MANAGING GANG-RELATED CASES

Bench Handbook

[REVISED 2019]

JUDICIAL COUNCIL OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION

CENTER FOR JUDICIAL EDUCATION AND RESEARCH

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Published July 2019; covers case law through 6 C5th, 34 CA5th, and all legislation to 1/1/2019

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INTRODUCTION

Cases in which the prosecution offers gang evidence share common features and issues not necessarily present in other cases. This Handbook includes, in one resource, a comprehensive discussion of the issues facing the court when presiding over gang-related cases. The creation of this Handbook evolved from materials and a CJER course developed by former Los Angeles Superior Court Judge Michelle R. Rosenblatt to address the variety of issues that arise in most gang-related prosecutions, including the application of the California Street Terrorism Enforcement and Prevention (STEP) Act, witness issues, ruling on the admissibility of gang evidence, expert testimony, courtroom security, jury issues, and the peculiarities of sentencing in gang cases.

This Handbook examines the issues that must be considered in a case when evidence of gang membership is sought to be introduced, whether it is a prosecution under the STEP Act or a case in which neither a gang enhancement nor gang crime are charged. The Handbook explains the STEP Act, the elements of the crimes enacted as part of the Act, and the applicable sentencing schemes. It also covers evidentiary issues in cases not prosecuted under the STEP Act in which the prosecution seeks to introduce evidence of gang affiliation. Because gang evidence may be more prejudicial than probative due to guilt by association, this Handbook analyzes the distinctions between those factual situations that support its introduction and those in which the introduction of gang evidence would cause undue prejudice.

The Handbook covers the use of expert witnesses to establish gang affiliation and to establish the elements of the STEP Act, including the use of hearsay and the scope of the expert opinion.

One common feature of gang cases is reluctant witnesses, so the Handbook has a chapter dedicated to witness issues. Some witnesses may be afraid of retaliation. Other witnesses have loyalties to the gang that will affect whether they decide to appear, or whether they testify truthfully. Some witnesses may fear self-incrimination. This Handbook describes procedures that may be used to obtain the testimony of witnesses who may be reluctant to testify. It further discusses what may be taken into consideration when ordering discovery of witness identifying information.

Finally, this Handbook covers issues that pertain specifically to the selection, admonishment, and instruction of juries in gang cases, and the court's authority to order security procedures to ensure the safety of all participants.

Chapter 1
CALIFORNIA STREET TERRORISM ENFORCEMENT AND PREVENTION ACT (STEP ACT)

I. [§1.1] PURPOSE AND APPLICABILITY OF THE STEP ACT

The California Street Terrorism Enforcement and Prevention Act (the STEP Act) (Pen C §§186.20–186.33) was enacted in response to what the Legislature identified as a "state of crisis" caused by violent street gangs "whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods." Pen C §186.21. It notes that these activities "present a clear and present danger to public order and safety." Pen C §186.21. In enacting the STEP Act, the Legislature created a substantive crime for actively participating in a criminal street gang and a conduct enhancement and three alternative sentencing provisions for committing a felony for the benefit of a criminal street gang, all of which expand criminal liability and increase punishment for gang-related offenses.

II. DEFINITIONS UNDER THE STEP ACT

A. [§1.2] Criminal Street Gang

The STEP Act defines a "criminal street gang" as

- Any ongoing organization, association, or group of three or more persons, whether formal or informal (see §1.3);
- Having as one of its "primary activities" (see §1.4) the commission of one or more crimes designated in Pen C §186.22(e)(1)–(25), (31)–(33) (see §1.6);
- Sharing a common name or identifying sign or symbol (see *In re Nathaniel C.* (1991) 228 CA3d 990, 1001 (association of multiple names with gang satisfies this requirement, as long as at least one name is common to gang members; graffiti which signifies gang is also sufficient); and
- Engaging in or having engaged in a "pattern of criminal gang activity" by members individually or collectively (see §1.5). Pen C §186.22(f).

When a small local street gang and a larger gang organization share a similar name, that is not, of itself, sufficient to permit the status or deeds of the larger group to be ascribed to the

smaller group. *People v Williams* (2008) 167 CA4th 983, 987–989 (expert testimony about large Peckerwood group didn't establish that Small Town Peckerwoods were a gang). As stated in *Williams*, "[s]omething more than a shared ideology or philosophy, or a name that contains the same word, must be shown before multiple units can be treated as a whole when determining whether a group constitutes a criminal street gang. Instead, some sort of collaborative activities or collective organizational structure must be inferable from the evidence, so that the various groups reasonably can be viewed as parts of the same overall organization." 167 CA4th at 988. See §1.3.

The existence of a criminal street gang may be established by expert testimony. See *In re Jose P.* (2003) 106 CA4th 458, 463, 467, disapproved on other grounds in 62 C4th 59, 78 n5; §§2.7–2.11.

B. [§1.3] "ORGANIZATION, ASSOCIATION, OR GROUP"

A "criminal street gang" as defined in Pen C §186.22(f)—and in particular its requirement of an "organization, association, or group"—calls for evidence that an organizational or associational connection unites the "group" members. When the prosecution relies on the conduct of gang subsets to show a criminal street gang's existence, the prosecution must show a connection among those subsets, and also that the subsets comprise the same gang the defendant sought to benefit. *People v Prunty* (2015) 62 C4th 59, 85; *People v Lara* (2017) 9 CA5th 296, 329–333.

That connection among the subsets may take the form of evidence of collaboration or organization, or the sharing of material information among the subsets of a larger group. Alternatively, it may be shown that the subsets are part of the same loosely hierarchical organization, even if the subsets themselves do not communicate or work together. And in other cases, the prosecution may show that various subset members exhibit behavior showing their self-identification with a larger group, thereby allowing those subsets to be treated as a single organization. *People v Prunty, supra*, 62 C4th at 71; *People v Resendez* (2017) 13 CA5th 181, 188–193; *People v Garcia* (2017) 9 CA5th 364, 376–379.

Prunty also explained, however, when a defendant commits a crime to benefit a particular subset, and the prosecution can show that the subset in question satisfies the primary activities and predicate offense requirements, there will be no need to link together the activities of the subset to the larger umbrella gang. *People v Prunty, supra*, 62 C4th at 71. See *People v Tovar* (2017) 10 CA5th 750, 757–759 (prosecution did not need to connect gang subset, of which defendant admitted to being member, to larger gang, where there was sufficient evidence that defendant conspired to murder victim for benefit of subset, as opposed to the larger gang).

C. [§1.4] PRIMARY ACTIVITIES

Evidence of past or present conduct by gang members involving the commission of one or more of the crimes designated in Pen C §186.22(e) (see §1.6) is relevant in determining the group's "primary activities." *People v Sengpadychith* (2001) 26 C4th 316, 323. Both past and present offenses have some tendency in reason to show the group's primary activity and therefore fall within the general rule of admissibility. 26 C4th at 323. The jury may consider the circumstances of the charged offense in deciding whether the group has as one of its primary activities the commission of one or more of the listed crimes. 26 C4th at 320, 323.

The phrase "primary activities" implies that the commission of one or more of the listed crimes must be one of the group's chief or principal occupations, and necessarily excludes the occasional commission of those crimes by the group's members. 26 C4th at 323. Sufficient proof

of the gang's primary activities might consist of evidence that the group's members *consistently* and *repeatedly* have committed the listed crimes. 26 C4th at 324. See *In re Alexander L.* (2007) 149 CA4th 605, 614 (two 1-year-old assault convictions of purported gang members did not provide substantial evidence that gang members consistently and repeatedly committed criminal activity listed in gang statute); *People v Vy* (2004) 122 CA4th 1209, 1225–1226 (three violent assaults by defendant's gang, including current charge, over less than 3-month period was sufficient evidence that commission of these predicate crimes was one of gang's "primary activities"); *People v Perez* (2004) 118 CA4th 151, 160 (evidence of retaliatory shootings of a few individuals over a period of less than 1 week, together with a beating 6 years earlier, was insufficient to establish that group's members consistently and repeatedly committed criminal activity listed in gang statute).

The testimony of a gang expert, based on conversations with gang members, personal investigation of crimes committed by gang members, and information obtained directly from colleagues and other law enforcement agencies, may be sufficient to prove a gang's primary activities. *People v Duran* (2002) 97 CA4th 1448, 1465. The expert's foundation for his or her opinion may rest entirely on the charged offenses. *People v Galvan* (1988) 68 CA4th 1135, 1139–1142. See §§2.7–2.11.

D. [§1.5] Pattern of Criminal Gang Activity

A "pattern of criminal gang activity" means (Pen C §186.22(e)):

- The commission of, attempted commission of, conspiracy to commit, solicitation of, or adjudication or conviction of
  - — Any combination of two or more of the offenses listed in Pen C §186.22(e)(1)–(25), (31)–(33); *or*
  - — At least one of the offenses listed in Pen C §186.22(e)(26)–(30), and at least one of the offenses listed in Pen C §186.22(e)(1)–(25), (31)–(33) (so-called "predicate offenses"). Pen C §186.22(j). For list of predicate offenses, see §1.6.

Note: A pattern of gang activity cannot be established solely by the ID theft offenses set out in Pen C §186.22(e)(26)–(30). Pen C §186.22(j).

- At least one predicate offense must have occurred after September 26, 1988 (enactment date of the STEP Act).
- The last of the predicate offenses must have occurred within 3 years of a prior offense.

Note: While the last of the predicate offenses must have occurred within 3 years of a prior charged offense, it need not have occurred within 3 years of the charged offense, unless the charged offense is one of the relied-upon predicate offenses. *People v Fiu* (2008) 165 CA4th 360, 387–389.

- The offenses must have been committed on separate occasions, or by two or more persons on the same occasion. Pen C §186.22(e); *People v Loeun* (1997) 17 C4th 1.

Note: The use of the disjunctive "or" in defining a pattern of criminal gang activity means a pattern "can be established by two or more incidents, each with a single perpetrator, or by a single incident with multiple participants committing one or more predicate offenses." *In re*

Nathaniel C. (1991) 228 CA3d 990, 1003. Thus, there is no requirement that each predicate offense be committed by two or more persons or that the predicate offenses involve different crimes. 228 CA3d at 1002–1003.

An offense committed before the charged offense may serve as predicate offense. *People v Tran* (2011) 51 C4th 1040, 1046–1049 (offense defendant committed on separate occasion); *People v Gardeley* (1996) 14 C4th 605, 625, disapproved on other grounds in 63 C4th 665, 686 n13 (offense committed by defendant's fellow gang member on prior occasion). Predicate offenses may also be established by evidence of the charged offense(s). *People v Loeun, supra*, 17 C4th at 9–11. Offenses occurring *after* the charged offense, however, cannot serve as predicate offenses. *People v Duran* (2002) 97 CA4th 1448, 1458. For instance, a pattern of gang activity has been shown by evidence of:

- The charged offense and one other offense committed on a prior occasion by the defendant. *People v Tran, supra*.
- The charged offense and one other offense committed on a prior occasion by the defendant's fellow gang member. *People v Gardeley, supra*.
- The charged offense and another offense committed on the same occasion by the defendant's fellow gang member. *People v Loeun, supra*.
- Two instances of the same offense. *In re Nathaniel C., supra*.

The predicate offenses need not be gang related, *i.e.,* committed for the benefit of, at the direction of, or in association with the gang. *People v Gardeley, supra,* 14 C4th at 621. In addition, the prosecution need not prove that the gang members who perpetrated the predicate offenses were gang members when they committed the offenses. *People v Augborne* (2002) 104 CA4th 362, 373–375.

A crime committed by the defendant with another gang member aiding and abetting the commission of the crime only establishes one predicate offense for purposes of the STEP Act. *People v Zermeno* (1999) 21 C4th 927, 931–932; *People v Duran, supra,* 97 CA4th at 1458 n4.

Predicate offenses may be established by a certified minute order (see Evid C §452.5), or by documentary evidence and the testimony of a gang expert. *People v Villegas* (2001) 92 CA4th 1217, 1227–1228. However, conclusionary testimony that gang members have previously engaged in specified offenses, based on nonspecific hearsay and arrest information that does not indicate exactly who, when, where, and under what circumstances the offenses were committed, is insufficient. *In re Jose T.* (1991) 230 CA3d 1455, 1462.

The jurors need not unanimously agree on which two (or more) of several possible predicate offenses establish that the gang has engaged in a pattern of criminal gang activity. *People v Funes* (1994) 23 CA4th 1506, 1525–1529.

E. [§1.6] PREDICATE OFFENSES

The designated predicate offenses are (Pen C §186.22(e)(1)–(33)):

(1) Assault with a deadly weapon or by means of force likely to produce great bodily injury. Pen C §245. Assault with a deadly weapon encompasses assault with a firearm under Pen C §245(a)(2). *People v Maldonado* (2005) 134 CA4th 627, 632–635.

(2) Robbery. Pen C §§211–214.

(3) Unlawful homicide or manslaughter. Pen C §§187–199.

(4) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture specified controlled substances. Health & S C §§11054–11058.

(5) Shooting at an inhabited dwelling or occupied motor vehicle. Pen C §246.

(6) Discharging or permitting the discharge of a firearm from a motor vehicle. Pen C §26100(a), (b).

(7) Arson. Pen C §§450–457.1.

(8) The intimidation of witnesses and victims. Pen C §136.1.

(9) Grand theft. Pen C §487(a), (c).

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

(11) Burglary. Pen C §459.

(12) Rape. Pen C §261.

(13) Looting. Pen C §463.

(14) Money laundering. Pen C §186.10.

(15) Kidnapping. Pen C §207.

(16) Mayhem. Pen C §203.

(17) Aggravated mayhem. Pen C §205.

(18) Torture. Pen C §206.

(19) Felony extortion. Pen C §§518, 520.

(20) Felony vandalism. Pen C §594(b)(1). See *People v Superior Court* (Johnson) (2004) 120 CA4th 950, 954, 956–959 (finding STEP Act applied to sophisticated conspiracy by gang to paint graffiti on numerous buildings and rejecting contention that predicate offense must be a *violent* crime).

(21) Carjacking. Pen C §215.

(22) The sale, delivery, or transfer of a firearm. Pen C §§27500–27590.

(23) Possession of a pistol, revolver, or other firearm capable of being concealed on the person. Pen C §29610.

(24) Threats to commit crimes resulting in death or great bodily injury. Pen C §422.

(25) Theft and unlawful taking or driving of a vehicle. Veh C §10851.

(26) Felony theft of an access card or account information. Pen C §484e.

(27) Counterfeiting, designing, using, or attempting to use an access card. Pen C §484f.

(28) Felony fraudulent use of an access card or account information. Pen C §484g.

(29) Unlawful use of personal identifying information to obtain credit, goods, services, or medical information. Pen C §530.5.

(30) Wrongfully obtaining Department of Motor Vehicles documentation. Pen C §529.7.

(31) Prohibited possession of a firearm. Pen C §§29800–29875.

(32) Carrying a concealed firearm. Pen C §25400.

(33) Carrying a loaded firearm. Pen C §25850.

The *attempted* commission of any of these offenses also constitutes a predicate offense. Pen C §186.22(e); *People v Vy* (2004) 122 CA4th 1209, 1226–1227 (finding attempted murder to be a predicate offense).

III. PARTICIPATION IN CRIMINAL STREET GANG (PEN C §186.22(A))

A. [§1.7] ELEMENTS

Under the STEP Act, it is a felony or misdemeanor for any person to actively participate in a criminal street gang. The offense is punishable by imprisonment in county jail for up to 1 year, or by imprisonment in state prison for 16 months, or 2 or 3 years. Pen C §186.22(a).

There are three elements that must be proved to find a violation of Pen C §186.22(a):

(1) The defendant actively participated in a criminal street gang;

(2) When the defendant participated in the gang, he or she knew that the members of the gang engage in or have engaged in a pattern of criminal gang activity; and

(3) The defendant willfully promoted, furthered, or assisted in any felonious criminal conduct by members of that gang.

Active participation. To secure a conviction or juvenile adjudication under Pen C §186.22(a), it is not necessary for the prosecution to prove that the defendant devotes all or a substantial part of his or her time and efforts to the gang, nor is it necessary to prove that the defendant is a member of the gang. The prosecution need only prove the defendant's active participation in the gang. Pen C §186.22(i). Active participation requires involvement that is more than nominal or passive but does not mean that the defendant must have a leadership role in the gang. *People v Castenada* (2000) 23 C4th 743, 747, 752–753; *In re Jose P.* (2003) 106 CA4th 458, 466.

It is not enough that a defendant has actively participated in a criminal street gang at any point in time. A defendant's active participation must be shown at or reasonably near the time of the crime. *People v Garcia* (2007) 153 CA4th 1499, 1509.

Promote/further/assist felonious criminal conduct by gang members. The promote/further/assist element of Pen C §186.22(a) is satisfied by evidence that the defendant was a direct perpetrator of felonious gang-related conduct or an aider and abettor of that conduct. *People v Castaneda*, *supra*, 23 C4th at 749–750; *People v Ngoun* (2001) 88 CA4th 432, 436–437.

To prove that the defendant aided and abetted felonious criminal conduct by a member of the gang, the prosecutor must prove that (CALCRIM 1400):

- A member of the gang committed the crime;
- The defendant knew that the gang member intended to commit the crime;
- Before and during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime; and
- The defendant's words and conduct did in fact aid and abet the commission of the crime.

