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# THREATEN SENTENCING ENHANCEMENT, COERCE PLEA, (WASH, RINSE,) REPEAT: A CAUSE OF WRONGFUL CONVICTION BY GUILTY PLEA

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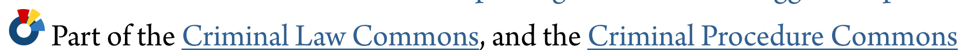
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# THREATEN SENTENCING ENHANCEMENT, COERCE PLEA, (WASH, RINSE,) REPEAT: A CAUSE OF WRONGFUL CONVICTION BY GUILTY PLEA

*By: Wes Reber Porter**

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## I. Introduction

Our American criminal justice system is too often described as broken.[1] It was not a clean break in a single, isolated location. Instead, our criminal justice system suffers from many, many little nicks, bumps, and bruises at the hands of its keepers. The evolution of sentencing enhancements within our criminal justice system represents the latest nagging, reoccurring injury. In the ultimate Trojan horse to criminal defendants, the Supreme Court sought to protect the individual rights of the accused with its recent decisions on sentencing enhancements.[2] But at the hands of lawmakers, the judiciary, and prosecutors, criminal defendants suffer more. Our criminal justice system also suffers from practices related to sentencing enhancements and the resulting wave of wrongful convictions by guilty plea.[3]

1. Recently, "broken" criminal justice has been a familiar headline. *See, e.g.*, James Downie, *Yes, the American Justice System is Broken*, Wash. Post (Dec. 5, 2014), http://www.washingtonpost.com/blogs/post-partisan/wp/2014/12/05/yes-the-american-justice-system-is-broken/ [http://perma.cc/HK68-VW2E]; *cf.* Reetu Mody, *The Criminal Justice System Is Not Broken, It's Doing Exactly What It's Meant to Do*, Kennedy Sch. Rev. (Dec. 5, 2014), http://harvardkennedyschoolreview.com/the-criminal-justice-system-is-not-broken-its-doing-exactly-what-its-meant-to-do/ [http://perma.cc/67L2-A94K].

2. *See infra* Part IV (arguing that the Supreme Court sought to protect individual rights, not streamline guilty pleas or assist the government at trial and in plea negotiations); *see, e.g.*, United States v. Booker, 543 U.S. 220, 258 (2005) (holding that certain aspects of the Federal Sentencing Act were incompatible with the Sixth Amendment, requiring severance).

3. *See generally* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 Yale L.J. 1097, 1148–80 (2001) (criticizing sentencing enhancements after the Supreme Court's decision in *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), for compelling the defendant to deal with sentencing considerations pretrial and tainting plea negotiations).

*The Sad Reality of Sentencing Enhancements*

*A crime occurs outside of a crowded movie theater on a Friday night. The witness accounts are as scattered as the witnesses themselves after the knife was brandished at approximately 10:15 pm. Many of the witnesses recount an assault that began in a familiar way: two men bumped shoulders, words were exchanged, and the situation escalated unnecessarily while others encouraged the altercation or failed to intervene. The victim of the stabbing offers only vague details about the attack and attacker. For the police to decipher what happened and arrive at a suspect, it will be difficult. Even with some breaks, investigating and prosecuting this case appears challenging and problematic.*

*Nonetheless, law enforcement finds a suspect from the patchwork of witness accounts and limited other evidence. A young man is arrested, invokes his rights, refuses to offer a statement, and retains an attorney to begin the hard work of their exploring viable defenses at trial. The government's challenges at trial include proving identity in the crowd once the knife was introduced and offering unbiased witness testimony. Putting the issues of identity and bias aside, the exchange between the defendant and victim is equally unclear and raises trial issues related to proving intent and self-defense.*

*The young man, at this stage, is not interested in a plea to a felony assault charge. Contrary to the overwhelming number of cases in our criminal justice system,*[4] *this case may merit the time, expense, and energy of an increasingly rare jury trial. Counsel for the defendant negotiates pretrial with the prosecution but, per the client's wishes, counsel informs the government that his client wishes to proceed to trial.*

*Despite the muddled facts, this case likely will not go to trial. The government, in fact, will compel the young man to accept the plea to felony assault. Counsel could have filed motions alleging constitutional violations and attempting to exclude evidence at trial. Counsel could have mounted a defense, put on evidence and called witnesses including the defendant. Counsel could have made arguments creating doubt in the jurors' minds. The young man, unfortunately, will plead guilty without any changed circumstances to the evidence on the underlying assault. He will plead guilty without any adverse ruling from the court and before a jury is ever empaneled.*

*Why? What changed?*

Prior to that night at the movie theater, state lawmakers enacted sentencing enhancement legislation.[5] Intending to appear "tough on crime" before their constituency and control sentencing outcomes, the

4. Over 90% of all criminal cases are resolved by guilty pleas and the number is significantly higher in the federal system. Jed S. Rakoff, *Why Innocent People Plead Guilty*, 61 N.Y. REV. BOOKS 16, 16 (2014) ("In 2013, while 8 percent of all federal criminal charges were dismissed (either because of a mistake in fact or law or because the defendant had decided to cooperate), more than 97 percent of the remainder were resolved through plea bargains, and fewer than 3 percent went to trial. The plea bargains largely determined the sentences imposed.").

5. In this Article, the Author uses the illustration of California's sentencing enhancement that covers when criminal activity is "for the benefit of . . . any criminal street gang." CAL. PENAL CODE § 186.22 (West 2014). In 1988, California enacted the Street Terrorism Enforcement and Prevention Act, commonly known as the STEP Act. CAL. PENAL CODE §§ 186.20–.26 (West 2014).

legislators shifted criminal justice and impinged the individual rights of the accused.[6] *What changed?* The entire game changed.

Here, the government's tactical use of a *sentencing consideration* related to the defendant's alleged motive to commit the crime can change the entire case as early as the initial plea discussions. In the above illustration, the government dictated a guilty plea not based upon a cooperating witness, new evidence, or the prospect of additional charges. The government threatened that, if he wished to proceed to trial, the government would also allege a sentencing enhancement about his motive of the assault—likely that the crime was committed for the "benefit of a gang." Instead, as is now common practice, the government's threatened use of a *sentencing enhancement*—a fact or set of circumstances which may legislatively increase the sentence post-conviction—forced the defendant's hand into a guilty plea.

The young man may have defenses and arguments as to *this* sentencing allegation as well. Those will go unheard. As discussed in greater detail below, he will face the assault allegations and "for the benefit of a gang" sentencing consideration at the *same trial*, before the *same jury*, and at the *same time*.[7] The prosecutor's threat to allege a sentencing consideration effectively ends the underlying assault case and strong-arms another guilty plea.

The Supreme Court paved the way for this all-too-common plea bargaining practice. Beginning in the early 1990s through 2004, the Court considered the constitutionality and procedure associated with sentencing enhancements.[8] Ironically, in a decade of decisions, the Court sought to confer more procedural safeguards to *protect* the rights of the criminally accused. It is critical to understand that the Court attempted to protect the criminal defendant at sentencing, not streamline the system for more guilty pleas and short-hand justice. It was not supposed to work this way.

The lawmakers failed to balance the rights of the criminal defendant with sentencing enhancement legislation.[9] In fact, most sentencing enhancement laws are devoid of procedure and safeguards for the

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6. In a prophetic article, one commentator viewed the earliest conversion of sentencing factors to offense elements as unconstitutional. *See* Jacqueline E. Ross, *Unanticipated Consequences of Turning Sentencing Factors into Offense Elements: The* Apprendi *Debate*, 12 FED. SENT'G REP. 197, 198–202 (2000) (arguing that the elements rule will prejudice defendants at trial, lead to collusive bargaining over sentencing facts, encourage legislative circumvention, and breed uncertainty and litigation).

7. *See infra* Part IV (discussing the perfect storm for the accused when his due process and fair trial rights are afforded to him at the same time, before the same jury that hears his underlying case).

8. *See infra* Part II (discussing the history of the Supreme Court decisions that have considered sentencing enhancements).

9. The Author notes in this Article that state legislators who promulgate sentencing enhancement legislation uniformly fail to include any procedural safeguards. *See infra* Part IV.

accused. The judiciary must, at the very least, ensure the accused is not *more* disadvantaged at his trial on the underlying allegations due to sentencing enhancements.[10] As argued here, the judiciary fails to do so.[11] State appellate courts, instead, have ratified this unconstitutional and unfair practice to threaten enhancement and coerce a guilty plea.[12] In so doing, they have sponsored an unreviewable wave of wrongful convictions and left untreated another injury to our criminal justice system. As argued in this Article, some sentencing enhancements impinge the defendant's constitutional rights and taint the criminal justice process from plea negotiations through inevitable wrongful convictions that follow.

Part II of this Article will discuss the Supreme Court's decisions related to sentencing enhancements and the evolution that led to the government proving enhancements at trial. Part III will discuss how the Supreme Court's classifications for sentencing enhancements are inadequate post-*Booker*, and further classification is needed based upon the enhancement evidence's relation to the government's evidence to prove the underlying crime. Motive evidence is discussed as central to the analysis and proposal here. Part IV will lay out the constitutional and evidentiary challenges to requiring the government to prove a sentencing enhancement at an unbifurcated trial. The Article will present the constitutional arguments against evidence of certain sentencing enhancements: the defendant's right to trial; presumption of innocence; analogies to the defendant's wearing shackles at trial; and reference to his silence. California's gang enhancement then illustrates how the judiciary can exacerbate the injustice prompted by the legislature's procedural failings. Lastly, Part V offers several definitive recommendations so that the states' procedural process with respect to sentencing enhancements may comport with the Court's intent to confer greater procedural guarantees to the criminal defendant, not less.

10. *See infra* Part IV. The Author uses California's gang enhancement as an illustration of his arguments in this Article. *See, e.g.*, People v. Hernandez, 94 P.3d 1080, 1084–85, 1088 (Cal. 2004) (demonstrating the appellate court's strained logic to hold that evidence that would not ordinarily be part of the government's case presentation is somehow admissible in the unbirfurcated trial *because of the sentencing enhancement*).

11. *Hernandez*, 94 P.3d 1080.

12. *See id.* at 1088. The California appellate court, in a discussion about the trial court's denial of the defendant's request for bifurcation, manipulated the language of its unfair prejudice provision in California Evidence Code Section 352, similar to Federal Rule of Evidence 403:

> Any evidence admitted solely to prove the gang enhancement was not so minimally probative on the charged offense, and so inflammatory in comparison, that it threatened to sway the jury to convict regardless of defendants' actual guilt. Accordingly, defendants did not meet their burden "to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried."

*Id.* at 1087 (quoting People v. Bean, 760 P.2d 996, 1007 (Cal. 1988)).

## II. Sentencing Enhancements on Trial

The United States criminal justice system sets forth more crimes than anyone could have imagined when it evolved from common law into a criminal code system.[13] Like a fast food menu, American penal codes are teeming with options—and, as to punishment, the prosecutor increasingly may opt to "supersize" the charges as well. Enhancing, or threatening to enhance, a defendant's punishment pretrial and throughout plea discussions has become mainstream practice in criminal cases.

A sentencing enhancement is a fact or set of circumstances that, once proved, serves to increase a defendant's punishment at sentencing.[14] Often the increase in the accused's sentence is mandatory and binding on the sentencing court. Generally, modern criminal legislation includes not only new crimes but punishment additives that apply to a broader swath of existing crimes.[15] These sentencing portions of criminal legislation aim to reel in judicial discretion at sentencing and prescribe sentencing outcomes.[16] Legislators never intended to streamline criminal justice and foster even more guilty pleas in a system that already boasts more than 90% of cases resolved by pleas.[17]

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13. *See* George Will, *When Everything is a Crime in the United States*, Japan Times (Apr. 9, 2015), http://www.japantimes.co.jp/opinion/2015/04/09/commentary/world-commentary/everything-crime-united-states/#.VfwROEoo5v4 ("There are an estimated 4,500 federal criminal statutes—and innumerable regulations backed by criminal penalties that include incarceration. Even if none of these were arcane, which many are, their sheer number would mean that Americans would not have clear notice of what behavior is proscribed or prescribed. The presumption of knowledge of the law is refuted by the mere fact that estimates of the number of federal statutes vary by hundreds.").

14. *See* Judicial Council of Cal. Jury Instructions, Enhancement, Sentencing Factor, or Specific Factual Issue: Template—Bifurcated Trial (2006), Westlaw CALCRIM 3251.

15. *See infra* Section IV.E (discussing California's STEP Act which includes both new crimes based upon gang activity and the gang enhancement that is the subject of this Article).

16. *See* Michael Fisher, *Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing*, 46 Duq. L. Rev. 65, 67–70 (2007) (outlining the historical fluctuations of judicial discretion in federal sentencing theory prior to the era of mandatory guidelines). Prior to 1987, a court sentenced a defendant convicted of a felony to a term of imprisonment between the statutory minimum (often no jail time) and maximum for the offense of conviction. *Id.*; *see infra* note 25 and accompanying text. Today, after *Booker*, the trial court has returned to a more structured form of that same wide discretion at sentencing. United States v. Booker, 543 U.S. 220, 258–63 (2005) (Breyer, J., opinion in part) (explaining that the Federal Sentencing Act "requires judges to take account of the Guidelines together with other sentencing goals").

