

Memorandum 2008-53

**Nonsubstantive Reorganization of Deadly Weapon Statutes:
Sentence Enhancement Provisions**

In its nonsubstantive study of the statutes relating to deadly weapons, the Commission is in the process of preparing a tentative recommendation, which will be broadly circulated for comment. With one exception, the plan is to reorganize the material in Title 2 of Part 4 of the Penal Code (Penal Code §§ 12000-12809) in a user-friendly manner in a new Part 6 of the Penal Code, without making any substantive changes.

The exception involves a number of sections that provide “sentence enhancements” (i.e., rules that impose an additional and consecutive term to the base term of punishment for a crime when specified conditions are met). For example, Section 12022.7(a) provides:

Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years.

The Commission knows from prior experience that there is significant practitioner resistance to any change in the section numbers of provisions that are used in determining sentence length. There are extensive practice materials that reference those section numbers.

To avoid that sort of resistance, the Commission decided that, to the extent practicable, sentence determining sections would be left in their current locations, without any change to their numbers or substance. See Memorandum 2007-5, p. 4; Minutes (January 2007), p. 7.

This could be accomplished as follows:

- (1) Repeal existing Title 2 (commencing with Section 12000) of Part 4 of the Penal Code, which includes both the sentence enhancement provisions at issue here and the weapon provisions that are the main focus of this study.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

- (2) Add a new Title 2 (commencing with Section 12001) of Part 4 of the Penal Code, which would include only the sentence enhancement sections and related provisions. The section numbers and text of those provisions would be unchanged (with the exception of cross-reference updating).
- (3) Add a new Part 6 (commencing with Section 16000), which would include the “Control of Deadly Weapon” provisions.

The attached staff draft would implement the first two steps, repealing existing Title 2 and adding a new Title 2 for sentence enhancements. A few noteworthy points about the draft are discussed below.

Scope of New Title

In implementing the approach described above, the Commission will need to decide what provisions to leave in their current locations, under the heading of “Sentence Enhancements,” and what provisions to move to the new Part 6, under the heading of “Control of Deadly Weapons.” The provisions at issue here fall into four groups, which are discussed below.

Non-Weapon Sentence Enhancements

Existing Title 2 includes a number of sentence enhancements that are not conditioned on the possession or use of a weapon. See Penal Code §§ 12022.1 (secondary offense), 12022.6 (taking or damaging property), 12022.7 (great bodily injury), 12022.75 (administration of controlled substance), 12022.8 (infliction of great bodily injury in committing sexual offense), 12022.85 (sexual offense by person with AIDS), 12022.9 (crime causing termination of pregnancy), 12022.95 (injury to child).

It seems clear that those sections should not be relocated to the new Part 6. They are not related to the control of deadly weapons. **In the attached draft, those provisions are kept in their current location, with their existing section numbers.**

Weapon Enhancements for General Crimes

There are a number of sentence enhancements that apply when a weapon is possessed or used in the commission of a general crime (i.e., a crime that is not specific to the use or control of weapons). For example, Section 12022.5(a) provides:

Except as provided in subdivision (b), any person who personally uses a firearm in the commission of a felony or

attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense.

Under that provision, any person who commits *any* felony (other than one for which use of a firearm is an element of the crime) will receive an additional term for personally using a firearm in commission of the felony. See also Penal Code §§ 12021.5 (street gang crimes), 12022 (possession or use of firearm or dangerous weapon), 12022.2 (armor piercing ammunition or body vest), 12022.3 (sexual offenses), 12022.4 (furnishing firearm used in crime), 12022.53 (personal use or discharge of firearm), 12022.55 (discharge of firearm from vehicle causing great bodily injury).

That sort of enhancement is intended to deter weapon use, but the underlying offense does not involve weapon regulation. It is a “garden variety” crime. Consequently, these enhancements are heavily used in the prosecution of routine offenses. That heavy use weighs in favor of leaving them in place, with their existing section numbers. If the numbers were changed, the resulting inconvenience would affect prosecutors, defense attorneys, and judges in numerous assault, robbery, drug, and murder cases that have nothing directly to do with the regulation of weapons.

It is also noteworthy that these sections are easily severable from the rest of the provisions of existing Title 2. They are functionally self-contained, and do not have complex connections to provisions that would be moved to the new Part 6. It would not create any drafting or use problems if the sections were left in place.

Because these provisions are used in charging a large number of non-weapon offenses, it would be best to leave them unchanged. That is the approach taken in the attached draft.

Weapon Crimes

Existing Title 2 includes a number of sections that establish crimes relating directly to the control of weapons, and set the terms of punishment for those crimes. For example, Section 12072(a)(2) makes it a crime to “sell, supply, deliver, or give possession or control of a firearm to any person” if there is cause to believe that the person falls within a specifically prohibited class (e.g., a person convicted of a felony).

Because that section will be used in charging the specified crime and determining the sentence, it might be convenient to prosecutors if it were left in place, without any change to its section number.

However, that approach would be incompatible with the Commission's assignment in this study. The purpose of this study is to create a more useable and coherent body of law on the control of deadly weapons. The Commission was specifically directed to minimize the use of cross-references and to "[o]rganize existing provisions in such a way that similar provisions are located in close proximity to each other." 2006 Cal. Stat. res. ch. 128. It would not be possible to comply with those instructions if provisions establishing weapon crimes were not located in new Part 6, along with other related weapon control provisions.

If the purpose of this study is to be fulfilled, it is necessary that sections in existing Title 2 that establish weapon crimes be included in new Part 6. That is the approach that we have consistently followed in preparing Part 6.