Felonious criminal conduct. Penal Code §186.22(a) targets any felonious criminal conduct, and not just felonious gang-related conduct. *People v Albillar* (2010) 51 C4th 47, 54–59. Note that a defendant's misdemeanor conduct in the charged case, which is elevated to a felony by operation of Pen C §186.22(a), is not sufficient to satisfy the felonious criminal conduct requirement of Pen C §186.22(a) or of active gang participation charged as an element of felony firearm charges under Pen C §25400(c)(3) or §25850(c)(3). *People v Lamas* (2007) 42 C4th 516, 524.

A member of a criminal street gang who acts alone in committing a felony does not violate Penal Code §186.22(a). The commission of felonious criminal conduct must be done collectively with gang members. That is, felonious criminal conduct must be committed by at least two gang members, one of whom can include the defendant. *People v Rodriguez* (2012) 55 C4th 1125, 1131–1139. The defendant must act to promote, further, or assist in any felonious criminal conduct with another member of the defendant's gang. It is not sufficient that the defendant act with a member of another gang unless it is shown that those gangs are subsets of a primary gang and typically work together. *People v Velasco* (2015) 235 CA4th 66, 73–78. See also *People v Rios* (2013) 222 CA4th 542, 546 (holding in *Rodriguez* that a lone actor cannot violate Pen C §186.22(a) does not apply to separate Pen C §186.22(b) gang enhancement).

Penal Code §186.22(a) requires a separate intent and objective from the underlying felony committed on the gang's behalf. *People v Ferraez* (2003) 112 CA4th 925, 935. The defendant must have the intent and objective to actively participate in the criminal street gang but need not have the intent to commit the underlying felony. *People v Ngoun, supra,* 88 CA4th at 435–436.

When the defendant has the intent to commit the underlying felony and also has the intent to commit that felony to promote or assist the gang, there is no requirement to stay the defendant's sentence for the gang crime under Pen C §654. Although the defendant may have pursued both objectives simultaneously, they are, nonetheless, independent of each other. *People v Ferraez, supra,* 112 CA4th at 935; *In re Jose P., supra,* 106 CA4th at 468–471.

The court must require the defendant to serve a minimum of 180 days in the county jail as a condition for granting probation or suspending execution of the sentence. Pen C §186.22(c).

Possession of a firearm by a felon, which is a felony under Pen C §29800(a)(1), constitutes felonious criminal conduct within meaning of Pen C §186.22(a). *People v Infante* (2014) 58 C4th 688, 692–695.

A felony violation of Pen C §186.22(a) constitutes a "serious felony" under Pen C §1192.7(c)(28). *People v Ulloa* (2009) 175 CA4th 405, 410. See also the California Supreme Court's persuasive dicta in *People v Briceno* (2004) 34 C4th 451, 459–460.

Prop 47 reclassification of felony. When a defendant's felony conviction and sentence are recalled and subsequently reclassified from a felony to a misdemeanor under Proposition 47 (Pen C §1170.18), the defendant is resentenced as if the crime was originally a misdemeanor. If a conviction for Pen C §186.22(a) is subsumed within the same judgment, that conviction must be dismissed. See *People v Valenzuela* (2019) 7 C5th 415 (reduction of defendant's grand theft conviction to a misdemeanor established that the defendant could not be regarded as having engaged in felonious criminal conduct, a critical element of Pen C §186.22(a)).

B. [§1.8] PENAL CODE §654 ISSUES

Penal Code §654 bars punishment for both an underlying crime committed to benefit a gang, and a violation of Pen C §186.22(a) based on the commission of the same underlying crime, even if the two crimes have different objectives. *People v Mesa* (2012) 54 C4th 191, 196–200. Penal Code §654 does not come into play if the gang crime and the underlying crime are based on different acts. 54 C4th at 199–200. The *Mesa* court, quoting from *People v Sanchez* (2009) 179 CA4th 1297, 1315, disapproved on other grounds in 55 C4th 1125, 1137 n8, stated that Pen C §654 applies where the "defendant stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself. 54 C4th at 198. See also *People v Arauz* (2012) 210 CA4th 1394, 1404 (underlying felony of attempted premeditated murder).

IV. COMMISSION OF FELONY FOR BENEFIT OF CRIMINAL STREET GANG (PEN C §186.22(B))

A. [§1.9] ELEMENTS

Penal Code §186.22(b) imposes an enhancement and other additional penalties on defendants who commit a crime for the benefit of a criminal street gang. There are two elements that must be proved to find a violation of Pen C §186.22(b):

(1) The defendant committed a felony for the benefit of, at the direction of, or in association with any criminal street gang; and

(2) The defendant specifically intended to promote, further, or assist in any criminal conduct by gang members.

The Pen C §186.22(b) enhancement applies to "any person." The defendant need not be a current or active member of the gang. *In re Ramon T.* (1997) 57 CA4th 201, 206–207.

The prosecution must introduce evidence that the charged offense was gang related, *i.e.*, that the crime was committed for the benefit of, at the direction of, or in association with any criminal street gang. Pen C §186.22(b). Because this first prong of the gang enhancement is worded in the disjunctive, a gang enhancement may be imposed on either gang association or benefit. *People v Weddington* (2016) 246 CA4th 468, 485. Committing a crime in concert with known gang members can be substantial evidence that the crime was committed in "association" with a gang. *People v Morales* (2003) 112 CA4th 1176, 1198 (jury can reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members).

A crime is committed in association with a gang if the "defendants relied on their common gang membership and the apparatus of the gang in committing" the charged offenses. *People v Albillar* (2010) 51 C4th 47, 60. In *Albillar*, three criminal street gang members who sexually assaulted a 16-year-old girl were found to have committed the crimes in association with a gang because as fellow gang members they were able to rely on each other to help facilitate the sexual assaults, they could expect their fellow gang members not to talk to the police, and they relied upon their membership in the gang to intimidate the victim. 51 C4th at 61–62. The commission of the sexual assaults was also found to have benefited the gang by enhancing its reputation for viciousness. 51 C4th at 63. See also *People v Gardeley* (1996) 14 C4th 605, 619, disapproved on other grounds in 63 C4th 665, 686 n13 (gangs rely on violent assaults to frighten the residents of an area where the gang members sell drugs, thereby securing the gang's drug-dealing stronghold); *People v Olguin* (1994) 31 CA4th 1355, 1384, overruled on other grounds in 24 C4th 889, 901 n3 (gang participation in retaliation killing on behalf of another gang benefits the gang by enhancing its "respect").

In addition to proving that the charged offense was gang related, the prosecution must introduce evidence that the defendant committed the charged offense with the specific intent to promote, further, or assist in any criminal conduct by gang members. Pen C §186.22(b). There is no further requirement that the defendant act with the specific intent to promote, further, or assist a gang. *People v Albillar, supra*, 51 C4th at 67. The Ninth Circuit Court of Appeals has held that Pen C §186.22(b) requires a showing of intent to promote the gang's criminal activity beyond the charged crime. *Briceno v Scribner* (9th Cir 2009) 555 F3d 1069, 1078–1083; *Garcia v Carey* (9th Cir 2005) 395 F3d 1099, 1103. The California Supreme Court, however, rejected the Ninth Circuit's interpretation, and held that the showing required is of a specific intent to promote

"any" criminal conduct, rather than "other" criminal conduct. *People v Albillar, supra,* 51 C4th at 64–66. *Albillar* summarized that "[I]f substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members."

Although a lone actor is subject to a gang enhancement, merely belonging to a gang at the time of the commission of the charged offense does not constitute substantial evidence to support an inference that the actor specifically intended to promote, further, or assist any criminal conduct by gang members. *People v Perez* (2017) 18 CA5th 598, 607; *People v Rios* (2013) 222 CA4th 542, 566.

The elements of the gang enhancement must be proved beyond a reasonable doubt. Whether these elements have been proved is a matter for determination by the jury, which must be instructed as to each element. *People v Sengpadychith* (2001) 26 C4th 316, 320.

The Pen C §186.22(b) enhancement may apply to a provocative act murder. *People v Mejia* (2012) 211 CA4th 586, 613–614.

B. [§1.10] ENHANCEMENT PROVISION UNDER PEN C §186.22(B)(1)

For gang-related felonies, other than those described in Pen C §186.22(b)(4) and (5) (see §§1.11–1.12), *i.e.,* most felonies punishable by a determinate term, the STEP Act imposes a sentencing enhancement. *People v Briceno* (2004) 34 C4th 451, 460 n7; *People v Sengpadychith* (2001) 26 C4th 316, 320. These sentence enhancements are as follows:

- An additional term of 10 years if the crime is a *violent felony* under Pen C §667.5(c). Pen C §186.22(b)(1)(C).
- An additional term of 5 years if the crime is a *serious felony* under Pen C §1192.7(c). Pen C §186.22(b)(1)(B).

Note: Penal Code §1192.7(c)(28) makes any felony offense, which would also constitute a felony violation of Pen C §186.22, a serious felony. It includes any felony committed for the benefit of a criminal street gang under the Pen C §186.22(b)(1) gang sentence enhancement. *People v Briceno, supra,* 34 C4th at 459, 463–464. However, Pen C §1192.7(c) only comes into play if the defendant reoffends, at which time any prior felony that is gang related is deemed a serious felony. The gang-related felony is not treated as a serious felony in the current proceeding. 34 C4th at 465 (this avoids "impermissible bootstrapping" of offenses). Therefore, although it is proper to define any felony committed for the benefit of a criminal street gang as a serious felony under Pen C §1192.7(c)(28), it is improper to use the same gang-related conduct again to obtain an additional 5-year sentence under Pen C §186.22(b)(1)(B). 34 C4th at 465–466; *People v Bautista* (2005) 125 CA4th 646, 657.

- An additional term of 2, 3, or 4 years for *all other felonies*. Pen C §186.22(b)(1)(A). The court must select the sentence enhancement that, in the court's discretion, best serves the interest of justice and must state the reasons for its choice on the record at the time of sentencing. Pen C §186.22(b)(3). If the underlying felony is committed on the grounds of, or within 1000 feet of a school while in session, that fact is a circumstance in aggravation that must be considered in imposing the enhancement term. Pen C §186.22(b)(2).

Note: A Pen C §186.22(b)(1)(A) enhancement may not be appended to a serious or violent felony. The statutory language unambiguously excludes serious and violent felonies. *People v Francis* (2017) 16 CA5th 876, 881–886 ("Except as provided in subparagraphs (B) and (C)…").

These additional terms must run consecutively to the punishment otherwise prescribed for the felony. Pen C §186.22(b)(1). A conviction of a felony with an enhancement under Pen C §186.22(b)(1) constitutes a "serious felony" and therefore is a "strike." See Pen C §1192.7(c)(28).

In a case involving multiple offenses, the enhancement may be applied with respect to each offense the jury finds was committed for the benefit of a criminal street gang. *People v Akins* (1997) 56 CA4th 331, 337–341 (two criminal street gang enhancements were proper when charged robberies and assaults involved two different victims and were separated by time and distance). When a defendant is convicted of multiple counts of attempted murder, each on behalf of a criminal street gang, under the "kill zone" theory, the court may impose a Pen C §186.22(b)(1) enhancement on each count. *People v Bragg* (2008) 161 CA4th 1385, 1402–1403 (no violation of Pen C §654).

If an enhancement is found true, the court must require the defendant to serve a minimum of 180 days in the county jail as a condition of probation or suspension of the sentence. Pen C §186.22(c).

The enhancement provisions of Pen C §186.22(b)(1)(C) may not be applied when the defendant is sentenced to a straight life term as well as those expressed in years to life (other than those enumerated in Pen C §186.22(b)(4)). *People v Lopez* (2005) 34 C4th 1002, 1004, 1006–1010 (defendant convicted of gang-related first-degree murder, punishable by term of 25 years to life, is not subject to additional 10-year enhancement of Pen C §186.22(b)(1)(C) for violent felony, but is instead subject to 15-year minimum parole eligibility term under Pen C §186.22(b)(5)). For discussion, see §1.12.

For a discussion of the limits on imposing a Pen C §186.22(b)(1) when a defendant is also subject to a Pen C §12022.53 firearm enhancement, see §1.19.

C. [§1.11] Alternative Penalty Under Pen C §186.22(b)(4): Life Term

Penal Code §186.22(b)(4) is an alternative penalty provision that provides for an indeterminate life sentence for certain felonies that are gang related. *People v Briceno* (2004) 34 C4th 451, 460 n7; *People v Sengpadychith* (2001) 26 C4th 316, 327. Under Pen C §186.22(b)(4), any person convicted of a gang-related felony, described below, must be sentenced to an indeterminate term of life imprisonment, with a minimum term of the indeterminate sentence calculated as the greater of:

- Fifteen years if the felony is a home invasion robbery (Pen C §213(a)(1)(A)), carjacking (Pen C §215), shooting at an inhabited building or vehicle (Pen C §246), or crime committed with the discharge of a firearm from a vehicle (Pen C §12022.55). Pen C §186.22(b)(4)(B).
- Seven years if the felony is extortion (Pen C §519) or attempting to dissuade a witness from testifying by force or an implied or express threat of force under Pen C §136.1(c)(1). Pen C §186.22(b)(4)(C); *People v Anaya* (2013) 221 C4th 252, 269–271; *People v Lopez* (2012) 208 CA4th 1049, 1064–1065.

- The term determined by the court under Pen C §1170 for the underlying conviction, plus any applicable enhancements and any limitation of the parole period under Pen C §3046, for any of the felonies described above. Pen C §186.22(b)(4)(A).

Because a conviction that qualifies under Pen C §186.22(b)(4) is punishable by life imprisonment, it is considered a violent felony under Pen C §667.5(c)(7), and therefore is subject to a firearm use enhancement under Pen C §12022.53. *People v Jones* (2009) 47 C4th 566, 572–579 (defendant personally discharged firearm during the commission of a crime described in Pen C §186.22(b)(4) that triggered a life sentence and an additional 20-year enhancement under Pen C §12022.53(c)).

D. [§1.12] ALTERNATIVE PENALTY UNDER PEN C §186.22(B)(5): 15-YEAR MINIMUM BEFORE PAROLE

Penal Code §186.22(b)(5) is an alternative penalty provision that applies to any gang-related felony that is punishable by life imprisonment. *People v Briceno* (2004) 34 C4th 451, 460 n7. The STEP Act does not alter the term of imprisonment when the felony is gang related, but it requires the defendant to serve a minimum of 15 years before becoming eligible for parole. See Pen C §186.22(b)(5); *People v Sengpadychith* (2001) 26 C4th 316, 327. Penal Code §186.22(b)(5) encompasses defendants who receive straight life terms as well as terms expressed as years to life. *People v Lopez* (2005) 34 C4th 1002, 1007. This provision establishes a 15-year minimum parole eligibility period, rather than a sentence enhancement for a particular term of years. *People v Johnson* (2003) 109 CA4th 1230, 1237.

A defendant who is convicted of a felony that is punishable by a life term is subject to the parole eligibility provisions of Pen C §186.22(b)(5), not to the sentence enhancement provisions of Pen C §186.22(b)(1). *People v Lopez* (2005) 34 C4th 1002, 1004, 1006–1010 (defendant convicted of gang-related first-degree murder, punishable by term of 25 years to life, is not subject to additional 10-year enhancement of Pen C §186.22(b)(1)(C) for violent felony but is instead subject to 15-year minimum parole eligibility term under Pen C §186.22(b)(5)); *People v Johnson, supra,* 109 CA4th at 1236–1239 (in sentencing defendant to prison for 15 years to life for second degree murder, court could not impose consecutive 10-year term for gang allegation under Pen C §186.22(b)(1)(C)); *People v Harper* (2003) 109 CA4th 520, 523–527 (in sentencing defendant to prison for 25 years to life for first-degree murder, court could not impose consecutive 10-year term for gang allegation under Pen C §186.22(b)(1)(C)).

A defendant sentenced to 25 years to life under the three strikes law is not subject to an additional 10-year enhancement of Pen C §186.22(b)(1)(C) but is instead subject to a 15-year minimum parole eligibility term under Pen C §186.22(b)(5). The three strikes law is a penalty provision, not an enhancement, and thus defendant was convicted of felonies punishable by imprisonment in state prison for life, as required by Pen C §186.22(b)(5). *People v Williams* (2014) 227 CA4th 733, 739–745. See also *People v Salvador* (2017) 11 CA5th 584, 588–594 (indeterminate sentences imposed under one strike law are terms punishable in state prison for life, precluding application of Pen C §186.22(b)(1)(C) enhancement; trial court erred in imposing consecutive 10-year gang enhancements on 10 counts carrying indeterminate life terms).

In a "three strikes" case, the 15-year minimum term may be doubled under Pen C §667(e)(1) for the second strike, because Pen C §186.22(b)(5) is an alternative penalty provision, not an enhancement. *People v Jefferson* (1999) 21 C4th 86, 100–101.

The 15-year minimum term requirement applies only if the underlying felony by its own terms provides for a life sentence apart from the application of any enhancement. It does not apply when a defendant is sentenced to a life term because the underlying felony and the enhancement *together* result in a life term. *People v Montes* (2003) 31 C4th 350, 356–361 (lower court erroneously imposed the minimum parole term to a defendant convicted of a gang related attempted murder without premeditation with Pen C §12022.53(d) firearm enhancement).

E. [§1.13] Alternative Punishment for Both Felonies and Misdemeanors Under Pen C §186.22(d)

Any person convicted of any felony or misdemeanor committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote or assist in any criminal conduct by gang members, must be sentenced to (Pen C §186.22(d)):

- The county jail for not less than 180 days nor more than 1 year; or
- To state prison for 1, 2, or 3 years.

