

Introduced by Senator Wright

February 12, 2009

An act to amend Sections 186.22, 186.33, 1170.1, 12021.5, 12022.2, and 12022.4 of the Penal Code, relating to sentencing.

LEGISLATIVE COUNSEL'S DIGEST

SB 150, as introduced, Wright. Sentencing.

Existing law provides that most felonies are punishable by a triad of terms of incarceration in the state prison, comprised of low, middle, and upper terms. Previous law that required the court to impose the middle term, unless there were circumstances in aggravation or mitigation of the crime, was amended to provide that the choice of the appropriate term rests within the sound discretion of the court. Existing provisions related to sentence enhancements involving criminal street gang activity, firearms, and sentencing generally specify that the court shall impose the middle term of a triad of sentence enhancements unless there are circumstances in aggravation or mitigation of the crime.

This bill would delete the requirement that the court impose the middle term, as specified, from those provisions.

This bill would amend Proposition 21, an initiative statute adopted by the voters at the March 7, 2000, Statewide Primary Election that provides that its provisions may be amended by the Legislature by a $\frac{2}{3}$ vote of the membership of each house, and therefore requires a $\frac{2}{3}$ vote.

Vote: $\frac{2}{3}$. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 186.22 of the Penal Code is amended to read:

186.22. (a) Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.

(b) (1) Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows:

(A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion.

(B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years.

(C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years.

(2) If the underlying felony described in paragraph (1) is committed on the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school, during hours in which the facility is open for classes or school-related programs or when minors are using the facility, that fact shall be a circumstance in aggravation of the crime in imposing a term under paragraph (1).

(3) ~~The court shall order the imposition of the middle term of the sentence enhancement, unless there are circumstances in aggravation or mitigation.~~ The court shall state the reasons for its

1 choice of sentencing enhancements on the record at the time of
2 the sentencing.

3 (4) Any person who is convicted of a felony enumerated in this
4 paragraph committed for the benefit of, at the direction of, or in
5 association with any criminal street gang, with the specific intent
6 to promote, further, or assist in any criminal conduct by gang
7 members, shall, upon conviction of that felony, be sentenced to
8 an indeterminate term of life imprisonment with a minimum term
9 of the indeterminate sentence calculated as the greater of:

10 (A) The term determined by the court pursuant to Section 1170
11 for the underlying conviction, including any enhancement
12 applicable under Chapter 4.5 (commencing with Section 1170) of
13 Title 7 of Part 2, or any period prescribed by Section 3046, if the
14 felony is any of the offenses enumerated in subparagraph (B) or
15 (C) of this paragraph.

16 (B) Imprisonment in the state prison for 15 years, if the felony
17 is a home invasion robbery, in violation of subparagraph (A) of
18 paragraph (1) of subdivision (a) of Section 213; carjacking, as
19 defined in Section 215; a felony violation of Section 246; or a
20 violation of Section 12022.55.

21 (C) Imprisonment in the state prison for seven years, if the
22 felony is extortion, as defined in Section 519; or threats to victims
23 and witnesses, as defined in Section 136.1.

24 (5) Except as provided in paragraph (4), any person who violates
25 this subdivision in the commission of a felony punishable by
26 imprisonment in the state prison for life shall not be paroled until
27 a minimum of 15 calendar years have been served.

28 (c) If the court grants probation or suspends the execution of
29 sentence imposed upon the defendant for a violation of subdivision
30 (a), or in cases involving a true finding of the enhancement
31 enumerated in subdivision (b), the court shall require that the
32 defendant serve a minimum of 180 days in a county jail as a
33 condition thereof.

34 (d) Any person who is convicted of a public offense punishable
35 as a felony or a misdemeanor, which is committed for the benefit
36 of, at the direction of or in association with, any criminal street
37 gang with the specific intent to promote, further, or assist in any
38 criminal conduct by gang members, shall be punished by
39 imprisonment in the county jail not to exceed one year, or by
40 imprisonment in the state prison for one, two, or three years,

1 provided that any person sentenced to imprisonment in the county
2 jail shall be imprisoned for a period not to exceed one year, but
3 not less than 180 days, and shall not be eligible for release upon
4 completion of sentence, parole, or any other basis, until he or she
5 has served 180 days. If the court grants probation or suspends the
6 execution of sentence imposed upon the defendant, it shall require
7 as a condition thereof that the defendant serve 180 days in a county
8 jail.