Weapon Crime Enhancements

There are three provisions in existing Title 2 that provide sentence enhancements for specific weapon crimes. For example, Section 12072(g)(4) provides an enhancement for a violation of Section 12072(a)(2) (described above), if the weapon at issue is subsequently used in the commission of a felony (for which the perpetrator of that felony is convicted and sentenced). See also Section 12280(a)(2) (crime of transferring assault weapon or .50 BMG rifle enhanced when recipient is minor), 12280(d) (crime involving assault weapon or .50 BMG rifle enhanced when perpetrator commits a second crime at the same time).

It might be convenient to prosecutors, defense attorneys, and judges if those enhancement provisions were left in place, without any change to their numbering. However, unlike the provisions that enhance general crimes, these enhancements are specific to crimes that directly involve the control of deadly weapons. As such, they should be included within new Part 6.

What's more, if the crimes that those provisions enhance are moved to new Part 6 (as the staff recommends), then it would be even more important that these directly related provisions also be moved to the same location in the new part.

Furthermore, those provisions exist in sections that are long and complex, and that are the subject of numerous cross-references in other provisions. It

seems likely that the most convenient way to reorganize those long sections would be to convert each long section into an article comprised of several smaller sections. An existing cross-reference to one of those sections could then be recast as a reference to the corresponding article, without any change in meaning. If a small piece of the section were left behind in the sentence enhancement title, that drafting approach could not be used. In order to avoid any possible change in meaning, all of the cross-references would need to include two references — to the article that continues the bulk of the former section’s provisions, and to the piece that was left in the sentence enhancement title.

For all of the reasons stated above, the staff recommends that the enhancements listed above be moved to new Part 6 and located with the provisions establishing the weapon crimes that they enhance. Consistent with that recommendation, those provisions are not included in the attached draft.

Request for Comment

The staff believes that the approach described above strikes the best balance between the main goal of creating a better organized and more useable body of weapon control statutes (without making any substantive changes), while making no changes to frequently used sentence enhancements that either do not involve weapons or that involve them in an indirect way, as an enhancement to a general crime. The staff invites public comment on this issue.

Definitions

The approach described above involves isolating the sentence enhancement sections from the other sections that currently surround them. In doing so, it is important to preserve the application of definitions that currently apply to the sentence enhancement sections, but that might not apply if the definition provisions are moved elsewhere.

There are two sources of definitions that need to be examined. They are discussed below.

Definitions Provided in Penal Code Section 12001

The first source of definitions is existing Penal Code Section 12001, which provides a number of definitions that, by their terms, are applicable to the entire title.

Most of the terms defined in Section 12001 are not used in the sentence enhancement sections. **Definitions of terms that aren’t used in the sentence**

enhancement provisions do not need to be continued in the new title. The attached draft does not include those definitions.

Only two of the terms defined in Section 12001 are used in the sentence enhancement provisions. The proper treatment of those terms is discussed below.

The first defined term is “firearm.” That term is defined in Section 12001(b), and is used in several of the sentence enhancement sections. See Sections 12021.5, 12022, 12022.2, 12022.3, 12022.4, 12022.5, 12022.53, 12022.55.

To preserve the existing meaning of the term, the existing definition of “firearm” needs to be included in the new title. That is accomplished in proposed Section 12001.

The second defined term is “pistol.” That word is used in one of the sentence enhancement sections (Section 12021.5), *but does not appear to be used in its defined sense.*

Section 12001(a)(1) defines “pistol” as follows:

As used in this title, the terms “pistol,” “revolver,” and “firearm capable of being concealed upon the person” shall apply to and include any device designed to be used as a weapon, from which is expelled a projectile by the force of any explosion, or other form of combustion, *and that has a barrel less than 16 inches in length. These terms also include any device that has a barrel 16 inches or more in length which is designed to be interchanged with a barrel less than 16 inches in length.*

(Emphasis added.) Note that the language *before* the italicized language is substantively the same as the existing definition of “firearm.” See Section 12001(b). It is the italicized language that distinguishes a pistol from other types of firearms. The distinguishing feature is the length of the barrel.

The word “pistol” is used in Section 12021.5(b), which provides a sentence enhancement for, among other things, carrying a firearm that has a “detachable *pistol* magazine”:

(b) Every person who carries a loaded or unloaded firearm together with a detachable shotgun magazine, *a detachable pistol magazine*, a detachable magazine, or a belt-feeding device on his or her person, or in a vehicle, during the commission or attempted commission of any street gang crimes described in subdivision (a) or (b) of Section 186.22, shall, upon conviction of the felony or attempted felony, be punished by an additional term of imprisonment in the state prison for two, three, or four years in the court’s discretion. The court shall 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 sentence.

(Emphasis added.)

Although the word “pistol” is used in the phrase “detachable pistol magazine,” that phrase is itself a defined term of art:

(2) “Detachable pistol magazine” means a device that is designed or redesigned to do all of the following:

(A) To be attached to a semiautomatic firearm that is not a rifle or shotgun that is designed or redesigned to fire ammunition.

(B) To be attached to, and detached from, a firearm that is not a rifle or shotgun that is designed or redesigned to fire ammunition.

(C) To feed ammunition continuously and directly into the loading mechanism of a firearm that is not a rifle or a shotgun that is designed or redesigned to fire ammunition.

Section 12021.5(c)(2). In addition, Section 12021.5 defines the terms “detachable magazine” (which is used with a rifle) and “detachable shotgun magazine” (which is used with a shotgun). Section 12021.5(c)(1), (3). Taken together, the three terms encompass detachable magazines for use with a rifle, a shotgun, or a firearm other than a rifle or shotgun.

The definition of “pistol” in Section 12001 is incompatible with that scheme. It defines “pistol” solely by reference to barrel length. Consequently, Section 12001 expressly provides that “pistol” can include a rifle or shotgun, so long as the barrel is short enough. See Section 12001(f). See also Section 12020(c)(1) (“short-barreled shotgun”), (c)(2) (“short-barreled rifle”).