A person sentenced to the county jail is not eligible for release on completion of sentence, parole, or any other basis, until 180 days are served. In granting probation or suspending the execution of the defendant's sentence, the court must require the defendant to serve 180 days in the county jail. Pen C §186.22(d).

The alternative penalty provisions of Pen C §186.22(d) are not limited to "wobblers," but apply to all misdemeanors and felonies. *Robert L. v Superior Court* (2003) 30 C4th 894, 900–909. In *Robert L.*, the Supreme Court noted that Pen C §186.22(d) is not a substantive offense or a sentence enhancement, but is an alternative penalty provision. 30 C4th at 898–900.

When a person is convicted of a misdemeanor with a Pen C §186.22(d) violation, it may become a felony for sentencing purposes, at the court's discretion. *People v Arroyas* (2002) 96 CA4th 1439, 1444. And if the violation is elevated to a felony at sentencing, it is a strike for purposes of the three strikes law. *People v Rocco* (2012) 209 CA4th 1571, 1574–1579. However, the sentencing enhancement provided for felonies under Pen C §186.22(b)(1) cannot be used to further enhance a misdemeanor that has been made a felony under Pen C §186.22(d). *People v Arroyas, supra*, 96 CA4th at 1444–1448. Penal Code §186.22(d) presents an option for punishing a felony differently than provided by Pen C §186.22(b)(1) and also provides an option for punishing gang-related misdemeanors more severely. 96 CA4th at 1445.

A misdemeanor sentenced as a felony under Pen C §186.22(d) is not a "serious felony" within the meaning of Pen C §1192.7(c)(28). *People v Ulloa* (2009) 175 CA4th 405, 412–413.

The alternative penalty provision of Pen C §186.22(d) applies to juvenile offenders. *In re Damien V.* (2008) 163 CA4th 16, 20–26.

F. [§1.14] Bifurcating Trial of Gang Enhancement From Trial of Charged Offense

It is within the court's discretion to bifurcate the trial of a Pen C §186.22(b)(1) gang enhancement from the trial of the charged offense. *People v Hernandez* (2004) 33 C4th 1040, 1044, 1048–1051. In *Hernandez*, the California Supreme Court noted that generally there is less need for bifurcation with a gang enhancement than with a prior conviction allegation, because a prior conviction allegation relates to the defendant's status and may have no connection to the charged offense, while a criminal street gang enhancement is attached to the charged offense and, by definition, is inextricably intertwined with that offense. 33 C4th at 1048.

However, bifurcation may be warranted when the predicate offenses offered to establish a "pattern of criminal gang activity" under Pen C §186.22(e) are not related to the charged crime or to the defendant and, thus, evidence of these offenses may be unduly prejudicial. Bifurcation may also be warranted when the gang evidence, even as it relates to the defendant, is so extraordinarily prejudicial and of so little relevance to the defendant's guilt that it might persuade the jury to convict regardless of the defendant's actual guilt. 33 C4th at 1049.

Bifurcation is not necessary, however, if evidence of the defendant's gang membership is admissible at the trial of the charged offense, *e.g.,* to establish the defendant's identity, motive, or intent. 33 C4th at 1049–1050. Even if some of the evidence offered to prove the gang enhancement would be inadmissible at the trial of the charged offense, *e.g.,* if some of this evidence might be excluded under Evid C §352 as being unduly prejudicial, the court may still deny bifurcation if other factors favor a unitary trial. 33 C4th at 1050. See also *People v Pettie* (2017) 16 CA5th 23, 43–46 (court did not abuse discretion in denying motion to bifurcate; evidence of gang membership was probative to other charges, to show defendants' motive, to show their state of mind regarding the consequences of the conspiracy charge, and to show their active participation in gang); *People v Garcia* (2016) 244 CA4th 1349, 1357–1358 (court did not abuse discretion in deny motion to bifurcate; evidence of defendants' robbery spree was relevant and probative to gang enhancement and to defendants' motive in committing the robberies).

The court should consider the extent to which the gang evidence is relevant to the charged offense, whether the jury might be confused by introducing collateral matters, and whether evidence that can be admitted solely to prove the gang enhancement is so inflammatory that it might sway the jury to convict. *People v Hernandez, supra*, 33 C4th at 1051. The party seeking severance of the gang enhancement from the charged offense has the burden of establishing "a substantial danger of prejudice" if the charged offense and the gang enhancement are not tried separately. *People v Hernandez, supra*.

G. [§1.15] STRIKING GANG ENHANCEMENT

The court may strike the additional punishment for a Pen C §186.22(b)(1) enhancement or refuse to impose the minimum jail sentence for misdemeanors subject to Pen C §186.22(d) in an unusual case when the interests of justice would best be served. Pen C §186.22(g). See *People v Fuentes* (2016) 1 C5th 218, 224. The court must specify on the record and enter into the minutes the circumstances indicating that the interests of justice would best be served by that disposition. Pen C §186.22(g).

Despite the language of Pen C §186.22(g), the court has discretion under Pen C §1385(a) to dismiss or strike entirely a Pen C §186.22(b)(1) sentencing enhancement allegation. *People v Fuentes, supra*, 1 C5th at 226–231 (Pen C §186.22(g) does not limit the trial court's discretion to strike the gang enhancement). *Fuentes* disapproved *People v Campos* (2011) 196 CA4th 438, to the extend it stated, that the enactment of Pen C §186.22(g) "provides the clear legislative direction needed to eliminate courts' power to use section 1385 to dismiss or strike gang allegations and enhancements and to refuse to impose gang alternative penalties." 1 C5th at 229 n8, quoting *Campos* at 196 CA4th at 451–452.

V. [§1.16] SPECIAL CIRCUMSTANCE: MURDER BY STREET GANG MEMBER (PEN C §190.2(A)(22))

A defendant who is convicted of first-degree murder is subject to the sentence of death or life without the possibility of parole if:

- The defendant intentionally killed the victim (Pen C §190.2(a)(22));
- The defendant was an active participant in a criminal street gang at the time of the killing (Pen C §190.2(a)(22));
- The defendant knew that the gang members engaged in or have engaged in a pattern of criminal gang activity (*People v Carr* (2010) 190 CA4th 475, 485–488); and
- The murder was carried out to further the activities of the criminal street gang (Pen C §190.2(a)(22)).

The gang-murder special circumstance may apply to a provocative act murder. *People v Mejia* (2012) 211 CA4th 586, 610–613.

In all capital cases "courts must exercise caution in admitting evidence that a defendant is a member of a gang because such evidence may be highly inflammatory and may cause the jury to 'jump to conclusion' that the defendant deserves the death penalty." *People v Lewis* (2008) 43 C4th 415, 499, overruled on other grounds in 58 C4th 912, 919.

VI. OTHER SENTENCING OPTIONS

A. [§1.17] RESTITUTION

No probation case. The defendant must be ordered to pay restitution to any victim who has suffered economic loss as a result of the defendant's criminal conduct. Pen C §1202.4(a)(3)(B), (f); see Cal Const art I, §28(b)(13)(A). A sentence without a restitution award to the victim is invalid; however, the court may properly add a restitution order later. The court should also announce at the sentencing that the court is reserving the ability to order victim restitution during the probationary term and reserve the defendant's right to a hearing on any amount imposed. See Pen C §1202.46; *People v Rowland* (1997) 51 CA4th 1745, 1750–1752.

Probation case. The court has broad discretion to order restitution as a condition of probation consistent with the ends of fostering rehabilitation and protecting public safety. Pen C §1203.1(a)(3), (j); *People v Anderson* (2010) 50 C4th 19, 26–27. Under Pen C §1203.1(j), the court can order restitution as a condition of probation even when the losses are not necessarily caused by the criminal conduct underlying the defendant's conviction. 50 C4th at 26–27. However, the restitution condition must be reasonably related either to the crime of which the defendant was convicted or to the goal of deterring future criminality. *People v Carbajal* (1995) 10 C4th 1114, 1121–1124.

In *In re I. M.* (2005) 125 CA4th 1195, 1208–1211, the court upheld, as a condition of probation, restitution for funeral expenses of a murder victim's family against a juvenile offender who was found to have acted as an accessory after the fact in connection with the murder. The court found the restitution order was reasonably related to the crime of which defendant was convicted and was calculated to deter the juvenile's gang involvement. When a defendant has promoted and assisted gang conduct, a restitution order serves a rehabilitative purpose by demonstrating to the defendant the consequences of gang membership. The effect of the order is to make the defendant aware of the consequences of that choice by compelling the defendant to share responsibility for the gang-related activities in which the defendant participated. The order

also forces the defendant to face the emotional and financial effects of gang-related activity on the victim and the victim's family. 125 CA4th at 1210.

For a comprehensive discussion of victim restitution, see *California Judges Benchguide 83:* Restitution (CJER rev. 2017).

B. [§1.18] NO-CONTACT ORDERS

At the sentencing of a defendant convicted of a violation of Pen C §186.22, the court must consider issuing an order restraining the defendant from any contact with a victim of the crime Pen C §136.2(i)(1). The order may be valid for up to 10 years. The duration of any no-contact order must be based on the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and victim's immediate family. Pen C §136.2(i)(1). The court may issue this no-contact order regardless of whether the defendant is sentenced to the state prison or a county jail or subject to mandatory supervision, or whether imposition of sentence is suspended and the defendant is placed on probation. Pen C §136.2(i)(1).

The court must also consider issuing an order restraining the defendant from any contact with a percipient witness to the crime, if it can be established by clear and convincing evidence that the witness has been harassed by the defendant. Pen C §136.2(i)(2).

C. FIREARM ENHANCEMENTS

1. [§1.19] Use or Discharge of Firearm

Penal Code §12022.53(b), (c), or (d) set out enhancements for personal use (Pen C §12022.53(b)) or personal and intentional discharge (Pen C §12022.53(c)–(d)) of a firearm during the commission of certain felonies. Under Pen C §12022.53(e)(1), these enhancements apply vicariously to all principles in gang cases if the jury finds that (1) the defendant committed a specified felony for the benefit of a criminal street gang in violation of Pen C §186.22(b), and (2) any principal used or discharged a firearm in the commission of the felony. Pen C §12022.53(e)(1); *People v Gonzales* (2001) 87 CA4th 1, 11–19 (upholding this provision against various constitutional challenges, including violation of equal protection and due process). See also *People v Hernandez* (2005) 134 CA4th 474, 480–483 (Pen C §12022.53 does not violate equal protection by treating aiders and abettors in killings for the benefit of a street gang more severely than aiders and abettors in killings for the benefit of other equally dangerous criminal associations, such as drug cartels and terrorist organizations). Although the defendant must first be convicted of the underlying offense before the enhancement may apply, the prosecution need not plead and prove the conviction of the principal who discharged the firearm. *People v Garcia* (2002) 28 C4th 1166, 1173–1174.

When punishment is imposed under Pen C §12022.53(e), an additional gang enhancement under Pen C §186.22(b) may not be imposed unless the trier of fact finds that the defendant personally used or personally discharged a firearm in the commission of the offense. If a person other than the defendant used or discharged a firearm in the commission of the offense, the court may only impose the Pen C §12022.53 enhancement. Pen C §12022.53(e)(2).

When there is vicarious liability, the court must choose between the Pen C §186.22(b) and Pen C §12022.53 enhancements and impose the enhancement that results in the greater sentence. Pen C §12022.53(j); *People v Brookfield* (2009) 47 C4th 583, 590–596. However, both enhancements may be imposed if the defendant personally used or personally discharged a firearm during the commission of a gang crime. Pen C §12022.53(e)(2). Although

§1170.1(f) prohibits multiple firearm enhancements, Pen C §12022.53(e)(2) expressly allows the imposition of both Pen C §12022.53 and Pen C §186.22(b) enhancements. As the more specific statute, Pen C §12022.53(e)(2) controls. *People v Robinson* (2012) 208 CA4th 232, 257–261.

When a defendant is convicted of a firearm use enhancement under Pen C §12022.3(a), §12022.5, or §12022.55, the underlying offense becomes a violent felony under Pen C §667.5(c)(8). When a felony to which Pen C §186.22(b)(1)(C) enhancement attaches is a violent felony under Pen C §667.5(c)(8) because a firearm use enhancement also attached to that felony, the Pen C 186.22(b)(1)(C) enhancement involves the use of a firearm. Therefore only the greatest of those enhancements may be imposed under Pen C §1170.1(f). *People v Rodriguez* (2009) 47 C4th 501, 508–509. Similarly, Pen C §1170.1(f) precludes a trial court from imposing both a firearm use enhancement and a gang enhancement under Pen C §186.22(b)(1)(B), in connection with a single offense, when the offense is a serious felony under Pen C §186.22(b)(1)(B) and involves the use of a firearm. *People v Le* (2015) 61 C4th 416, 423–429. See also *People v Gonzalez* (2009) 178 CA4th 1325, 1330–1332 (court may not impose Pen C §12022.7(a) great bodily enhancement and a Pen C §186.22(b)(1)(C) gang enhancement resulting from defendant's infliction of great bodily injury on the same victim in the commission of a single offense; court may only impose greatest enhancement under Pen C §1170.1(g)).

The court may impose the enhancement term of 25 years to life under Pen C §12022.53(d) on a defendant who personally discharges a firearm causing death in the commission of a murder, notwithstanding the fact that the defendant is convicted of first-degree murder with gang-murder special circumstances within the meaning of Pen C §190.2(a)(22) and sentenced to life imprisonment without the possibility of parole. *People v Shabazz* (2006) 38 C4th 55, 66–70.

The sentence enhancement provisions of Pen C §12022.53 are not limited by the multiple punishment prohibition of Pen C §654. *People v Palacios* (2007) 41 C4th 720, 723, 725–733. See also *People v Ahmed* (2011) 53 C4th 156 (Pen C §654 does not apply when specific sentencing statutes delineate how multiple enhancements interact).

The court may, in the interest of justice under Pen C §1385, strike or dismiss the firearm enhancements of Pen C §§12022.53(b), (c), and (d). Pen C §12022.53(h).

2. [§1.20] Carrying Firearm

A defendant who carries a loaded or unloaded firearm on his or her person (or in his or her vehicle) during the commission, or attempted commission, of a street gang crime under Pen C §186.22(a) or (b) is subject to an additional enhancement of 1, 2, or 3 years. Pen C §12021.5(a). A 2-, 3-, or 4-year enhancement must be imposed on a defendant who carries a loaded or unloaded firearm with a detachable shotgun magazine, detachable pistol magazine, detachable magazine, or belt-feeding magazine. Pen C §12021.5(b).

D. Other Gang-Related Offenses

1. [§1.21] Soliciting Another to Participate in Gang

Soliciting or recruiting another to actively participate in a criminal street gang, with the intent that the solicited or recruited person either participate in a pattern of criminal gang activity or promote, further, or assist in felonious conduct by members of the gang, is punishable by imprisonment in state prison for 16 months, or 2 or 3 years. Pen C §186.26(a).

Threatening another with physical violence on two or more separate occasions in a 30-day period with the intent to coerce, induce, or solicit a person to actively participate in a criminal street gang is punishable by imprisonment in state prison for 2, 3, or 4 years. Pen C §186.26(b).

Using physical violence to coerce, induce, or solicit another to actively participate in a criminal street gang, or to prevent a person from leaving a criminal street gang, is punishable by imprisonment in state prison for 3, 4, or 5 years. Pen C §186.26(c).

If the person solicited, recruited, coerced, or threatened is a minor, an additional term of 3 years must be imposed to run consecutively to the penalty prescribed for the particular violation. Pen C §186.26(d).

These provisions do not limit prosecution under any other statute. Pen C §186.26(e).

2. [§1.22] Supplying Firearms to Gang

Knowingly supplying, selling, or giving possession or control of a firearm to another is punishable either as a misdemeanor by imprisonment in county jail for 30 days to 6 months, or as felony, punishable by imprisonment in county jail for 16 months, or 2 or 3 years, and/or a fine of up to $1000 if:

- The person, corporation, or firm supplying, selling, or giving the firearm has actual knowledge that the person will use it to commit a felony described in Pen C §186.22(e) while actively participating in a criminal street gang, the members of which engage in a pattern of criminal activity. Pen C §186.28(a)(1).
- The firearm is used to commit the felony. Pen C §186.28(a)(2).
- The person to whom the firearm was supplied has been convicted of a felony described in Pen C §186.22(e). Pen C §186.28(a)(3).

This provision only applies if the person is not convicted as a principal to the felony offense committed by the person to whom the firearm was supplied. Pen C §186.28(b).

3. [§1.23] Carrying Loaded or Concealed Firearms

The offense of carrying a loaded firearm in public is elevated from a misdemeanor to a felony when the offense is committed by an active participant in a criminal street gang, as defined in Pen C §186.22(a) (see §1.7). Pen C §25850(c)(3). Likewise, the offense of carrying a concealed firearm in public is elevated from a misdemeanor to a felony when the offense is committed by an active participant in a criminal street gang. Pen C §25400(c)(3).

In order to meet the elements of Pen C §186.22(a) and thereby elevate the misdemeanor gun offenses to felonies under Pen C §25400(c)(3) or §25850(c)(3), the prosecution must prove that the defendant actively participated in a criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promoted, furthered, or assisted in any felonious criminal conduct by members of the gang that is distinct from the defendant's otherwise misdemeanor conduct of carrying a loaded or concealed firearm in public. *People v Lamas* (2007) 42 C4th 516, 524–525; *People v Robles* (2000) 23 C4th 1106, 1115.

