discharging a firearm from a motor vehicle in the commission of a felony or attempted felony, shall, upon conviction of the felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of imprisonment in the state prison for 5, 6, or 10 years.~~

PC 12022.7.

(a) A Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission or attempted commission of a felony shall, in addition and consecutive to the punishment prescribed for the ~~felony or attempted felony~~ offense of which he ~~or she~~ the person has been convicted, be punished by an additional term of imprisonment in the state prison for three years, unless infliction of great bodily injury is an element of the that offense of which he ~~or she~~ is convicted.

(b) A Any person found to have inflicted great bodily injury pursuant to subdivision (a) which causes the victim to become comatose due to brain injury or to suffer paralysis, ~~as defined in Section 12022.9,~~ of a permanent nature, shall be punished by an additional and consecutive term of imprisonment in the state prison for five years. As used in this subdivision, "paralysis" means a major or complete loss of motor function resulting from injury to the nervous system or to a muscular mechanism.

(c) A Any person who personally inflicts great bodily injury on a person who is 70 years of age or older, other than an accomplice, in the commission or attempted commission of a felony shall, in addition and consecutive to the punishment prescribed for the ~~felony or attempted felony offense~~ of which ~~he or she~~ the person has been convicted, be punished by an additional term of imprisonment in the state prison for five years, unless infliction of great bodily injury is an element of the that offense of which he or she is convicted.

(d) A Any person who personally inflicts great bodily injury on a child under the age of five years in the commission or attempted commission of a felony shall, in addition and consecutive to the punishment prescribed for the ~~felony or attempted felony offense~~ of which ~~he or she~~ the person has been convicted, be punished by an additional term of imprisonment in the state prison for four, five, or six years, unless infliction of great bodily injury is an element of ~~the~~ that offense of which he or she is convicted. The court shall ~~order imposition of~~ impose the middle term unless there are circumstances in aggravation or mitigation. The court shall state ~~its~~ the reasons for its enhancement choice on the record at the time of sentencing.

(e) A Any person who personally inflicts great bodily injury under circumstances involving domestic violence in the commission or attempted commission of a felony shall, in addition and consecutive to the punishment prescribed for the ~~felony or attempted felony offense~~ of which ~~he or she~~ the person has been convicted, be punished by an additional term of imprisonment in the state prison for three, four, or five years. The court shall ~~order imposition of~~ impose the middle term unless there are circumstances in aggravation or mitigation. The court shall state ~~its~~ the reasons for its enhancement choice on the record at the time of sentencing. As used in this ~~section~~ subdivision, "domestic violence" has the meaning provided in subdivision (b) of Section 13700.

(f) As used in this section, "great bodily injury" means a significant or substantial physical injury.

(g) This section shall not apply to murder or manslaughter or a violation of Section 451 or 452. ~~The additional term provided in this section shall not be imposed unless the fact of great bodily injury is charged in the accusatory pleading and admitted or found to be true by the trier of fact.~~

~~(h) The court shall impose the additional terms of imprisonment under either subdivision (a), (b), (c), or (d), but may not impose more than one of these terms for the same offense.~~

PC 12022.9.

(a) Any person who, during the commission or attempted commission of a felony, knows or reasonably should know that the victim is pregnant, and who, with intent to inflict injury, and without the consent of the woman, personally inflicts injury upon a pregnant woman that results in the termination of the pregnancy shall, in addition and consecutive to the punishment prescribed by the felony or attempted felony for the offense of which the person has been convicted, be punished by an additional term of imprisonment in the state prison for five years in the state prison. The additional term provided in this subdivision shall not be imposed unless the fact of that injury is charged in the accusatory pleading and admitted or found to be true by the trier of fact.

Nothing in this subdivision section shall be construed as affecting the applicability of subdivision (a) of Section 187 of the Penal Code.

~~(b)(1) Any person convicted of a violation of subdivision (c) of Section 12034 shall, in addition and consecutive to the punishment for that violation, be punished by an additional term of four years, if as a result of the defendant personally and willfully and maliciously discharging the firearm, the victim suffers paralysis or paraparesis of a major body part, including, but not limited to, the entire hand or foot.~~

~~(2) Any person convicted of a violation of Section 246 shall, in addition and consecutive to the punishment for that violation, be punished by an additional term of four years, if as a result of the defendant personally and willfully and maliciously discharging the firearm at an occupied motor vehicle from another motor vehicle, the victim suffers paralysis or paraparesis of a major body part, including, but not limited to, the entire hand or foot.~~

~~(3) For purposes of this subdivision:~~

~~(A) "Paralysis" means a major or complete loss of motor function resulting from injury to the nervous system or to a muscular mechanism.~~