The staff believes that the defined phrase “detachable pistol magazine” was intended to be read as a single term, with the meaning that it is expressly given. If the word “pistol” were given its defined meaning in this case, the classification scheme in Section 12021.5 (rifle, shotgun, firearm other than rifle or shotgun) would break down (the categories would be rifle, shotgun, short-barreled firearm including a rifle or shotgun). There are no appellate cases discussing the meaning of “pistol” in Section 12021.5.

If the definition of “pistol” from Section 12001 were included in the new title, it would be solely for its application to Section 12021.5. That choice might be seen as endorsing the view that the separate definition of “pistol” has some bearing on the meaning of “detachable pistol magazine.” That would potentially create new confusion, where there appears to be none today.

On the other hand, the inconsistency between the terms “pistol” and “detachable pistol magazine” already exists, and the Commission could choose to simply continue the existing definition provisions verbatim, with a note acknowledging the problem and indicating that the Commission does not intend anything other than strict preservation of the status quo.

The attached draft does not continue the definition of “pistol” for the purposes of the sentence enhancement provisions. A note following Section 12021 invites comment on the issue. Is that an acceptable approach for the tentative recommendation?

Definitions Contained Within Sentence Enhancement Sections

A number of the sentence enhancement sections set out definitions governing terms used in those sections. The definition of “detachable pistol magazine” in Section 12021.5 is an example.

The attached draft would leave those definitions alone, except to correct cross-references in provisions that incorporate outside definitions by reference. Where such cross-reference corrections are made, they are specifically identified in the Comments.

Severability

Existing Section 12003 provides that the provisions of the existing title are severable. The substance of that section would be continued in proposed Section 23505, for the purposes of applying its rule to the reorganized provisions on firearms.

The severability rule also needs to continue to apply to the sentence enhancement provisions. For that purpose, it is included in the attached draft as proposed Section 12003.

Conclusion

The staff recommends that the attached draft be approved for inclusion in a tentative recommendation.

Respectfully submitted,

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PROPOSED LEGISLATION

Staff Note. This is a staff draft of a portion of a tentative recommendation on deadly weapons. It would continue existing sentence enhancement provisions without substantive change.

Some of the provisions in this draft contain a bracketed cross-reference to one or more existing code sections. As those existing code sections are revised, these cross-references will be conformed to the new numbering scheme.

1 Penal Code §§ 12000-12809 (repealed). Control of Deadly Weapons
2 Title 2 (commencing with Section 12000) of Part 4 of the Penal Code is
3 repealed.

4 Comment. The provisions of the repealed title are continued without substantive change, as
5 follows:

6 (1) The repealed provisions that relate to sentence enhancements are continued without
7 substantive change in new Title 2 (commencing with Section 12001), entitled "Sentence
8 Enhancements."

9 (2) The portions of former Section 12590 relating to picketing in the uniform of a peace officer
10 are continued in new Section 830.95.

1 (3) All other repealed provisions are continued without substantive change in new Part 6
2 (commencing with Section 16000), entitled “Control of Deadly Weapons”.

3 **Penal Code §§ 12001-12022.95 (added). Sentence enhancements**

4 Title 2 (commencing with Section 12001) is added to Part 4 of the Penal Code,
5 to read:

6 **TITLE 2. SENTENCE ENHANCEMENTS**

7 **§ 12001. “Firearm”**

8 12001. As used in this title, “firearm” has the meaning provided in subdivision
9 (a) of Section 16520.

10 **Comment.** Section 12001 continues the definition of “firearm” provided in former Section
11 12001(a)(1), without substantive change.

12 **Staff Note.** Section 12001 does not include the existing definition of the term “pistol.” See
13 existing Penal Code Section 12001(a), (f). The only provision of the proposed title that uses the
14 term “pistol” is Section 12021.5, which uses it as part of the defined phrase “detachable pistol
15 magazine.” The Commission believes that the definition of that phrase is intended to apply to the
16 phrase as a whole, and is not affected by the separate definition of the word “pistol.” For that
17 reason, the definition of “pistol” is not included in this draft. The Commission invites input on
18 whether this approach would make any substantive change in the meaning of Section 12021.5.

19 **§ 12003. Severability of provisions**

20 12003. If any section, subsection, sentence, clause or phrase of this title or any
21 other provision listed in Section 16850 is for any reason held to be
22 unconstitutional, that decision shall not affect the validity of the remaining
23 portions of this title or any other provision listed in Section 16850. The Legislature
24 hereby declares that it would have passed this title and any other provision listed
25 in Section 16850, and each section, subsection, sentence, clause and phrase
26 thereof, irrespective of the fact that any one or more other sections, subsections,
27 sentences, clauses or phrases be declared unconstitutional.

28 **Comment.** Section 12003 continues former Section 12003 without substantive change.

29 **§ 12021.5. Weapon enhancement for street gang crime**

30 12021.5. (a) Every person who carries a loaded or unloaded firearm on his or her
31 person, or in a vehicle, during the commission or attempted commission of any
32 street gang crimes described in subdivision (a) or (b) of Section 186.22, shall,
33 upon conviction of the felony or attempted felony, be punished by an additional
34 term of imprisonment in the state prison for one, two, or three years in the court’s
35 discretion. The court shall impose the middle term unless there are circumstances
36 in aggravation or mitigation. The court shall state the reasons for its enhancement
37 choice on the record at the time of sentence.