Misdemeanor conduct that would be impermissibly used to support the gang allegation for Pen C §25400(c)(3) or §25850(c)(3) purposes cannot be transformed into viable felonious conduct simply by charging a separate felony offense based on the same conduct. *In re Jorge P.* (2011) 197 CA4th 628, 633–637, disapproved on other grounds in 58 C4th 668, 695. However, the prosecution is not required to prove that the firearm offense occurred in connection with the defendant's gang participation. *People v Schoppe-Rico* (2006) 140 CA4th 1370, 1377–1383.

Possession of firearm by a felon, which is a felony under Pen C §29800(a)(1), constitutes felonious criminal conduct within meaning of Pen C §186.22(a). *People v Infante* (2014) 58 C4th

688, 692–695 (defendant's conviction elevated other misdemeanor offenses of carrying concealed firearm and carrying a loaded firearm in public to felonies under Pen C §§25400(c)(3) and 25850(c)(3), respectively).

For a discussion of the sentence enhancements for carrying a firearm during the commission or attempted commission of a street gang crime, see §1.20.

4. [§1.24] Conspiracy

In *People v Johnson* (2013) 57 C4th 250, the California Supreme Court held that conspiracy to commit the offense of active gang participation is a valid offense. When an active gang participant possessing the required knowledge and intent agrees with fellow gang members to commit a felony, he or she has also agreed to commit the gang participation offense. That agreement constitutes conspiracy to commit the offense of active gang participation, and may be separately charged once a conspirator has committed an overt act.

The plain language of both Pen C §§182 and 186.22(a) reflects no legislative intent to preclude a conviction for a traditional conspiracy to commit the gang participation offense. While Pen C §186.22(a) makes no reference to the conspiracy statute, such mention is unnecessary because Pen C §182(a)(1) expressly encompasses the agreement to commit "any crime." The stated purposes of the STEP Act are entirely consistent with recognizing the crime of conspiracy to commit the substantive gang participation offense. 57 C4th at 260–261. A contrary legislative intent cannot be inferred from the electorate's enactment of Pen C §182.5, which expanded liability by creating a new kind of criminal conspiracy in the gang context. 57 C4th at 261–263. In *Johnson*, the defendants were active gang members, well aware of each other's active status and the gang's pattern of criminal gang activity. Their agreement to commit various shootings constituted an agreement to commit the gang participation offense and, once an overt act was performed, all the elements of conspiracy to violate Pen C §182(a) were satisfied.

Penal Code §182.5 provides that a person who actively participates in a 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, assists, or benefits from felonious criminal conduct by members of the gang, is guilty of conspiracy to commit that felony and may be punished as specified in Pen C §182(a). Key distinctions of Pen C §182.5 from traditional conspiracy under Pen C §182 are discussed in *People v Johnson, supra*.

5. [§1.25] Violation of Gang Loitering Ordinance

The STEP Act does not prevent cities and counties from adopting and enforcing laws relating to gangs and gang violence that are consistent with the Act. Pen C §186.25.

An example of such a law is illustrated in *In re Daniel G.* (2004) 120 CA4th 824, in which a juvenile defendant was charged with possession of an assault weapon (Pen C §30605(b)) and with loitering with the intent to publicize a street gang in violation of L.A. County Code §13.44.010. That Code section makes it a misdemeanor for any person who is a member of a criminal street gang, as that term is defined in Pen C §186.22(f), or who is in the company of or acting in concert with a member of a criminal street gang, to loiter or idle in a "public place," as defined in that section, with the intent to publicize a criminal street gang's dominance over certain territory in order to intimidate nonmembers of the gang from entering, remaining in, or using the public place or adjacent area. To find a violation of such an anti-loitering ordinance, there must be proof that the defendant loitered with the intent to commit a crime should the opportunity arise. This intent may be inferred from the circumstances. 120 CA4th at 833–834.

However, merely being in the area and close to the conduct of illegal activity by others is insufficient. 120 CA4th at 834. Evidence of the defendant's prior conduct, coupled with evidence of other suspicious but noncriminal conduct occurring right before the arrest, might be sufficient to show the required intent. 120 CA4th at 834–835.

E. [§1.26] PROBATION CONDITIONS

In granting probation, the court has broad discretion to impose conditions consistent with the ends of fostering rehabilitation and protecting public safety, including conditions to discourage defendants from engaging in gang-connected activities Pen C §1203.1(j); *People v Perez* (2009) 176 CA4th 380, 383. Probation conditions must be reasonably related either to the crime of which the defendant was convicted or to the goal of deterring future criminality. *People v Carbajal* (1995) 10 C4th 1114, 1121–1124. In *People v Brandao* (2012) 210 CA4th 568, 573–577, a probation condition prohibiting contact with gang members was held invalid because it had no relationship to the defendant's crime of possession of amphetamine or his past crimes, it related to conduct which was not in itself criminal, and it forbade conduct which was not related to future criminality, absent evidence that the defendant or his family members had any current or past ties to any criminal street gangs. In accord with *Brandao* is *In re Edward B*. (2017) 10 CA5th 1228, 1234–1236.

Association with gang members. A court may order the defendant not to associate with gang members, provided there is explicit knowledge of the gang affiliation. *People v Leon* (2010) 181 CA4th 943, 949–950. For example, in *Leon*, the court approved the following probation condition: "You are not to associate with any person you know to be or the probation officer informs you is a member of a criminal street gang." See also *In re H. C.* (2009) 175 CA4th 1067, 1071–1072 (condition prohibiting association "with any person known to you to be on probation, on parole or a member of a criminal street gang."). But the lack of knowledge component in a probation condition is not always fatal. In *In re Oswaldo R.* (2017) 11 CA5th 409, 416–418, the court held failure to include knowledge component in probation condition requiring juvenile defendant not to participate in gang-related activity did not render condition unconstitutional because the scope of condition was readily ascertainable; the condition provided a reasonable degree of certainty; the condition was one of a number of conditions imposed with reference to law concerning criminal street gangs; and gang terms, as printed on dispositional order and stated orally by juvenile court, included the statutory definition of criminal street gang.

Areas of gang-related activity. Similarly, an explicit knowledge requirement must be applied to a probation condition prohibiting the defendant from frequenting areas of gang-related activity. *People v Leon, supra*, 181 CA4th at 952 ("You are not to visit or remain in any specific location which you know to be or which the probation officer informs you is an area of criminal-street-gang-related activity."). See also *In re H. C., supra*, 175 CA4th at 1072 (condition that minor "not visit any area known to him to be a place of gang-related activity"; the name of the actual geographic area that would be prohibited to the minor is preferable).

Gang paraphernalia. The knowledge requirement also extends to probation conditions restricting the display of gang signs and the possession of gang paraphernalia. *People v Leon, supra*, 181 CA4th at 950–951 ("You are not to possess, wear or display any clothing or insignia, tattoo, emblem, button, badge, cap, hat, scarf, bandana, jacket or other article of clothing that you know or that the probation officer informs you is evidence of, affiliation with, or membership in a criminal street gang."). See also *People v Lopez* (1998) 66 CA4th 615, 638 (defendant "may not wear or possess any item of gang clothing known to be such by defendant including any gang

insignia, moniker or pattern, jewelry with gang significance nor . . . display any gang insignia, moniker or other markings of gang significance known to be such by defendant on his person or property as may be identified by law enforcement or the probation officer, except that he shall not be required to remove the tattoos on his body that existed at the time of sentencing").

Disclosure of electronic device information and social media websites. People v Ebertowski (2014) 228 CA4th 1170, 1174–1177, upheld a warrantless search condition of probation requiring the disclosure of passwords to electronic devices under the defendant's custody or control, and all passwords to social media sites, and submission to these devices at any time. The court found the probation condition was reasonable under the circumstances. The defendant's current offenses were threatening and resisting a police officer for the benefit of his gang. Password conditions were related to the crimes, which were gang related, because they were designed to allow the probation officer to monitor defendant's gang associations and activities. And the defendant's gang association was also related to his future criminality, as it gave him the bravado to threaten and resist armed police officers. 228 CA4th 1176–1177.

Other conditions. The court may require the defendant to stay away from school campuses during school hours, provided the condition is sufficiently precise. See *People v Barajas* (2011) 198 CA4th 748, 760–762 (probation condition modified to read "You're not to knowingly be on or within 50 feet of any school campus during school hours unless you're enrolled in it or with prior permission of the school administrator or probation officer"). See also *In re Edward B., supra*, 10 CA5th at 1236–1238 (probation condition requiring minor to avoid "any part of a school campus" unless minor is enrolled withstood vagueness challenge). Additionally the court may prohibit the defendant from attending court proceedings involving street gang members. For example, in *People v Leon, supra*, 181 CA4th at 954 the court approved the following condition: "You shall not be present at any court proceeding where you know or the probation officer informs you that a member of a criminal street gang is present or that the proceeding concerns a member of a criminal street gang unless you are a party, you are a defendant in a criminal action, you are subpoenaed as a witness, or you have the prior permission of your probation officer."

VII. REGISTRATION REQUIREMENT

A. [§1.27] PERSONS SUBJECT TO REGISTRATION REQUIREMENT

A person convicted of specified gang-related offenses must either register with the chief of police if residing in a city, or the sheriff of the county if residing in an unincorporated area. Pen C §186.30(a). Registration is required if the person has been convicted of any of the following (Pen C §186.30(b)(1)–(3)):

- Active participation in and furtherance of felonious conduct by a criminal street gang under Pen C §186.22(a) (see §1.7).
- Any felony for which a sentencing enhancement has been imposed under Pen C §186.22(b)(1) (see §1.10).
- Any crime the court has determined is gang related at the time of sentencing or disposition. "Gang related" means related to a "criminal street gang" within the meaning of Pen C §186.22(e), (f). Gang-related crimes include, but are not limited to, all crimes committed for the benefit of, at the direction of, or in association with a criminal street gang. *In re Jorge G.* (2004) 117 CA4th 931, 940–941, 944–946.

Nothing in the registration statutes precludes a court in its discretion from imposing the registration requirement in a gang-related crime. Pen C §186.32(e).

The registration requirement has been found to be constitutional. See *People v Bailey* (2002) 101 CA4th 238, 244–245. Gang-member registration under Pen C §186.30 is not punishment for due process purposes and, therefore, need not be based on proof beyond a reasonable doubt. The fact that the subject crime was gang related need only be shown by a preponderance of the evidence. *In re Jorge G., supra,* 117 CA4th at 942–944.

Registration is also required of juvenile offenders. Pen C §186.30(b); see *In re Jorge G., supra.*

B. [§1.28] ADVISING DEFENDANT OF DUTY TO REGISTER

At the time of sentencing, the court must inform the defendant of the duty to register under Pen C §186.30. Pen C §186.31. This advisement must be noted in the minute order, and the clerk must send a copy of the order to the law enforcement agency having jurisdiction over the defendant's last known address. Pen C §186.31.

An order requiring a defendant to disclose the areas the defendant frequents is unconstitutionally vague. *People v Sanchez* (2003) 105 CA4th 1240, 1243–1244 ("areas frequented" has no fixed meaning such that the defendant can know what information is expected to be disclosed and places excessive discretion on law enforcement for its interpretation). The order may, however, require the defendant to disclose any aliases or monikers. 105 CA4th at 1244–1245 (order does not violate defendant's right against self-incrimination).

C. [§1.29] TIME LIMITS ON REGISTRATION

Registration must occur within 10 days of release from custody or 10 days of arrival in the city or county, whichever occurs first. Pen C §186.30(a). Registrants who change their address must provide the new address to the applicable law enforcement agency within 10 days and, if moving to a new jurisdiction, must register in that jurisdiction within the same 10-day period. Pen C §186.32(b). The parole or probation officer assigned to the person must verify compliance with the registration requirement. Pen C §186.31.

The registration requirement terminates 5 years after the last imposition of the requirement. Pen C §186.32(c).

D. [§1.30] REGISTRANT'S DUTY TO PROVIDE INFORMATION

To register, the registrant must appear at the law enforcement agency and submit fingerprints and a current photograph. The registrant must also submit and sign a written statement giving "any information" that the agency may require. Pen C §186.32(a). These statements, photographs, and fingerprints are not open to inspection by any person other than law enforcement officers. Pen C §186.32(d).

The requirement that a registrant must provide "any information" the law enforcement agency requires does not implicate the registrant's Fifth Amendment right to remain silent or Sixth Amendment right to have counsel present during questioning. Because the questioning is limited to descriptive information about the registrant, these rights are not implicated. *People v Sanchez* (2003) 105 CA4th 1240, 1245–1246; *People v Bailey* (2002) 101 CA4th 238, 246. Under Pen C §186.32(a)(2)(C), a registrant is only required to disclose information that will enable the law enforcement agency to locate the registrant, such as full name, any aliases or gang

monikers or change of name, date of birth, residence address, description and license plate number of any vehicle currently owned or driven, and information regarding employment or school. *People v Sanchez, supra,* 105 CA4th at 1243–1244. A registrant may not be required, however, to disclose information about other gang members. *In re Jorge G.* (2004) 117 CA4th 931, 948–949.

The public interest in detecting and preventing crime takes precedence over a gang registrant's private interest in declining to provide personal identifying and locational information. 117 CA4th at 951–952.

E. [§1.31] Failure to Register

A knowing failure to register is a misdemeanor. Pen C §186.33(a). A person who fails to register, and who is subsequently convicted of another gang-related offense, must be punished by an additional state prison term of 16 months or 2 or 3 years. Pen C §186.33(b)(1). The court must select the sentence enhancement which, in the court's discretion, best serves the interests of justice and must state the reasons for its choice on the record at the time of sentencing. Pen C §186.33(b)(1).

VIII. OTHER REMEDIES

A. [§1.32] Confiscation of Weapons and Ammunition

A firearm and its ammunition, or any other deadly or dangerous weapon owned or possessed by a member of a criminal street gang for the purpose of committing an offense listed in Pen C §186.22(e), may be confiscated by a law enforcement agency or police officer. Pen C §186.22a(f)(1). On notice and hearing, a court may declare the weapon to be a nuisance and order its disposal under Pen C §§18000 and 18005. Pen C §186.22a(f)(2)–(6).

B. [§1.33] Confiscation and Sale of Vehicle Involved in Crime

When a person, who is a member of a criminal street gang, is found to be unlawfully in possession of a firearm while present in a vehicle, the court must order the sale of that vehicle. Pen C §246.1(a). The vehicle may not be sold, however, if it is stolen, owned by another person, or there is a community property interest in it owned by another person and the vehicle is the only one available to the defendant's immediate family. Pen C §246.1(f).

C. [§1.34] Forfeiture of Criminal Profits

In any case in which a person is alleged to have engaged in a pattern of criminal profiteering activity, on conviction of the underlying offense, any property interest acquired through the pattern of criminal activity is subject to forfeiture, as are all proceeds of that activity. Pen C §186.3. "Criminal profiteering activity" means any act committed or attempted, or any threat made for financial gain or advantage, which may be charged as a crime under specified sections of the Penal Code, including under Pen C §186.22(a) and including any felony subject to enhancement under Pen C §186.22(b). Pen C §186.2(a)(26). "Pattern of criminal profiteering activity" means engaging in at least two incidents of criminal profiteering that (1) have the same or a similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics; (2) are not isolated events; and (3) were committed as a criminal activity of organized crime. Pen C §186.2(b). "Organized crime" includes crime committed by a criminal street gang as defined in Pen C §186.22(f). Pen C §186.2(d).

D. [§1.35] NUISANCE ABATEMENT OF PLACE USED BY GANG

A building or place used by members of a criminal street gang for the purpose of committing any of the offenses listed in Pen C §186.22(e), or any offense involving dangerous or deadly weapons, burglary, or rape, and any building or place where that criminal conduct occurs, is a nuisance that must be enjoined or abated, and for which damages may be recovered. Pen C §186.22a(a).

An action for injunction or abatement filed under §186.22a(a) is governed by Health & S C §§11570–11587, with exception of the following (§186.22a(b)):

- The court may not assess a civil penalty against any person unless that person knew or should have known of the unlawful acts;
- No order of eviction or closure may be entered;
- All injunctions issued must be limited to those necessary to protect the health and safety of the residents or the public or those necessary to prevent further criminal activity; and
- A suit may not be filed until 30-day mailed notice of the unlawful use or criminal conduct has been provided to the property owner.

If an injunction is issued under Pen C §186.22a(a) or CC §3479 to abate gang activity constituting a nuisance, the Attorney General or any district attorney or any prosecuting city attorney may maintain an action for money damages on behalf of the community or neighborhood injured by that nuisance. Pen C §186.22a(c). Any money damages awarded shall be paid by or collected from assets of the criminal street gang or its members. Only members of the criminal street gang who created, maintained, or contributed to the creation or maintenance of the nuisance shall be personally liable for the payment of the damages awarded. Pen C §186.22a(c). In a civil action for damages brought pursuant to this subdivision, the Attorney General, district attorney, or city attorney may use, but is not limited to the use of, the testimony of experts to establish damages suffered by the community or neighborhood injured by the nuisance. Pen C §186.22a(c).

E. [§1.36] GANG ABATEMENT INJUNCTION

A district attorney, county counsel, or city attorney may bring a civil action in the name of the people of California, under the general public nuisance statutes, to abate a public nuisance caused by activities of street gangs. CCP §731; CC §§3479–3480; *People ex rel Gallo v Acuna* (1997) 14 C4th 1090, 1110–1112. A gang abatement injunction may prohibit gang members from engaging in various activities, *e.g.,* possessing weapons and associating with other gang members within a designated geographical area, wearing gang-related clothing, or using certain signs and symbols.

