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*“Justice for the Incarcerated”*

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**ENHANCEMENTS IN CALIFORNIA CRIMINAL LAW: Making sense of tacking on more time.**

In this article, California prisoners will learn the fundamentals about sentencing enhancements.

Sentencing enhancements are laws that increase the usual punishment for criminal convictions. California has a complicated scheme of sentencing enhancements. This article explains—in the clearest possible language—the major enhancements in five areas: prior crimes, guns, gangs, great bodily injury, and carjacking. This article also explains how a court chooses between consecutive and concurrent sentences, and how consecutive sentences are calculated.

**1. Prior-crime enhancements.**

California’s enhancements for prior crimes can be fairly split into two categories: (1) the three-strikes law; and (2) everything else. The three-strikes law overshadows all the others.

**The three-strikes law:**

The three-strikes law increases punishment for felony convictions when the defendant has a prior conviction for a serious or violent felony. These prior serious or violent felony convictions are called, “strikes.”

*i. What qualifies as a serious or violent felony?*

Serious felonies are listed in Penal Code 1192.7(c) and 1192.8, and violent felonies are listed in 667.5(c). The two categories mostly overlap. Not all of them are listed here, but they include murder, mayhem, rape, sodomy, lewd and lascivious act, robbery, kidnapping, carjacking, and first-degree burglary. Violent felonies also include any felony punishable by a life sentence or the death penalty. And any felony where the defendant inflicts great bodily injury or uses a firearm is a violent felony.

*ii. What if you have one or more prior strikes?*

There are two consequences for having one prior strike. First, the sentence for any new felony conviction **doubles**. (PC 667(e)(1) and 1170.12(c)(1).) Second, a 5-year enhancement

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applies in addition to the doubling if the new felony is “serious” felony. (667(a).)

The consequences are much worse if you have two or more prior strikes. In that case, the three-strikes law calls for a 25-to-life sentence for *any* new felony.

*iii. Do juvenile convictions count as strikes?*

Sometimes. Penal Code 667(d)(3) and 1170.12(b)(3) set four conditions that must be met for a juvenile conviction to count as a strike: (1) the minor was at least 16 years old when he committed the prior crime; (2) the minor was found fit to be adjudicated in juvenile court for the prior; (3) the juvenile crime was a serious or violent felony; and (4) the minor has been adjudicated a ward of the court on the basis of committing a serious or violent crime. Juvenile convictions count as strikes only when all four conditions are satisfied.

*iv. How to avoid a three-strike sentence if you have a prior strike.*

Courts have the power to “strike the strike.” This means they can choose to ignore prior strikes when they sentence for new crimes. (1385(a) and *People v. Superior Court (Romero)*, 13 Cal. 4th 497 (1996).) Courts can ignore one prior strike, or they can ignore all prior strikes and sentence the defendant entirely outside of the three-strikes law. There is one exception though. The 5-year enhancement always applies to a serious felony if the defendant has a prior strike. (PC 1385(b).)

Unfortunately, there are no clear rules for when a court should “strike the strike.” They do so when it is in the interests of justice. Courts also consider whether the defendant falls outside the spirit of the three-strike law. These are general rules and the court has wide latitude to make the decision.

**Everything else:**

California has several other sentencing enhancements for prior crimes. Here are some of the most common.

A current conviction for a “serious” felony gets a 5-year enhancement if the defendant has a prior serious-felony conviction. (PC 667(a).) Also, a 3-year enhancement applies to “violent” felonies if the defendant served time in prison for a prior violent felony. (PC 667.5(a).) Additionally, a 1-year enhancement applies to any felony if the defendant served time in prison for a prior felony. (PC 667.5(b).)

Defendants convicted of some sex-crimes also face strict enhancements. These crimes are listed in PC 667.6(e). A person convicted of a crime on the list receives a 5-year enhancement for *each* prior conviction on the list. (PC 667.6(a).) Even worse, if the defendant previously went to prison a crime on the list, the court imposes a 10-year enhancement for *each* prior prison term. (PC 667.6(b).)

California also has enhancements for prior drug crimes. Convictions for narcotic offenses get a 3-year enhancement for *each* prior drug-crime conviction. (Health and Safety Code 11370.2(a).)