17. *See* Bibas, *supra* note 3.

### A. *The Rise of Sentencing Enhancements*

Aspiring legislators seeking the enviable "tough-on-crime" badge enact new criminal laws, hopefully bearing their names.[18] Beginning in the 1990s and continuing into the 2000s, lawmakers, particularly state lawmakers, began promulgating sentencing enhancement legislation.[19] These enhancement statutes, rather than proscribe any new criminal conduct, may apply to a broad swath of crimes already on the books in the state penal codes. Thus, in an era of rampant over-criminalization and prison overcrowding,[20] lawmakers continually sponsor legislation that serves only to ratchet up the punishment for countless existing crimes.[21]

Traditionally, legislators promulgated new criminal statutes with reference only to a maximum punishment, while trial judges imposed punishment with wide discretion. Wide judicial discretion allows the sentencing judge to account for unique offense characteristics and the individual person facing punishment. Unsatisfied with the lack of uniformity and proportionality of criminal sentences, the legislative branch has increasingly enacted laws aimed at more consistent, prescribed punishment.[22] Sentencing enhancement legislation was born out of the long-standing struggle between the legislative and judicial

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18. Renata E.B. Strause, *How Federal Statutes Are Named*, 105 L. LIBR. J. 7, 10 & n.17 (2013).

19. *See* Traci Schlesinger, *The Failure of Race Neutral Policies: How Mandatory Terms and Sentencing Enhancements Contribute to Mass Racialized Incarceration*, 57 CRIME & DELINQ. 56, 65 (2011) ("Although there were very few sentencing enhancements or mandatory terms on the books in these five states in 1977, states adopted dozens of these policies during the period studied. By 2001, the five states in this study had adopted an average of 20 enhancements or mandatory terms that apply to all offenses, 51 enhancements or mandatory terms that apply to violent offenses, 9 enhancements or mandatory terms that apply to property offenses, and 25 enhancements or mandatory terms that apply to drug offenses.").

20. *See* Jim Liske, *The 50-Billion-Dollar Question*, HUFFINGTON POST (Apr. 18, 2014, 7:19 PM), http://www.huffingtonpost.com/jim-liske/prison-reform-crime_b_5174435.html [http://perma.cc/QVS6-VLW2] (advancing the economic argument against prison over-crowding).

21. *See* Wes R. Porter, *Blame Congress, Not Prosecutors, for the Absurdity of Mandatory Minimums*, DAILY J. (Dec. 19, 2013), http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1610&context=pubs [http://perma.cc/PL7N-9JV6] (arguing that federal prosecutors merely play on the field that Congress built with its inevitable "tough-on-crime" campaign platform).

22. In 2014 and 2015, much has been written about mandatory minimum sentences and curbing mandatory punishment for certain, non-violent crimes. In an argument that echoes some of those posed in this Article, one commentator urged that Congress can end this injustice:

> To achieve this, Congress first needs to stop passing laws that contain mandatory sentencing provisions. Mandatory sentences do not work . . . . Prosecutors too often wield enhancements to pressure defendants to plead rather than exercise their constitutional right to go to trial—or to punish those that do. . . .
>
> Second, Congress needs to eliminate, or greatly reduce, existing mandatory minimums . . . .

branch over the power to control outcomes in criminal cases.[23] Like mandatory minimum sentences[24] and guideline sentencing,[25] the legislative branch sought, and continues to seek, to control sentencing outcomes in criminal cases.[26]

The power struggle to control sentencing outcomes in the 1980s meant chartering new waters for lawmakers. Before guideline sentencing and mandatory minimum statutes, politicians merely enacted sentencing platitudes and broad policy statements about the goals of punishment and the judiciary's role at sentencing.[27] Crime bills may have contained maximum punishments for newly created crimes, but sentencing outcomes for criminal defendants used to be properly reserved for the judiciary.[28] The entire federal guideline sentencing scheme derived from Congress's creation of the United States Sentencing Commission to oversee and report on federal sentencing.[29]

After the 2000s, lawmakers regularly promulgated legislation aimed to curb judicial discretion.[30] They sought control over the weight the court should assign to certain information and, ultimately, the punishment imposed. Even when lawmakers go too far in the tug-of-war against the judiciary, legislation introduced to peel back oversteps have little support with politicians.[31] Sentencing enhancement legisla-

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U.S. Rep. John Conyers, *Criminal Injustice*, HUFFINGTON POST (May 21, 2014, 12:11 PM), http://www.huffingtonpost.com/john-conyers/criminal-injustice-justice-reform_b_5365392.html [http://perma.cc/LFC6-UR25].

23. *See infra* note 34 and accompanying text.

24. *See* Robert P. Mosteller, *New Dimensions in Sentencing Reform in the Twenty-First Century*, 82 OR. L. REV. 1, 17 (2003) ("Another form of structured sentencing is the mandatory minimum sentence of imprisonment to be imposed upon conviction for specified crimes or combinations of crimes."); *see also* FEDERAL MANDATORY MINIMUM SENTENCES PASSED, EXPANDED, OR INCREASED BY CONGRESS, 2002–2012, FAMILIES AGAINST MANDATORY MINIMUMS (Aug. 6, 2012), http://www.famm.org/Repository/Files/Chart%20Fed%20MMs%20passed%2002-12%208.6.12.pdf [http://perma.cc/7SHZ-246H] (summarizing a decade of federal mandatory-minimum legislation).

25. *See* U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM'N (1989)) [hereinafter U.S.S.G.]. The "era" of the mandatory Guidelines is defined as November 1, 1987, the date the Guidelines became "effective," to January 12, 2005, the date of the Court's *Booker* decision. *Id.* ch. 1, pt. A, § 2; United States v. Booker, 543 U.S. 220, 220 (2005).

26. *See supra* notes 24–25 and accompanying text.

27. *See* 18 U.S.C. § 3553(a) (2012). If the Guidelines were meant to represent a skilled attempt of the Commission to balance the § 3553(a) factors in different situations then, with the numbers and calculations, that attempt falls short. *See* Wes Reber Porter, *Federal Judges Need Competing Information to Rival Misleading Guidelines at Sentencing*, 26 FED. SENT'G REPORTER 28, 32 (2013), 2013 WL 8171736.

28. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017–26 (1984) (to be codified at 28 U.S.C. §§ 991–998).

29. U.S.S.G., *supra* note 25, at ch. 1, pt. A, § 1–2; *see also* sources cited *supra* note 27.

30. *See* sources cited *infra* note 31.

31. *See* Alleyne v. United States, 133 S. Ct. 2151, 2155 (2013); *see Sixth Amendment—Right to Jury Trial—Mandatory Minimum Sentences*—Alleyne v. United States, 127 HARV. L. REV. 248, 257 (2013) ("Nevertheless, *Alleyne* represents a signif-

tion might represent the worst of it. Sentencing enhancements demonstrate an excellent example of campaign posturing devolving into more "one-size-fits-all" justice.[32]

B. *How Sentencing Enhancements Are Supposed to Work*

Legislators sold sentencing enhancements on the ideals of longstanding punishment goals of uniformity and proportionality.[33] Enhancement statutes were supposed to assign relative value and weight to certain information at sentencing to achieve these goals. For the sake of uniformity, legislatures randomly assigned unsupported value and weight to specific information for the court. Sentencing enhancement legislation was intended to assist the judiciary and guide the courts' discretion at sentencing. Instead of an effective tool for trial courts, however, enhancements function more as handcuffs or a straight jacket.

Inherent to judicial discretion at sentencing was the court's freedom to consider and weigh voluminous information in fashioning punishment in a criminal case.[34] Sentencing processes have long provided the trial court with information far beyond the contours of the offense conduct.[35] A trial court has long received significant information

icant development in the tug-of-war between the judiciary and the legislature over control of the sentencing process: it is thus the next major chapter in the rollback of structured sentencing reforms and legislative authority over sentencing factors that began in *Apprendi*.").

32. Courts often discussed "one-size-fits-all" when considering downward departures under Guidelines section 5K2.0, "Grounds for Departure," because the Guidelines provision was too sweeping in the case at issue. *See, e.g.*, United States v. Marquez-Gallegos, 217 F.3d 1267, 1270–71 (10th Cir. 2000) ("Where the factor in issue is one already taken into account by the applicable Guideline and adjustments, departure from the Guideline is permissible only if that factor is present in a manner or degree unusual enough to distinguish the case from the 'heartland' of cases covered by the Guideline." (citing U.S.S.G. § 5K2.0 (1999))); *see also* United States v. Rausch, 570 F. Supp. 2d 1295, 1305 (D. Colo. 2008) ("The criteria also point to individuated considerations: *No one size fits all*. The object of this balancing process is to achieve not a perfect or a mechanical sentence, but a condign one—one that is decent, appropriate and deserved under all attendant circumstances." (emphasis added)).

33. *See* JACK M. KRESS, PRESCRIPTION FOR JUSTICE 10 (1980); *see also* Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 785 (2006) ("Rising departure rates [from the Commission's mandates] can thus fairly be characterized as an indication that many judges lack a strong commitment to the guidelines' vision of uniformity." (alteration in original)); William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63, 70 (1993) ("[T]he SRA seeks to reconcile competing goals of proportionality and uniformity.").

34. In the federal system, the arm of the court charged with assisting with sentencing is U.S. Probation, and that office prepares a Presentence Report ("PSR") about the defendant and his offense conduct. Rita v. United States, 551 U.S. 338, 342–45 (2007). Most states have equivalent information before the trial court in preparation for sentencing. *See id.*

35. In the federal system, the sentencing court receives a PSR with a wealth of information about the defendant and his offense conduct. *Id.* The Supreme Court has

about the defendant, his offense conduct, and his criminal history.[36] Most trial courts, accordingly, consider almost everything related to the offense and defendant in fashioning the appropriate sentence in a criminal case.[37] Many courts offer detailed reasons for imposing a sentence in a criminal case.

It is important to correct a common misconception about sentencing enhancements: *enhancements do not furnish the sentencing court with new information*. Because the information is already known to the trial court at sentencing,[38] sentencing enhancements do nothing to better *inform* the trial court in exercising its discretion.

Sentencing enhancements did prove useful in two contexts. First, certain information can be too unwieldy and voluminous for the trial court to sift through and weigh in each individual case. For example, guidance and valuation of the defendant's criminal history and a pattern of similar offense conduct can serve the goals of uniformity and proportionality.[39] Sentencing courts should readily appreciate how other courts have dealt with similar offenders with similar criminal backgrounds. That is, specific deterrence of the defendant and recidivism generally can be difficult to assess and weigh similarly without unifying standards.

Second, some sentencing enhancements compel the trial court to consider information beyond that which was needed to prove the crime but was nevertheless an obvious part of the case presentation.[40]

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detailed the considerations for the trial judge and reinforces that the § 3553 factors also mandate "the sentencing judge to 'impose a sentence sufficient, but not greater than necessary, to comply with' the basic aims of sentencing as set out above." *Id.* at 347–48.

36. *Id.* at 342–44.

37. 18 U.S.C. § 3553(a) (2012). The § 3553 factors represent the provision that tells the sentencing judge to consider (1) offense and offender characteristics; (2) the need for a sentence to reflect the basic aims of sentencing, namely, (a) "just punishment" (retribution), (b) deterrence, (c) incapacitation, (d) rehabilitation; (3) the sentences legally available; (4) the Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution. *Id.*

38. *See* Steve Y. Koh, Note, *Reestablishing the Federal Judge's Role in Sentencing*, 101 YALE L.J. 1109, 1120–21 (1992) (discussing the prosecutorial gamesmanship inherent in gathering information for the court's consideration at sentencing and in U.S. Probation's presentencing reports).

39. The Supreme Court early on excepted out sentencing enhancement provisions related to criminal history. *See* Almendarez-Torres v. United States, 523 U.S. 224, 244 (1998) (holding that the fact of a defendant's prior convictions is not subject to the jury-trial requirement of the Sixth Amendment); *see also* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). The Court held that the Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, *other than the fact of a prior conviction*, must be submitted to a jury and proved beyond a reasonable doubt. *See id.* First, the defendant had his day in court with respect to the prior offenses. Second, the Author believes, criminal history provisions greater serve the sentencing goals of uniformity and proportionality.

40. Elements of the crime are different from sentencing enhancements. Many comprehensive crime bills contain both new crimes and sentencing enhancements.

The sentencing court then effectively weighs statutorily-isolated information during sentencing, as compared to a similar defendant convicted of a similar crime without these additional offense characteristics. The range of punishment may shift upward based upon a finding of these other facts or circumstances. For example, aside from the defendant's criminal history and beyond the elements of the offense, a trial court may consider his use of a weapon, the monetary impact, or a resulting injury as traditional sentencing enhancements.[41] Note here that these enhancements are likely inextricably intertwined with the government's natural presentation of its case in chief.[42] The information—the use of a weapon, loss amount, or resulting injury—likely was part of the trial or guilty plea colloquy and then summarized for the court in a presentence report.