~~(B) "Paraparesis" means a significant weakness of a major body part, including, but not limited to, the entire hand or foot, causing the extremity to be functionally impaired and rendered useless to assist with one of the basic skills in life such as eating or walking.~~

~~(C) The additional term provided in this section shall not be imposed unless the fact of the injury is charged in an accusatory pleading and admitted or found to be true by the trier of fact.~~

Uncodified intent language:

SEC. ____ . In repealing the specific provisions of subdivision (e) of Section 12022 of the Penal Code, in Section *** of this act, and subdivision (f) of Section 12022.5 of the Penal Code, in Section *** of this act, it is not the intent of the Legislature to alter the application of the general provision of subdivision (f) of Section 1170.1 of the Penal Code to the enhancements provided in those sections.

SEC. ____ . In repealing the specific provision of subdivision (f) of Section 12022 of the Penal Code, in Section *** of this act, it is not the intent of the Legislature to alter the existing authority and discretion of the court to strike the enhancements or to strike the additional

punishment for the enhancements provided in that section pursuant to the general provision of Section 1385 of the Penal Code.

SEC. _____. (a) In repealing the enhancement in paragraph (2) of subdivision (a) of Section 12022.5 of the Penal Code, in Section *** of this act, the Legislature recognizes that the conduct punished under that provision is now subject to greater punishment under subdivision (b) of Section 12022.53 of the Penal Code.

(b) In repealing the enhancement in paragraph (1) of subdivision (b) of Section 12022.5 of the Penal Code, in Section *** of this act, the Legislature recognizes that the conduct punished under that provision is now subject to greater punishment under subdivision (d) of Section 12022.53 of the Penal Code.

(c) In repealing the enhancement in subdivision (c) of Section 12022.5 of the Penal Code, in Section *** of this act, the Legislature recognizes that the conduct punished under that provision is now subject to the same punishment under subdivision (a) of Section 12022.5 of the Penal Code.

(d) The repeal of those provisions of Section 12022.5 of the Penal Code described in subdivisions (a), (b), and (c) shall not be given any retroactive application, and shall not be construed to benefit any person who committed a crime or received an enhancement or any other punishment while those provisions were in effect.

SEC. _____. The amendments to subdivision (d) of Section 12022.5 of the Penal Code, in Section *** of this act, are intended to be declaratory of existing law, and to conform the language of the statute to the decision of the California Supreme Court in *People v. Ledesma* (1997) 16 Cal.4th 90, and the decisions of the Court of Appeal in *People v. Moore* (1986) 178 Cal.App.3d 898, *People v. Martinez* (1987) 194 Cal.App.3d 15, *People v. Joachim* (1995) 38 Cal.App.4th 1526, *People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332-1334 (Section II), and *People v. Harper* (2000) 82 Cal.App.4th 1413, 1416-1419 (Section III).

SEC. _____. The amendments to subdivision (f) of Section 12022.5 of the Penal Code, in Section *** of this act, to prohibit striking the enhancement, are intended to be declaratory of existing law as contained in *People v. Thomas* (1992) 4 Cal.4th 206, and *People v. Ledesma* (1997) 16 Cal.4th 90.

SEC. _____. In repealing the specific provision of subdivision (f) of Section 12022.53 of the Penal Code, in Section *** of this act, it is not the intent of the Legislature to alter the application of the general provisions of subdivisions (f) and (g) of Section 1170.1 of the Penal Code to the enhancements provided in that section.

SEC. _____. In repealing Section 12022.55 of the Penal Code, in Section *** of this act, the Legislature recognizes that the conduct punished under that provision is now subject to greater punishment under subdivision (d) of Section 12022.53 of the Penal Code. The repeal of Section 12022.55 of the Penal Code shall not be given any retroactive application, and shall not be construed to benefit any person who committed a crime or received an enhancement or any other punishment while that provision was in effect.

SEC. _____. In repealing the specific provisions relating to pleading enhancements in subdivision (g) of Section 12022.7 of the Penal Code, in Section *** of this act, and subdivision (a) of Section 12022.9 of the Penal Code, in Section *** of this act, it is not the intent of the Legislature to alter the application of the general provision of subdivision (e) of Section 1170.1 of the Penal Code to the enhancements provided in those sections.

SEC. _____. In repealing the specific provision of subdivision (h) of Section 12022.7 of the Penal Code, in Section *** of this act, it is not the intent of the Legislature to alter the application of the general provision of subdivision (g) of Section 1170.1 of the Penal Code to the enhancements provided in that section.