38 (b) Every person who carries a loaded or unloaded firearm together with a
39 detachable shotgun magazine, a detachable pistol magazine, a detachable

1 magazine, or a belt-feeding device on his or her person, or in a vehicle, during the
2 commission or attempted commission of any street gang crimes described in
3 subdivision (a) or (b) of Section 186.22, shall, upon conviction of the felony or
4 attempted felony, be punished by an additional term of imprisonment in the state
5 prison for two, three, or four years in the court's discretion. The court shall impose
6 the middle term unless there are circumstances in aggravation or mitigation. The
7 court shall state the reasons for its enhancement choice on the record at the time of
8 sentence.

9 (c) As used in this section, the following definitions shall apply:

10 (1) "Detachable magazine" means a device that is designed or redesigned to do
11 all of the following:

12 (A) To be attached to a rifle that is designed or redesigned to fire ammunition.

13 (B) To be attached to, and detached from, a rifle that is designed or redesigned
14 to fire ammunition.

15 (C) To feed ammunition continuously and directly into the loading mechanism
16 of a rifle that is designed or redesigned to fire ammunition.

17 (2) "Detachable pistol magazine" means a device that is designed or redesigned
18 to do all of the following:

19 (A) To be attached to a semiautomatic firearm that is not a rifle or shotgun that
20 is designed or redesigned to fire ammunition.

21 (B) To be attached to, and detached from, a firearm that is not a rifle or shotgun
22 that is designed or redesigned to fire ammunition.

23 (C) To feed ammunition continuously and directly into the loading mechanism
24 of a firearm that is not a rifle or a shotgun that is designed or redesigned to fire
25 ammunition.

26 (3) "Detachable shotgun magazine" means a device that is designed or
27 redesigned to do all of the following:

28 (A) To be attached to a firearm that is designed or redesigned to fire a fixed
29 shotgun shell through a smooth or rifled bore.

30 (B) To be attached to, and detached from, a firearm that is designed or
31 redesigned to fire a fixed shotgun shell through a smooth bore.

32 (C) To feed fixed shotgun shells continuously and directly into the loading
33 mechanism of a firearm that is designed or redesigned to fire a fixed shotgun shell.

34 (4) "Belt-feeding device" means a device that is designed or redesigned to
35 continuously feed ammunition into the loading mechanism of a machinegun or a
36 semiautomatic firearm.

37 (5) "Rifle" shall have the same meaning as specified in Section 17090.

38 (6) "Shotgun" shall have the same meaning as specified in Section 17190.

39 **Comment.** Section 12021.5 continues former Section 12021.5 without change, except that
40 subdivisions (c)(5)-(6) are revised to correct cross-references to the definitions of "rifle" and
41 "shotgun."

42 See also Section 12001 ("firearm" defined).

1 **§ 12022. Armed with firearm or personal use of deadly or dangerous weapon**

2 12022. (a)(1) Except as provided in subdivisions (c) and (d), any person who is
3 armed with a firearm in the commission of a felony or attempted felony shall be
4 punished by an additional and consecutive term of imprisonment in the state
5 prison for one year, unless the arming is an element of that offense. This additional
6 term shall apply to any person who is a principal in the commission of a felony or
7 attempted felony if one or more of the principals is armed with a firearm, whether
8 or not the person is personally armed with a firearm.

9 (2) Except as provided in subdivision (c), and notwithstanding subdivision (d), if
10 the firearm is an assault weapon, as defined in [Section 12276 or Section 12276.1],
11 or a machinegun, as defined in Section 16880, or a .50 BMG rifle, as defined in
12 Section 16110, the additional and consecutive term described in this subdivision
13 shall be three years whether or not the arming is an element of the offense of
14 which the person was convicted. The additional term provided in this paragraph
15 shall apply to any person who is a principal in the commission of a felony or
16 attempted felony if one or more of the principals is armed with an assault weapon
17 or machinegun, or a .50 BMG rifle, whether or not the person is personally armed
18 with an assault weapon or machinegun, or a .50 BMG rifle.

19 (b)(1) Any person who personally uses a deadly or dangerous weapon in the
20 commission of a felony or attempted felony shall be punished by an additional and
21 consecutive term of imprisonment in the state prison for one year, unless use of a
22 deadly or dangerous weapon is an element of that offense.

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

25 (3) When a person is found to have personally used a deadly or dangerous
26 weapon in the commission of a felony or attempted felony as provided in this
27 subdivision and the weapon is owned by that person, the court shall order that the
28 weapon be deemed a nuisance and disposed of in the manner provided in Sections
29 18000 and 18005.

30 (c) Notwithstanding the enhancement set forth in subdivision (a), any person
31 who is personally armed with a firearm in the commission of a violation or
32 attempted violation of Section 11351, 11351.5, 11352, 11366.5, 11366.6, 11378,
33 11378.5, 11379, 11379.5, or 11379.6 of the Health and Safety Code, shall be
34 punished by an additional and consecutive term of imprisonment in the state
35 prison for three, four, or five years.

36 (d) Notwithstanding the enhancement set forth in subdivision (a), any person
37 who is not personally armed with a firearm who, knowing that another principal is
38 personally armed with a firearm, is a principal in the commission of an offense or
39 attempted offense specified in subdivision (c), shall be punished by an additional
40 and consecutive term of imprisonment in the state prison for one, two, or three
41 years.

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

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

6 **Comment.** Section 12022 continues former Section 12022 without change, except that
7 subdivision (a)(2) is revised to correct cross-references to the definitions of “.50 BMG Rifle,”
8 “assault weapon,” and “machinegun,” and subdivision (b)(3) is revised to correct a cross
9 reference to former Section 12028.

10 See also Section 12001 (“firearm” defined).

11 **Staff Note.** The cross-reference for the definition of “assault weapon” in Section 12022(a)(2)
12 has not been updated, but is instead placed in brackets. Once the section numbers for the
13 definition of “assault weapon” have been finalized, the cross-reference in this section will be
14 updated.