Lastly, it bears stating that the legislative intent of sentencing enhancement legislation was never to fundamentally affect the defendant's constitutional rights, his trial on the underlying offense, or plea negotiations.[43] Sentencing enhancement legislation was supposed to be reserved for the judge and her sentencing determination post-trial. Sentencing enhancements were to come into play in the court's preparation for a sentencing hearing weeks or months after a defendant's conviction at trial or guilty plea.[44] They were intended to merely impact how the sentencing judge would weigh the information at sentencing. Unfortunately, not all sentencing enhancements played out as intended in practice.

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With sentencing enhancements, a prosecutor first proves a crime to a jury and beyond a reasonable doubt and then ratchets up the punishment through additional facts and factors not proven at trial. Even if presented at trial, when the enhancement is based upon a fact or factor that is not an element, then a guilty verdict provided no information about that fact or factor. Without a special verdict form and a specific request for the jury to consider it, elements and sentencing factors were segregated by their phases of trial.

41. CAL. PENAL CODE §§ 12022.5–.7 (West 2012).

42. *See infra* Part IV.D. (discussing the evidentiary challenges to motive-based enhancements such as improper character, relevance and unfair prejudice).

43. *See infra* Part III.C. (arguing that certain sentencing enhancements—termed here as "motive enhancements"—violate the defendant's constitutional rights to due process and a fair trial and rob him of his presumption of innocence).

44. *See e.g.*, U.S.S.G., *supra* note 26, at ch. 1, pt. A (setting forth the "statutory mission" and "basic approach" policy statements that begin the Guidelines); 18 U.S.C. 3553(a) (2012) (setting out the statutory policies of sentencing). "The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation." U.S.S.G., *supra* note 26, at ch. 1, pt. A ("Statutory Mission"). These matters are simply not relevant at the trial, only for sentencing.

Sentencing legislation, including the most comprehensive attempt promulgated in the Guidelines, target the goals of honesty, uniformity, and proportionality at sentencing. As argued in this Article, the broad goals of sentencing should never infect the processes of trial and plea bargaining nor affect the basic constitutional rights of the accused.

### C. *The Court Sought to Confer Benefits to the Accused at Sentencing*

The Supreme Court has long wrestled with sentencing enhancements and the procedural guarantees afforded to the criminal defendant.[45] The Court revisited several times the procedural requirements for proving and applying sentencing enhancements in the federal system, as set forth in the United States Sentencing Guidelines ("the Guidelines") and similar mandatory state sentencing schemes.[46] Since the inception of sentencing enhancement legislation, criminal defendants have regularly challenged the Court's increased sentence that resulted from additional factors beyond the elements of the crime and not proven at trial by the standard of beyond a reasonable doubt. And the Court has consistently sought to ensure additional procedural guarantees for the criminally accused.

With each case leading to the Court's *Booker* decision in 2005, the Court profiled an injustice related to sentencing enhancement legislation as applied in practice.[47] The Court initially focused on the notions of fairness and notice to the accused with the government's intent to rely upon a sentencing enhancement after the guilty plea or trial verdict.[48] Trial judges had increased a defendant's exposure at sentencing through judicial findings that rubber-stamped government allegations by lower standards of proof such as preponderance of the evidence.[49] The Court honed in on the defendant's constitutional right to jury trial

45. *See* McMillan v. Pennsylvania, 477 U.S. 79, 84–86 (1986) (holding that a State may properly treat visible possession of a firearm as a sentencing consideration rather than an element of a particular offense that must be proved beyond a reasonable doubt); Patterson v. New York, 432 U.S. 197, 207, 214–15 (1977) (rejecting a claim that, whenever a State links the "severity of punishment" to the "presence or absence of an identified fact" the State must prove that fact beyond a reasonable doubt).

46. *See* Apprendi v. New Jersey, 530 U.S. 466, 490–92 (2000); Jones v. United States, 526 U.S. 227, 242 (1999) (discussing the Sixth Amendment concerns raised in *McMillan* as it "broached the potential constitutional significance of fact finding that raised the sentencing ceiling"); Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998).

47. *See generally* Harris v. United States, 536 U.S. 545, 563 (2002) ("Any 'fact that . . . exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone' . . . would have been, under the prevailing historical practice, an element of an aggravated offense."); *Apprendi*, 530 U.S. 466 (distinguishing sentencing factors that would push out the maximum punishment of the charged offense); *Jones*, 526 U.S. at 232 (distinguishing between elements to be proved at trial and sentencing factors which could be first addressed at trial); *Almendarez-Torres*, 523 U.S. at 228 (relegating criminal history enhancements and recidivism penalties to sentencing); *see also McMillan*, 477 U.S. at 81 (using "sentencing factor" to refer to a fact that was not found by the jury but could affect the sentence imposed by the judge).

48. *See Jones*, 526 U.S. at 249.

49. *See* Blakely v. Washington, 542 U.S. 296 (2004) (Washington state sentencing scheme allowing the trial judge to enhance a defendant's sentencing based upon a finding by preponderance of the evidence); United States v. Booker, 543 U.S. 220 (2005) (similar requirements in the federal scheme).

and due process before the enhancement's application at sentencing.[50] The Court consistently questioned sentencing considerations that materially altered the complexion of the underlying criminal case. The Court analyzed the accused's ability to challenge the facts or circumstances that led to the increased punishment at sentencing.[51]

The Court's 2000 decision in *Apprendi* was representative of its protection of the defendant's individual rights and meaningful procedural safeguards.[52] Before *Booker*, because most enhancements did not affect maximum punishment and, thus, did not implicate *Apprendi*, trial judges still largely considered sentencing enhancements only at the time of sentencing.[53] Sentencing processes, like the federal criminal justice system, allowed the trial judge to make findings with respect to the mandatory enhancements to a defendant's punishment, not only post-trial at a sentencing hearing, but also by a lesser standard of proof. Enhancements still lacked procedure and represented a disproportionate focus on statutorily isolated facts and circumstances.

In 2005, the Supreme Court again sought to confer additional procedural safeguards to criminal defendants by compelling the government to prove even more sentencing enhancements to a jury at trial *and* by the standard of beyond a reasonable doubt.[54] The Court's decision effectively treated sentencing enhancements as elements of the offense based upon the defendant's constitutional right to jury trial,

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50. *See Booker*, 543 U.S. at 244. In *Apprendi*, the Court held that the Constitution requires that "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *See Apprendi*, 530 U.S. at 474–97 (emphasis added).

51. *See Booker*, 543 U.S. at 274–80 (explaining the bizarre result as founded in the accused's right to a jury trial and a beyond a reasonable doubt verdict supporting an imposed enhancement).

52. *Apprendi*, 530 U.S. at 466, 491–92. The defendant's understanding of the maximum punishment available to the court at sentencing is fundamental to fairness and notice. Lawmakers set forth maximum punishment in criminal statutes and trial courts must apprise defendant of his exposure at the time of arraignment and again at a guilty plea. In federal and state criminal courts, defendants had opted to plead guilty or contest government allegations at trial without adequate knowledge or notice that his sentence could be enhanced thereafter and the maximum punishment upon conviction could slide upward. The *Apprendi* Court held that, if the sentencing enhancement increases the maximum punishment, then it must prove such an enhancement at trial, as if it were an element. *Id.* at 477, 490. In many states thereafter, prosecutors therefore must prove beyond a reasonable doubt, and the jury must specifically find, any enhancement that pushed out the ceiling of his maximum punishment. *See id.* at 495–97.

53. *See, e.g.*, CAL. PENAL CODE § 12022(b)(1) (West 2012) ("A person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for *one year*." (emphasis added)). For serious, underlying offenses such as robbery, burglary, and rape, a one year enhancement to a defendant's sentence would likely not affect the twenty-year or more statutory maximum punishments proscribed in the California Penal Code.

54. United States v. Booker, 543 U.S. 220, 244 (2005) (Stevens, J., opinion in part).

his right to a *fair trial*.[55] The *Booker* Court required a jury trial and proof beyond a reasonable doubt for any factor that would mandate an increase in a defendant's sentence regardless of the impact on the accused's maximum exposure.[56] No one predicted the gift horse the *Booker* decision would become in the decade that followed.

As argued in this Article, after *Booker*, the process for imposing a sentencing enhancement *more* severely impacted some defendants by depriving them of the very constitutional rights the Court sought to protect—the accused's right to jury trial and due process under the law. The miscarriage of justice discussed below surfaced in the states where again state legislators erroneously believed that they were offering greater protections to the criminal defendant. The *Booker* Court provided for two solutions: the federal solution of "structured discretionary sentencing" and the solution opted for by some states—a jury trial on all sentencing enhancements. It is the latter solution adopted by some states, including California, that poses the dangers discussed in this Article: coercive plea discussions, deprived constitutional rights, and avoidable wrongful convictions.

### D. *The Federal Solution*

For almost twenty years, the federal criminal justice system allowed sentencing to dominate the discussion.[57] The federal sentencing guidelines were binding on the sentencing judge.[58] The parties briefed upward and downward movement to the applicable guideline range, to include enhancements, departures, and variances predominantly related to the defendant's offense conduct. After a guilty plea or guilty verdict at trial, the trial court made determinations about this movement of the applicable sentencing range using the preponderance of the evidence standard.[59] Most sentencing determinations were well-

55. *Id.* at 241–42.

56. *Id.* at 244.

57. *See supra* text accompanying note 25.

58. *See* 18 U.S.C. § 3553(b)(1) (2012), *excised by* United States v. Booker, 543 U.S. 220 (2005); *see also Report on the Continuing Impact of* United States v. Booker *on Federal Sentencing*, UNITED STATES SENT'G COMMISSION 14 (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf [http://perma.cc/N85J-Q29F] ("For nearly twenty years, courts were *required* to impose sentences within the applicable guideline range unless the court found the existence of an aggravating or mitigating circumstance of a kind or to a degree not adequately taken into consideration by the Commission in formulating the sentencing guidelines." (emphasis added)) [hereinafter "*Booker* Report"].

59. *Id.* The trial court's determinations at sentencing served the overarching goals of the Sentencing Reform Act and the Guidelines—honesty, uniformity, and proportionality. *See* 28 U.S.C. § 991(b)(1)(B) (2010); U.S.S.G., *supra* note 26, at ch. 1, § 1.3 (Congress set out three goals in the preamble to the Guidelines: (1) "honesty in sentencing"; (2) "uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders"; and (3) "proportionality in sentencing through a system that imposes appropriately different

prescribed while others were vaguer and susceptible to argument. In the end, after the court findings, the district judge's discretion in sentencing was narrowly confined to a tight range of months of imprisonment.

The *Booker* decision dramatically changed the landscape of federal sentencing.[60] The decision could have been devastating to the federal criminal justice system, the U.S. Sentencing Commission and Guidelines, and nearly two decades of sentencing jurisprudence between 1988 and 2005. But the Court sidestepped the destruction and conjured a solution to preserve the Guidelines and the long-standing federal sentencing schema: The Court offered that, if the Guidelines were discretionary, not mandatory, then the Guidelines remained constitutional.[61] The federal solution, consistent with the court's intent,[62] aims to protect the accused and his constitutional rights.[63]

More importantly, criminal defendants have benefited from the post-*Booker* application of the discretionary Guidelines in the federal system. Criminal defendants have received increasingly lower sentences each year as the system drifts away from the mandatory guidelines era of 1988–2005.[64] And when convicted of crimes for which the mandatory guidelines were most harsh, such as drug trafficking crimes, with many federal offenses, the accused now receive a

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sentences for criminal conduct of differing severity."); *cf.* Gall v. United States, 522 U.S. 39, 49–50 (2007) (returning the federal district courts to a three-step process post-*Booker*, requiring the court to: consult the Guidelines as advisory to the ultimate sentence imposed; consider departures and adjustments; and consider the policy and factors of § 3553(a)).

60. *See Booker*, 543 U.S. at 226–27 (Stevens, J., opinion in part). To remedy this unconstitutionality, *Booker* rendered the Guidelines advisory. *See id.* at 245 (Breyer, J., opinion in part). Because advisory guidelines permit a judge to "exercise[ ] his discretion to select a specific sentence within a defined range," they do "not implicate the Sixth Amendment." *Id.* at 233 (Stevens, J., opinion in part).

61. *Id.* True to the Court's central holding in *Booker*, the accused no longer is subject to mandatory increases to his sentence based upon factors neither alleged nor proven at trial. *See id.* at 244. Because the ultimate sentence is a discretionary application by a court, the rigidity of enhancements and specific information do not dominate the narrative. *See id.* at 233 Instead, the sentencing judge considers more about individuals and individual circumstances than enhancements and calculations.

62. Critics of the federal sentencing scheme, including the federal solution post-*Booker*, argue that Guidelines remain overly formulaic and the trial court continues to rubber-stamp findings set forth by the prosecutors by the lower standard of proof of preponderance of the evidence. Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 39, 60–62 (2005).

63. The Court then offered that the Guidelines could pass constitutional muster if they were not binding on the sentencing judge. *See Booker*, 543 U.S. at 245 (Breyer, J., opinion in part). The Court even set out a process whereby the Guidelines remained central to the framework for the Court's restored discretion at sentencing. *Id.* After *Booker*, the judge must consider the Guidelines, make findings about sentencing enhancements by preponderance of the evidence (for sentences exceeding the maximum), and then use its discretion to sentence within the punishments allowed under the statutes. *Id.* at 233, 244–45.