SEC. _____. In repealing the enhancements in paragraphs (1) and (2) of subdivision (b) of Section 12022.9 of the Penal Code, in Section *** of this act, the Legislature recognizes that the conduct punished under those provisions is now subject to greater punishment under subdivision (d) of Section 12022.53 of the Penal Code. The repeal of those provisions of Section 12022.9 of the Penal Code shall not be given any retroactive application, and shall not be construed to benefit any person who committed a crime or received an enhancement or any other punishment while those provisions were in effect.

CONFORMING ENHANCEMENT LANGUAGE

The standard language used in the enhancement statutes provides that a person "shall" be punished by the additional term of imprisonment. Of the 150 known enhancement provisions in the various codes, 145 use the standard language of "shall." This language is consistent with the general rule for imposing enhancements in PC 1170.1(d), which provides that "the court shall also impose the additional terms provided for any applicable enhancements" [emphasis added].

However, there are five enhancement provisions that use the incorrect language that a person "may" be punished by the additional term of imprisonment: HS 25189.5(e), HS 25189.7(c), PC 674(a), PC 674(b), and PC 12280(e). This language is not only inconsistent with the overwhelming majority of enhancements, it also directly conflicts with the controlling provision for imposing enhancements in PC 1170.1(d). These five incorrect provisions should now be conformed to the standard language.

Furthermore, conforming these provisions by using the word "shall" will not convert them into mandatory enhancements. On the contrary, the court will still have the discretion to strike these enhancements or to strike the punishment for these enhancements under the general provision of PC 1385. This discretion can be confirmed with an appropriate legislative intent provision.

Nickel (11/01)

STATUTES

HS 25189.5. (a) – (d) [no change]

(e) The court also shall impose upon a person convicted of violating subdivision (b), (c), or (d), a fine of not less than five thousand (\$5,000) nor more than one hundred thousand dollars (\$100,000) for each day of violation, except as further provided in this subdivision. If the act which violated subdivision (b), (c), or (d) caused great bodily injury, or caused a substantial probability that death could result, the person convicted of violating subdivision (b), (c), or (d) ~~may~~ shall be punished by imprisonment in the state prison for one, two, or three years, in addition and consecutive to the term specified in subdivision (b), (c), or (d), and may be fined up to two hundred fifty thousand (\$250,000) for each day of violation.

(f) [no change]

HS 25189.7. (a) – (b) [no change]

(c) The court also shall impose upon a person convicted of violating subdivision (b) a fine of not less than five thousand dollars (\$5,000) nor more than one hundred thousand dollars (\$100,000) for each day of violation, except as otherwise provided in this subdivision. If the act which violated subdivision (b) caused great bodily injury or caused a substantial probability that death could result, the person convicted of violating subdivision (b) ~~may~~ shall be punished by imprisonment in the state prison for one, two, or three years, in addition and consecutive to the term specified in subdivision (b), and may be fined up to two hundred fifty thousand (\$250,000) for each day of violation.

PC 674. (a) Any person who is a primary care provider in a day care facility and who is convicted of a felony violation of Section 261, 285, 286, 288, 288a, or 289, where the victim of the crime was a minor entrusted to his or her care by the minor's parent or guardian, a court, any public agency charged with the provision of social services, or a probation department, ~~may~~ shall be punished by an additional term of two years.

(b) If the crime described in subdivision (a) was committed while voluntarily acting in concert with another, the person so convicted ~~may~~ shall be punished by an additional term of three years.

(c) The enhancements authorized by this section ~~may~~ shall be imposed in addition to any other required or authorized enhancements.

PC 12280. (a) – (d) [no change]

(e) Notwithstanding Section 654 or any other provision of law, any person who commits another crime while violating this section ~~may~~ shall receive an additional, consecutive

punishment of one year for violating this section in addition and consecutive to the punishment, including enhancements, which is prescribed for the other crime.

(f) – (u) [no change]

Uncodified intent language: The amendments to Section 25189.5 and 25189.7 of the Health and Safety Code, and to Sections 674 and 12280 of the Penal Code, which change the word "may" to "shall", are not intended to alter the existing authority and discretion of the court to strike those enhancements or to strike the additional punishment for those enhancements pursuant to Section 1385 of the Penal Code.

