

GENERAL OFFICE MEMORANDUM 18-055

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: JOHN K. SPILLANE 
Chief Deputy District Attorney

SUBJECT: EFFECT OF REPEAL OF PENAL CODE § 12022.6 ON
PENDING OR NEWLY FILED CASES

DATE: APRIL 10, 2018

Penal Code section 12022.6, the excessive-taking enhancement, contained a sunset clause that was meant to spur the Legislature to periodically make adjustments for inflation. Unfortunately, the Legislature let the statute expire, and it was repealed entirely on January 1, 2018. Urgency legislation to reenact the statute is currently pending ([AB 1511](#)).

In the meantime, some defendants are arguing that the repeal should apply retroactively. They rely on the “*Estrada* rule” (*In re Estrada* (1965) 63 Cal.2d 740, 748), which is a presumption that a statute reducing punishment will apply retroactively to all nonfinal cases.

The *Estrada* rule probably does not apply in this situation, so we may still allege section 12022.6 enhancements for any crimes completed before 2018. The following authorities may assist deputies in opposing defense motions on pending or newly filed cases:

- The *Estrada* rule is only a presumption about legislative intent, and other facts may indicate a contrary intent. (*People v. Conley* (2016) 63 Cal.4th 646, 656.) Here, the preface to the sunset clause read: “It is the intent of the Legislature that the provisions of this section be reviewed within 10 years to consider the effects of inflation on the additional terms imposed.” (Former § 12022.6, subd. (f) (2017).) Since the sunset clause was expressly intended to spur legislative action, not reduce punishment, the *Estrada* rule should not apply. (See also *In re Pedro T.* (1994) 8 Cal.4th 1041, 1045 [holding that a sunset clause for temporarily increased punishments did not trigger the *Estrada* rule].)
- The *Estrada* presumption does not apply if the Legislature inadvertently repeals a statute. (*People v. Alexander* (1986) 178 Cal.App.3d 1250, 1263.) Here, a bill to reenact section 12022.6 ([AB 1511](#)) is pending as urgency legislation, indicating that the Legislature unintentionally allowed it to expire.
- Absent the *Estrada* rule or an express declaration of retroactivity, legislative changes are prospective only. ([Pen. Code, § 3.](#)) Also, repeal of a statute does not otherwise bar prosecution or punishment for an act already committed. ([Gov. Code, § 9608.](#))

Please note that any new section 12022.6 with increased dollar amounts *may* apply retroactively. (See *People v. Nasalga* (1996) 12 Cal.4th 784, 797–798.)

mb/sd