9 (e) As used in this chapter, “pattern of criminal gang activity”
10 means the commission of, attempted commission of, conspiracy
11 to commit, or solicitation of, sustained juvenile petition for, or
12 conviction of two or more of the following offenses, provided at
13 least one of these offenses occurred after the effective date of this
14 chapter and the last of those offenses occurred within three years
15 after a prior offense, and the offenses were committed on separate
16 occasions, or by two or more persons:

17 (1) Assault with a deadly weapon or by means of force likely
18 to produce great bodily injury, as defined in Section 245.

19 (2) Robbery, as defined in Chapter 4 (commencing with Section
20 211) of Title 8 of Part 1.

21 (3) Unlawful homicide or manslaughter, as defined in Chapter
22 1 (commencing with Section 187) of Title 8 of Part 1.

23 (4) The sale, possession for sale, transportation, manufacture,
24 offer for sale, or offer to manufacture controlled substances as
25 defined in Sections 11054, 11055, 11056, 11057, and 11058 of
26 the Health and Safety Code.

27 (5) Shooting at an inhabited dwelling or occupied motor vehicle,
28 as defined in Section 246.

29 (6) Discharging or permitting the discharge of a firearm from
30 a motor vehicle, as defined in subdivisions (a) and (b) of Section
31 12034.

32 (7) Arson, as defined in Chapter 1 (commencing with Section
33 450) of Title 13.

34 (8) The intimidation of witnesses and victims, as defined in
35 Section 136.1.

36 (9) Grand theft, as defined in subdivision (a) or (c) of Section
37 487.

38 (10) Grand theft of any firearm, vehicle, trailer, or vessel.

39 (11) Burglary, as defined in Section 459.

40 (12) Rape, as defined in Section 261.

- 1 (13) Looting, as defined in Section 463.
- 2 (14) Money laundering, as defined in Section 186.10.
- 3 (15) Kidnapping, as defined in Section 207.
- 4 (16) Mayhem, as defined in Section 203.
- 5 (17) Aggravated mayhem, as defined in Section 205.
- 6 (18) Torture, as defined in Section 206.
- 7 (19) Felony extortion, as defined in Sections 518 and 520.
- 8 (20) Felony vandalism, as defined in paragraph (1) of
- 9 subdivision (b) of Section 594.
- 10 (21) Carjacking, as defined in Section 215.
- 11 (22) The sale, delivery, or transfer of a firearm, as defined in
- 12 Section 12072.
- 13 (23) Possession of a pistol, revolver, or other firearm capable
- 14 of being concealed upon the person in violation of paragraph (1)
- 15 of subdivision (a) of Section 12101.
- 16 (24) Threats to commit crimes resulting in death or great bodily
- 17 injury, as defined in Section 422.
- 18 (25) Theft and unlawful taking or driving of a vehicle, as defined
- 19 in Section 10851 of the Vehicle Code.
- 20 (26) Felony theft of an access card or account information, as
- 21 defined in Section 484e.
- 22 (27) Counterfeiting, designing, using, attempting to use an
- 23 access card, as defined in Section 484f.
- 24 (28) Felony fraudulent use of an access card or account
- 25 information, as defined in Section 484g.
- 26 (29) Unlawful use of personal identifying information to obtain
- 27 credit, goods, services, or medical information, as defined in
- 28 Section 530.5.
- 29 (30) Wrongfully obtaining Department of Motor Vehicles
- 30 documentation, as defined in Section 529.7.
- 31 (31) Prohibited possession of a firearm in violation of Section
- 32 12021.
- 33 (32) Carrying a concealed firearm in violation of Section 12025.
- 34 (33) Carrying a loaded firearm in violation of Section 12031.
- 35 (f) As used in this chapter, “criminal street gang” means any
- 36 ongoing organization, association, or group of three or more
- 37 persons, whether formal or informal, having as one of its primary
- 38 activities the commission of one or more of the criminal acts
- 39 enumerated in paragraphs (1) to (25), inclusive, or (31) to (33),
- 40 inclusive, of subdivision (e), having a common name or common

1 identifying sign or symbol, and whose members individually or
2 collectively engage in or have engaged in a pattern of criminal
3 gang activity.

4 (g) Notwithstanding any other law, the court may strike the
5 additional punishment for the enhancements provided in this
6 section or refuse to impose the minimum jail sentence for
7 misdemeanors in an unusual case where the interests of justice
8 would best be served, if the court specifies on the record and enters
9 into the minutes the circumstances indicating that the interests of
10 justice would best be served by that disposition.

11 (h) Notwithstanding any other provision of law, for each person
12 committed to the Division of Juvenile Facilities for a conviction
13 pursuant to subdivision (a) or (b) of this section, the offense shall
14 be deemed one for which the state shall pay the rate of 100 percent
15 of the per capita institutional cost of the Division of Juvenile
16 Facilities, pursuant to Section 912.5 of the Welfare and Institutions
17 Code.