2. Gun enhancements.

California has one gun enhancement that is so strict that it overshadows all the others: the 10-20-life enhancement. This article will also explain a few other gun enhancements.

### **The 10-20-life enhancement:**

Personally using a firearm during a violent felony will get you a 10-year, 20-year, or 25-to-life enhancement under PC 12022.53.

*i. What crimes are subject to the 10-20-life enhancement?*

The 10-20-life enhancement applies to specific “violent” felonies. Penal Code 12022.53(a) lists 16 felonies that are considered “violent,” including among others: murder, kidnapping, robbery, carjacking, and rape. In addition, any felony that carries a life sentence or the death penalty counts as a “violent felony.” Attempts also trigger the enhancement, except for attempted assaults.

*ii. What are the enhancements for using a gun during a violent felony?*

The 10-20-life law creates three gun enhancements: (1) for using a gun; (2) for discharging a gun; and (3) for discharging a gun and causing great bodily injury or death.

Anyone who “uses” a firearm during a violent felony is subject to a 10-year enhancement, even if the gun is not loaded, and even if the gun is broken and inoperable.

Anyone who “discharges” a firearm during a violent felony is subject to a 20-year enhancement. This applies anytime the trigger is pulled, even if the gun misfires and does not fire a bullet.

Anyone who “discharges a firearm and causes great bodily injury or death” is subject to a 25-years-to-life enhancement. This enhancement can apply even when the victim was not hit by a bullet. So long as the defendant’s actions of discharging the gun caused the injury, the enhancement applies. For example, *People v. Palmer* (2005) 35 Cal. App. 4th 1141, imposed the 25-to-life enhancement where the victim (who was not hit by a bullet) broke an ankle trying to run from the defendant who fired the gun. The enhancement does not apply, however, if the defendant causes great bodily injury or death only to an accomplice.

*iii. What if someone else used or discharged the gun?*

The 10-20-life enhancements apply only if a defendant “personally” uses or discharges a firearm, so the enhancements do not apply if an accomplice or co-defendant had the gun. There is, however, one exception for gang crimes. Where the *defendant* committed a street-gang crime (PC 186.22), and *anyone with the defendant* used, discharged, or discharged and caused great bodily injury or death, then the defendant can receive the enhancement even if he did not personally use the gun.

### **General enhancements for having a gun during a felony:**

There are different enhancements for being “armed” during a felony and “using a gun” during a felony.

*i. What is the difference between being “armed” and “using” a gun?*

A person is “armed” anytime a gun is readily accessible. The person does not need to be carrying the gun so long as they can readily obtain it. For example, if guns and drugs are

found in a bedroom closet, the defendant is “armed” because the gun was readily accessible during the crime of drug possession. Also, aiders and abettors are considered “armed” even if they are not personally armed.

“Use” of a gun is a very broad term and almost any use of a gun will qualify. If the gun is visible, it qualifies as “use.” It does not need to be fired. If the gun is likely to produce fear of harm, that is enough.

*ii. What are the penalties for being armed or using a gun during a felony?*

Anyone “armed” during commission of any felony gets a 1-year enhancement, unless being armed is an element of that felony. But if the gun is an assault weapon, machine gun, or .50 BMG rifle, then a 3-year enhancement applies even if being armed is an element of the felony. (PC 12022(a)(1).)

Drug and sex crimes have special enhancements for being “armed.” An armed defendant who commits a drug felony gets a 3, 4, or 5-year enhancement. (PC 12022(c).) If the defendant is not personally armed but knows that an accomplice is personally armed, the defendant gets a 1, 2, or 3-year enhancement. For sex crimes, being armed while committing a sex crime listed in PC 12022.3 causes a 1, 2, or 5-year enhancement. (12022.3.)

“Using” a gun during any felony gets a 3, 4, or 10-year enhancement, unless it is a felony where being armed is an element of the crime. (PC 12022.5(a).) If the gun is an assault weapon or machine gun the enhancement increases to 5, 6, or 10 years.

**Gun enhancements for cars and for street-gang crimes:**

Discharging a firearm from a vehicle and causing great bodily injury or death leads to a 5, 6, or 10-year enhancement. (12022.55.)