The importance of the interests affected by an injunction, *i.e.*, constitutional due process and general public policy considerations, requires that the facts necessary to justify its issuance be proven by clear and convincing evidence. *People v Englebrecht* (2001) 88 CA4th 1236, 1254–1256. See *People ex rel Reisig v Acuna* (2010) 182 CA4th 866, 873–882 (preliminary injunction supported by evidence of the criminal records of the named defendants, and the declarations of 48 police officers familiar with the area and a gang expert). The interests involve more than a mere dispute over property or money. The need for a standard of proof allowing a greater confidence in the decision reached arises not because the personal activities enjoined are sublime

or grand but rather because they are commonplace, and ordinary. While it may be lawful to restrict such activity, it is also extraordinary. *People v Englebrecht, supra.*

To issue an injunction on named gang members, it must be proved that the gang and its members were responsible for the public nuisance to be abated and the individuals are active members of the gang. *People v Englebrecht, supra,* 88 CA4th at 1258. In determining "gang membership" in context of a gang injunction, the court may refer to the definition of a "criminal street gang" in Pen C §186.22(f) (see §1.2), modified as follows: the group must have as one of its primary activities the commission of the acts constituting the public nuisance; and its members individually or collectively must engage in a pattern of activity amounting to the public nuisance. *People v Englebrecht, supra*. Thus conduct not amounting to gang crime under Pen C §186.22 may be the subject of an action to abate a nuisance. *People ex rel Reisig v Acuna, supra*, 182 CA4th at 879.

Gang injunctions typically include a provision barring member of a gang from associating in public with any person known to them to be gang members. The California Supreme Court has found that these provisions do not violate a gang member's right to associate under the First Amendment. *People ex rel Gallo v Acuna, supra*, 14 C4th at 1110–1112 (court upheld provision prohibiting defendant from "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view" with any other person the defendant knows to be a gang member in four-block area). A narrowly drawn prohibition on the use of words, gestures, hand signs, or other forms of communication that describe or refer to the gang and on the wearing of clothing that bears the gang's name in the designated area is proper, when the basis for the prohibition is that this expression amounts to or contributes to the public nuisance. *People v Englebrecht, supra,* 88 CA4th at 1266.

The area designated in the injunction must not be larger than is necessary to abate the public nuisance, and it must be specifically described. *In re Englebrecht* (1998) 67 CA4th 486, 495.

Gang members must be properly served with notice of the injunction proceeding and given an opportunity to be heard before the court may issue a preliminary injunction. *People ex rel Reisig v Broderick Boys* (2007) 149 CA4th 1506. See also *People v Sanchez* (2017) 18 CA5th 727 (defendant deprived of procedural due process when subjected to injunction without prior notice or opportunity to be heard on the question of whether he was a covered gang member). However, they are not entitled to a jury trial on the issue of their gang membership. *People v Englebrecht, supra,* 88 CA4th at 1253. Nor is there a right to appointed counsel. *Iraheta v Superior Court* (1999) 70 CA4th 1500, 1514–1515.

A person who willfully disobeys an injunction that restrains the activities of a criminal street gang or any of its members is guilty of misdemeanor contempt. Pen C §166(a)(9). The court may find that the offense is gang-related and order the defendant to register as a gang offender under Pen C §186.30 (see §1.27). *In re J. V.* (2010) 181 CA4th 909, 912–913.

Chapter 2
ADMISSIBILITY OF GANG EVIDENCE

I. THEORIES OF ADMISSIBILITY

A. [§2.1] Evidence of Gang Affiliation May Be Relevant to Identity, Motive, and Intent

California courts have long recognized the potential prejudicial effect of gang membership evidence, but they have admitted this evidence when the very reason for the crime is gang related. *People v Ruiz* (1998) 62 CA4th 234, 239–240. Although evidence of a defendant's gang membership creates a risk that the jury will improperly infer that the defendant has a criminal disposition and therefore is guilty as charged, this evidence *is* admissible if:

- It is relevant to prove the defendant's identity, motive, or intent; and
- The prejudicial effect of this evidence does not outweigh its probative value. *People v Carter* (2003) 30 C4th 1166, 1194.

For example, evidence of gang membership has been held admissible to show identity, motive, or intent in the following cases:

- The defendant in a robbery case told the victim that she was "dealing with" a gang member. Gang testimony was relevant to permit the jury to understand the defendant's statement, to show his intent to steal, to show a motive for the crime, and to explain how the defendant's statement could induce fear in the victim. *People v Hernandez* (2004) 33 C4th 1040, 1053.

- The victim was dressed like a gang member and was allegedly shot by the defendant, a member of a rival gang, for appearing to be a gang member in an area that was "claimed" by both gangs as their territory. Evidence of the defendant's gang membership and of the "deadly" rivalry between the gangs was admissible to show the defendant's motive for the shooting. *People v Williams* (1997) 16 C4th 153, 192–194.
- The victims were members of a rival gang who were shot in "a battle over turf." Evidence of the defendant's gang membership was admissible because gang retaliation was "the only plausible motive." *People v Sandoval* (1992) 4 C4th 155, 175.
- All of the charged offenses originated with a conspiracy by the gang leadership to murder the father of a defecting member. Evidence of the defendant's gang membership was admissible to show his motive and intent. *People v Price* (1991) 1 C4th 324, 397. Voir dire provided an effective means for removing any jurors who might be so prejudicially influenced by reference to the defendant's membership in the Aryan Brotherhood that they could not fairly try the case. 1 CA4th at 398.
- The victim and the defendant were members of rival gangs, which had been engaged in a feud involving numerous attacks on each other. Evidence of incidents between the gangs was relevant to prove motive, malice, premeditation, and intent with respect to the charge of murder. *People v Funes* (1994) 23 CA4th 1506, 1510–1511, 1518–1519.
- Evidence of the defendant's gang affiliation was critical to prove both motive (retaliation for the death of a fellow gang member) and intent to kill (random killings based on hatred). *People v Woods* (1991) 226 CA3d 1037, 1054.
- Motive could not have been proved without showing that the defendant's gang engaged in criminal and violent acts and that members were obligated to commit these acts under penalty of their own lives. This evidence on motive logically and naturally aided the prosecution in rebutting the presumption of innocence and showing a reason for the defendant's criminal behavior. *People v Dominguez* (1981) 121 CA3d 481, 498–499.
- Rap lyrics written by defendant were admissible and probative of defendant's state of mind and criminal intent, his membership in a gang and loyalty to it, and his motive and intent to kill opposing gang members. *People v Zepeda* (2008) 167 CA4th 25, 32–36.
- Evidence of the structure, religion, and criminal activities of the organization known as the "Family" showed the motivation for, and nature of the conspiracy involved in, the Tate-LaBianca murders. *People v Manson* (1976) 61 CA3d 102, 131, 155–156.
- Evidence aided the prosecution in rebutting the presumption of innocence by showing a reason for the defendant's criminal behavior and was used by the defense to establish that the crimes charged in the information were committed by other gang members, not by the defendant. *People v Plasencia* (1985) 168 CA3d 546, 552–553.
- Evidence of the defendant's gang membership was relevant to his identity as one of the participants in a group attack on the victims (to rebut his denial of both gang membership and presence at the scene of the crimes) and to his motive for participating in a conspiratorial scheme (that he had told other gang members they could obtain the money they needed for alcohol and drugs by attacking the victims). *People v Contreras* (1983) 144 CA3d 749, 755–758.

- Evidence that the defendants were gang members formed a significant evidentiary link in the chain of proof tying them to the crimes charged. Evidence that the defendants were members of the same gang as other persons involved in the commission of the crimes fortified the testimony of witnesses who identified the defendants as participants in these crimes. *People v Champion* (1995) 9 C4th 879, 921–923.

Evidence of a defendant's membership in a gang that is *not* relevant because it does not have any "tendency in reason" to prove a disputed fact that is of consequence to the determination of the action (Evid C §210) is inadmissible. Such evidence allows the jury to make unreasonable inferences that the defendant is guilty of the offense charged on the theory of "guilt by association." *People v Perez* (1981) 114 CA3d 470, 477. Gang evidence is inadmissible if introduced only to show a defendant's criminal disposition or bad character, creating the inference that the defendant committed the charged offense. *People v Avitia* (2005) 127 CA4th 185, 192, 195. Gang evidence was found irrelevant in the following:

- Evidence that gang graffiti was found in the defendant's bedroom should not have been admitted in the defendant's trial on a charge of grossly negligent discharge of a firearm, when no gang enhancement was alleged and there was no evidence the charged crime was related to any gang activity. 127 CA4th at 192–195.
- Evidence that the defendant was a member of a gang and had gang tattoos should not have been admitted for the purpose of proving the defendant's identity when the victim had identified the defendant through police photographs. Such evidence was prejudicial and should have been excluded under Evid C §352. *People v Perez, supra.*

Even when evidence of the defendant's gang membership is relevant, the court should carefully scrutinize this evidence before admitting it, due to its potential prejudicial impact on the jury. *People v Williams, supra,* 16 C4th at 193. The Supreme Court has condemned the introduction of evidence of gang membership that is "only tangentially relevant, given its highly inflammatory impact." *People v Cox* (1991) 53 C3d 618, 660, disapproved on other grounds in 45 C4th 390, 421 n22. See also *People v Albarran* (2007) 149 CA4th 214, 223–232 (introduction of certain extremely prejudicial gang evidence violated defendant's due process rights and rendered trial fundamentally unfair). In determining whether the probative value of the evidence is outweighed by its prejudicial effect, consider:

- The significance of the evidence;
- Whether this evidence is cumulative of other evidence introduced on the issues of identity, motive, or intent; and
- Whether any prejudicial effect can be mitigated by instructing the jury on the limited purposes for which the evidence is being admitted. *People v Carter, supra,* 30 C4th at 1196; *People v Williams, supra,* 16 C4th at 194. For a discussion of limiting instructions, see §4.7.

The court may also consider whether the inflammatory effect of the defendant's gang membership may be neutralized by the fact that the victim was also a gang member. See *People v Sandoval, supra,* 4 C4th at 173.

B. [§2.2] Evidence of Gang Affiliation May Be Relevant to Witness's Credibility

Evidence that the defendant and defense witnesses are members of the same gang may be admissible to prove the witnesses' bias in favor of the defendant, provided this evidence is not cumulative to other admissible and less inflammatory evidence showing their association. *U.S. v Abel* (1984) 469 US 45, 49, 105 S Ct 465, 83 L Ed 2d 450; *People v Bojorquez* (2002) 104 CA4th 335, 342; *People v Cardenas* (1982) 31 C3d 897, 903–905. For example:

- The United States Supreme Court held that a witness's testimony that he and the defendant were members of a prison gang made the existence of the witness's bias toward the defendant more probable and created an inference that the witness's testimony was slanted or fabricated to help the defendant. Their common gang affiliation was probative of bias. In addition, the witness's description of the prison gang as one sworn to secrecy and self-protection was relevant to the source and strength of the witness's bias. *U.S. v Abel, supra,* 469 US at 49, 52.
- A judge properly admitted a gang expert's testimony that because of the small size of the gang, it was impossible for the defendant and the witness not to know each other, when the relationship between the defendant and the witness could not be established in any other way. This evidence was not only admissible to show bias but was also admissible for the purpose of impeaching the witness's statement that he had never met the defendant. *People v Ruiz* (1998) 62 CA4th 234, 240–242.
- A judge properly admitted a gang expert's testimony that the witness and the defendant had admitted to him on or about the time of the charged offense that they were gang members, even though there was other evidence of a relationship between the witness and the defendant. This evidence was admissible for the purposes of impeaching the witness's denial of an ongoing relationship with the defendant, and for impeaching the defendant's denial of his admission to being a gang member as well as his claim that his gang membership had ended before the charged offense was committed. *People v Bojorquez, supra,* 104 CA4th at 342–343. However, the court abused its discretion in admitting that portion of the gang expert's testimony about the criminal tendencies of gangs—defendant's in particular—and about their members' unwillingness to testify against each other and inclination to eliminate adverse witnesses. This evidence lacked probative value and was prejudicial. 104 CA4th at 343–345.
- In a case with compelling and overwhelming evidence of the codefendants' close relationship and affinity for one another, evidence that they allegedly belonged to the same criminal street gang was cumulative and prejudicial. *People v Maestas* (1993) 20 CA4th 1482, 1495.

C. [§2.3] Other Purposes for Which Gang Affiliation May Be Relevant

In *People v Brown* (2003) 31 C4th 518, a case in which no gang enhancement was alleged, evidence that the defendant swore an oath on his gang that he shot the victim was held admissible because it served in assisting the jury in determining whether his statement that he shot the victim was mere braggadocio or a true statement of fact. By swearing to its truth on his gang, the defendant distinguished his statement from mere bravado. 31 C4th at 546–547.

If a defendant puts good character in issue during the penalty phase of a death penalty trial, the prosecution may counter with evidence of the defendant's gang affiliation. *People v Fierro* (1991) 1 C4th 173, 236–237.

II. METHODS OF PROOF

A. [§2.4] PROOF OF GANG MEMBERSHIP BY DEFENDANT'S PRIOR ADMISSION

Proof of a defendant's gang membership may be shown by introducing evidence of the defendant's admission of gang membership in a prior proceeding, provided the admission is not remote in time. See *People v Price* (1991) 1 C4th 324, 427–428.

Testimony of a law enforcement officer who has qualified as a gang expert that the defendants admitted to him they were members of a gang was held admissible, notwithstanding the defendants' objection that these admissions were made several years before the crimes charged. Their objection went to the weight, not the admissibility, of the officer's testimony. *People v Champion* (1995) 9 C4th 879, 921.

B. [§2.5] PROOF OF INTENT AND MOTIVE BY ADMISSION OF PRIOR ACT OF GANG ACTIVITY

A prior act of gang activity may be admissible under Evid C §1101(b) to establish the defendant's intent and motive if the prior act and the charged act are sufficiently similar. See *People v Zepeda* (2001) 87 CA4th 1183, 1211–1212 (fact that defendant previously committed drive-by shooting under circumstances indicating that he did so for gang-related purposes helped show that he likely committed the instant charge of drive-by shooting for gang-related purposes). Any prejudicial effect of showing the defendant's involvement in a previous gang-related act of violence may be "minimized" if there is other evidence showing the defendant's gang association and by placing limitations on the admission of this evidence, *e.g.,* by introducing the incident by way of ancillary testimony of the prosecution's gang expert and not by testimony of the victim of the incident, and by providing a limiting instruction that the evidence may only be considered in determining the defendant's motive and intent. 87 CA4th at 1211–1212.

C. [§2.6] PROOF OF PAST GANG MEMBERSHIP

The fact that the defendant testifies to no longer being a gang member does not make evidence of past gang membership inadmissible. The prosecution's inability to demonstrate the defendant was still a gang member when the offense occurred goes to the weight, not the admissibility, of the evidence of past gang membership. *People v Williams* (1997) 16 C4th 153, 249–250 (in view of evidence of defendant's past gang membership, his testimony that he had terminated that membership went to weight, not admissibility, of gang paraphernalia police seized from his bedroom more than one year later). See *People v Champion* (1995) 9 C4th 879, 921 (based on officer's testimony that defendants had admitted their gang membership to him, and evidence that they continued to associate with other admitted gang members until time of charged crimes, jury could reasonably conclude that defendants were still members of gang at time of crimes despite their denials).

III. EXPERT TESTIMONY REGARDING GANGS

A. [§2.7] ADMISSION OF EXPERT TESTIMONY

California law permits a person with special knowledge, skill, experience, training, or education in a particular field to qualify as an expert witness and to give testimony in the form of an opinion. Evid C §§720, 801. Under Evid C §801, expert opinion testimony is admissible only if the subject matter of the testimony is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact, and it is based on matter, whether or not admissible, that an expert may reasonably rely on in forming an opinion on the subject to which the testimony relates. The subject matter of the culture and habits of criminal street gangs meets this criteria. *People v Vang* (2011) 52 C4th 1038, 1044; *People v Gonzalez* (2005) 126 CA4th 1539, 1550 (evidence of gang sociology and psychology is beyond common experience and thus proper subject for expert testimony). Expert testimony has been properly admitted in many cases to show the motivation for the crime, generally retaliation or intimidation, and whether and how the crime was committed to benefit or promote a gang. 126 CA4th at 1550.

For example:

- A gang expert may testify as to whether a particular incident as described in a hypothetical scenario, was "gang-related activity" and whether the primary purpose of a particular gang was to commit specified offenses. *People v Gardeley* (1996) 14 C4th 605, 619, disapproved on other grounds in 63 C4th 665, 686 n13.
- A gang expert may testify as to how the participants were acting for the benefit of the gang. *People v Valdez* (1997) 58 CA4th 494, 508–509. See *People v Olguin* (1994) 31 CA4th 1355, 1384, overruled on other grounds in 24 C4th 889, 901 n3 (expert permitted to testify that gang benefited from homicide of rival gang member because it promoted respect for gang from other gangs).
- A gang expert may testify as to the meaning of gang terminology. *People v Champion* (1995) 9 C4th 879, 919–925 (expert also permitted to describe significance of gang graffiti symbols and hand signs).
- A gang expert may testify that a defendant's tattoos signify that he is a "hard-core" gang member and that his tattoo of the number "187" referred to Pen C §187, which proscribes murder, and that the tattoo was displayed as a badge of honor after the defendant allegedly killed a rival gang member. *People v Ochoa* (2001) 26 C4th 398, 437–439.
- An expert's testimony that the defendant's flashing of gang signs from a fleeing vehicle to pedestrians and pursuing officers during a chase was intended to intimidate the community and the police and display the gang's dominance. *People v Margarejo* (2008) 162 CA4th 102, 108–110 (jury could reasonably infer from defendant's actions that he had the specific intent to assist other criminal conduct by gang members).
- An expert's testimony about what it means to be a "rat" in gang culture was relevant to the defendant's motive and intent, and also relevant to help the jury understand the discrepancies between some of the witnesses' statements to the police and their testimony at trial due to their fear of testifying truthfully. *People v Martinez* (2003) 113 CA4th 400, 413–414.
- A gang expert may give an opinion that the defendant is a gang member based on his participation in a drive-by shooting with other gang members, because gangs are not

known to commit drive-by shootings with nonmembers. *People v Manriquez* (1999) 72 CA4th 1486, 1491–1492.