18 (i) In order to secure a conviction or sustain a juvenile petition,
19 pursuant to subdivision (a) it is not necessary for the prosecution
20 to prove that the person devotes all, or a substantial part, of his or
21 her time or efforts to the criminal street gang, nor is it necessary
22 to prove that the person is a member of the criminal street gang.
23 Active participation in the criminal street gang is all that is
24 required.

25 (j) A pattern of gang activity may be shown by the commission
26 of one or more of the offenses enumerated in paragraphs (26) to
27 (30), inclusive, of subdivision (e), and the commission of one or
28 more of the offenses enumerated in paragraphs (1) to (25),
29 inclusive, or (31) to (33), inclusive of subdivision (e). A pattern
30 of gang activity cannot be established solely by proof of
31 commission of offenses enumerated in paragraphs (26) to (30),
32 inclusive, of subdivision (e), alone.

33 SEC. 2. Section 186.33 of the Penal Code is amended to read:
34 186.33. (a) Any person required to register pursuant to Section
35 186.30 who knowingly violates any of its provisions is guilty of
36 a misdemeanor.

37 (b) (1) Any person who knowingly fails to register pursuant to
38 Section 186.30 and is subsequently convicted of, or any person
39 for whom a petition is subsequently sustained for a violation of,
40 any of the offenses specified in Section 186.30, shall be punished

1 by an additional term of imprisonment in the state prison for 16
2 months, or 2, or 3 years. ~~The court shall order imposition of the~~
3 ~~middle term unless there are circumstances in aggravation or~~
4 ~~mitigation.~~ The court shall state its reasons for the enhancement
5 choice on the record at the time of sentencing.

6 (2) The existence of any fact bringing a person under this
7 subdivision shall be alleged in the information, indictment, or
8 petition, and be either admitted by the defendant or minor in open
9 court, or found to be true or not true by the trier of fact.

10 SEC. 3. Section 1170.1 of the Penal Code is amended to read:

11 1170.1. (a) Except as otherwise provided by law, and subject
12 to Section 654, when any person is convicted of two or more
13 felonies, whether in the same proceeding or court or in different
14 proceedings or courts, and whether by judgment rendered by the
15 same or by a different court, and a consecutive term of
16 imprisonment is imposed under Sections 669 and 1170, the
17 aggregate term of imprisonment for all these convictions shall be
18 the sum of the principal term, the subordinate term, and any
19 additional term imposed for applicable enhancements for prior
20 convictions, prior prison terms, and Section 12022.1. The principal
21 term shall consist of the greatest term of imprisonment imposed
22 by the court for any of the crimes, including any term imposed for
23 applicable specific enhancements. The subordinate term for each
24 consecutive offense shall consist of one-third of the middle term
25 of imprisonment prescribed for each other felony conviction for
26 which a consecutive term of imprisonment is imposed, and shall
27 include one-third of the term imposed for any specific
28 enhancements applicable to those subordinate offenses.

29 (b) If a person is convicted of two or more violations of
30 kidnapping, as defined in Section 207, involving separate victims,
31 the subordinate term for each consecutive offense of kidnapping
32 shall consist of the full middle term and shall include the full term
33 imposed for specific enhancements applicable to those subordinate
34 offenses.

35 (c) In the case of any person convicted of one or more felonies
36 committed while the person is confined in a state prison or is
37 subject to reimprisonment for escape from custody and the law
38 either requires the terms to be served consecutively or the court
39 imposes consecutive terms, the term of imprisonment for all the
40 convictions that the person is required to serve consecutively shall

1 commence from the time the person would otherwise have been
2 released from prison. If the new offenses are consecutive with each
3 other, the principal and subordinate terms shall be calculated as
4 provided in subdivision (a). This subdivision shall be applicable
5 in cases of convictions of more than one offense in the same or
6 different proceedings.

7 (d) When the court imposes a prison sentence for a felony
8 pursuant to Section 1170 or subdivision (b) of Section 1168, the
9 court shall also impose, in addition and consecutive to the offense
10 of which the person has been convicted, the additional terms
11 provided for any applicable enhancements. If an enhancement is
12 punishable by one of three terms, the court shall, *in its discretion*,
13 ~~impose the middle term unless there are circumstances in~~
14 ~~aggravation or mitigation one of those terms~~, and state the reasons
15 for its sentence choice, ~~other than the middle term~~, on the record
16 at the time of sentencing. The court shall also impose any other
17 additional term that the court determines in its discretion or as
18 required by law shall run consecutive to the term imposed under
19 Section 1170 or subdivision (b) of Section 1168. In considering
20 the imposition of the additional term, the court shall apply the
21 sentencing rules of the Judicial Council.

