

## RECENT DEVELOPMENTS IN SENTENCING LAW (February 2008)

### ENHANCEMENTS

- **Penal Code section<sup>1</sup> 654 applies where enhancements go to the nature of the current offense and punish acts done during commission of that offense. Accordingly, it bars the reliance on a single act of firearm use to impose a firearm enhancement and to augment a gang enhancement (§ 186.22(b)(1)(C)).** (*People v. Rodriguez* (2007) 157 Cal.App.4th 14, 22.) The Court in *Rodriguez* analogized the situation to that of necessarily included offenses and concluded that the firearm use finding was necessarily included in the augmented gang enhancement. *Rodriguez* highlights a split in authority as to whether section 654 applies to enhancements. (Please note that the Supreme Court has interpreted language in the firearm enhancement in section 12022.53, not present in section 12022.5 at issue in *Rodriguez*, as barring the application of section 654 (*People v. Palacios* (2007) 41 Cal.4th 720, 726-728).)
- **Section 12022.1, subdivision (e), which provides that “any state prison sentence for the secondary offense shall be consecutive to the primary offense [(crime committed before release on bail)],” requires a consecutive sentence of only one secondary offense (crime committed while released on bail) where there are multiple secondary offenses.** The choice whether to impose the secondary offenses consecutively or concurrently to each other is a discretionary choice for the trial court. (*People v. Tillotson* (2007) 157 Cal.App.4th 517, 544-545.) *This case is a reminder that in cases with bail enhancements (§ 12022.1, subd. (b)), a possible adverse circumstance to look for is whether the court failed to make the first secondary offense consecutive. Unlike the two year enhancements in subdivision (b), the statute does not explicitly require pleading before imposing a consecutive sentence pursuant to subdivision (e).*
- **It is impermissible dual-use under section 1170, subdivision (b), to impose an enhancement for a prison prior (§ 667.5, subd. (b)) and to use the fact of the prior conviction underlying the prison prior to justify an upper term sentence.** (*People v. McFearson* (2008) 158 Cal.App.4th 810, 816.) The Fifth Appellate District reached this holding, after concluding that the Supreme Court case of *People v. Jones* (1993) 5 Cal.4th 1142, 1148, which held that a court could not impose both prison prior enhancements (§ 667.5, subd. (b)) and serious felony prior enhancements (§ 667, subd. (a)), is indistinguishable. A prison prior is based on the fact of prior conviction, not a prior prison term. *McFearson* is also significant and useful authority for the premise that cases with dual-use should be reversed because it cannot be known what the court would have done had it realized its error. (*McFearson*, at p. 816.) The Court of Appeal reversed the defendant’s sentence, even though the trial court had given other permissible reasons for choosing the upper term. Significantly, the court explicitly recognizes its decision contradicts its similar holding in *People v. Hurley* (1983) 144 Cal.App.3d 706, 709 [no dual-use where court imposes two prison priors and relies on convictions that formed basis for the prison priors to conclude prior convictions are numerous and justify upper term].)

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<sup>1</sup>All statutory references are to the Penal Code unless otherwise noted.

- **Courts have discretion to strike deadly weapon enhancements pursuant to section 12022, subdivision (b)(1).** (*People v. Jones* (2007) 157 Cal.App.4th 1373, 1383.)