ENHANCEMENTS

PC 186.10(c)(1)(A)	PC 667.9(a)
PC 186.10(c)(1)(B)	PC 667.9(b)
PC 186.10(c)(1)(C)	PC 667.10(a)
PC 186.10(c)(1)(D)	PC 667.15(a)
PC 186.11(a)(1)/(2)	PC 667.15(b)
PC 186.11(a)(1)/(3)	PC 667.16(a)
PC 186.22(b)(1)(A)	PC 667.17
PC 186.22(b)(1)(B)	PC 670(c)
PC 186.22(b)(1)(C)	PC 674(a)
PC 186.26(d)	PC 674(b)
PC 186.33(b)(1)	PC 12021.5(a)
PC 273d(b)	PC 12021.5(b)
PC 273.4(a)	PC 12022(a)(1)
PC 289.5(d)	PC 12022(a)(2)
PC 290(q)(1)	PC 12022(b)(1)
PC 290.4(b)(1)	PC 12022(b)(2)
PC 347(a)(2)	PC 12022(c)
PC 368(b)(2)(A) [(a) prior to 1/1/99]	PC 12022(d)
PC 368(b)(2)(B) [(a) prior to 1/1/99]	PC 12022.1(b)
PC 368(b)(3)(A) [(a) prior to 1/1/99]	PC 12022.2(a)
PC 368(b)(3)(B) [(a) prior to 1/1/99]	PC 12022.2(b)
PC 422.75(a)	PC 12022.3(a)
PC 422.75(b)	PC 12022.3(b)
PC 422.75(c)	PC 12022.4
PC 422.75(e)	PC 12022.5(a)(1)
PC 451.1(a)(1)	PC 12022.5(a)(2)
PC 451.1(a)(2)	PC 12022.5(b)(1)
PC 451.1(a)(3)	PC 12022.5(b)(2)
PC 451.1(a)(4)	PC 12022.5(c)
PC 451.1(a)(5)	PC 12022.53(b)
PC 452.1(a)(1)	PC 12022.53(c)
PC 452.1(a)(2)	PC 12022.53(d)
PC 452.1(a)(3)	PC 12022.55
PC 452.1(a)(4)	PC 12022.6(a)(1)
PC 548(b)	PC 12022.6(a)(2)
PC 550(e) [former IC 1871.1(d)]	PC 12022.6(a)(3)
PC 550(f)	PC 12022.6(a)(4)
PC 550(g)	PC 12022.7(a)
PC 593a(b)	PC 12022.7(b)
PC 600(c)	PC 12022.7(c)
PC 600(d)	PC 12022.7(d)
PC 667(a)(1)	PC 12022.7(e) [(d) prior to 1/1/01]
PC 667.5(a)	PC 12022.75
PC 667.5(b)	PC 12022.8
PC 667.51(a)	PC 12022.85(a)
PC 667.6(a)	PC 12022.9(a)
PC 667.6(b)	PC 12022.9(b)(1)
PC 667.8(a)	PC 12022.9(b)(2)
PC 667.8(b)	PC 12022.95 [former PC 273a(a)(2)]
PC 667.85	PC 12072(g)(4)

PC 12280(a)(2)
PC 12280(e) [(c) prior to 1/1/00]
HS 1522.01(c)
HS 11353.1(a)(1)
HS 11353.1(a)(2)
HS 11353.1(a)(3)
HS 11353.4(a)
HS 11353.4(b)
HS 11353.6(b)
HS 11353.6(c)
HS 11356.5(a)(1)
HS 11356.5(a)(2)
HS 11356.5(a)(3)
HS 11370.2(a)
HS 11370.2(b)
HS 11370.2(c)
HS 11370.4(a)(1) [+ HS 11372(b) - fine]
HS 11370.4(a)(2) [+ HS 11372(c) - fine]
HS 11370.4(a)(3) [+ HS 11372(d) - fine]
HS 11370.4(a)(4)
HS 11370.4(a)(5)
HS 11370.4(a)(6)
HS 11370.4(b)(1)
HS 11370.4(b)(2)
HS 11370.4(b)(3)
HS 11370.4(b)(4)
HS 11379.7(a)
HS 11379.7(b)
HS 11379.8(a)(1)
HS 11379.8(a)(2)
HS 11379.8(a)(3)
HS 11379.8(a)(4)
HS 11379.9(a)
HS 11380.1(a)(1)
HS 11380.1(a)(2)
HS 11380.1(a)(3)
HS 11380.5(a)(1) [repealed 1/1/98 - 7/6/98]
HS 25189.5(e)
HS 25189.7(c)
IC 1871.4(c)
IC 11760(b)
IC 11880(b)
VC 20001(c)
VC 23558 [former VC 23182]
VC 23566(c) [former VC 23190(c)]
WI 10980(h)(1)(A)
WI 10980(h)(1)(B)
WI 10980(h)(1)(C)
WI 10980(h)(1)(D)
WI 14107(d)