64. *Booker* Report, *supra* note 58, at 24–25, 58.

markedly lower sentence as compared to the applicable guideline range, and the Court imposes a "below-guideline" sentence in a higher percentage of cases.[65]

Some states followed the federal solution. Other states opted for a jury trial on the sentencing enhancement alleged by the government, complete with jury findings on the enhancements by the standard of beyond a reasonable doubt—what this Article calls "the states' solution."[66] Yet, even in the states that opted for the states' solution, many enhancements do not pose the dangers discussed in this Article.[67] The pressing problem lies with an undeclared classification of sentencing enhancements in these states opting for the states' solution, those that did not follow the federal solution. To narrow the analysis and shed light on this latent problem, this Article isolates a new classification of enhancements not considered yet by the judiciary.

## III. A New Sentencing Enhancement Classification and Motive Evidence

To date, the Court has classified sentencing enhancements largely based upon the effect a specific enhancement has on the defendants' potential or imposed sentence.[68] The Court's outcome-based classifications of sentencing enhancements proved effective before 2005 and its decision in *United States v. Booker*.[69] There was simply no need to classify or treat differently other sentencing enhancements.[70] These outcome-based classifications worked pre-*Booker* because other enhancements were relegated to the discretion of the trial judge at the sentencing hearing.

### A. *Classifying an Enhancement by its Relation to the Underlying Crime*

I propose, in the wake of *Booker* and because of the states' solution that the judiciary also must consider, and eventually classify, a sentencing enhancement based upon its relation to the government's evi-

65. *Id.* at 3, 58–61. For example, from 2005 to 2011, the percentage difference from the low end of the applicable guideline and the sentence imposed has widened from a low of 10.2% below the guideline minimum in fiscal year 2004 to a high of 17.9% below the guideline minimum in fiscal year 2011. *Id.* at 61.

66. It is important to note that the "states' solution" bears the most logical connection to the holding in *Booker*. The Author and other scholars posit that the federal solution was unnecessary to the *Booker* holding, incongruous and specially crafted for diplomatic and other reasons.

67. For example, enhancements related to the defendant's prior criminal history remained properly reserved for sentencing and enhancement evidence that is inextricably intertwined with the government case presentation in its case-in-chief are already before the jury.

68. *See* Almendarez-Torres v. United States, 523 U.S. 224, 229 (1998).

69. *See* United States v. Booker, 543 U.S. 220 (2005).

70. *Almendarez-Torres*, 523 U.S. at 229–30.

dence presented on the underlying offense conduct. In light of the coercive plea negotiation practices and resulting wrongful convictions, we must treat these most problematic sentencing enhancements in a dramatically new way. To greater assist legislators, trial courts, and appellate courts, we must independently consider a new classification based upon the connection, even direct overlap, between the evidence supporting the offense conduct alleged and the evidence supporting a jury's finding on the sentencing enhancement.

### 1. Inextricably Intertwined

Here, the term "inextricably intertwined," borrowed from evidence rules and jurisprudence, is useful.[71] When there is direct overlap between the evidence the government will present at trial on the elements of underlying crimes and the evidence, then the two are inextricably intertwined. A shorter version is, would the jury have heard this evidence even without the sentencing enhancement? If yes, then the jury's consideration of the sentencing enhancement at the same trial before the same jury does not suffer from the constitutional and evidentiary pitfalls discussed in this Article.

For example, consider the use of a weapon, amount of financial loss, and resulting injury types of enhancements under the states' solution. Even if not directly supporting an element of an assault or fraud charge, we fully expect evidence of these type of enhancements to be presented at trial because they are inextricably intertwined with the government's presentation of its case in chief. Stated differently, we expect that the evidence at issue would be part of the government's presentation whether or not the case involved a sentencing enhancement. As another example of an intertwined enhancement, many states have a "gun enhancement" for specific crimes committed with firearms.[72] Distinct from the many firearm offenses in the penal codes in every jurisdiction, the gun enhancement increases the punishment for crimes that do *not* reflect anything about the firearm in the elements of the crime, such as robbery, threat, and assault crimes. Through the course of proving the robbery, threat, or assault case, the prosecutor would present credible evidence of the defendant's use of a gun, whether or not the sentence increased based upon the gun.

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71. *See* FED. R. EVID. 404(b); United States v. Vizcarra-Martinez, 66 F.3d 1006, 1012–13 (9th Cir. 1995).

72. Adam Ferrise, *Akron Man Sentenced to 13 Years in Wife's Killing*, NE. OHIO MEDIA GROUP (Apr. 10, 2015, 1:18 PM), http://www.cleveland.com/akron/index.ssf/2015/04/world_war_ii_veteran_sentenced.html [http://perma.cc/2K2P-BCA8] (describing a case where the defendant was convicted and sentenced to thirteen years for involuntary manslaughter based upon shooting his wife).

### 2. Motive Enhancements

Conversely, evidence in support of a sentencing enhancement that would not otherwise organically be part of the government's case-in-chief should be treated differently by the trial court during the procedural consideration of bifurcation. The evidence in support of the enhancement that is new and different should not be presented to the same jury at the same time as they consider guilt on the underlying crimes. For instance, *evidence supporting sentencing enhancements* that relate to the defendant's motive to commit the crime are not necessarily inextricably intertwined with the evidence we expect in support of the underlying criminal allegations.[73] We will use the term "motive enhancements" to describe this category in this Article.

To ensure that a defendant's constitutional rights are protected and that the integrity of his criminal justice system is preserved, it is time to rethink sentencing enhancements premised on the defendant's criminally culpable motive to commit the crime. We must isolate these motive enhancements to ensure that defendants' constitutional rights to a trial and due process are protected. The Court, as discussed above, has analyzed sentencing enhancements before with an eye toward protecting an accused's constitutional rights and creating procedural safeguards in our criminal justice system.[74]

### 3. Mandatory Bifurcation

Under the states' solution, the most applicable procedural safeguard is mandatory bifurcation. Most American court systems offer bifurcated trials and bifurcated phases of trial[75] as a procedural tool available to the trial judge at her discretion. In most instances, when the legislative branch needs untainted jury findings then they prescribe mandatory bifurcation in the statute or the appellate courts decide that tool must be used in specific circumstances.[76] Mandatory or statutory bifurcation, as opposed to mere discretionary tools, has

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73. *Vizcarra-Martinez*, 66 F.3d at 1012–13, 1015–16.

74. *See Booker*, 543 U.S. at 226–27; *see also supra* notes 46–60.

75. For purposes of this Article, "bifurcated trial" indicates two distinct juries who consider separate issues framed by the court and "bifurcated phases of trial," the more prevalent procedural tool in this context, refers to the same jury considering separate issues in seriatim and benefitting from evidence heard during earlier phases.

76. *See, e.g.*, California Penal Code section 1026 requires bifurcation when the criminal defendant provides notice of his intent to advance the insanity defense in California. Similarly, California Penal Code section 190.1 provides for mandatory bifurcation for death penalty cases in California. In the federal context, Federal Rule of Criminal Procedure 32.2 mandates that the court determine the property subject to civil forfeiture in a separate phase of trial, typically with the same jury, following a guilty verdict on counts connected to proceeds of the crime. FED. R. CRIM. P. 32.2. Even the Federal Rules of Civil Procedure offer bifurcation "for convenience, to avoid prejudice, or to expedite and economize." FED. R. CIV. P. 42(b). The federal court presiding over a civil trial "may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims." *Id.*

worked well elsewhere in criminal cases such as death penalty cases, insanity defenses,[77] and even asset forfeiture claims that accompany criminal charges.[78]

No court has found a constitutional right to bifurcation.[79] The judiciary employs discretionary bifurcation of issues, such as liability and damages, as well as severance of parties, such as indemnification claims, routinely in civil cases.[80] The accused has the burden to establish the need for bifurcation.[81] The defendant the Supreme Court sought to protect in *Booker* and its progeny, most commonly the party seeking bifurcation of evidence supporting a motive enhancement from other evidence supporting the underlying charge, has the burden to "clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried."[82] Unfortunately, trial

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77. The defendant's insanity defense makes the strongest case for mandatory bifurcation for motive enhancements. The defendant's presentation about his lack of intent at the same time and at the same trial as his evidence of his own disease or defect that may excuse his criminal conduct can muck up the government's case. So, several state legislators have cured a procedural problem for the government. Currently, twelve jurisdictions provide for bifurcation for insanity defenses by statute or court rule. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION, 2004 199–202 (2006), http://www.bjs.gov/content/pub/pdf/sco04.pdf [http://perma.cc/5SRT-PRAS]. In some of those states, bifurcation is mandatory and not left to the discretion of the trial judge. *See* Kathryn S. Berthot, *Bifurcation in Insanity Trials: A Change in Maryland's Criminal Procedure*, 48 MD. L. REV. 1045, 1053 (1989).

By deduction, when it favors the government, lawmakers figure out how to parse out the phases of trial between guilt phase and potential defense. When it adversely affects the criminal defendant, the legislators fail to parse out trial from sentencing matters to protect the constitutional rights of the accused.

78. *See* United States v. Feldman, 853 F.2d 648, 662 (9th Cir. 1988). The bifurcation phase of an asset forfeiture allegation also favors the government's presentation of criminal and civil cases with different burdens. *See id.* at 662–63. Like a segregated sentencing phase of trial as to applicable enhancements, the asset forfeiture phase of a criminal case can require only limited additional work after the guilt phase before the same jury. *Id.* Slightly different evidence that serves a slightly different purpose in the criminal justice process. *Id.*

By deduction again, when it favors the government, lawmakers figure out how to parse out the phases of trial between civil and criminal and guilt versus asset forfeiture.

79. Hester v. State, 315 N.E.2d 351, 353 (Ind. 1974); People v. Newberry, 290 N.E.2d 592, 597 (Ill. 1972); Commonwealth v. Bumpus, 290 N.E.2d 167, 175 (Mass. 1972); Simpson v. State, 275 A.2d 794, 795 (Del. 1971). In fact, "[n]o court has yet accepted the argument that the concept of a bifurcated trial is a constitutional right that inures to the defendant in any given case." People v. Yukl, 372 N.Y.S.2d 313, 315 (Sup. Ct. 1975).

80. In the civil context, judges truly see bifurcation, as well as severance, as an efficiency mechanism because they can save work and the jury's time by taking up trial phases one at a time. In criminal cases, the trial judge knows that 90% or more cases result in conviction and proceed to a sentencing phase. Thus, discretionary bifurcation goes underutilized in the criminal context because judges see the tool as creating two trials out of one.

81. People v. Hernandez, 94 P.3d 1080, 1086 (Cal. 2004) (holding that the defendant did not meet his burden that bifurcation was necessary in these circumstances).

82. *Hernandez*, 94 P.3d at 1086.

courts, if given the choice, steer clear of bifurcated trials as a matter of policy.[83] Yet an accused's constitutional rights can be infringed once the trial court denies bifurcation.

Some jurisdictions rely upon the lack of statutory authority to dismiss motions for bifurcation.[84] Others conjure up legislative intent to conduct a single trial where there was none.[85] The technical remedy is available to the defendant, but, in truth, it represents a failure on behalf of the lawmakers to provide for procedural safeguards for the accused. In some circumstances, as with motive enhancements, the accused's right to a fair trial and due process under the law can only be realized through the procedural guarantee of a bifurcated trial.

Because many state criminal courts opted for the states' solution for sentencing enhancements, the criminal justice system must develop further classification to, once again, protect the rights of the accused and require bifurcation at trial. A brief look at the rationale for how our criminal justice system handles both death penalty cases and criminal history sentencing enhancements can show the way for motive enhancements.

### B. *Supreme Court's Classifications of Sentencing Enhancements*

#### 1. Death Penalty Procedure Lessons

While death is undeniably different because of its severity and irrevocability,[86] the states' implementation of capital punishment schemes,

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83. The Arizona Supreme Court found the requirement of bifurcation in its insanity statute created an irrefutable presumption of intent during the first part of the trial which violated the defendant's constitutional right to a fair trial. *See* State v. Shaw, 471 P.2d 715, 724 (Ariz. 1970). "Texas's insanity statute [that] provided for mandatory bifurcation of the defendant's mental state was repealed by the state legislature on due process grounds." Berthot, *supra* note 77, at 1046 & 1046 n.4 (citing Townsend v. State, 427 S.W.2d 55, 61–62 (Tex. Crim. App. 1968)). Texas's anxiety over mandatory bifurcation was brewing for some time as it earlier denied bifurcation on the grounds that "[t]wo-part jury trials are rare in our jurisprudence . . . [and] have never been compelled by this Court as a matter of constitutional law." Spencer v. Texas, 385 U.S. 554, 568 (1967). Lastly, a Wyoming court found that the bifurcation statute prohibited the defendant from presenting evidence against his guilt until the second phase of the trial—a violation of due process. Sanchez v. State, 567 P.2d 270, 274, 278 (Wyo. 1977).

