

GENERAL OFFICE MEMORANDUM 18-005

TO: ALL DISTRICT ATTORNEY PERSONNEL

FROM: JOHN K. SPILLANE   
Chief Deputy District Attorney

SUBJECT: COURT DISCRETION TO STRIKE GUN ENHANCEMENTS  
(PENAL CODE SECTIONS 12022.5 and 12022.53)

DATE: JANUARY 5, 2018

As noted previously in GOM 17-142, formerly the court could not strike or dismiss a firearm enhancement under Penal Code<sup>1</sup> sections 12022.5 or 12022.53. Effective January 1, 2018, SB 620 amended those sections to allow the court to strike or dismiss those enhancements at the time of sentencing pursuant to section 1385. (See §§ 12022.5, subd. (c); 12022.53, subd. (h).) The court now has discretion to take one of two actions related to gun enhancements. The court may strike the enhancement and the punishment under 1385 subdivision (a) or, under section 1385, subdivision (c), the court may strike only the punishment for the enhancement. Striking only the punishment for the enhancement under 1385 subdivision (c) retains the facts of the enhancement in the defendant's criminal history but does not add any punishment. Under this provision, the enhancement will remain a conviction and still have the effect of elevating crimes to serious or violent felonies (strikes) and can still be used to limit custody credits. (See *In re Pacheco* (2007) 155 Cal.App.4<sup>th</sup> 1439.) Deputies should move the court to make a record as to why it is striking the enhancement under (a) or only the punishment under (c) pursuant to section 1385.

The court's decision to strike an enhancement or punishment for an enhancement is reviewable for abuse of discretion. A court should only take this action where the defendant falls outside the spirit of the sentencing scheme. (See *People v. Williams* (1998) 17 Cal.4<sup>th</sup> 148, 161.) It is an abuse of discretion for the court to do so to reward a guilty plea, for judicial convenience, or because of personal antipathy to the law without consideration of the individual case. (*People v. Superior Court (Romero)* (1996) 13 Cal.4<sup>th</sup> 497, 531.)

Finally, in most cases where section 12022.53 applies, the defendant will also be ineligible for probation under section 1203.06.<sup>2</sup> The court may not strike the latter allegation under section 1385, but the 1203.06 allegation should be separately alleged and proved. Deputies should, therefore, confirm that their charging documents include a 1203.06 allegation, where applicable.

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> This section makes a defendant ineligible for probation for personally using a firearm in the commission of certain listed offenses. Most of the offenses listed in section 12022.53, subdivision (a), are included in section 1203.06.