15 **§ 12022.1. Secondary offense**

16 12022.1. (a) For the purposes of this section only:

17 (1) “Primary offense” means a felony offense for which a person has been
18 released from custody on bail or on his or her own recognizance prior to the
19 judgment becoming final, including the disposition of any appeal, or for which
20 release on bail or his or her own recognizance has been revoked. In cases where
21 the court has granted a stay of execution of a county jail commitment or state
22 prison commitment, “primary offense” also means a felony offense for which a
23 person is out of custody during the period of time between the pronouncement of
24 judgment and the time the person actually surrenders into custody or is otherwise
25 returned to custody.

26 (2) “Secondary offense” means a felony offense alleged to have been committed
27 while the person is released from custody for a primary offense.

28 (b) Any person arrested for a secondary offense which was alleged to have been
29 committed while that person was released from custody on a primary offense shall
30 be subject to a penalty enhancement of an additional two years in state prison
31 which shall be served consecutive to any other term imposed by the court.

32 (c) The enhancement allegation provided in subdivision (b) shall be pleaded in
33 the information or indictment which alleges the secondary offense, or in the
34 information or indictment of the primary offense if a conviction has already
35 occurred in the secondary offense, and shall be proved as provided by law. The
36 enhancement allegation may be pleaded in a complaint but need not be proved at
37 the preliminary hearing or grand jury hearing.

38 (d) Whenever there is a conviction for the secondary offense and the
39 enhancement is proved, and the person is sentenced on the secondary offense prior
40 to the conviction of the primary offense, the imposition of the enhancement shall
41 be stayed pending imposition of the sentence for the primary offense. The stay
42 shall be lifted by the court hearing the primary offense at the time of sentencing

1 for that offense and shall be recorded in the abstract of judgment. If the person is
2 acquitted of the primary offense the stay shall be permanent.

3 (e) If the person is convicted of a felony for the primary offense, is sentenced to
4 state prison for the primary offense, and is convicted of a felony for the secondary
5 offense, any state prison sentence for the secondary offense shall be consecutive to
6 the primary sentence.

7 (f) If the person is convicted of a felony for the primary offense, is granted
8 probation for the primary offense, and is convicted of a felony for the secondary
9 offense, any state prison sentence for the secondary offense shall be enhanced as
10 provided in subdivision (b).

11 (g) If the primary offense conviction is reversed on appeal, the enhancement
12 shall be suspended pending retrial of that felony. Upon retrial and reconviction,
13 the enhancement shall be reimposed. If the person is no longer in custody for the
14 secondary offense upon reconviction of the primary offense, the court may, at its
15 discretion, reimpose the enhancement and order him or her recommitted to
16 custody.

17 **Comment.** Section 12022.1 continues former Section 12022.1 without change.

18 **§ 12022.2. Possession of armor penetrating ammunition or wearing of body vest**

19 12022.2. (a) Any person who, while armed with a firearm in the commission or
20 attempted commission of any felony, has in his or her immediate possession
21 ammunition for the firearm designed primarily to penetrate metal or armor, shall
22 upon conviction of that felony or attempted felony, in addition and consecutive to
23 the punishment prescribed for the felony or attempted felony, be punished by an
24 additional term of 3, 4, or 10 years. The court shall order the middle term unless
25 there are circumstances in aggravation or mitigation. The court shall state the
26 reasons for its enhancement choice on the record at the time of the sentence.

27 (b) Any person who wears a body vest in the commission or attempted
28 commission of a violent offense, as defined in [subdivision (b) of Section
29 12021.1], shall, upon conviction of that felony or attempted felony, in addition and
30 consecutive to the punishment prescribed for the felony or attempted felony of
31 which he or she has been convicted, be punished by an additional term of one,
32 two, or five years. The court shall order the middle term unless there are
33 circumstances in aggravation or mitigation. The court shall state the reasons for its
34 enhancement choice on the record at the time of the sentence.

35 (c) As used in this section, “body vest” means any bullet-resistant material
36 intended to provide ballistic and trauma protection for the wearer.

37 **Comment.** Section 12022.2 continues former Section 12022.2 without change, except that
38 subdivision (b) is revised to correct a cross-reference to the definition of “violent offense.”

39 See also Section 12001 (“firearm” defined).

40 **Staff Note.** The cross-reference for the definition of “violent offense” in Section 12022.2(b)
41 has not been updated, but is instead placed in brackets. Once the section number for the definition
42 of “violent offense” has been finalized, the cross-reference in this section will be updated.

1 **§ 12022.3. Weapon enhancement for sexual offense**

2 12022.3. For each violation of Section 220 involving a specified sexual offense,
3 or for each violation or attempted violation of Section 261, 262, 264.1, 286, 288,
4 288a, or 289, and in addition to the sentence provided, any person shall receive the
5 following:

6 (a) A 3-, 4-, or 10-year enhancement if the person uses a firearm or a deadly
7 weapon in the commission of the violation.

8 (b) A one-, two-, or five-year enhancement if the person is armed with a firearm
9 or a deadly weapon.

10 **Comment.** Section 12022.3 continues former Section 12022.3 without change.

11 See also Section 12001 (“firearm” defined).

12 **Staff Note.** The text of this provision reflects an amendment made by SB 1302 (Cogdill). See
13 2008 Cal. Stat. ch. 599, § 5.

14 **§ 12022.4. Furnishing firearm**

15 12022.4. Any person who, during the commission or attempted commission of a
16 felony, furnishes or offers to furnish a firearm to another for the purpose of aiding,
17 abetting, or enabling that person or any other person to commit a felony shall, in
18 addition and consecutive to the punishment prescribed by the felony or attempted
19 felony of which the person has been convicted, be punished by an additional term
20 of one, two, or three years in the state prison. The court shall order the middle
21 term unless there are circumstances in aggravation or mitigation. The court shall
22 state the reasons for its enhancement choice on the record at the time of the
23 sentence. The additional term provided in this section shall not be imposed unless
24 the fact of the furnishing is charged in the accusatory pleading and admitted or
25 found to be true by the trier of fact.