### CUNNINGHAM

- **A fact relied upon by court that defendant admitted prior to sentencing is a valid factor for court to rely upon.** In *People v. Landaverde* (2007) 157 Cal.App.4th 28, 34, one justification by the trial court for the upper term sentence was that sexual abuse lasted for five years. Because the defendant's recorded admission to a detective that he abused the victim for years was admitted at trial, the Court of Appeal found this factor valid. *This holding significantly expands the exception to the right to jury trial of a factor admitted by a defendant from a defendant's admission of an aggravating factor for sentencing purposes to a fact admitted by the defendant for any purpose at any time that is admitted into evidence.*
- **A jury finding of great bodily injury does not establish an "inherent high risk" from using a firearm,** the trial court's justification for choosing the upper term for a firearm enhancement. In *People v. Lincoln* (2007) 157 Cal.App.4th 196, 203-204, the Court of Appeal found this particular error not harmless because the lack of clarity of the meaning of "inherent high risk" left it unknown how the jurors would be instructed and whether "inherent high risk" was more than an inherent feature of the firearm enhancement. It ultimately reversed, after concluding it could not conclude with confidence a jury would have found one of the factors relied upon true beyond a reasonable doubt, citing *Sandoval* (other factors were victim vulnerability and planning or deliberation). *This case could be used as an analogy in situations when the court's justification for an enhanced sentencing choice is arguably different than a jury's finding of fact for another purpose.*
- **Prior convictions not relied upon by trial court to justify upper term sentence can validate upper term sentence.** Trial court listed multiple reasons for imposing the upper term that did not fit within the prior conviction exception, but it also justified a denial of probation on six prior misdemeanor convictions and a criminal history of increasing seriousness. (*People v. Stuart* (January 24, 2008, C054017).
- While still waiting for the Supreme Court to decide whether these factors fit within an exception to *Cunningham's* right to jury finding beyond a reasonable doubt, Division Three of the Fourth Appellate District held that **a defendant's status on parole at the time of the offense fits within the prior conviction exception, but it is a harder question whether unsatisfactory performance on parole requires a jury trial.** The court did not resolve the latter question because it determined any error was harmless given overwhelming evidence of unsatisfactory performance and given that other valid factors existed. In dicta, the court noted that, on the one hand, the determination of whether performance was unsatisfactory requires a subjective determination, but, on the other hand, such a decision is one traditionally made by trial courts in a special position to compare defendants. (*People v. Morton* (2008) 159 Cal.App.4th 239.) *If the latter justification became law, it would significantly expand the exception to the right to jury trial of an admission by the defendant of the fact of prior conviction.*

## CREDITS

- **The 15% credit limitation of section 2933.1 applies to the sentence imposed for a non-violent felony where a violent felony is stayed pursuant to section 654.** (*In re Pope* (2008) 158 Cal.App.4th 860, 863-866.)
- **Individuals are not entitled to credits for time spent on an electronic monitor.**(*People v. Anaya* (2007) 158 Cal.App.4th 608, 612-613.)\_\_

## FEES / FINES

- **Evidence of victim restitution at a restitution hearing can consist solely of statements of the victim of estimates of the value of the stolen property. Once such evidence is presented, it is up to the defense to obtain greater detail on cross-examination or present its own evidence to contradict the values.** In *People v. Prosser* (2007) 157 Cal.App.4th 682, 689-692, the victim testified regarding the amount her mother said she had spent on jewelry, estimates of the value of other jewelry based on her reported conversations with various jewelers, and estimates of other items without explanation. The Court of Appeal found appellant's claim that the trial court should have been more specific in explaining its award waived, but regardless, found the award of restitution based on the victim's testimony of claimed amounts, "discounted" by the trial court, a proper exercise of discretion. Also, it found the victim's opinion testimony had adequate foundation pursuant to Evidence Code section 813.
- **Probation revocation fines pursuant to Penal Code section 1202.44 apply in all cases where probation is granted, regardless of whether sentence is imposed and execution suspended or not.** (*People v. Taylor* (2007) 157 Cal.App.4th 433, 438.)

## PROPOSITION 36

- **Where the third allegation of a drug-related probation violation is based on conduct that occurred prior to notice of the second drug-related probation violation, Proposition 36 should not be terminated due to three drug-related violations because the defendant did not have three distinct periods of probation.** The problem lies in a lack of notice; the defendant was not informed of a second violation in time to change behavior to avoid a third violation, which contradicts the purpose of the statute. The fact that a single hearing for multiple violations is permissible to fulfill due process protections does not change this result. (*People v. Hazle* (2007) 157 Cal.App.4th 567, 576-577.)