- A gang expert's opinion that the defendant was an active associate of a prison gang that targeted for violent retribution those who cooperated with law enforcement was supported by evidence of a potential witness's refusal to take courtroom oath or testify. *People v Sisneros* (2009) 174 CA4th 142, 152–153. See also *People v Lopez* (1999) 71 CA4th 1550, 1555 (gang member's refusal to testify was relevant where gang expert opined that gang members "act as a unit" to advance the cause of the gang and to protect their members).
- A gang expert may give an opinion that the defendant is a gang member based on printouts of the defendant's MySpace page. *People v Valdez* (2011) 201 CA4th 1429, 1433–1438 (printouts properly authenticated). But see *People v Beckley* (2010) 185 CA4th 509, 514–518 (printouts of photograph and gang roster downloaded from MySpace website not authenticated).
- A gang expert may testify that a defendant's knowledge of a criminal street gang's current activities, including information about where gang members had hidden guns and the identity of members who were engaged in gang shootings, is available only to active gang members. *People v Garcia* (2007) 153 CA4th 1499, 1508–1511.
- A gang expert may testify as to the participants' status as gang members or associates. *People v Valdez, supra,* 58 CA4th at 507. In this case, the expert was permitted to testify that gangs in the pertinent jurisdiction were not public and open organizations or associations that have a clearly defined or ascertainable membership, but instead are more secretive, loosely defined associations of people. Determining whether someone is involved and the level of involvement requires the accumulation of a wide variety of evidence over time and its evaluation by those familiar with gangs. 58 CA4th at 506–507.

In determining the admissibility of expert testimony, the court must also consider whether its prejudicial effect outweighs its probative value. For example, in *People v Bojorquez* (2002) 104 CA4th 335, 343–345, a trial judge should not have permitted a gang expert to testify about the ethnic composition and criminal habits of gangs in the city where the charged offense occurred, when the probative value of this evidence with respect to disputed issues or facts in the case was minimal. The expert's testimony about the criminal tendencies of gangs, including the defendant's gang, and about their members' unwillingness to testify against each other and inclination to eliminate adverse witnesses lacked substantial probative value, and tended to ascribe guilt of this conduct to the defendant. The expert's testimony should have been limited to rebuttal of the defendant's and a defense witness's denials of gang membership, which was relevant to bias.

B. [§2.8] EXPERT'S RELIANCE ON HEARSAY

A gang expert may provide testimony consisting of general background information regarding the training, knowledge, expertise, and premises generally accepted in that field. For instance, the gang expert may testify about general gang culture or the behavior of a particular gang's history, territory, conduct, and general operations. *People v Sanchez* (2016) 63 C4th 665, 685, 698; *People v Vega-Robles* (2017) 9 CA5th 382, 411. An expert's background knowledge and experience is not subject to exclusion as hearsay, even though offered for its truth. 63 C4th

685. For instance, gang experts may rely on conversations with gang members, their personal investigations of gang-related crimes, information obtained from colleagues and other law enforcement agencies, and relevant personal observations. *People v Vy* (2004) 122 CA4th 1209, 1223 n10; *People v Duran* (2002) 97 CA4th 1448, 1463. In permitting gang experts to testify based on conversations with gang members, the courts have recognized that it would be virtually impossible for these experts to offer an opinion about gangs without reference to these conversations. *People v Olguin* (1994) 31 CA4th 1355, 1384–1385, overruled on other grounds in 24 C4th 889, 901 n3; *People v Gamez* (1991) 235 CA3d 957, 967–969, overruled on other grounds in 14 C4th 605, 624 n10.

Testimony conveying general background information must be distinguished from case-specific testimony about the particular events and participants alleged to have been involved in the case being tried. *People v Sanchez, supra*, 63 C4th at 685. When an expert relates to the jury case-specific out-of-court statements and treats the content of those statements as true and accurate to support the expert's opinion, the statements are inadmissible hearsay unless independently proven by competent evidence or are covered by a hearsay exception. 63 C4th at 686. In *Sanchez*, the California Supreme Court disapproved of case law concluding that an expert's basis testimony is not offered for its truth, or that a limiting instruction, coupled with a trial court evaluation of the potential prejudicial impact of the evidence under Evid C §352, sufficiently addressed hearsay and confrontation issues. 63 C4th at 686 n13.

The Court stated that "[i]f an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." 63 C4th at 684.

If an expert seeks to relate testimonial hearsay, the hearsay must not only fall within a statutory exception, but must also satisfy the Sixth Amendment's Confrontation Clause. The Confrontation Clause bars the admission of testimonial hearsay unless (1) the declarant is unavailable and (2) the defendant had a prior opportunity for cross-examination of the declarant or forfeited that right by wrongdoing. 63 C4th at 686; *Crawford v Washington* (2004) 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177. Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial. 63 C4th at 689.

In *Sanchez,* the defendant was charged with drug and firearm offenses that were alleged to have been for the benefit of a street gang. At trial, a gang expert relied on information and statements contained in police documents, a STEP notice, and a field information or "FI" card as the basis for his expert opinion. The police documents indicated the defendant associated with, and had been repeatedly contacted by police while in the presence of, Delhi gang members. 63 C4th at 671–673. On cross-examination, the expert admitted he had never met the defendant and had not been present when the defendant was given the STEP notice, or during any of the defendant's other police contacts. His knowledge was derived solely from the police reports and FI card. Based on the information in the STEP notice, the police documents, and the FI cards, and the circumstances of the offense at issue, the expert opined that the defendant was a member of the Delhi gang and the charged crimes benefited the gang. 63 C4th at 672–673. The Supreme

Court reversed the true findings on the street gang enhancements and remanded the matter to the Court of Appeal.

Sanchez concluded that statements about a completed crime, made to an investigating officer by a nontestifying witness, are generally testimonial unless they are made in the context of an ongoing emergency or for some primary purpose other than preserving facts for use at trial. Accordingly, the police reports in *Sanchez* were testimonial. 63 C4th 694–695. Likewise, information in the retained portion of a STEP notice, consisting of the serving officer's sworn statement attesting to the completed service and recording Sanchez's biographical information, statements, and the identity of his companions at the time of service was testimonial. 63 C4th at 696–697. Due to an inadequate record, *Sanchez* did not address whether the content of the FI cards at issue was testimonial. But the Court did state that an FI card "produced in the course of an ongoing criminal investigation "would be more akin to a police report, rendering it testimonial." 63 C4th at 697. See also *People v Martinez* (2018) 19 CA5th 853, 859 (expert's testimony about FI cards that contained information indicating that defendant had joined a gang was inadmissible hearsay); *People v Iraheta* (2017) 14 CA5th 1228, 1248–1249 (FI cards prepared in course of criminal investigation, which were referenced by gang expert as basis for his opinion that men found with defendant were admitted gang members, were testimonial).

C. [§2.9] LAW ENFORCEMENT OFFICERS AS GANG EXPERTS

Law enforcement officers may provide expert testimony regarding gangs, as long as they have special knowledge, skill, experience, training, and education related to gangs. See Evid C §720; *People v Williams* (1997) 16 C4th 153, 195–196. Acceptable qualifications include being a member of a special law enforcement gang task force, having received special training on gangs, having investigated numerous gang crimes, and having attended classes and seminars on gang crime. *People v Ochoa* (2001) 26 C4th 398, 438; *People v Williams, supra,* 16 C4th at 195; *People v McDaniels* (1980) 107 CA3d 898, 904.

D. [§2.10] HYPOTHETICAL QUESTIONS

In general, an expert may state an opinion on the basis of facts given in a hypothetical question that asks the expert to assume their truth. The question must be rooted in the facts shown by the evidence of the case being tried. *People v Vang* (2011) 52 C4th 1038, 1045–1046; *People v Gardeley* (1996) 14 C4th 605, 618, disapproved on other grounds in 63 C4th 665, 686 n13. It is not necessary, however, that the question include a statement of all the evidence in the case. The statement may assume facts within the limits of the evidence, not unfairly assembled, on which the opinion of the expert is required, and considerable latitude must be allowed in the choice of facts as to the basis on which to frame a hypothetical question. *People v Vang*, *supra*, 52 C4th at 1046. In *Vang*, the Court disapproved *People v Killebrew* (2002) 103 CA4th 644, insofar as it is interpreted as barring, or even limiting, the use of hypothetical questions. 52 C4th 1047–1048.

The following hypothetical questions have been found to be proper:

- Asking whether an assault on a "young baby gangster," such as had been charged in the case, was committed for the benefit of and in association with a gang and was gang motivated. The expert gave the opinion that gang members committed the assault "to keep the gang strong because the gang is only as strong as its weakest member" and that they put the member "in check" over some perceived wrong that the member did to the gang. *People v Vang*, *supra*, 52 C4th at 1044–1049.

- Asking whether specified violent assaults, such as had been charged in this case, were typical gang-related activities. The expert gave the opinion that these were "classic" examples of gang-related activity, explaining that criminal street gangs rely on these violent assaults to frighten the residents of an area where gang members sell drugs, thereby securing the gang's drug-dealing stronghold. 14 C4th at 619.
- Asking why someone would go to the location where the alleged murder occurred and ask a person where they were from and then shoot them, as the defendant was alleged to have done. The expert gave the opinion that such behavior, by a known gang member, was likely done to establish the member's reputation within the gang and to establish the reputation of the gang within the community. *People v Zepeda* (2001) 87 CA4th 1183, 1207–1209.
- Asking why gang members are involved in drug sales, which elicited the expert's response that it involves less risk than other crimes, enables the gang to use the profits to buy guns or more drugs to increase the volume of its business, and enhances the gang's reputation. This evidence was admitted to rebut the defendant's claim that he sold the drugs to make money for himself and not for the gang. *People v Ferraez* (2003) 112 CA4th 925, 928, 930–931.
- Asking whether a hypothetical gang member who goes into rival gang territory does so as a challenge and would protect himself or herself with a weapon. This evidence was not improper opinion evidence about the defendant's actual intent, but related to defendant's motivation for entering rival gang territory and his likely reaction to language or actions he perceived as gang challenges. *People v Ward* (2005) 36 C4th 186, 209–210.

There are dangers associated with the use of hypothetical questions. Over objection, the court should be vigilant to ensure that they are used fairly. And the court may require that the hypotheses on which the questioning is based be reframed to supply an adequate basis. *People v Vang*, *supra*, 52 C4th at 1051. But it is not a legitimate objection that the hypothetical questions tracked the evidence too closely, or because the questioner did not disguise the fact that the questions were based on the evidence. *People v Vang, supra*.

E. [§2.11] Reliability of Expert Testimony

In determining whether to permit an individual to testify as an expert on gangs, the court may consider the reliability of the proposed testimony. For example, in *People v Price* (1991) 1 C4th 324, the judge properly refused to admit the testimony of a social psychologist and criminologist whom the defense proposed to call as an expert witness on prison gangs in general and on the Aryan Brotherhood in particular, because the witness's opinions were not based on matters perceived or personally known to him, but were based instead largely on conversations with self-identified Aryan Brotherhood members whose identities the witness was unwilling to disclose, thereby substantially impairing the prosecution's ability to effectively cross-examine him. The judge also questioned whether there was "any degree of scientific reliability" to the testimony. 1 C4th at 420–421.

In *In re Alexander L.* (2007) 149 CA4th 605, 611–614, an officer of a gang enforcement unit testified that he "knew" that a defendant's gang had been involved in assaults, burglaries, automobile thefts, and other crimes, without giving specifics as to how he knew. The Court of Appeal held that the officer's opinion was not supported by a sufficient foundation. The court stated that it was impossible to tell whether the officer's claimed knowledge of the gang's

activities was based on highly reliable sources, such as court records of conviction, or based on entirely unreliable hearsay. However, this case was distinguished in *People v Martinez* (2008) 158 CA4th 1324, 1330, in which the expert testified about his extensive training and experience as a gang expert and his personal knowledge and investigation of the gang in question.

Chapter 3
WITNESS ISSUES

I. PROTECTING WITNESSES

A. [§3.1] Issuing Protective Orders

Witnesses in a gang-related case may be fearful of testifying. There are, however, various measures the court can take to ensure witnesses' safety. One of these measures is to issue a protective order under Pen C §136.2 on a showing of a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur. The order may be directed to the defendant, as well as to any other person before the court, including a subpoenaed witness or other person entering the courtroom. Pen C §136.2(a)(1)(B)–(C). The order may prohibit the defendant or other specified person from communicating in any manner with any specified witness or victim, except through an attorney under any reasonable restrictions the court may impose. Pen C §136.2(a)(1)(D).

The court may also issue an order requiring a law enforcement agency within the court's jurisdiction to provide protection for a victim or witness, or both, or for their immediate family members who reside in the same household or within reasonable proximity of the victim's or witness's household. Pen C §136.2(a)(1(F). The order may not be made without the consent of

the law enforcement agency except for limited and specified time periods and on an express finding by the court of a clear and present danger of harm to the victim or witness, or their immediate family members. Pen C §136.2(a)(1)(F).

The duration of any protective order must be limited to the pendency of the criminal proceeding in which it is issued. *People v Stone* (2004) 123 CA4th 153, 159–160.

B. [§3.2] LIMITING PRETRIAL DISCLOSURE OF WITNESS IDENTITY

Protecting the safety of witnesses is an important obligation of the courts. To this end, the court has broad discretion to deny, restrict, or defer disclosure of a witness's identity *before* trial on a showing of good cause. See Pen C §1054.7. "Good cause" is defined as "threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." Pen C §1054.7. The court may also limit pretrial disclosure of the identity of victims or witnesses to protect them from harassment. See Pen C §1054(d). For example, in *Alvarado v Superior Court* (2000) 23 C4th 1121, the Court held that "[i]n view of the circumstances of the offense—a jailhouse murder with likely prison gang involvement and crucial prosecution witnesses who themselves were jailhouse inmates and thus particularly vulnerable to threats, coercion, or violent acts of other inmates, the trial court clearly had discretion to permit the prosecution to withhold pretrial disclosure of the witnesses' names and photographs." 23 C4th at 1136. To protect a witness's safety, the court may restrict pretrial disclosure to defense counsel and ancillary personnel. 23 C4th at 1149–1150. In *Montez v Superior Court* (1992) 5 CA4th 763, the prosecution demonstrated a sufficient danger of threats or harm to eyewitnesses to a murder by gang members. The witnesses had been harassed by the defendants' gang associates, and they feared further harassment from these individuals and other members of the gang. The court concluded that disclosure of the witnesses' identity could be deferred, particularly given the allegations concerning the defendants' affiliations with violent criminal gangs. 5 CA4th at 764, 770–771. The showing of "good cause" may be made in camera, and if relief from disclosure is granted, the entire record of the hearing must be sealed. Pen C §1054.7.

Once identity information is disclosed, the court may not restrict defense counsel from contacting and interviewing a victim or witness absent evidence of harassment, threats, or danger to the victim or witness. *Reid v Superior Court* (1997) 55 CA4th 1326, 1335 (restriction on pretrial contact was not warranted merely based on the victims' declarations that they were afraid and that the contact would embarrass them or invade their privacy).

The identity of the prosecution's witnesses may not be *permanently* withheld from the defense, however, nor may a witness testify anonymously. *Alvarado v Superior Court, supra*, 23 C4th at 1146–1149. The names of witnesses, even if believed to be endangered, must be disclosed at trial. When a witness is crucial to the prosecution's case, the identity of the witness must be made available to the defendant to enable the defendant to conduct an effective cross-examination. 23 C4th at 1146–1147, 1151–1152.

☛ JUDICIAL TIPS:

- If the court finds good cause to withhold the addresses and telephone numbers of witnesses before the trial begins to protect them from danger and harassment, the court may, as in *Montez v Superior Court, supra*, fashion an alternative discovery procedure whereby the prosecution is ordered to provide the witnesses to the defense for interviews, and the witnesses

are instructed to appear for such interview at the office of the prosecution, the office of the defense, the police department, or such location as is agreed upon by the parties.

- The court may consider ordering the disclosure of witness names to one individual in the public defender's office solely for the purpose of running conflict checks in order to avoid learning about conflicts on the eve of or during trial.

C. [§3.3] Conditional Examination of Witness

When there is evidence that a witness's life is in jeopardy, the defendant or the prosecutor may apply for an order that this witness be examined conditionally. Pen C §1336(b). See *People v Jurado* (2006) 38 C4th 72, 113–115. The defendant or the prosecutor may contest the application. Pen C §1341. The attendance of the witness at the conditional examination may be enforced by a subpoena. Pen C §1342. The defendant has the right to be present at the examination. Pen C §1340. The examination must be transcribed and may also be video-recorded. Pen C §1343. The transcript of the testimony of a witness conditionally examined and subject to both direct and cross-examination may be read in evidence, or the video-recording may be shown, by either party at trial if the court finds that the witness is unavailable as a witness within the meaning of Evid C §240. Pen C §1345.