26 **Comment.** Section 12022.4 continues former Section 12022.4 without change.

27 See also Section 12001 (“firearm” defined).

28 **§ 12022.5. Personal use of firearm**

29 12022.5. (a) Except as provided in subdivision (b), any person who personally
30 uses a firearm in the commission of a felony or attempted felony shall be punished
31 by an additional and consecutive term of imprisonment in the state prison for 3, 4,
32 or 10 years, unless use of a firearm is an element of that offense.

33 (b) Notwithstanding subdivision (a), any person who personally uses an assault
34 weapon, as specified in [Section 12276 or Section 12276.1], or a machinegun, as
35 defined in Section 16880, in the commission of a felony or attempted felony, shall
36 be punished by an additional and consecutive term of imprisonment in the state
37 prison for 5, 6, or 10 years.

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

1 (d) Notwithstanding the limitation in subdivision (a) relating to being an element
2 of the offense, the additional term provided by this section shall be imposed for
3 any violation of Section 245 if a firearm is used, or for murder if the killing is
4 perpetrated by means of shooting a firearm from a motor vehicle, intentionally at
5 another person outside of the vehicle with the intent to inflict great bodily injury or
6 death.

7 (e) When a person is found to have personally used a firearm, an assault
8 weapon, a machinegun, or a .50 BMG rifle, in the commission of a felony or
9 attempted felony as provided in this section and the firearm, assault weapon,
10 machinegun, or a .50 BMG rifle, is owned by that person, the court shall order that
11 the firearm be deemed a nuisance and disposed of in the manner provided in
12 Sections 18000 and 18005.

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

15 **Comment.** Section 12022.5 continues former Section 12022.5 without change, except that
16 subdivision (b) is revised to correct cross-references to the definitions of “assault weapon” and
17 “machinegun” and subdivision (e) is amended to correct a cross reference to former Section
18 12028.

19 See also Section 12001 (“firearm” defined).

20 **Staff Notes.** (1) The cross-reference for the definition of “assault weapon” in Section
21 12022.5(b) has not been updated, but is instead placed in brackets. Once the section numbers for
22 the definition of “assault weapon” have been finalized, the cross-reference in this section will be
23 updated.

24 (2) There is no definition of “.50 BMG Rifle” that is applicable to this section. That appears to
25 have been an oversight. *Cf.* Section 12022(a)(2). Unless the Commission otherwise directs, we
26 will add this matter to the list of “Minor Clean-up Issues for Possible Future Legislative
27 Attention.” See Memorandum 2008-52.

28 **§ 12022.53. Personal use or discharge of firearm**

29 12022.53. (a) This section applies to the following felonies:

30 (1) Section 187 (murder).

31 (2) Section 203 or 205 (mayhem).

32 (3) Section 207, 209, or 209.5 (kidnapping).

33 (4) Section 211 (robbery).

34 (5) Section 215 (carjacking).

35 (6) Section 220 (assault with intent to commit a specified felony).

36 (7) Subdivision (d) of Section 245 (assault with a firearm on a peace officer or
37 firefighter).

38 (8) Section 261 or 262 (rape).

39 (9) Section 264.1 (rape or sexual penetration in concert).

40 (10) Section 286 (sodomy).

41 (11) Section 288 or 288.5 (lewd act on a child).

42 (12) Section 288a (oral copulation).

43 (13) Section 289 (sexual penetration).

44 (14) Section 4500 (assault by a life prisoner).

1 (15) Section 4501 (assault by a prisoner).

2 (16) Section 4503 (holding a hostage by a prisoner).

3 (17) Any felony punishable by death or imprisonment in the state prison for life.

4 (18) Any attempt to commit a crime listed in this subdivision other than an
5 assault.

6 (b) Notwithstanding any other provision of law, any person who, in the
7 commission of a felony specified in subdivision (a), personally uses a firearm,
8 shall be punished by an additional and consecutive term of imprisonment in the
9 state prison for 10 years. The firearm need not be operable or loaded for this
10 enhancement to apply.

11 (c) Notwithstanding any other provision of law, any person who, in the
12 commission of a felony specified in subdivision (a), personally and intentionally
13 discharges a firearm, shall be punished by an additional and consecutive term of
14 imprisonment in the state prison for 20 years.

15 (d) Notwithstanding any other provision of law, any person who, in the
16 commission of a felony specified in subdivision (a), Section 246, or subdivision
17 (c) or (d) of Section 26100, personally and intentionally discharges a firearm and
18 proximately causes great bodily injury, as defined in Section 12022.7, or death, to
19 any person other than an accomplice, shall be punished by an additional and
20 consecutive term of imprisonment in the state prison for 25 years to life.

21 (e)(1) The enhancements provided in this section shall apply to any person who
22 is a principal in the commission of an offense if both of the following are pled and
23 proved:

24 (A) The person violated subdivision (b) of Section 186.22.

25 (B) Any principal in the offense committed any act specified in subdivision (b),
26 (c), or (d).

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

32 (f) Only one additional term of imprisonment under this section shall be
33 imposed per person for each crime. If more than one enhancement per person is
34 found true under this section, the court shall impose upon that person the
35 enhancement that provides the longest term of imprisonment. An enhancement
36 involving a firearm specified in Section 12021.5, 12022, 12022.3, 12022.4,
37 12022.5, or 12022.55 shall not be imposed on a person in addition to an
38 enhancement imposed pursuant to this section. An enhancement for great bodily
39 injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on
40 a person in addition to an enhancement imposed pursuant to subdivision (d).