84. *See, e.g.*, Gruzen v. State, 634 S.W.2d 92, 95 (Ark. 1982) ("[Defendant was] not entitled to a bifurcated trial . . . [because the] Rules of Criminal Procedure do not provide for such a trial.").

85. In *State v. Sanders*, the Supreme Court of Kansas asserted the separation was impermissible because "the verdict form . . . contemplate[d] an unbifurcated trial." State v. Sanders, 574 P.2d 559, 565 (Kan. 1977); *accord* State v. Gray, 351 So. 2d 448, 455 (La. 1977) (determining the statute implied the necessity to deny bifurcation).

86. Spaziano v. Florida, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part) ("[B]ecause of its severity and irrevocability, the death penalty is qualitatively different from any other punishment."); *see also* Jeffery Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 117 n.1 (2004).

including its necessary procedural safeguards, informs the sentencing enhancement discussion. Due to its severity and finality, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."[87] The Court unequivocally rested its constitutional decisions about capital punishment on heightened procedural safeguards due to the accused.[88] Central among these procedural safeguards was the need for jury findings at sentencing and bifurcated proceedings of trial and sentencing phases to ensure the underlying trial and finding of guilt is not tainted.[89] It is of some importance that the government and the defendant have an equal interest in an untainted guilt phase of trial.[90]

A jurisdiction can impose the death penalty, the ultimate sentencing enhancement available in some murder cases, by way of, first, a jury's finding in an underlying "guilt phase" of the murder case and, second, a separate "penalty phase" finding after weighing aggravating and mitigating factors of the crime.[91] In most jurisdictions, only after an untainted finding of guilt, the jury must unanimously find that capital punishment is appropriate. Of the procedural safeguards afforded to the accused in a capital case, the following three can inform our understanding of the procedural inadequacies for motive enhancements:

- it is mandated by statute that the jury's work in a capital case is bifurcated into two distinct phases;
- the trial on the guilt phase is undisturbed and untainted by the potential punishment available at sentencing; and

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87. Woodson v. North Carolina, 428 U.S. 280, 305 (1976); *see also* Ring v. Arizona, 536 U.S. 584, 614 (2002) (Breyer, J., concurring) ("This Court has held the Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty."); *see also* Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion) ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed.").

88. In no uncertain terms, Justice Breyer stated in his concurrence in *Ring*, without heightened procedural safeguards, the use of the death penalty would violate the Eighth Amendment. *Ring*, 536 U.S. at 614 (Breyer, J., concurring) ("Otherwise, the constitutional prohibition against 'cruel and unusual punishments' would forbid its use."). In *Gregg*, a plurality specifically enumerated several procedural safeguards to ward against the arbitrariness and capriciousness of imposing the death penalty at sentencing. *Gregg*, 428 U.S. at 188–89.

89. *Gregg*, 428 U.S. at 190–95. The need for jury sentencing was expressed in *Gregg* so as "to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 190 (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968)).

90. To be more explicit, the government needs a conviction and, in a capital case, the prospect of the imposition of the death penalty has the very real possibility of affecting jurors' findings on guilt. To preserve the integrity of the murder allegation, the considerations of punishment are carved out of the guilt phase and reserved for the sentencing phase. Cynically, the legislature provided for mandatory bifurcation and procedural safeguards when favorable to the government.

91. CAL. PENAL CODE § 190.1 (West 2014).

- after sitting for the trial on the underlying crime, the same jury then decides whether the increased punishment is warranted with the benefit of all of the evidence put before it in the earlier phase.

The Supreme Court long ago acknowledged that the criminal defendant's constitutional right to a jury trial dictated that a jury, as opposed to a judge, must make the necessary findings for imposition of the death penalty.[92] As finders of fact in the death penalty context, however, the jury must be adequately informed both of evidence relevant to sentencing and of appropriate standards for making a death penalty decision to satisfy the heightened procedural safeguards.[93] The Court recognized early on that mandatory bifurcation was also necessary.[94] After requiring jury sentencing, the Court cited, at length, the sections of Model Penal Code that discussed the merits of bifurcation as a procedural safeguard against jury prejudice during the guilt phase.[95] "The obvious solution . . . is to bifurcate the proceeding, abiding strictly by the rules of evidence until and unless there is a conviction, but once guilt has been determined opening the record to the further information that is relevant to sentence."[96] That is, when requiring a jury finding as a procedural protection for the accused, the Court was mindful that the defendant's right to a fair trial and other constitutional rights were not impacted.[97] Of the jurisdictions that still have the death penalty, all of them adhere to jury sentencing and bifurcated proceedings.[98]

The Court further considered the evidentiary implications inherent when information bearing on sentencing may taint the precedent guilt determination.[99] In the death penalty context, with a jury finding on

92. *Ring*, 536 U.S. at 609 (majority opinion). In *Ring*, Justice Breyer suggested another reason for the necessity of jury sentencing—"retribution provides the main justification for capital punishment"—and only a jury (presumably because they have heard the facts and evidence) can determine if the death penalty will serve that purpose. *Id.* at 614 (Breyer, J., concurring) (citing Harris v. Alabama, 513 U.S. 504, 515–26 (1995) (Stevens, J., dissenting)).

93. *Gregg*, 428 U.S. at 189–95.

94. *Id.* at 190–91.

95. *Id.* at 191 (quoting MODEL PENAL CODE § 201.6 cmt 5 (AM. LAW INST., Tentative Draft No. 9, 1959) ("[If a unitary proceeding is used] the determination of the punishment must be based on less than all the evidence that has a bearing on that issue . . . . Trial lawyers understandably have little confidence in a solution that admits the evidence and trusts to an instruction to the jury that it should be considered only in determining the penalty and disregarded in assessing guilt.")).

96. *Id.* (quoting MODEL PENAL CODE § 201.6 cmt. 5 (AM. LAW INST., Tentative Draft No. 9, 1959)).

97. *Id.* at 190–91.

98. *See* Marshall v. Lonberger, 459 U.S. 422, 456 (1983) ("Bifurcated proceedings are now the rule in capital cases throughout the Nation."). *See generally Capital Punishment*, 44 GEO. L.J. ANN. REV. CRIM. PROC. 895, 902–11 (2015) (discussing state procedures for capital punishment).

99. *Gregg*, 428 U.S. at 190–91.

sentencing, state law required mandatory bifurcation because "[m]uch of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question."[100] Death is different, and capital punishment jurisprudence more easily commands the Court's attention.[101] But the same principles dictate the jury trials required for motive enhancements today.[102]

2. Criminal History Sentencing Enhancements Lessons

After several years of reviewing broad-based punishment increases in criminal cases, the Court had to sort through other sentencing enhancements, such as those based upon the defendant's criminal history.[103] The classic theories of punishment are rooted in treating recidivists more harshly at sentencing.[104] The defendant's recidivism and specific deterrence have long been a sentencing consideration for the trial court.[105] Some of the earliest sentencing enhancements thus focused not on the crime but on the criminal's prior encounters with criminal justice system.[106]

100. *Id.* at 190.

101. *See* sources cited *supra* note 86.

102. *See, e.g.*, Blakely v. Washington, 542 U.S. 296, 303–04 (2004) (requiring a jury determination of motive when it would cause sentencing above the statutory maximum). Why did the *Gregg* Court so readily recognize the need to bifurcate the guilt phase with jury sentencing in a capital trial while, almost 30 years later, the *Booker* Court did not require jury findings for many sentencing enhancements, avoiding the need to address bifurcation? *See Gregg*, 428 U.S. at 190–91; Booker v. United States, 543 U.S. 223, 244, 264–65 (2005). One theory is the government, in capital cases, has a similar interest in not infecting the guilt phase of a capital case with sentencing evidence because jurors may not find guilt in appropriate cases due to their ideological or personal feelings about capital punishment. As discussed below, with jury findings on other sentencing enhancements post-*Booker*, the government does not run the same risk of impacting its case on the underlying crime. *See infra* Section III.C & Part IV. The evidence supporting a sentencing enhancement generally favors a finding of guilt and, with the proliferation of sentencing enhancements, prosecutors do not want to navigate two phases of so many jury trials. *See infra* Section III.C & Part IV.

103. *See* Harris v. United States, 536 U.S. 545, 563 (2002) ("Any 'fact that . . . exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone' . . . would have been, under the prevailing historical practice, an element of an aggravated offense."); Apprendi v. New Jersey, 530 U.S. 466 (2000) (same); Jones v. United States, 526 U.S. 227, 232 (1999) (same).

104. *See* Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to* Apprendi, 97 MARQ. L. REV. 523, 526–30 (2014) (discussing the theory and history of the use of recidivism in sentencing).

105. *Id.* at 537–50.

106. Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998) (relegating criminal history enhancements and recidivism penalties to sentencing); *see also* Spencer v. Texas, 385 U.S. 554, 565–67 (1967) (discussing common law and statutory approaches to considering prior convictions in sentencing).

The Court was quick to reserve consideration for these "criminal history enhancements" for the judge at sentencing.[107] Unlike an element of a crime based upon criminal history, such as a felon in possession of a firearm, the Court was careful not to require a jury finding for criminal history sentencing enhancements.[108] The states followed.[109]

The judiciary, like it did with evidence related to death penalty determinations, intuitively segregated evidence of the criminal history enhancement from the evidence related to the underlying criminal offense. The determination for criminal history enhancements was relegated to a sentencing hearing and for the trial judge.[110] The judiciary had comfort in relegating enhancements based upon the defendant's criminal past to sentencing because, as to his constitutional concerns, those matters had *their* day in court. The courts could arrive at a process with criminal history enhancements that did not offend the accused constitutional rights to due process and fair trial—he already had due process and his independent right to trial on the other charges. For purposes of this Article, the following two reasons are instructive; how and why the courts decided that criminal history should not be part of the trial on the underlying crime.

First, the introduction of evidence about a defendant's criminal history is antithetical to a fair, impartial, and non-prejudicial trial. Our criminal justice system is premised on the axiom that a defendant is tried solely on his offense conduct, not his past conduct and propensity to commit crimes. Status and profiling generally have no place at a criminal trial. If criminal history were incorporated in the same trial and before the same jury as the underlying crime, then the defendant with priors would seldom get a fair and impartial jury trial as to the underlying offense. *The system would always be trying whom the defendant was as opposed to what the defendant allegedly did*.

Second, and importantly as discussed below with respect to motive enhancements, lawmakers promulgated evidence codes and specific rules of evidence to exclude evidence of the defendant's other crimes

107. *See supra* notes 46–60 (defining the rule of sentencing enhancements as "other than criminal history").

108. *See* Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (citing Jones v. United States, 526 U.S. 227, 243 (1999)).

109. *See* People v. Calderon, 885 P.2d 83, 89 n.2 (Cal. 1994) (noting the practice of judicial consideration of prior convictions in sentencing by many states and the federal government). Under an earlier decision in *People v. Bracamonte*, a California court of appeal announced a rule bifurcating all sentencing phases requiring evidence of challenged prior convictions. People v. Bracamonte, 174 Cal. Rptr. 191, 195–96 (Ct. App. 1981). The court in *Bracamonte* asserted that allegations regarding prior convictions were inherently prejudicial to the defendant and, as a result, should be insulated from the guilt phase by bifurcation; however, in *People v. Calderon*, the California Supreme Court altered the rule of *Bracamonte* and gave greater discretionary power concerning bifurcation to the judiciary. *Id.*; *Calderon*, 885 P.2d at 90–91.

110. *Almendarez-Torres*, 523 U.S. at 228.

and status in most instances. The judiciary recognized long ago that evidence in support of criminal history enhancements should not be part of the trial on the underlying charge.[111] The potential for taint of the accused's right to fair trial and presumption of innocence was apparent.[112]

Due to the states' failure to distinguish different types of enhancements and the inartful procedural implementation under the states' solution, instead of a safeguard conferred to the accused, prosecutors gained yet another tactical advantage during plea bargaining and at trial. Legislators and trial courts failed to consider the procedural implications of proving motive enhancements at trial and the critical need to protect the accused against spillover in the form of bifurcated trial provisions. As a result, once the prosecution alleges certain sentencing enhancements, the accused has been procedurally doomed.

### C. *Motive Evidence*

Motive is among the most difficult admissibility calls for criminal trial courts. Motive evidence involves the questions jurors want answered most, but motive is *not* an element of most crimes. Motive evidence makes for difficult admissibility determination for the court because often what motivated the defendant to commit the crime will unfairly prejudice him at trial. Motive evidence can incorporate a larger illicit purpose for committing the crime, often related to financial incentives, such as gambling debts, drug habits, and gang activity. While the defendant's motive is almost always relevant, motive evidence just as often violates character evidence and unfair prejudice rules. Because character evidence, arguments of other crimes, wrongs, or acts under Federal Rule 404(b), and the unfair prejudice balancing test under Rule 403 are so broad, they are evidentiary issues most ripe for litigation in criminal trials.[113]

In the federal rules, and most state rules that mirror the language, the word "motive" appears only in Rule 404(b) describing "crimes, wrongs or other acts" by the defendant.[114] Rule 404(b) is a prosecutor's rule that allows the admission of other bad acts by the defendant when probative—not of his propensity to commit crime but of some other part of the case that is controverted by the defense.[115] Some of the other acceptable uses of other crimes, wrongs, or acts are elements

111. *Id.*; *see also supra* notes 102–109.