D. [§3.4] Closing Courtroom During Examination of Witness

The court has broad discretion to control courtroom proceedings in a manner directed toward promoting the safety of witnesses. On the prosecution's motion, the court may close the examination of a witness whose life would be subject to a substantial risk in appearing before the general public and when no alternative security measures, including efforts to conceal the witness's features or physical description, searches of members of the public attending the examination, or the temporary exclusion of other actual or potential witnesses, would be adequate to minimize the perceived threat. Pen C §868.7(a)(2). The California Supreme Court has noted that among the "overriding interests" that may justify closure of a courtroom is the protection of witnesses from intimidation. *NBC Subsidiary (KNBC-TV), Inc. v Superior Court* (1999) 20 C4th 1178, 1222 n46.

The court also has general authority, on motion of either party, to exclude all potential and actual witnesses from the courtroom (Pen C §867) and to exclude the public on the defendant's request and on finding that the public's exclusion is necessary to protect the defendant's right to a fair and impartial trial (Pen C §868).

The court may also exclude, based on a witness's safety concerns, select supporters of the accused during the examination of that witness. In *People v Esquibel* (2008) 166 CA4th 539, the trial court, in a gang-related case, excluded from the courtroom two friends of the defendant during the examination of a child witness. There was no evidence of any intimidation by the spectators, precluding application of Pen C §686.2 (see §3.5). The spectators were excluded solely on the concerns of the witness's mother for the safety of her child. The court of appeal held that the exclusion, based on these facts of the case, did not violate the defendant's constitutional right to a public trial. 166 CA4th at 550–554. The court warned trial courts to proceed with caution in this area, advising that the exclusion of a nondisruptive spectator in a criminal trial should never be undertaken without a full evaluation of the necessity for the exclusion and the alternatives that might be taken. 166 CA4th at 556.

E. [§3.5] Removal of Intimidating Spectator From Courtroom

The court may order removal of any spectator who is intimidating a witness after holding a hearing and finding all of the following by clear and convincing evidence (Pen C §686.2):

- The spectator is actually engaging in intimidation of the witness.
- The witness will not be able to give full, free, and complete testimony unless the spectator is removed.
- Removal of the spectator is the only reasonable means of ensuring that the witness may give full, free, and complete testimony.

☛ **JUDICIAL TIP:** It is particularly helpful in a gang case to make sure courtroom security personnel become aware of the identities of spectators. In some cases, rival gang members may appear and might have to be seated separately. In other cases, the bailiff can keep a watchful eye out for intimidation of a witness by a spectator, sometimes referred to as "mad-dogging," and if this occurs, the bailiff can report back what is observed.

F. [§3.6] Crimes Against Witnesses

A person may be prosecuted for the following behavior:

- Attempting to prevent or dissuade a witness or victim from testifying. Pen C §136.1.
- Attempting by force or threat of force to induce a witness to give false testimony or to withhold material information. Pen C §137.
- Giving or offering a witness a bribe not to testify. Pen C §138.
- Threatening a witness or victim with the use of force or violence on the witness or victim (or their immediate family). Pen C §§139, 140.

II. ADMITTING EVIDENCE OF WITNESS INTIMIDATION

A. [§3.7] To Show Defendant's Consciousness of Guilt

Evidence of an attempt by a third person to suppress a witness's testimony is inadmissible against the defendant if the attempt did not occur in the defendant's presence. However, if the defendant authorized the attempt, evidence of this conduct *is* admissible against the defendant. *People v Williams* (1997) 16 C4th 153, 200. As a prerequisite for admitting such evidence, it must be shown that the defendant had more than a "mere opportunity" to authorize a third person to attempt to influence the witness. Evidence of intimidation of a witness by or on the defendant's behalf is admissible on the theory that this evidence is relevant to show consciousness of guilt. 16 C4th at 201. A defendant's statement of an intention to arrange for suppression of a witness's evidence is admissible to prove consciousness of guilt, because evidence of an intent to do a particular thing leads to an inference that the conduct was actually undertaken. 16 C4th at 205–206. The jury may also consider the defendant's intimidation of a witness as an aggravating factor in the penalty phase of a death penalty trial. 16 C4th at 244–248.

B. [§3.8] To Show Witness's State of Mind

Evidence that a witness is afraid of testifying or is fearful of retaliation is relevant to the issue of the witness's credibility and therefore may be admissible. *People v Burgener* (2003) 29

C4th 833, 869–870 (witness's testimony that she had been afraid to tell the truth because of threats defendant had made against her and her children was admissible because threats explained why her prior testimony differed from her current testimony); *People v Williams* (1997) 16 C4th 153, 211 (witness's testimony that she was afraid for her life at preliminary hearing was relevant to issue of her credibility, as it explained inconsistencies between her testimony at preliminary hearing and at trial). See Evid C §780(j) (jury may consider witness's attitude toward action in which witness is testifying or toward giving of testimony).

There is no requirement that the threats be corroborated before they may be admitted to reflect on the witness's credibility. *People v Burgener, supra,* 29 C4th at 869–870 (fact that individual who told witness of defendant's threats against her was dead did not affect admissibility of witness's testimony regarding threats).

It is also not necessary to show that threats against the witness were made by the defendant personally, or that the witness's fear of retaliation is directly linked to the defendant, for the evidence to be admissible. *People v Olguin* (1994) 31 CA4th 1355, 1368, overruled on other grounds in 24 C4th 889, 901 n3. Evidence of a third person's intimidation of a witness may be admitted for the limited purpose of showing the witness's state of mind, attitude, actions, bias, or prejudice, without proof that the defendant authorized the intimidation. 31 CA4th at 1367–1369. For example, a witness's testimony that she had been told by others that if she went to the police she would end up "just like [the murdered victim]" was properly admitted for the nonhearsay purpose of showing why she had not come forward sooner. *People v Sapp* (2003) 31 C4th 240, 280–281. See *People v Sanchez* (1997) 58 CA4th 1435, 1450 (witness's testimony that he initially lied to detectives because he "was afraid of what might happen" after being threatened by defendant's fellow gang members was admissible to assist jury in determining when witness was in fact telling the truth).

The fact that a witness is testifying despite fear of recrimination is important to fully evaluating credibility. Such a witness may be more credible because of a personal stake in the testimony. *People v Olguin, supra,* 31 CA4th at 1368–1369. The jurors are entitled to know not just that the witness was afraid, but also, within the limits of Evid C §352, the facts that will enable them to evaluate the witness's fear. *People v Burgener, supra,* 29 C4th at 869; *People v Olguin, supra,* 31 CA4th at 1369.

When such testimony is admitted, the court should instruct the jury on the limited purpose of this evidence, *i.e.,* it is not offered for its truth, but to show the witness's state of mind. *People v Burgener, supra,* 29 C4th at 870.

III. ENSURING WITNESS APPEARANCE AT TRIAL

A. [§3.9] "REASONABLE DILIGENCE" REQUIREMENT

Recognizing that witnesses may be fearful of testifying against a defendant who is a gang member, the prosecution must exercise "reasonable diligence" in ensuring the witnesses' appearance at trial. If the court finds the prosecution has exercised "reasonable diligence" to locate the missing witnesses but has been unable to do so, the court may find that these witnesses are "unavailable" within the meaning of Evid C §240(a)(5) and admit the transcript of their testimony at the preliminary hearing as prior recorded testimony under Evid C §1291. *People v Beyea* (1974) 38 CA3d 176, 190–192, disapproved on other grounds in 52 C4th 769, 808.

Although Evid C §240(a)(5) refers to "reasonable diligence," the evaluation has often been as one involving "due diligence." Due diligence "connotes persevering application, untiring

efforts in good earnest, efforts of a substantial character." *People v Fuiava* (2012) 53 C4th 622, 675. Relevant considerations include whether the search was timely begun, the importance of the witness's testimony, and whether leads were competently explored. *People v Fuiava, supra*. Due diligence is not limited to situations in which the prosecution is trying to find a witness who has gone missing. It also includes the duty to use reasonable means to prevent a present witness from becoming absent. *People v Roldan* (2012) 205 CA4th 969, 975–985 (prosecution's efforts to make a witness available for trial fell short of due diligence, when in light of the material witness's pending deportation, the prosecutor failed to seek the witness's detention as a material witness under Pen C §1332 (see §3.10) or pursue other judicial remedies to secure the witness; failed to videotape the witness's preliminary hearing testimony, knowing the witness was to be deported following the hearing; and failed to notify the defense of the pending deportation).

The "reasonable diligence" requirement is also imposed on the defense with respect to its witnesses. See *People v Price* (1991) 1 C4th 324, 423–424 (prior testimony of defense witness was not admissible under Evid C §§240(a)(5) and 1291, when defense counsel did not exercise due diligence to procure witness's attendance at trial).

The failure of a material witness who has been subpoenaed to appear at trial may constitute good cause under Pen C §1382 to continue the trial. *Gaines v Municipal Court* (1980) 101 CA3d 556, 560.

B. [§3.10] MATERIAL WITNESS BOND

If the court is satisfied, by proof on oath, that there is good cause to believe that any material witness for the prosecution or the defense will not appear and testify at trial unless security is required, the court may order the witness to enter into a written undertaking to appear and testify at the time and place ordered by the court or forfeit an amount deemed proper. Pen C §1332(a). The statute applies to minor witnesses as well as adults. Although service of a subpoena is the preferred method for obtaining a witness's attendance, the procedure set forth in Pen C §1332 is available for the unusual case in which typical compulsory process is inadequate. *In re Francisco M.* (2001) 86 CA4th 1061, 1074. Evidence that a witness is avoiding service or that the witness will not appear if served may supply "good cause" to believe the witness will not appear and testify unless security is required. Although a witness's prior disobedience to a subpoena may be an important factor in determining whether the witness is likely to appear at trial, this is not a prerequisite to invoking the procedure set forth in Pen C §1332. 86 CA4th at 1074.

By its terms, Pen C §1332(a) contemplates an initial hearing at which the witness is entitled to notice of the basis on which detention is sought. 86 CA4th at 1076. At this hearing, the witness should have counsel, either retained or appointed, and must be afforded the opportunity to controvert the allegations seeking the detention and to be heard on all relevant issues, including whether the witness will agree to return if released and whether other alternatives to incarceration in place of security are feasible and adequate. The court has discretion to limit the form and manner of proof as appropriate to the particular case. 86 CA4th at 1076. Factors that may be considered include (86 CA4th at 1076–1079):

- The nature and seriousness of the charges.
- The nature and importance of the witness's proposed testimony.
- The length of the proposed detention.
- Evidence relevant to whether the witness will or will not appear and testify.

- The age and maturity of the witness.
- The harm to the witness and the witness's family resulting from incarceration.
- The witness's financial resources.
- The circumstances of any continuance of the case that will prolong the witness's incarceration.
- Whether steps short of incarceration are feasible and adequate to protect the interests of the prosecution, the defendant, and the witness.

If the witness refuses to comply with the order to enter into a written undertaking, the court may commit the witness to the sheriff's custody until the witness complies or is legally discharged. Pen C §1332(b). The witness is entitled to an automatic review of the order by another judge within 2 days of the order (Pen C §1332(c)), and is entitled to a review of the order every 10 days while in custody (Pen C §1332(d)). At these times, the court should consider any relevant change in circumstances in determining whether to continue the detention, including whether the witness has credibly changed his or her attitude about appearing at trial or about accepting an alternative to custody. 86 CA4th at 1079.

IV. ADMITTING PRIOR TESTIMONY OF WITNESS

A. [§3.11] When Witness Refuses to Testify

When a witness refuses to testify at trial due to fear, the prosecution may seek to offer the witness's prior testimony under Evid C §1291, which requires that the witness be "unavailable" to testify. A mental state of fear may constitute a "mental illness or infirmity" within the meaning of Evid C §240(a)(3). *People v Rojas* (1975) 15 C3d 540, 547–552. See *People v Francis* (1988) 200 CA3d 579, 587–588 (witness who is physically available yet refuses to testify, after court has used all available means to coerce testimony, is "unavailable").

B. [§3.12] When Witness Claims Lack of Memory

A witness's testimony about not remembering a certain event is not generally considered inconsistent with the witness's prior statement describing the event. However, when a witness's claimed lack of memory amounts to deliberate evasion, inconsistency is implied and the statement is admissible not only as impeachment, but as the truth of the matter stated on that former occasion. *People v Ervin* (2000) 22 C4th 48, 84.

V. ADMITTING SWORN STATEMENT OF DECEASED WITNESS

A. [§3.13] Requirements for Admissibility

Evidence of a prior statement made by a deceased witness that relates to acts or events that are relevant to a criminal prosecution under the STEP Act is not made inadmissible by the hearsay rule as long as the proponent establishes each of the following (Evid C §1231(a)–(e)):

- The statement relates to acts or events within the witness's personal knowledge.
- The statement was made under oath or affirmation in an affidavit, or was made at a deposition, preliminary hearing, grand jury hearing, or other proceeding in compliance with law and was made under penalty of perjury. The oath may have been administered by a peace officer. Evid C §1231.2.

- A verbatim transcript, copy, or record of the statement exists. A record may include a statement preserved by means of an audio or video-recording, or equivalent technology.
- The witness died from other than natural causes.

The proponent of the statement must also establish that the statement was made under circumstances that would indicate its trustworthiness and render the witness's statement particularly worthy of belief. Circumstances relevant to the issue of trustworthiness include, but are not limited to, the following (Evid C §1231(f)):

- Whether the statement was made in contemplation of a pending or anticipated criminal or civil matter in which the declarant had an interest other than as a witness.
- Whether the witness had a bias or motive for fabricating the statement and the extent of any bias or motive.
- Whether the statement is corroborated by evidence other than statements that are admissible only under Evid C §1231.
- Whether the statement was a statement against the declarant's interest.

This exception to the hearsay rule may not withstand constitutional scrutiny in light of the United States Supreme Court's decision in *Crawford v Washington* (2004) 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177, holding that when testimonial statements are at issue, the only indicia of reliability sufficient to satisfy constitutional demands is confrontation.

B. [§3.14] PROCEDURAL REQUIREMENTS

A statement is admissible under Evid C §1231 only if the proponent of the statement makes known to the adverse party the intention to offer, and the particulars of, the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to meet the statement. Evid C §1231.1.

Any law enforcement officer who testifies as to any statement under Evid C §1231 must have 5 years of law enforcement experience or have completed a training course certified by the Commission on Peace Officer Standards and Training that includes training in the investigation and reporting of cases and testifying at preliminary hearings and trials. Evid C §1231.3.

If the prior statement is admitted, the jury may not be told that the witness died from other than natural causes, but may only be told that the witness is unavailable. Evid C §1231.4.

VI. [§3.15] OFFERING WITNESS IMMUNITY

In a felony prosecution, the prosecutor must make a formal application to the court to obtain immunity from prosecution for any witness. See Pen C §1324. Immunity may be granted only after a full hearing at which the court determines the necessity, materiality, and relevance of the proposed testimony. Pen C §1324. In a misdemeanor prosecution, a witness may obtain immunity by voluntarily agreeing to testify. See Pen C §1324.1. On the prosecutor's written request, the court must approve the witness's written agreement to testify, unless the court finds doing so would be clearly contrary to the public interest. Pen C §1324.1. An immunized witness cannot refuse to testify. *People v Cooke* (1993) 16 CA4th 1361, 1366. An immunized witness may also be prosecuted for perjury or contempt in answering or failing to answer questions in accordance with the order of immunity. Pen C §§1324, 1324.1.

There are two types of immunity: (1) *transactional immunity*, which prevents the witness from being prosecuted or subjected to penalty for any fact or act that required giving testimony

or producing evidence; and (2) *use immunity*, which only protects the witness from the use of that actual testimony or any evidence derived from that testimony. See *Kastigar v U.S.* (1972) 406 US 441, 453, 92 S Ct 1653, 32 L Ed 2d 212; *People v Cooke, supra,* 16 CA4th at 1366. Use immunity does not protect the witness from prosecution, but merely prevents a prosecutor from using the witness's immunized testimony against the witness. Use immunity affords sufficient protection to overcome a witness's Fifth Amendment claim of privilege; transactional immunity is not constitutionally required. *Kastigar v U.S., supra,* 406 US at 453. Transactional immunity may only be granted on the prosecutor's request. Pen C §1324; *People v Cooke, supra,* 16 CA4th at 1366–1367. It is not within the court's power to grant transactional immunity to any witness. 16 CA4th at 1367.

Chapter 4
JURY ISSUES

I. [§4.1] EXPLORING POSSIBLE BIAS ON VOIR DIRE

The court should ensure that the examination of prospective jurors on voir dire is sufficient to disclose any bias the jurors might have toward gangs and their members. See *People v Price* (1991) 1 C4th 324, 397–398; *People v Beyea* (1974) 38 CA3d 176, 195, disapproved on other grounds in 52 C4th 769, 808. If there has been media coverage of the case, including the fact that the defendant is a member of a gang, the prospective jurors should also be examined as to whether they have read or heard about the case. *People v Beyea, supra*.