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

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

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

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

17 (k) When a person is found to have used or discharged a firearm in the
18 commission of an offense that includes an allegation pursuant to this section and
19 the firearm is owned by that person, a coparticipant, or a coconspirator, the court
20 shall order that the firearm be deemed a nuisance and disposed of in the manner
21 provided in Sections 18000 and 18005.

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

26 **Comment.** Section 12022.53 continues former Section 12022.53 without change, except that
27 subdivision (d) is revised to correct a cross-reference to former Section 12034(c)-(d) and
28 subdivision (k) is revised to correct a cross-reference to former Section 12028.

29 See also Section 12001 (“firearm” defined).

30 **§ 12022.55. Discharge of firearm from motor vehicle causing great bodily injury or death**

31 12022.55. Notwithstanding Section 12022.5, any person who, with the intent to
32 inflict great bodily injury or death, inflicts great bodily injury, as defined in
33 Section 12022.7, or causes the death of a person, other than an occupant of a
34 motor vehicle, as a result of discharging a firearm from a motor vehicle in the
35 commission of a felony or attempted felony, shall be punished by an additional
36 and consecutive term of imprisonment in the state prison for 5, 6, or 10 years.

37 **Comment.** Section 12022.55 continues former Section 12022.55 without change.

38 See also Section 12001 (“firearm” defined).

39 **§ 12022.6. Taking, damaging, or destroying property**

40 12022.6. (a) When any person takes, damages, or destroys any property in the
41 commission or attempted commission of a felony, with the intent to cause that

1 taking, damage, or destruction, the court shall impose an additional term as
2 follows:

3 (1) If the loss exceeds sixty-five thousand dollars (\$65,000), the court, in
4 addition and consecutive to the punishment prescribed for the felony or attempted
5 felony of which the defendant has been convicted, shall impose an additional term
6 of one year.

7 (2) If the loss exceeds two hundred thousand dollars (\$200,000), the court, in
8 addition and consecutive to the punishment prescribed for the felony or attempted
9 felony of which the defendant has been convicted, shall impose an additional term
10 of two years.

11 (3) If the loss exceeds one million three hundred thousand dollars (\$1,300,000),
12 the court, in addition and consecutive to the punishment prescribed for the felony
13 or attempted felony of which the defendant has been convicted, shall impose an
14 additional term of three years.

15 (4) If the loss exceeds three million two hundred thousand dollars (\$3,200,000),
16 the court, in addition and consecutive to the punishment prescribed for the felony
17 or attempted felony of which the defendant has been convicted, shall impose an
18 additional term of four years.

19 (b) In any accusatory pleading involving multiple charges of taking, damage, or
20 destruction, the additional terms provided in this section may be imposed if the
21 aggregate losses to the victims from all felonies exceed the amounts specified in
22 this section and arise from a common scheme or plan. All pleadings under this
23 section shall remain subject to the rules of joinder and severance stated in Section
24 954.

25 (c) The additional terms provided in this section shall not be imposed unless the
26 facts of the taking, damage, or destruction in excess of the amounts provided in
27 this section are charged in the accusatory pleading and admitted or found to be
28 true by the trier of fact.

29 (d) This section applies to, but is not limited to, property taken, damaged, or
30 destroyed in violation of Section 502 or subdivision (b) of Section 502.7. This
31 section shall also apply to applicable prosecutions for a violation of Section 350,
32 653h, 653s, or 653w.

33 (e) For the purposes of this section, the term “loss” has the following meanings:

34 (1) When counterfeit items of computer software are manufactured or possessed
35 for sale, the “loss” from the counterfeiting of those items shall be equivalent to the
36 retail price or fair market value of the true items that are counterfeited.

37 (2) When counterfeited but unassembled components of computer software
38 packages are recovered, including, but not limited to, counterfeited computer
39 diskettes, instruction manuals, or licensing envelopes, the “loss” from the
40 counterfeiting of those components of computer software packages shall be
41 equivalent to the retail price or fair market value of the number of completed
42 computer software packages that could have been made from those components.

1 (f) It is the intent of the Legislature that the provisions of this section be
2 reviewed within 10 years to consider the effects of inflation on the additional
3 terms imposed. For that reason this section shall remain in effect only until
4 January 1, 2018, and as of that date is repealed unless a later enacted statute,
5 which is enacted before January 1, 2018, deletes or extends that date.

6 **Comment.** Section 12022.6 continues former Section 12022.6 without change.

7 **§ 12022.7. Great bodily injury**

8 12022.7. (a) Any person who personally inflicts great bodily injury on any
9 person other than an accomplice in the commission of a felony or attempted felony
10 shall be punished by an additional and consecutive term of imprisonment in the
11 state prison for three years.

12 (b) Any person who personally inflicts great bodily injury on any person other
13 than an accomplice in the commission of a felony or attempted felony which
14 causes the victim to become comatose due to brain injury or to suffer paralysis of
15 a permanent nature, shall be punished by an additional and consecutive term of
16 imprisonment in the state prison for five years. As used in this subdivision,
17 “paralysis” means a major or complete loss of motor function resulting from injury
18 to the nervous system or to a muscular mechanism.

19 (c) Any person who personally inflicts great bodily injury on a person who is 70
20 years of age or older, other than an accomplice, in the commission of a felony or
21 attempted felony shall be punished by an additional and consecutive term of
22 imprisonment in the state prison for five years.

23 (d) Any person who personally inflicts great bodily injury on a child under the
24 age of five years in the commission of a felony or attempted felony shall be
25 punished by an additional and consecutive term of imprisonment in the state
26 prison for four, five, or six years.