22 (e) All enhancements shall be alleged in the accusatory pleading
23 and either admitted by the defendant in open court or found to be
24 true by the trier of fact.

25 (f) When two or more enhancements may be imposed for being
26 armed with or using a dangerous or deadly weapon or a firearm
27 in the commission of a single offense, only the greatest of those
28 enhancements shall be imposed for that offense. This subdivision
29 shall not limit the imposition of any other enhancements applicable
30 to that offense, including an enhancement for the infliction of great
31 bodily injury.

32 (g) When two or more enhancements may be imposed for the
33 infliction of great bodily injury on the same victim in the
34 commission of a single offense, only the greatest of those
35 enhancements shall be imposed for that offense. This subdivision
36 shall not limit the imposition of any other enhancements applicable
37 to that offense, including an enhancement for being armed with
38 or using a dangerous or deadly weapon or a firearm.

39 (h) For any violation of an offense specified in Section 667.6,
40 the number of enhancements that may be imposed shall not be

1 limited, regardless of whether the enhancements are pursuant to
2 this section, Section 667.6, or some other provision of law. Each
3 of the enhancements shall be a full and separately served term.

4 SEC. 4. Section 12021.5 of the Penal Code is amended to read:

5 12021.5. (a) Every person who carries a loaded or unloaded
6 firearm on his or her person, or in a vehicle, during the commission
7 or attempted commission of any street gang crimes described in
8 subdivision (a) or (b) of Section 186.22, shall, upon conviction of
9 the felony or attempted felony, be punished by an additional term
10 of imprisonment in the state prison for one, two, or three years in
11 the court's discretion. ~~The court shall impose the middle term~~
12 ~~unless there are circumstances in aggravation or mitigation.~~ The
13 court shall state the reasons for its enhancement choice on the
14 record at the time of sentence.

15 (b) Every person who carries a loaded or unloaded firearm
16 together with a detachable shotgun magazine, a detachable pistol
17 magazine, a detachable magazine, or a belt-feeding device on his
18 or her person, or in a vehicle, during the commission or attempted
19 commission of any street gang crimes described in subdivision (a)
20 or (b) of Section 186.22, shall, upon conviction of the felony or
21 attempted felony, be punished by an additional term of
22 imprisonment in the state prison for two, three, or four years in
23 the court's discretion. ~~The court shall impose the middle term~~
24 ~~unless there are circumstances in aggravation or mitigation.~~ The
25 court shall state the reasons for its enhancement choice on the
26 record at the time of sentence.

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

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

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

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

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

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

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

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

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

6 (3) “Detachable shotgun magazine” means a device that is
7 designed or redesigned to do all of the following:

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

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

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

16 (4) “Belt-feeding device” means a device that is designed or
17 redesigned to continuously feed ammunition into the loading
18 mechanism of a machinegun or a semiautomatic firearm.

19 (5) “Rifle” shall have the same meaning as specified in
20 paragraph (20) of subdivision (c) of Section 12020.

21 (6) “Shotgun” shall have the same meaning as specified in
22 paragraph (21) of subdivision (c) of Section 12020.

23 SEC. 5. Section 12022.2 of the Penal Code is amended to read:

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

34 (b) Any person who wears a body vest in the commission or
35 attempted commission of a violent offense, as defined in
36 subdivision (b) of Section 12021.1, shall, upon conviction of that
37 felony or attempted felony, in addition and consecutive to the
38 punishment prescribed for the felony or attempted felony of which
39 he or she has been convicted, be punished by an additional term
40 of one, two, or five years. ~~The court shall order the middle term~~

1 ~~unless there are circumstances in aggravation or mitigation.~~ The
2 court shall state the reasons for its enhancement choice on the
3 record at the time of the sentence.

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

7 SEC. 6. Section 12022.4 of the Penal Code is amended to read:

8 12022.4. Any person who, during the commission or attempted
9 commission of a felony, furnishes or offers to furnish a firearm to
10 another for the purpose of aiding, abetting, or enabling that person
11 or any other person to commit a felony shall, in addition and
12 consecutive to the punishment prescribed by the felony or
13 attempted felony of which the person has been convicted, be
14 punished by an additional term of one, two, or three years in the
15 state prison. ~~The court shall order the middle term unless there are~~
16 ~~circumstances in aggravation or mitigation.~~ The court shall state
17 the reasons for its enhancement choice on the record at the time
18 of the sentence. The additional term provided in this section shall
19 not be imposed unless the fact of the furnishing is charged in the
20 accusatory pleading and admitted or found to be true by the trier
21 of fact.