California’s street-gang law is discussed in the next section, but it includes two enhancements to mention here. First, carrying a firearm during a street-gang crime leads to a 1, 2, or 3-year enhancement. (12021.5.) Second, a 2, 3, or 4-year enhancement applies if the firearm has a detachable magazine.

**3. Gang enhancements.**

The gang enhancements are in California’s Street Terrorism Enforcement and Prevention Act (called STEP). (PC 186.22.) This is an especially complex statute that contains, sentencing enhancements, alternative sentencing schemes, and a minimum parole eligibility period, among other provisions. It applies to crimes having to do with criminal street gangs.

*i. What is a “criminal street gang?”*

The full definition of a “criminal street gang” is: “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more criminal acts enumerated in PC 186.22(e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.”

(PC 186.22(f).) This complicated definition boils down to three elements of a criminal street gang:

- (1) an ongoing association involving 3 or more participants that have a common name or identifying sign or symbol;
- (2) the association has as one of its primary activities the commission of at least one of the specified crimes (discussed below); and
- (3) the group's members either separately or as a group must have engaged in a pattern of criminal gang activity.

That raises the question of what is, “a pattern of criminal gang activity” in element three? The pattern requires that at least two of the specified offenses (discussed in next paragraph) be committed within 3 years of each other, by at least two people, and on two separate occasions. The current charge can count as one of the two offenses.

Finally, STEP lists several crimes that apply to element 2 and that qualify as offenses that prove a pattern of gang activity. Thirty-three are listed in PC 186.22(e), but major ones include: assault with a deadly weapon, robbery, homicide or manslaughter, drug offenses, shooting at an inhabited dwelling or car, shooting from a car, grand theft, burglary, rape, kidnapping, carjacking, and carrying a concealed or loaded firearm.

*ii. When do the gang enhancements apply under STEP?*

STEP applies severe sentence enhancements when a person is convicted of a felony that is committed:

- (a) for the benefit of, at the direction of, or in association with any criminal street gang; and
- (b) with the specific intent to promote, further, or assist in any criminal conduct by gang members.

Regarding element (a), crimes can “benefit” a criminal street gang in many ways. Some include: retaliation, financial gain, respect or intimidation, increasing someone’s personal status within the gang, preventing arrest, and intimidating witnesses.

Also regarding element (a), crimes are “associated with” a criminal street gang anytime the defendant commits the crime with another gang member. Crimes are also “associated with” a gang if they have any connection to a gang. In one example, a defendant received a gang enhancement for illegal possession of a handgun. The gun possession was “associated” with a street gang because the defendant hid the gun at another gang member’s house. *People v. Margarejo* (2008) 162 Cal. App. 4th 102.

Moving on to element (b), a broad range of conduct shows a “specific intent to promote, further, or assist” criminal conduct by gang members. Any crime that intimidates rival gangs or neighborhood residents will suffice. If the crime helps, aids, or promotes *any* criminal conduct by gang members, that will satisfy the specific-intent element. It is not enough, however, for the prosecution to rely on gang membership and criminal history alone. Something else has to be proven.

To summarize, STEP’s gang enhancements apply whenever elements (a) and (b) are satisfied.

*iii. What enhancements apply under STEP?*

There are three enhancements that apply when a person is convicted of a felony that triggers STEP enhancements.

1. For *any* felony: 2, 3, or 4-year enhancement.
2. For *serious* felonies: 5-year enhancement.
3. For *violent* felonies: 10-year enhancement.

Serious felonies are listed in PC 1192.7(c), and violent felonies in 667.5(c).

*iv. What other sentencing changes does STEP create?*

STEP has three alternative sentencing schemes that increase punishment.

First, *any crime* (even misdemeanors) that meets the STEP elements is treated as a “wobbler” offense, meaning it can be sentenced like a misdemeanor or like a felony. This means the court can sentence to either up to a year in county jail, or in state prison for 1, 2, or 3 years. (PC 186.22(d).)

Second, some felonies get life sentences under STEP. They include home invasion robbery, carjacking, shooting at an occupied vehicle or building, shooting from a moving vehicle, extortion, and threatening a witness or victim. Commit any of these crimes as a street-gang crime, and the sentence is 15 years to life. The only exceptions are for extortion and threatening a witness or victim, which get 7 years to life.