112. *See supra* notes 102–109.

113. *See* FED. R. EVID. 403, 404(b).

114. FED. R. EVID. 404(b); *see, e.g.*, TEX. R. EVID. 404(b).

115. *See* James DeCleene, *A Prosecutor's Guide to Character Evidence: When is Uncharged Possession Evidence Probative of a Defendant's Intent to Distribute?*, 98 MARQ. L. REV. 1383, 1383–86 (2015).

or facts that the government must prove beyond a reasonable doubt such as identity, knowledge, and intent.[116]

This Article argues that motive evidence is not inextricably intertwined with the government's presentation of evidence to the underlying crime. If motive is a difficult admissibility determination for trial judges and involves the two most litigated rules of evidence in criminal trials, then it cannot be inherently part of the government's proof of the underlying crime. Courts do not consistently admit motive evidence in any identifiable way in criminal cases. Instead, courts unpredictably tend to allow motive evidence in more serious crimes or when the government needs it more to convict. Stated differently, prosecutors do not plan on motive evidence as part of the trial and should not need it to convict. For prosecutors, *motive is frosting on the cake*.

Many courts have admitted other crimes evidence under Rule 404(b) to prove motive and, therefore, would disagree with the fundamental premise stated above—*that evidence of motive enhancements is not inextricably intertwined with evidence that we expect to be presented to the jury at trial*.[117] The judiciary's disagreement, however, is based upon flawed logic. Courts make the improper inference that because motive evidence is often admitted into evidence at criminal trials that evidence of motive enhancements must be inextricably intertwined as well. That is, courts mistakenly believe that the evidence would be before the jury anyway, even without the sentencing enhancement alleged. Not true. It has been shown decidedly to be false.[118]

Much of the *evidence in support of a motive enhancement is not pure motive evidence*. Much of it is entirely unforeseeable as part of the government case presentation and, worse yet, goes far beyond what a trial court would ever permit under the rules of evidence. For exam-

116. *See* Fed. R. Evid. § 404(b).

117. *See e.g.*, People v. Hernandez, 94 P.3d 1080, 1085–89 (Cal. 2004) (admitting gang evidence against the defendant "to show a motive for the crime") ("A prior conviction allegation relates to the defendant's status and may have no connection to the charged offense; by contrast, the criminal street gang enhancement is attached to the charged offense and is, *by definition, inextricably intertwined* with that offense. So less need for bifurcation generally exists with the gang enhancement." (citing People v. Martin, 28 Cal. Rptr. 2d 660 (Ct. App. 1994) (emphasis added)); *see also* People v. Mendoza, 6 P.3d 150 (Cal. 2000) (element of fear); People v. Williams, 940 P.2d 710 (1997) (motive and identity).

118. *Compare Hernandez*, 94 P.3d at 1088–89 (admitted uncharged gang-affiliation evidence in the defendant's trial on the underlying offenses "to show a motive for the crime"), *with* United States v. Morley, 199 F.3d 129, 133 (3d Cir. 1999) ("A proponent's incantation of the proper uses of such evidence under the rule does not magically transform inadmissible evidence into admissible evidence."), *and* United States v. Varoudakis, 233 F.3d 113 (1st Cir. 2000) (denying the government's motive evidence proffered under Rule 404(b) for other crimes, wrongs or acts). "When prior bad act evidence is offered to prove a motive for the crime, 'courts must be on guard to prevent the motive label from being used to smuggle forbidden evidence of propensity to the jury.'" *Id.* at 120 (citing United States v. Utter, 97 F.3d 509, 514 (11th Cir. 1996)).

ple, appellate cases routinely deny relief based upon a review of the sufficiency of the evidence in support of motive enhancements like gang enhancements.[119] The prosecution routinely calls an expert to testify about the activities of the gang and the defendant's affiliation and status as a member on the elements of the offense. But it extends way beyond the categories of evidence a defendant could expect even if the court permitted, under the rules of evidence like Rule 404(b), evidence of motive to commit the crime. Conceptually, there is little to no overlap in the areas within the Venn diagram depicting the evidence presented at trial related to the elements and motive enhancement.

Some courts put forward legal fiction in support of their contention that evidence in support of a motive enhancement is independently admissible at the trial. Some trial courts clumsily cite the last case to permit motive evidence or, more broadly, evidence in support of a motive enhancement without case-by-case analysis. Then there are courts that, like the Court of Appeals in California in *Hernandez*, overtly strain standards and rules to admit evidence supporting motive enhancement at the *same trial* and *same time* as the underlying trial on the merits.[120] *Hernandez* held that even if not independently admissible, motive enhancement evidence will be admitted into evidence unless it is "so extraoridinarily prejudicial . . . that it threatens to sway the jury to convict."[121]

Accordingly, we must treat sentencing enhancements that require proof of motive—gang and hate enhancements—differently.[122] Motive evidence is sometimes part of the criminal trial, sometimes not. Sentencing enhancements based upon motive must not tilt evidence of questionable admissibility in favor of the government. A new tier of classification for non-inherent enhancement should be added to the sentencing enhancement discussion. Courts must segregate evidence of motive enhancements, like evidence of death penalty determination and criminal history, to avoid continued improper character evidence and unfair prejudice to the accused at trial.

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119. *See e.g.*, People v. Zavala, No. H036028, 2013 WL 5720149, at *23–25 (Cal. Ct. App. Oct. 22, 2013) (unpublished) (citing *Hernandez* and holding that the defendant did not meet his burden on appeal to demonstrate that the trial court's denial of bifurcation violated his due process rights); *cf.* People v. Villeda, No. B230494, 2012 WL 4459931, at *6 (Cal. Ct. App. Sept. 27, 2012) (unreported case) (distinguishing *Hernandez* on the grounds that the defendant had not "injected his gang affiliation into the crimes: [he] neither announced or otherwise referenced the gang when committing the robberies").

120. *Hernandez*, 94 P.3d at 1086.

121. *Id.*; *cf.* CAL. EVID. CODE § 352 (West 2011) (covering undue prejudice, akin to the Federal Rules of Evidence).

122. *Hernandez*, 94 P.3d at 1086.

## IV. Procedural "Perfect Storm" for the Accused

### A. *The Solution of Some States & Proving a Sentencing Enhancement at Trial*

Following *Booker*, California opted for the states' solution.[123] California chose to give its defendants the procedural, constitutional protections of a jury trial and jury finding beyond a reasonable doubt on sentencing enhancements that would require an increased sentence.[124] Again, California's decision is well-reasoned in light of the true holding in *Booker*.[125] States like California, at the time of the decision, argued that the states' solution better protected the accused in its criminal courts, particularly as compared to the federal solution. The states' solution and California's election to follow it should positively affect the defendant. Yet as argued in this Article, trials on the sentencing enhancements, for some enhancements, with the *same jury* at the *same time* violates the accused's constitutional rights (still) and the rules of evidence.

The legislative branch in California can, and should, provide for bifurcation procedurally when enacting an enhancement statute. But it does not. Instead, when the statute is procedurally silent, as is all legislation providing for sentencing enhancements, the bifurcation decision rests with the trial judge. For most over-worked, under-resourced trial courts, the bifurcation decision inherently conflicts with their survival mode of doing more with less.

### B. *Abuse of Discretion Review of Denied Request to Bifurcate*

Appellate courts instead hold that the trial judge did not abuse its discretion in denying bifurcation related to evidence supporting a motive enhancement.[126] As discussed above, trial courts seldom exercise their broad discretion to grant defense requests for bifurcation of the sentencing enhancements.[127] By leaving bifurcation to the discretion of the trial court, California, like others states, failed to divorce the "trial" of the enhancement from the trial of the underlying offense.[128] Following the court's denial of the defendant's request to bifurcate, the trial court improperly admits evidence, such as evidence in sup-

123. Judicial Council of Cal. Criminal Jury Instructions, CALCRIM 3103 (2015), http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf [http://perma.cc/QSV5-DJ3W].

124. *Id.*

125. *See supra* notes 60–63.

126. *See* People v. Hernandez, 94 P.3d 1080, 1087 (Cal. 2004) (holding that the trial court did not abuse its discretion by denying bifurcation of robbery trial of gang enhancement because a limiting instruction regarding gang evidence is only necessary if requested by defense counsel).

127. *See supra* Section III.A.3.

128. *See* sources cited *supra* note 109, 121.

port of a motive enhancement, that would not otherwise be part of the government's presentation to prove the underlying crime.

Therefore, when California and other states opt for the states' solution, the accused's constitutional rights to a trial and due process are violated in a whole new way. At trial, the government's case got stronger with the evidence in support of a motive enhancement, while the accused's hopes for a fair trial got decidedly weaker. And with appeal, it gets worse still for the accused. On appeal, high courts in states like California ratify and offer support to the next waves of trial judges passing on improper and unfairly prejudicial evidence about gang and hate group affiliation.[129]

### C. *Constitutional Arguments Against Unbifurcated Trials for Motive Enhancements*

#### 1. Defendant's Right to a (Fair) Trial

Ironically, the constitutional implications argued in this Article mirror the arguments that led to the Court's decision in *Booker*: the accused's Sixth Amendment right to trial by jury.[130] The *Booker* Court relied upon the accused's right to trial to require the government to prove the enhancements that mandated an increased sentence to have a jury finding by the standard of beyond a reasonable doubt.[131] The Court's decision in *Booker* was based on the defendant's constitutional right to a fair trial *on the sentencing enhancement*.[132]

It should stand to reason that a mandate designed to protect a defendant's right to fair trial should not so severely adversely impact the larger trial at issue, *the trial on the underlying crime*. The *Booker* Court gave the accused the right to trial on a sentencing consideration, but then some states implemented the requirement in such a way to poison the trial on the merits. It has also infected the process leading up to trial because prosecutors can coerce guilty pleas by threatening that the accused will face one of these poisoned trials. That is, without mandatory bifurcation, too many defendants must choose between an unfair and prejudicial trial and pleading guilty to avoid the sentencing enhancement.

#### 2. Presumption of Innocence

As discussed below under evidentiary challenges,[133] the evidence offered by the government in support of a motive enhancement can be overwhelmingly damaging. This includes evidence of unsavory status and affiliation with groups that trigger an emotional reaction from the

129. *See* sources cited *supra* note 109, 121.
130. *See* sources cited *supra* note 31, 60.
131. *See* sources cited *supra* note 31, 60.
132. *See* sources cited *supra* note 31, 60.
133. *See infra* Section IV.D.

jury. A criminal defendant must enjoy the presumption of innocence at his trial "unless and until" the allegations against him are proven beyond a reasonable doubt.[134] That ideal becomes more illusory when he is cloaked throughout trial with evidence in support of motive enhancements.

The government, throughout an unbifurcated trial on motive enhancements, wheels out evidence about the gang or hate group. Such evidence extends beyond the four corners of the underlying case on the merits. It also involves specific acts taken by the defendant *and others in the association* that weigh on the defendant as trial progresses. While all defendants must be presumed innocent, evidence in support of a motive enhancement can shackle the defendant at trial and improperly shift the burden to his proving that he is not guilty despite these associations and his status.

### 3. Shackles Analogy

It is the duty of the trial court to protect the defendant's right to a fair trial and to limit the possibility of unfair prejudice. There can be no more vivid example of unfair prejudice than that which is created by physical shackles on the defendant at trial before the jury.[135] The Supreme Court has declared that the stigma of appearing before the court in handcuffs is so great it can only be done in light of some "special need" "specific to the defendant on trial."[136] Where the court fails to provide such justification, "the defendant need not demonstrate actual prejudice to make out a due process violation."[137] If the court intends to shackle the defendant, defense counsel must have adequate opportunity to argue against the perceived necessity—because the unfair prejudice is obvious.[138]

Akin to public shackling at trial, trial courts, through their treatment of motive enhancements and denied motion to bifurcate, have effectively compelled the defendant to wear his gang colors or visible tattoos of his hate group at the unbifurcated trial of the underlying crime.[139] This too should be obvious. In the criminal context, no word may be more toxic to an accused than "gang." Gangs are associated, almost exclusively, with crime—and the most vividly fearsome crime in society. The government sought to prove exactly what jurors believe when they hear the word "gang" in court: this defendant on trial

134. People v. Mayo, 44 Cal. Rptr. 3d 497, 503–04 (Ct. App. 2006).

135. United States v. Apodaca, 843 F.2d 421, 430–31 (10th Cir. 1988); United States v. Theriault, 531 F.2d 281, 284 (5th Cir. 1976).

136. Deck v. Missouri, 544 U.S. 622, 624 (2005); *see also* Duckett v. Godinez, 67 F.3d 734, 747 (9th Cir. 1995) (holding that due process even prohibits shackling the defendant during sentencing of a capital trial unless it serves an essential state interest).

137. *Deck*, 544 U.S. at 635.

138. *See Theriault*, 531 F.2d at 285.

139. *Id.* at 284; *Deck*, 554 U.S. at 625.

for a specific crime belongs to a group that commits crime as its foundational purpose. It would not be much worse to make the defendant wear his gang colors and associate with his fellow gang members live and in person in front of the jury.