27 (e) Any person who personally inflicts great bodily injury under circumstances
28 involving domestic violence in the commission of a felony or attempted felony
29 shall be punished by an additional and consecutive term of imprisonment in the
30 state prison for three, four, or five years. As used in this subdivision, “domestic
31 violence” has the meaning provided in subdivision (b) of Section 13700.

32 (f) As used in this section, “great bodily injury” means a significant or
33 substantial physical injury.

34 (g) This section shall not apply to murder or manslaughter or a violation of
35 Section 451 or 452. Subdivisions (a), (b), (c), and (d) shall not apply if infliction
36 of great bodily injury is an element of the offense.

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

40 **Comment.** Section 12022.7 continues former Section 12022.7 without change.

1 **§ 12022.75. Administration of controlled substance**

2 12022.75. (a) Except as provided in subdivision (b), any person who, for the
3 purpose of committing a felony, administers by injection, inhalation, ingestion, or
4 any other means, any controlled substance listed in Section 11054, 11055, 11056,
5 11057, or 11058 of the Health and Safety Code, against the victim's will by means
6 of force, violence, or fear of immediate and unlawful bodily injury to the victim or
7 another person, shall, in addition and consecutive to the penalty provided for the
8 felony or attempted felony of which he or she has been convicted, be punished by
9 an additional term of three years.

10 (b)(1) Any person who, in the commission or attempted commission of any
11 offense specified in paragraph (2), administers any controlled substance listed in
12 Section 11054, 11055, 11056, 11057, or 11058 of the Health and Safety Code to
13 the victim shall be punished by an additional and consecutive term of
14 imprisonment in the state prison for five years.

15 (2) This subdivision shall apply to the following offenses:

16 (A) Rape, in violation of paragraph (3) or (4) of subdivision (a) of Section 261.

17 (B) Sodomy, in violation of subdivision (f) or (i) of Section 286.

18 (C) Oral copulation, in violation of subdivision (f) or (i) of Section 288a.

19 (D) Sexual penetration, in violation of subdivision (d) or (e) of Section 289.

20 (E) Any offense specified in subdivision (c) of Section 667.61.

21 **Comment.** Section 12022.75 continues former Section 12022.75 without change.

22 **§ 12022.8. Infliction of great bodily injury in committing sexual offense**

23 12022.8. Any person who inflicts great bodily injury, as defined in Section
24 12022.7, on any victim in a violation of Section 220 involving a specified sexual
25 offense, or a violation or attempted violation of paragraph (2), (3), or (6) of
26 subdivision (a) of Section 261, paragraph (1) or (4) of subdivision (a) of Section
27 262, Section 264.1, subdivision (b) of Section 288, subdivision (a) of Section 289,
28 or sodomy or oral copulation by force, violence, duress, menace, or fear of
29 immediate and unlawful bodily injury on the victim or another person as provided
30 in Section 286 or 288a shall receive a five-year enhancement for each violation in
31 addition to the sentence provided for the felony conviction.

32 **Comment.** Section 12022.8 continues former Section 12022.8 without change.

33  **Staff Note.** The text of this provision reflects an amendment made by SB 1302 (Cogdill). See
34 2008 Cal. Stat. ch. 599, § 6.

35 **§ 12022.85. Sexual offense by person with knowledge that the person has AIDS**

36 12022.85. (a) Any person who violates one or more of the offenses listed in
37 subdivision (b) with knowledge that he or she has acquired immune deficiency
38 syndrome (AIDS) or with the knowledge that he or she carries antibodies of the
39 human immunodeficiency virus at the time of the commission of those offenses,
40 shall receive a three-year enhancement for each violation in addition to the
41 sentence provided under those sections.

- 1 (b) Subdivision (a) applies to the following crimes:
2 (1) Rape in violation of Section 261.
3 (2) Unlawful intercourse with a person under 18 years of age in violation of
4 Section 261.5.
5 (3) Rape of a spouse in violation of Section 262.
6 (4) Sodomy in violation of Section 286.
7 (5) Oral copulation in violation of Section 288a.
8 (c) For purposes of proving the knowledge requirement of this section, the
9 prosecuting attorney may use test results received under subdivision (c) of Section
10 1202.1 or subdivision (g) of Section 1202.6.

11 **Comment.** Section 12022.85 continues former Section 12022.85 without change.

12 **§ 12022.9. Termination of pregnancy of victim known to be pregnant**

13 12022.9. Any person who, during the commission of a felony or attempted
14 felony, knows or reasonably should know that the victim is pregnant, and who,
15 with intent to inflict injury, and without the consent of the woman, personally
16 inflicts injury upon a pregnant woman that results in the termination of the
17 pregnancy shall be punished by an additional and consecutive term of
18 imprisonment in the state prison for five years. The additional term provided in
19 this subdivision shall not be imposed unless the fact of that injury is charged in the
20 accusatory pleading and admitted or found to be true by the trier of fact.

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

23 **Comment.** Section 12022.9 continues former Section 12022.9 without change.

24 **§ 12022.95. Injury to child**

25 12022.95. Any person convicted of a violation of Section 273a, who under
26 circumstances or conditions likely to produce great bodily harm or death, willfully
27 causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain
28 or injury that results in death, or having the care or custody of any child, under
29 circumstances likely to produce great bodily harm or death, willfully causes or
30 permits that child to be injured or harmed, and that injury or harm results in death,
31 shall receive a four-year enhancement for each violation, in addition to the
32 sentence provided for that conviction. Nothing in this paragraph shall be construed
33 as affecting the applicability of subdivision (a) of Section 187 or Section 192. This
34 section shall not apply unless the allegation is included within an accusatory
35 pleading and admitted by the defendant or found to be true by the trier of fact.

36 **Comment.** Section 12022.95 continues former Section 12022.95 without change.