Lastly, STEP increases the minimum parole period if a defendant commits a street-gang crime that is normally punishable by an indeterminate life sentence. In that case, the minimum parole eligibility is 15 years. For example, the normal sentence for kidnapping to commit a robbery is 7 years to life. But if the kidnapping meets STEP’s elements for a street-gang crime, then the sentence becomes 15 years to life instead.

*v. Conclusion.*

STEP is complex, and the enhancements can be confusing. But to summarize, the enhancements apply whenever a person commits a felony that is: (a) for the benefit of, at the direction of, or in association with any criminal street gang; and (b) with the specific intent to promote, further, or assist in any criminal conduct by gang members.

4. Enhancements for crimes causing great bodily injury.

After learning about gang enhancements, the enhancements for causing great bodily injury (GBI) are refreshingly straightforward.

The first question is determining what injuries qualify as a “great bodily injury.” The Penal Code calls it, “a significant or substantial physical injury.” (12022.7(f).) This is a broad definition, and the jury gets to decide whether an injury qualifies or not. With sex offenses, giving the victim a sexually-transmitted disease can qualify as GBI. At least one jury found that pregnancy was a GBI, where the defendant had consensual (but illegal) sex with a minor.

The standard GBI enhancement is 3 years, and it applies to anyone who causes GBI during the commission of a felony or an attempted commission. (PC 12022.7(a).) It does not

apply if the only person who suffers GBI is an accomplice.

A harsher enhancement applies when GBI or death results from shooting a firearm from a vehicle. In that case the enhancement is 5, 6, or 10 years. But this enhancement only applies when the defendant had the intent to cause GBI or death.

The GBI enhancement has one limitation. It cannot be applied if causing GBI or serious bodily injury is an element to the offense. As a result, it does not apply to murder or manslaughter. As another example, PC 243(d) is the crime, “battery involving the infliction of serious bodily injury.” Because inflicting a serious injury is part of the crime, the defendant cannot also be punished with a GBI enhancement.

Finally, remember that some of the enhancements discussed earlier in this article involved GBI. For example, any felony where the defendant causes GBI counts as a violent felony under the three-strikes law.

## 5. Carjacking enhancements.

Carjacking has already been discussed above, because it is both a serious and a violent felony. Hence, a *prior* conviction for carjacking will result in a 5-year enhancement for a *new* felony conviction. It is also covered by STEP and the 10-20-life firearm enhancement.

However, there are a few other enhancements. Personally using a deadly weapon during a carjacking gets a 1, 2, or 3-year enhancement. (PC 12022(b)(2).) There is also an enhancement applied to defendants who served prior prison terms for violent felonies. If those defendants are convicted of carjacking, the court imposes a 3-year enhancement for *each* prior prison term the defendant served for a violent felony. (PC 667.5(a).)

## 6. Consecutive versus concurrent sentences.

This section explains how courts choose between consecutive and concurrent sentences, and how to calculate the total consecutive sentence.

### *i. What is the difference between consecutive and concurrent sentences?*

This question comes up when a defendant is convicted of more than one crime in a single case. For example, suppose a defendant was convicted of two crimes, A and B, and they both carry a 4-year sentence. If the sentences are “concurrent,” they are served at the same time. The defendant serves both 4-year sentences together and gets out after 4 years. But, if the sentences are “consecutive,” they are served one after the other. So the defendant serves 4 years for crime A, and then serves another 4 years for crime B, for a total of 8 years.

### *ii. How do courts choose between consecutive and concurrent?*

Unless a statute requires consecutive sentences, the trial court has discretion to choose. (PC 669.) Most, if not all, of the enhancements in this article are required to be served consecutively.

The Rules of Court list criteria that courts should consider (Rule 4.425), but the court can also consider factors that are not listed. Here are some factors from the list:

- Were the crimes and their objectives independent of one another?
- Did the crimes involve separate acts of violence or threats of violence?
- Were the crimes committed at a single time in a single place, or at multiple times in

multiple places?

The Rules of Court also list factors that the court cannot use to impose consecutive sentences. (Rule 4.425(b).) This list includes: a fact used to impose the upper sentence term; a fact used to enhance the sentence; and a fact that is an element of the crime.

If the court chooses to impose consecutive sentences, it has to give a statement of reasons for that choice. (PC 1170(c).)