The gang labeling, affiliation, and specific past activities evidence should be so obviously unconstitutional that we need not go beyond the vivid imagery that shackles pose. This evidence implicates the accused's right to trial on the merits of the underlying offense and his robbed presumption of innocence during trial.

#### 4. Commenting on the Defendant's Silence at Trial

Events at trial, including the words of the prosecution, can also undermine the defendant's presumption of innocence. "[T]he test is whether, in the circumstances of the particular case, 'the language used was manifestly intended or was of such character that the jury would naturally and necessarily take to be a comment on the failure of the accused to testify or was of such character that the jury would naturally and necessarily take it to be so.'"[140] In *Griffin v. California*, the Court held the prosecution may not comment on a defendant's failure to testify when the prosecutor stated, "Essie Mae is dead, she can't tell you her side of the story. The defendant won't."[141]

The Court deemed a criminal trial tainted and remanded for retrial when the events at trial implicated the defendant's constitutional rights to include his presumption of innocence and due process right to have the burden rest with the government to prove its case beyond a reasonable doubt.[142] The prosecutor's comments during summation in *Griffin* directly impacted his unalienable right to remain silent and to compel the government to prove its case.[143] Yet, is that worse than the trial events that allow the government to introduce gang affiliation evidence throughout a trial of a robbery or assault? Is not the evidence in support of a motive enhancement at trial more damning to the accused?

Even oblique references to the defendant's failure to testify violate a defendant's right and undermine the presumption of innocence.[144] A prosecutor's implication that critical facts in the case have not been refuted and the only person who had the ability to challenge those facts was the defendant (who did not testify) was found to violate the defendant's presumption of innocence.[145] Furthermore, the prosecution is barred from urging the jury to use the actions of the defendant

140. United States v. Williams, 521 F.2d 950, 953 (D.C. Cir. 1975) (quoting Knowles v. United States, 224 F.2d 168, 170 (10th Cir. 1955)).
141. Griffin v. California, 380 U.S. 609, 611, 615 (1965).
142. *In re* Winship, 397 U.S. 358, 368 (1970).
143. *Griffin*, 380 U.S. at 615.
144. United States v. Brown, 546 F.2d 166, 173 (5th Cir. 1977).
145. Runnels v. Hess, 653 F.2d 1359, 1361–62 (10th Cir. 1981).

during the course of the trial as evidence of guilt when the defendant has declined to testify.[146] The appearance and conduct of the defendant during trial is irrelevant to the question of guilt or innocence unless the defendant takes the stand.[147] Further, the prosecution may not imply or state that the case would have been brought regardless.[148]

The commenting on the defendant's silence is instructive. One case opened the door to explore the true constitutional implications of this extremely common trial practice.[149] Thereafter, other courts followed to push the line even further about government conduct and trial court process that impinges defendants' rights. This is precisely what is needed here. A court must recognize how the routine and typical government evidence offered in support of motive enhancements at unbifurcated trials is patently unconstitutional, unfair, and not what the Court intended in *Booker*.[150]

### D. *The Evidentiary Arguments to Exclude Evidence Supporting Motive Enhancements*

Aside from the constitutional arguments, the evidentiary failures are significant. The same evidentiary rules that so evidently segregate death penalty or a criminal history enhancement from the underlying trial on the merits should dictate the court's exclusion of evidence supporting motive-based enhancements as well. Lawmakers promulgated evidence codes and specific rules of evidence to exclude evidence of the defendant's other crimes and status in most instances. The rules of evidence prohibit introducing any evidence for the purpose of showing the defendant's propensity to commit crimes.[151] Other convictions are irrelevant, improper character evidence, and unfairly prejudicial to the defendant.[152] Even when the defendant testifies at trial, his prior convictions in many jurisdictions remain inadmissible to impeach his credibility.[153] Other convictions most often bear no relevance to the offense conduct at issue during a criminal trial and make no fact of consequence more or less probable. Lastly, other convic-

146. United States v. Carroll, 678 F.2d 1208, 1210 (4th Cir. 1982).

147. Cunningham v. Perini, 655 F.2d 98, 100 (6th Cir. 1981).

148. United States v. Bess, 593 F.2d 749, 755–56 (6th Cir. 1979).

149. *See* sources cited *supra* note 141.

150. *See* United States v. Booker, 543 U.S. 220, 244 (2005).

151. *See, e.g.*, FED. R. EVID. 404(a) (isolating to prove propensity as the improper purpose for all character evidence).

152. *See, e.g.*, FED. R. EVID. 401, 403, 404(a) (proscribing evidence that is irrelevant, improper character evidence and unfairly prejudicial).

153. *See, e.g.*, FED. R. EVID. 609(a) (describing the balancing test that favors inadmissibility for the defendant's felonies when testifying as a witness).

tions are highly prejudicial and likely substantially outweigh any probative value of the evidence to the government.[154]

Admissible trial evidence must relate to a fact of consequence.[155] Typically, trial testimony and admitted evidence relate to an element of the offense charged (elemental evidence) or other common areas of proof in a criminal trial, such as identity, jurisdiction, and witness credibility (other criminal trial evidence). The court, through its evidentiary decisions, defines which trial evidence fits within these parameters during a jury trial. The court typically does not permit otherwise inadmissible evidence before the jury because it serves a purpose elsewhere in the criminal justice process. For example, information supporting a bail determination or motion to withdraw an attorney need not go before a jury at trial—the information does not bear on the jury's verdict and, worse, it could prejudice the defendant.

By contrast, evidence of a sentencing enhancement can sometimes relate to the offense but other times may relate to a separate and distinct allegation that is not an element of the crime. The sentencing enhancement similarly does not relate to common items of proof in a criminal trial such as jurisdiction, identity, and witness credibility. Before the rampant enactment of sentencing enhancements, the government did not need enhancement evidence to prove criminal cases at trial. In fact, prior to sentencing enhancements, trial courts more often rejected arguments by prosecutors to admit today's enhancement evidence as contributing to proof at a criminal trial. Therefore, enhancement evidence supports an independent finding by the judge or jury that usually, and historically, does not relate to the elements of the underlying offense and other criminal proof.

The government's evidence in support of a motive enhancement similarly puts a defendant's status on trial and clouds his offense conduct with improper character evidence expressly introduced for propensity. The illustration of California's gang enhancement applies here because it extends beyond evidence of prior crimes of the defendant *to evidence of the crimes of his organizational affiliation and associates*. That evidence too is irrelevant, improper character, unfairly prejudicial, and definitely not inextricably intertwined with the anticipated evidence in support of the underlying criminal charges.

Yet, the judiciary has handled motive enhancements far differently from criminal history enhancements because of procedure and perceived inconvenience. The trial court can no longer continue to allow the prosecution to present this type of motive-based evidence at the trial on the defendant's underlying crime. The court's interests in judi-

154. *See, e.g.*, FED. R. EVID. 403 (allowing evidence of other crimes requires notice, a controverted trial issue, unfair prejudice balancing, and specific jury instructions, if allowed); FED. R. EVID. 404(b) (referencing "motive" as an acceptable "other purpose" from propensity, the only federal rule to do so).

155. *See* FED. R. EVID. 401(b).

cial economy cannot justify allowing the prosecution to muddy the accused's trial with the most unfairly prejudicial evidence imaginable in a criminal case—gang and hate-group affiliation, status, and unrelated conduct. When the trial court conflates the reasoning for drastically different classifications of sentencing enhancement, the entire process becomes infected with unconstitutionality and fundamental unfairness to the accused. Faced with a single, tainted trial, most defendants—*even those with a viable defense*—will plead guilty to avoid the prospect of increased punishment.[156]

In some jurisdictions, the prosecutor may introduce enhancement evidence, such as the vagaries of what "benefits a gang" or "hate" motivation,[157] at the same trial as the (unrelated) underlying offense. The enhancement evidence then will dictate whether the defendant effectively can proceed to trial on the (unrelated) underlying offense. Even though the enhancement evidence does not support and is not needed to prove the elements of the crime or refute a trial defense, it taints the defendant's fundamental right to a jury trial and notions of fairness in criminal trial process that it was intended to preserve. The trial court must exclude evidence that violates a criminal defendant's constitutional guarantees of a fair trial or presents dangers of unfair prejudice that substantially outweigh the probative value of the evidence.

Despite the arguments from prosecutors and appellate courts' justifications, the enhancement evidence in these cases have little, if any, factual overlap with the evidence at a trial of the underlying offense alone. Yet, as argued below, California—both its legislature and then judiciary—exemplifies the precise problem that results after a state fails to consider the necessary procedural requirements that must accompany a motive sentencing enhancement such as gang and "hate" enhancements.[158]

### E. *The Illustration of California's Gang Enhancement*

In 1988, California enacted the Street Terrorism Enforcement and Prevention Act, commonly known as the STEP Act.[159] The Legislature's purpose and intent in enacting STEP was clearly written in the

156. By illustration, if we return to the facts described in the Introduction, the prosecutor would inform the young man and his defense counsel pretrial that, at the jury trial he demands, the defendant will face the felony assault charge and a sentencing enhancement based upon the young man's motive to commit the assault. *See supra* Part I. Defense counsel will request separate, bifurcated trials for the assault charge and enhancement allegation. The court, faced with presiding over two trials or one, will exercise its discretion and deny the defendant's request to bifurcate.

157. *See* THE INTERNATIONAL HANDBOOK ON HATE CRIME 25 (Nathan Hall et al. eds., 2015) ("The calls for enhanced punishment chimed with their political objective to appear 'tough on crime.'").

158. *See supra* Section IV.E.

159. CAL. PENAL CODE § 186.20–.26 (West 2014).

Legislative Findings and Declarations that precede the statute.[160] There, the Legislature declared California to be "in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods."[161] The perceived crisis in California was so severe that STEP was the first statute in the United States to criminalize participation in criminal street gang activity.[162]

The STEP Act aimed to combat street gangs in several ways, two of which are notable here: by creating the substantive crime of participation or membership in a criminal gang and creating a scheme of prison enhancements for crimes that "benefit or promote" the gang, regardless of the accused's actual membership in said gang.[163] Specifically, section 186.22(a) created the substantive crime of "active[ ] participat[ion] 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. . . ."[164] To prove an enhancement under Penal Code section 186.22(b)(1), the State must establish "criminal street gang," "primary activities," "pattern of criminal gang activity," or "specific intent to promote, further, or assist in any criminal conduct by gang members."[165]

The State of California and its "for the benefit of . . . any gang" enhancement (CA gang enhancement) are illustrative.[166] In *People v. Jose Pablo Hernandez*, the prosecution alleged that Hernandez committed a robbery under California's state penal code.[167] Hernandez allegedly approached two victims in a car, demanding money from the victims, dragged one victim out of the car and choked the victim

160. § 186.21.

161. *Id.*

162. Beth Bjerregaard, *The Constitutionality of Anti-Gang Legislation*, 21 CAMPBELL L. REV. 31, 32 (1998).

163. § 186.22(a)–(b).

164. § 186.22(a). "The STEP Act has been amended many times since it was first enacted." People v. Hernandez, 94 P.3d 1080, 1084 n.2. (Cal. 2004). As of 2014, punishment for violations of subsection (a) are imprisonment, "for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years." § 186.22(a). The following section created the "gang enhancement" scheme, which increased punishment for crimes committed for "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 . . . ." § 186.22(b). The statutory scheme for enhancements under subsection (b) is more complex than for subsection (a). *See* § 186.22(a)–(b). Section 186.22(b) states that, notwithstanding certain exceptions, the enhancement is an "additional term of two, three, or four years at the court's discretion." § 186.22(b)(1)(A). Furthermore, § 186.22(b) also states that the enhancement for a "serious" underlying felony is five years, and the enhancement for a "violent" underlying felony is ten years. § 186.22(b)(1)(B)–(C).

165. § 186.22(a), (e), (f).

166. § 186.22(b)(1).

167. People v. Hernandez, 94 P.3d 1080, 1084 (Cal. 2004).

before he stole the victim's necklace, and pointed a knife at the victim's neck.[168]

While the robbery allegation relates to any wrongful taking or theft where force was used, the government would not need to prove that a "dangerous or deadly weapon" was used as an element of the crime.[169] Instead, the prosecution alleges the knife used was a dangerous or deadly weapon as a sentencing enhancement.[170] The dangerous weapon enhancement made part of Hernandez's trial,[171] however, does *not* pose any of the evidentiary or unfairness problems highlighted in this Article. Under any evidentiary analysis, the weapon was inevitably part of the government's trial presentation irrespective of its sentencing impact. Because the weapon enhancement had no negative impact on Hernandez's trial, it is not at issue in the appellate decision.