*iii. How are consecutive sentences calculated?*

Calculating the total term for consecutive sentences is not as simple as adding up the sentences for each crime. Instead, there is a three-step process. But before we get to the steps, we have to define some terms.

Three terms need defining. First, the “principal term” means the crime for which the court *imposes* the longest sentence, plus enhancements that apply to that crime. The principal term is not necessarily the crime with the longest *possible* sentence. Second, the “subordinate term” simply means the term for the other crimes (not the principal), plus enhancements for the other crimes. For example, assume defendant is convicted of crimes A, B and C, and in order the defendant is sentenced to 5, 3, and 1 years. Crime A’s 5-year term is the “principal term” because it was the longest sentence imposed. Crimes B and C are the subordinate terms. Finally, the “aggregate term” is the total sentence.

Now, here are the three steps courts apply to calculate the aggregate term.

In step one, the court freely chooses the principal term, including any enhancements. This is easy because the judge simply uses whatever crime he or she gave the longest sentence for.

Step two is more complicated. In step two, the court calculates the subordinate term by imposing one-third of the middle term for the other crimes, and one-third of the enhancements. If an enhancement has multiple terms (for example the 3, 4, or 10-year enhancement for use of a firearm in PC 12022.5), the court chooses the one that best serves the interests of justice, then imposes one-third of that term. We will see an example in a moment.

Step three is to add the principal and subordinate terms together.

*iv. An example.*

Suppose defendant is convicted of three crimes: (1) lewd and lascivious act on a child under age 14; (2) second-degree robbery with a victim older than 65; and (3) unlawful driving of a motor vehicle. Now we apply the three steps.

In step one, we calculate the principal term. The lewd-and-lascivious-act conviction has a sentencing range of 3, 6, or 8 years. The robbery conviction has a range of 2, 3, or 5 years. Either one can serve as the principal term. It depends on which charge the judge decides to impose the longer sentence for. We will assume the judge sentences the defendant to 8 years for the lewd-act conviction. That becomes the principal term.

Step two is calculating the subordinate term. Count 1 is the principal, so counts 2 and 3 will form the subordinate term. Remember, for the subordinate term, the court imposes one-third of the middle term, and one-third of any enhancements.

So, for count 2, the robbery, the range is 2, 3, or 5 years. The court will impose one-third of the middle term. Here, the middle term is 3 years, and one-third of that is one year. So



the subordinate term on the robbery charge is one year. The robbery charge also has a 1-year enhancement because the victim was over age 65. The court will impose one-third of that enhancement. One-third of one year is 4 months.

For count 3, unlawful driving, the sentencing range is 16 months, 2 years, or 3 years. To calculate the subordinate term the court uses one-third of the middle term. One-third of 2 years is 8 months.

**The total subordinate term** is 1 year 4 months for the robbery and enhancement, plus 8 months for unlawful driving. One year + 4 months + 8 months = **2 years**.

In step 3, we add the principal and subordinate terms to find the aggregate term. Here, the principal term is 8 years for count 1. The total subordinate term is 2 years. So the aggregate term is  $8 + 2 = 10$  years.

*v. Another example.*

Now we will see an example where the court does not choose the longest available sentence as the principal term. Suppose the defendant is convicted of crimes A and B:

A's sentence range: 16 months, 2 years, or 3 years.

B's sentence range: 2, 3, or 4 years.

The sentencing court can choose either crime as the principal term, even though the max on crime B is longer than the max on crime A.

For step one (calculating the principal term), assume the court imposes the lower term of 16 months for crime A. Even though that sentence is shorter than the minimum for crime B, the 16-month sentence will serve as the principal term here.

For step two (calculating the subordinate term), the court imposes one-third of the middle term for crime B. The middle term is 3 years, and one-third of that is one year.

Now it makes sense that crime A is the principal and crime B is the subordinate. It is because the principal term is always the longest sentence the court actually imposes. Here, 16 months for crime A is longer than one year for crime B, so crime A is the principal term. This example shows that the principal term is the longest sentence *imposed*, not just the longest sentence *possible*.

## 7. Conclusion.

Hopefully the sentencing enhancements are easier to understand now. These are very harsh laws, and the years can pile up quickly. Share this knowledge with your family and friends. The more people who learn about how the system actually works, the more likely change will come.

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