By contrast, like the movie theater assault illustration above,[172] the prosecution further alleged that Hernandez committed his armed robbery "for the benefit of a criminal street gang," a sentencing enhancement.[173]

The government's proof of a gang enhancement can be expansive. Hernandez allegedly said to his victim, "You don't know who you are dealing with," and then told her "Hawthorne Little Watts," a known criminal street gang in Los Angeles.[174] Even if that evidence were adduced at the trial of the underlying robbery, the witnesses' recital of the defendant's statements is not enough. Witness accounts are routinely accompanied by expert testimony, as they were in *Hernandez*.[175] The gang expert then delves into matters that would never become part of the underlying robbery trial.[176]

Discretionary bifurcation is the system that California has adopted for gang enhancements. The plain language of the STEP Act does not require bifurcation, and courts have declined to impute this requirement into the statute.[177] This is markedly different from the court's

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168. *Id.* at 1083.
169. *Id.* at 1083–84.
170. *Id.*
171. *Id.*
172. *See supra* Part I.
173. *Hernandez*, 94 P.3d at 1084; CAL. PENAL CODE § 186.22(b)(1) (West 2014).
174. *Hernandez*, 94 P.3d at 1083.
175. *Id.*
176. *See id.*
177. The authority to bifurcate criminal trial issues in California is grounded in the California Penal Code section 1044, which gives the trial court broad discretion to control the conduct of a criminal trial. CAL. PENAL CODE § 1044 (West 2008). The defendant can move to have a trial bifurcated under section 352 of the evidence code, on the grounds that the prejudicial effect of the evidence outweighs its probative value. *See* CAL. EVID. CODE § 352 (West 2011). As in federal court, review of a trial court's decision not to bifurcate is one of abuse of discretion. *See* People v. Jordan, 721 P.2d 79, 82 (Cal. 1986). A trial court abuses its discretion when it "exercise[s] its

view of bifurcation with respect to prior convictions, in which case bifurcation, while still discretionary, is more readily authorized due to its recognized prejudicial effect. However, "[n]othing in section 186.22 suggests the street gang enhancement should receive special treatment of the kind given prior convictions."[178]

This view, adopted by the *Hernandez* court, has continued to dominate the reasoning with regard to bifurcation of gang enhancements. Nevertheless, the *Hernandez* court cautions that some gang evidence may be unduly prejudicial, especially with regard to predicate acts (those not committed by the defendant, but used to establish the criminal activities of the gang).[179] This type of evidence could be so inflammatory and prejudicial that bifurcation would be warranted. The court further noted, "[m]oreover, some of the other gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt."[180]

Carrying forward the illustration of California's gang enhancement, bifurcation of a gang enhancement from a common law crime like robbery is warranted when the defendant can clearly establish that proof of the enhancement, including the pattern of offenses by him or his associates, offered is unduly prejudicial. This is a fairly uniform standard in evidence—the judicial balancing of probative value and unfairly prejudicial effect of evidence. The *Hernandez* court showed its hand as it began to contort the unfair prejudice rules consistent with most evidence codes and under California's Rule 352.[181] In *Hernandez*, the appellate court held that the pattern of gang activity evidence must be "so *extraordinarily* prejudicial and *of so little relevance* to guilt that it *threatens to sway the jury to convict* regardless of the defendant's actual guilt."[182] The "threaten to sway the verdict" language shifts an evidentiary determination by the trial court into a harmless error standard of review by an appellate court.[183]

As argued in this Article, even under the *Hernandez* court's reframed unfair prejudice standard, proof of an unrelated pattern of gang evidence has *no relevance* to guilt, *is extraordinarily* prejudicial, and *does* threaten to sway the verdict on the underlying robbery allegation—jurors simply would more likely convict on the robbery after learning of the defendant's gang affiliation and that gang's activities, which include robberies. Because the expert testimony and pattern of offenses required to prove the gang enhancement are so unrelated to

discretion in an arbitrary, capricious, or patently absurd manner that result[s] in a manifest miscarriage of justice." *Id.*

178. *Hernandez*, 94 P.3d at 1085.
179. *See id.* at 1086.
180. *Id.*
181. *See id.* at 1085–87.
182. *Id.* at 1086 (emphasis added).
183. *See id.*

the crime—*or even the defendant*—proof of the gang enhancement must have its own day with a jury at trial.

*Hernandez* asserts there is less need for bifurcation of a gang enhancement than there is for bifurcation of a prior conviction enhancement allegation.[184] Several cases assert that the implication of prejudice is dispelled and that the need for bifurcation is unnecessary when the evidence that supports the enhancement would also be admissible to prove guilt in the underlying crime.[185]

The court asserted that a defendant must show that the trial judge abused discretion in denying bifurcation.[186] The court also asserts there is less call for bifurcation of a gang enhancement than a prior conviction.[187] Even prior to *Hernandez*, many California courts found bifurcation unnecessary. In *People v. Martin*, the trial court was found to have properly denied bifurcation because witnesses and evidence proving murder and gang enhancement were the same.[188] And *People v. Funes* found that there was no need for bifurcation because the evidence necessary to prove the gang enhancement and evidence relevant to prove motive, malice, premeditation, and intent were one-in-the-same.[189] While in *People v. Gutierrez*, the court determined that applying limiting instructions to evidence was more favorable than completely severing the trial.[190]

The abuse of discretion standard under California Evidence Code Rule 352 has been firmly adopted with regard to review of the trial courts' decision to bifurcate trials for California gang enhancements. To avoid an abuse of discretion challenge, courts should bifurcate the gang enhancement issue only when the evidence is extremely prejudicial and has little relevance to guilt.[191] In such a case, the gang enhancement should be bifurcated.[192] However, the courts have repeatedly found that the evidence supporting the gang enhancement is relevant to, and would be admissible at, a trial for guilt, making bifurcation unnecessary and dispelling claims of prejudice.

In so finding, the courts have reflexively repeated that the evidence relative to the gang enhancement charge is "inextricably intertwined with the offense" and relevant to prove any one of motive, malice, premeditation, specific intent, identity, modus operandi, or as part of

184. *Id.*
185. *Id.*; *see, e.g.*, People v. Martin, 28 Cal. Rptr. 2d 660, 662–63 (Ct. App. 1994).
186. *See supra* note 177 and accompanying text.
187. *See Hernandez*, 94 P.3d at 1083.
188. *Martin*, 28 Cal. App. 2d at 662.
189. People v. Funes, 28 Cal. Rptr. 2d 758, 764–66 (Ct. App. 1994).
190. People v. Gutierrez, 200 P.3d 847 (Cal. 2009).
191. *E.g.*, Scott v. Marshall, No. CV 09-1976-GHK (JEM), 2010 WL 546360, at *5–6 (C.D. Cal. Feb. 10, 2010).
192. *Id.*

the defendant's use of force or fear.[193] Some of these are elements of the underlying crime, and others are factors that the prosecution will use to rebut witnesses, reply to a defense, or otherwise carry its burden of proof. In fact, the perceived need for the prosecution to establish motive (which is not an element of the underlying crime) is considered to be of such importance that courts have allowed gang evidence to be admitted for that purpose, even if prejudicial.

Given the deferential standard of review and the oft-cited belief that most gang enhancement evidence would have been introduced at trial anyway, it is little wonder that, as of 2012, no courts in California have ever found that the trial court abused its discretion by not mandating bifurcation. However, the courts have repeatedly found that the evidence supporting the gang enhancement is "elemental," making bifurcation unnecessary and dispelling claims of prejudice.[194] In so finding, the courts have reflexively repeated that the evidence relative to the gang enhancement charge is "inextricably intertwined with the offense" and relevant to prove any one of motive, malice, premeditation, specific intent, identity, modus operandi, or as part of the defendant's use of force or fear.[195] Some of these are elements of the underlying crime, and others are factors that the prosecution will use to rebut witnesses, reply to a defense, or otherwise carry its burden of proof.

Not surprisingly, since *Hernandez*, no appellate court has held in a published decision that a trial court abused its discretion by denying bifurcation of the gang enhancement. Most cases have found the court did not abuse discretion in denying bifurcation of robbery trial from gang enhancement—and cite *Hernandez*. The truth is, even prior to Hernandez, many California courts denied the defendant's request for bifurcation because witnesses and evidence proving murder and gang enhancement were the same.[196]

## V. Recommendations and Conclusion

### A. *Change Local Rules and Practice*

Although part of a larger critique of our criminal justice system, we need not wait for the legislators and appellate courts to effect change with practices that so clearly infringe upon the criminal defendant's individual rights. Every trial court has the autonomy and authority to establish rules to protect the parties, particularly the accused, and preserve the integrity of the jury trial system in the name of fairness and

193. People v. Hernandez, 94 P.3d 1080, 1085 (Cal. 2004); *see also, e.g.*, People v. Zabalza, No. D058181, 2012 WL 748674, at *9 (Cal. Ct. App. Mar. 8, 2012) (unpublished).

194. *Zabalza*, 2012 WL 748674, at *9.

195. *Id.*

196. People v. Martin, 28 Cal. Rptr. 2d 660, 663 (Ct. App. 1994); People v. Funes, 28 Cal. Rptr. 2d 758, 764–65 (Ct. App. 1994).

justice. Courts, and even individual judges, publish rules of procedure and substantive law as their "local rules." Trial courts could lead the charge on wrongful convictions by guilty plea and motive sentencing enhancements through their own local rules.

Many local rules merely reflect judicial idiosyncrasies and pet peeves of the chief judge or individual courtroom. Local rules in criminal cases are aimed at protecting the rights of the accused. As recommended below, the trial court can unilaterally impose binding rules related to limitations related to proving sentencing enhancements, a guilty plea colloquy, or mandatory bifurcation for motive enhancements. Urging legislators to consider individual rights does not win elections. Arguing that appellate courts should about face on their prior decisions means to endure years of the status quo and too many more coerced guilty pleas. Trial courts can represent the change that the criminal justice system needs with motive enhancements and resulting wrongful convictions by guilty plea.

### B. *Defendant's Election Provisions*

Some court must acknowledge the gift horse that the *Booker* decision has turned into for the accused in the motive enhancement context. That is, some court or action group must be able to see that the accused's underlying trial and his fate are overrun by mere sentencing considerations. If *Booker* conferred jury trial and jury findings beyond a reasonable doubt to protect the constitutional rights of the accused at trial and, as applied, the same rights to fair trial and due process have suffered, then an election by the defendant seems logical. That is, the defendant should enjoy the right to choose between an untainted jury trial on the underlying trial and a finding by a jury on the enhancement.

If the defendant elects the untainted trial, then he necessarily waives the right to a trial on the evidence supporting the motive enhancement. The motive enhancement could then be found by the court by the standard of beyond a reasonable doubt. The defendant essentially gets the bifurcation but not the jury finding on the enhancement. It would not be a rubber-stamp process because the government would need to provide witnesses and evidence to meet the higher standard at sentencing. The focus under this recommendation is on the *Booker* Court's call for a higher burden of proof rather than a jury finding.

### C. *Change Plea Colloquy Rules*

If criminal justice has been reduced to a "charge and plea system," then should we not require more from the most critical hearing before sentencing: the change of plea hearing. Rules of procedure set forth the script of matters that the court must or should review with the

defendant before he pleads guilty. Some procedural rules concerning the plea colloquy aim to protect the defendant's individual rights or ensure that the defendant knows his constitutional rights forfeited by the guilty plea. Local rules or, with some patience, changes to respective criminal rules of procedure, can require more from a court during a guilty plea colloquy. Specifically, as to sentencing enhancements, the court should be required to inquire into additional charges and enhancements beyond the offense to which the defendant is pleading guilty.

The problem with the current rules concerning the court's plea colloquy with the court is they largely focus on the offense of conviction to the exclusion of all other circumstances that brought the defendant to the decision to plead guilty. Once a defendant pleads guilty, the court could inquire about the discussion between the government and the defense to include discussion about additional charges, threatened enhancements, potential defendants known to them, or other information. Knowing that the court will explore the totality of the pretrial negotiations may help curb improper government behavior and *sub rosa* agreements and threats.

### D. *Place the Burden on the Government to Prove Why Bifurcation is not Necessary*

So much of the deck is stacked against the accused during the criminal trial. Procedurally, trial courts can tweak the burden and burden-shifting related to trial motions, particularly those within its discretion to grant or deny. The accused's constitutional rights to a trial and due process are at issue, and the evidence in support of the motive enhancements is so damning, it is a small concession to ask the government to articulate why our criminal justice system cannot have two phases of trial with the same jury. Like death penalty, asset forfeiture, and cases implicating the insanity defense in some states, we seat a single jury and explain to them that their collective work in this case will come in two phases if necessary.

The results may be akin to too many trials on the motive enhancements occurring simultaneously with the trials on the underlying crimes. It would be the Author's hope, however, that occasionally the trial judge or even the government may see the value of a bifurcated trial.

### E. *Require Mandatory Bifurcation Provisions for Motive Enhancements*

The least likely option is that the lawmakers could insert the procedural safeguards that they neglected to include when they passed the comprehensive crime bill that included the sentencing enhancement language to support their "tough-on-crime" labeling.

### F. *Provide Guidance to Treat Motive Enhancements Differently*

As argued throughout, we need to fashion a new analysis and classification for certain sentencing enhancements that have infected the trial process from plea negotiations to sentencing. We need to treat motive enhancements differently to preserve the accused's constitutional rights at trial and curtail the wrongful convictions occurring because of this process. Sometimes all it takes is one legislator, one appellate court, one trial judge, or one person to suggest a necessary change to a broken process that has run far afoul from its intended beginnings.