During voir dire in a gang-related case, the court should determine:

- The jurors' familiarity and personal experience with gangs.
- If a juror's bias against gangs will prevent the juror from presuming that the defendant is innocent.
- If a juror's bias against gangs will automatically prevent the juror from considering the witnesses' testimony.
- If the jurors are afraid. If so, the court should take steps to put the jurors at ease.

☛ **JUDICIAL TIPS**:

- The court may ease jurors' fears by advising jurors that the court will take measures to protect their identities (see §4.3), that there is no history in their community of retribution against jurors, and that they should notify the court immediately if they have concerns over their personal safety.

- The court may want to resolve the admissibility of gang evidence before jury selection so that, if gang evidence is to be admitted, the court can include it in voir dire, to minimize the chance of undue prejudice.

II. [§4.2] VOIR DIRE QUESTIONS

Admissible gang evidence is not limited to a particular crime or set of circumstances. For example, it may be as relevant to a drug sales case as to a drive-by shooting. Even if participation in a criminal street gang (Pen C §186.22(a)) is charged, there will undoubtedly be another charge involving the underlying felony. Thus, the suggested voir dire questions are intended to be used as a supplement to questions relevant to the charges, the circumstances of the case, and those set forth in the Cal Rules of Ct, Standards of J Admin §4.30.

Questions regarding gang witnesses are often helpful because in gang-related cases, victims and witnesses are often members of a gang. Also, if the prosecution intends to present evidence that the defendant is a gang member and the defendant decides to testify, it is important to know whether the gang membership evidence will prevent the juror from keeping an open mind.

Questions regarding witnesses:

I will instruct you that you are to judge each witness by the same standards regardless of who the witness may be, and I will provide you with suggestions on what types of factors you may consider in determining the believability of a witness. Is there anyone who believes that they will not give full consideration to the testimony of each witness and judge each witness by the same standards?

If a witness is from a lifestyle different than your own, will you be able to keep an open mind?

There may be one or more witnesses in this case who are presently in custody. If a witness is in custody, will that fact alone prevent you from keeping an open mind and giving full consideration to his or her testimony?

Will you automatically disregard the testimony of a witness if the evidence shows that he or she is a member of or associated with a gang?

Will you be biased against a party that calls a gang member as a witness?

Questions regarding jurors' familiarity with gangs:

One of the allegations that the prosecution has charged is that the defendant committed the charged crimes for the benefit of or in association with a "criminal street gang." [*For Pen C §186.22(a) charge:* One of the charges in this case includes as an element that the defendant was an active participant in a "criminal street gang."] There may be evidence presented that a witness is a member of a gang. There may also be evidence presented that the defendant is a member of a gang. Have any of you had personal experiences with members of a gang?

Do you have any knowledge or expertise regarding any particular gangs?

Have you read any articles or seen any TV shows regarding law enforcement problems with gangs?

Questions regarding jurors' ability to be fair and presume defendant innocent:

Can you be fair in a gang case? (*Follow up:* If I were to take a poll of the other jurors, how many of them do you think would like to see more street gangs actively involved in your neighborhood? As a society, we have already made decisions collectively about gang crimes. We do not expect jurors to be neutral or to have no opinions. We just expect jurors to render their verdict based upon the

evidence, to keep an open mind, and to be fair. Would you be unfair to either party because of your feelings about gangs?)

Will you presume the defendant innocent if the evidence shows that he is a member of a gang?

Questions regarding jurors' fear of serving:

Do any of you have any fear of serving on a case involving gang evidence? (*Follow up:* We have excellent security in the courtroom and throughout the courthouse. After the verdict, all juror-identifying information is sealed. Do you believe you can keep an open mind? If you are selected as a juror, will your feelings bias you against either party?)

Question regarding expert witnesses:

In this case, individuals with particular training and experience may be called to testify as experts in particular subjects, for example, gangs. It is up to the jury to determine, after hearing the training and experience of the witness and the basis of his or her opinions, what weight to give this evidence. Is there anyone who will not give full consideration to the testimony of an expert witness?

III. PROTECTING JURORS

A. [§4.3] AUTHORITY TO PROTECT JURORS

A court has inherent, as well as statutory, power to protect the safety and privacy of jurors. *Townsel v Superior Court* (1999) 20 C4th 1084, 1091, 1085. See, *e.g.,* CCP §237(a)(2) (following verdict, court's record of jurors' personal identifying information must be sealed until further court order). For example, to protect the identity of the jurors, they may be referred to in court by their juror identification numbers rather than by name, as long as the court and counsel have a list with the jurors' names and corresponding identification numbers available to them. *People v Goodwin* (1997) 59 CA4th 1084, 1089–1091.

B. [§4.4] CRIMES AGAINST JURORS

A person may be prosecuted for the following:

- Giving or offering a bribe to a juror. Pen C §92.
- Attempting to influence a juror with respect to the verdict. Pen C §95.
- Threatening a juror following the verdict. Pen C §95.1.
- Assaulting a juror. Pen C §241.7.
- Committing battery on a juror. Pen C §243.7.

In addition, any defendant, defense counsel, or prosecutor who engages in unreasonable contact with a juror may be found in violation of a lawful court order and subject to monetary sanctions. CCP §206(d), (e).

IV. [§4.5] SPECTATOR MISCONDUCT

A spectator's misconduct in making comments in front of the jury about the defendant's guilt or innocence is grounds for a mistrial only if the misconduct prejudices or influences the jury. In most cases, the court can avert possible juror prejudice by admonishing the jury to

disregard the comments and not to let them influence the verdict. *People v Miranda* (1987) 44 C3d 57, 113–114.

V. [§4.6] COMMENTING TO JURY ON DEFENDANT'S GANG MEMBERSHIP

It is not improper for the prosecution to comment on the defendant's gang membership during the penalty phase of a death penalty trial if the evidence suggests that the murder the defendant has been convicted of was committed by the defendant's gang. The defendant's membership in that gang is one of the "circumstances of the crime" under Pen C §190.3(a), which the jury may consider in aggravation. *People v Champion* (1995) 9 C4th 879, 942–943.

However, in *People v Beyea* (1974) 38 CA3d 176, 196, disapproved on other grounds in 52 C4th 769, 808, a prosecutor's comparison of the defendants' actions to those of Hitler's Brown Shirts, Mussolini's people in Italy, Tojo's people in Japan, and the Ku Klux Klan overstepped the permissible bounds of fair comment. The reference to the defendants' gang membership was admissible only for the narrow purpose of showing their identity and motive. As a result, the prosecutor's remarks were unnecessary and improper.

VI. JURY INSTRUCTIONS

A. [§4.7] LIMITING INSTRUCTION

The court must give the jury a limiting instruction on the purpose for which it may consider evidence of the defendant's gang affiliation if the defendant requests such an instruction. *People v Hernandez* (2004) 33 C4th 1040, 1044, 1051–1052. However, there is no sua sponte duty to give a limiting instruction. *People v Woods* (1991) 226 CA3d 1037, 1053.

A limiting instruction to the jury in a case without a gang allegation might be stated as follows:

Example 1:

> Evidence that the defendant was a member of a gang was admitted only as circumstantial evidence of [motive] [intent] [the identity of the perpetrator]. This evidence may not be used for any other purpose. Gang membership in and of itself is not evidence of guilt.

Example 2:

> Evidence has been introduced that the defendant is a member of a particular gang. Such evidence, if believed, was not received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:
>
> - The identity and motive of the person who committed the crimes, if any, of which the defendant is accused.
> - The existence or nonexistence of a bias or interest of any witness.
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purpose. (See *People v Contreras* (1983) 144 CA3d 749, 755 n2).

When the prosecution has introduced evidence for the purpose of showing criminal street gang activities and criminal acts by gang members other than the crime for which defendant is

charged, such as the predicate acts that are an element of Pen C §186.22(a) and (b), the court may use the limiting instruction in CALCRIM 1403 or CALJIC 17.24.3. Use of CALJIC 17.24.3 is appropriate when the trial of the gang enhancement has not been bifurcated and when the court has not instructed under CALJIC 2.50 (Evidence of Other Crimes). See Use Note to CALJIC 17.24.3.

B. [§4.8] PARTICIPATION IN CRIMINAL STREET GANG INSTRUCTION

The court has a sua sponte duty to give an instruction defining the elements of the crime of participation in a criminal street gang. CALCRIM 1400 or CALJIC 6.50 may be used for this purpose.

C. [§4.9] GANG ENHANCEMENT INSTRUCTION

The court has a sua sponte duty to instruct the jury on each of the elements of the gang sentencing enhancement under Pen C §186.22(b)(1). *People v Sengpadychith* (2001) 26 C4th 316, 320, 327.

CALCRIM 1401 or CALJIC 17.24.2 may be used for this purpose.

D. [§4.10] ACTIVE GANG PARTICIPANT CARRYING FIREARM INSTRUCTION

The court has a sua sponte duty to define the elements of the crime of carrying a loaded firearm in public when the offense is committed by an active participant in a criminal street gang. Pen C §§25850(a), (c)(3); *People v Sengpadychith* (2001) 26 C4th 316, 320, 327. CALCRIM 2542 or CALJIC 12.54.1 may be used for this purpose. CALCRIM 2542 or CALJIC 12.46.1, 12.47.1, and 12.47.6 may be used to instruct the jury on the elements of carrying a concealed firearm when the offense is committed by an active participant in a criminal street gang. Pen C §25400(a), (c)(3).

E. [§4.11] SPECIAL CIRCUMSTANCE INSTRUCTION

CALCRIM 736 or CALJIC 8.81.22 may be used to instruct the jury on the "special circumstance" of an intentional killing carried out to further the activities of a criminal street gang. See Pen C §190.2(a)(22).

Chapter 5
COURTROOM SECURITY

I. USE OF PHYSICAL RESTRAINTS

A. [§5.1] SHOWING OF "MANIFEST NEED"

A defendant may be physically restrained at trial only as a last resort and only on a showing on the record of manifest need. *People v Price* (1991) 1 C4th 324, 403. In *Price*, the Supreme Court upheld the trial judge's order that during all court proceedings, the defendant, a member of the Aryan Brotherhood, would be secured to his chair in the courtroom by a single belly chain that would not be visible to the jury. The judge issued the order based on evidence that the defendant had committed multiple acts and threats of violence against officers at the jail or while being transported to court, and that he was having increasing difficulty in controlling his violent impulses. Based on this evidence, the judge had sufficient grounds for concluding that, unless restrained physically, the defendant would resort to violence in the courtroom if he became irritated or frustrated with the proceedings. 1 C4th at 403–404.

In general, "manifest need" for restraint requires a showing of unruliness, an announced intention to escape, or evidence of any nonconforming conduct or planned nonconforming conduct that disrupts or would disrupt the judicial process if the defendant were not restrained. The record must reflect the violence, threat of violence, or other nonconforming conduct by the defendant that demonstrates the need for restraint. *People v Seaton* (2001) 26 C4th 598, 651 (facts that the defendant was charged with a violent crime and that the courthouse layout was inherently insecure did not provide sufficient showing). See *People v Duran* (1976) 16 C3d 282, 290–291 (citing examples of "manifest need"). See also *People v Hawkins* (1995) 10 C4th 920, 943–944 (trial court's use of restraints upheld when there were multiple instances of violent and nonconforming jailhouse behavior by defendant, and the defendant had an extensive background of criminal and violent activity). This showing must be made with respect to all types of physical restraints, including handcuffs, shackles, manacles, and leg irons. *People v Duran, supra,* 16 C3d at 288 n5. Moreover, a showing of manifest need is required even when the device used to restrain the defendant is one that does not directly restrain physical movement and cannot easily be seen by jurors, such as a stun belt. *People v Howard* (2010) 51 C4th 15, 27–30; *People v Lomax* (2010) 49 C4th 530, 558–562. The trial court must also consider the special risks posed by the use of a device such as a stun belt before authorizing its use.

The court must make the decision to use physical restraints on a case-by-case basis; a court may not adopt a general policy of imposing such restraints on specified types of defendants. *People v Duran, supra*, 16 C3d at 293. Moreover, the court, not law enforcement personnel, must make the decision as to whether there is a manifest need for physical restraints. *People v Hill* (1998) 17 C4th 800, 841 (court abuses its discretion if it abdicates this decision-making responsibility to security personnel or law enforcement). In addition, although the prosecutor may bring matters that bear on the issue of restraining the defendant to the court's attention, it is the court's duty, not the prosecutor's, to initiate whatever procedures it deems necessary to make a due process determination that restraints are necessary. *People v Duran, supra,* 16 C3d at 293 n12.

The rules applicable to the shackling of defendants also apply to defense witnesses, although the prejudicial effect of shackling defense witnesses is less consequential because they are not on trial. 16 C3d at 288 n4.

A defendant cannot be shackled at a preliminary hearing absent some showing of necessity for the use of physical restraints, however, a lesser showing than that required at trial is appropriate. *People v Fierro* (1991) 1 C4th 173, 220. The *Fierro* court stated that "while the dangers of unwarranted shackling at the preliminary hearing are real, they are not as substantial as those presented during trial." The *Fierro* court did not have to address this lesser showing because the trial court in that case failed to state any reasons for the shackling of the defendant in the court record, clearly an abuse of the trial court's discretion in shackling the defendant. *People v Fierro*, *supra*. In *Deck v Missouri* (2005) 544 US 622, 626, 125 S Ct 2007, 161 L Ed 2d 953, the United States Supreme Court recognized that the rule that a defendant may not be shackled absent an individualized showing of need "has deep roots in the common law." However, the court noted in dicta that the rule "did not apply at the 'time of arraignment', or like proceedings before the judge." The Court concluded that the rule is meant to protect defendants appearing at trial before a jury. The Ninth Circuit Court of Appeals has upheld the policy of shackling defendants at their first appearance before a magistrate without an individual showing of need. *U.S. v Howard* (2007) 480 F3d 1005, 1012–1014. *Howard* held that no individualized showing was necessary to shackle defendants at federal pre-trial proceedings because "the policy at issue concerns only proceedings conducted without the presence of a jury." 480 F3d at 1014.

B. [§5.2] TYPE OF RESTRAINTS

If physical restraints are ordered, the restraints used must be as unobtrusive as possible, although as effective as necessary given the circumstances. The court has discretion to order the physical restraint that is most suitable for a particular defendant. *People v Duran* (1976) 16 C3d 282, 291.

C. [§5.3] INSTRUCTIONS TO JURY

If the restraints are visible, the court must instruct the jury, on its own motion, that the restraints should have no bearing on the determination of the defendant's guilt. *People v Duran* (1976) 16 C3d 282, 291–292. See CALCRIM 204 and CALJIC 1.04. When the restraints are concealed from the jury's view, the court need not instruct the jury that it should not be biased against the defendant because of the restraints, unless the defendant specifically requests such an instruction. This instruction should not be given unless requested because it might invite

attention to the restraints and thus create prejudice that would otherwise be avoided. *People v Cox* (1991) 53 C3d 618, 655, disapproved on other grounds in 45 C4th 390, 421 n22.

D. [§5.4] ALTERNATIVE TO RESTRAINTS

Instead of physically restraining the defendant, a bailiff may stand near the defendant while the defendant is on the stand if such a measure is deemed necessary to ensure safety in the courtroom. See *People v Marks* (2003) 31 C4th 197, 222–224 (approving such a procedure in this case based on the defendant's history of violence in the courtroom and the proximity of the witness stand to the jury box). Such monitoring does not require a showing of "manifest need." 31 C4th at 223–224.

II. [§5.5] PROVIDING ADDITIONAL SECURITY

The court has broad authority to maintain courtroom security and orderly proceedings. CCP §128(a)(3); *People v Hayes* (1999) 21 C4th 1211, 1269. The court may have a duty to provide extra security in the courtroom, *e.g.,* when a large number of the defendant's fellow gang members attend the trial. *People v Miranda* (1987) 44 C3d 57, 115. Neither due process nor any other constitutional right of a criminal defendant requires a hearing be held on the necessity for courtroom or courthouse security. *People v Hayes, supra,* 21 C4th at 1268.

The presence of armed guards in the courtroom need not be justified by the court or the prosecutor, unless these guards are present in unreasonable numbers. *People v Duran* (1976) 16 C3d 282, 291 n8. See *People v Jenkins* (2000) 22 C4th 900, 998–999 (no prejudice from occasional presence of one or two additional uniformed bailiffs). The United States Supreme Court has held that the use of identifiable security guards in the courtroom during a criminal trial is not inherently prejudicial. *Holbrook v Flynn* (1986) 475 US 560, 568–569, 106 S Ct 1340, 89 L Ed 2d 525. This is because the presence of guards at a defendant's trial need not be interpreted by the jurors as a sign that the defendant is particularly dangerous or culpable. Jurors may just as readily believe that the officers are present to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. It is entirely possible that the jurors will not infer anything from the guards' presence in the courtroom, because they are likely used to seeing armed guards in public places. *People v Hayes, supra,* 21 C4th at 1268.

The stationing of a courtroom deputy next to a testifying defendant is not an inherently prejudicial practice that must be justified by a showing of manifest need. *People v Stevens* (2009) 47 C4th 625, 638. The trial court must exercise its discretion and determine on a case-by-case basis whether this heightened security is appropriate. 47 C4th at 642. See also *People v Hernandez* (2011) 51 C4th 733, 741–744.

III. [§5.6] OTHER SECURITY MEASURES

Other security measures that may be taken are:

- Screening all persons who enter the courtroom for weapons. See *People v Hayes* (1999) 21 C4th 1211, 1267–1269.
- Requiring all persons to pass through a metal detector on entering the courtroom. See *People v Ayala* (2000) 23 C4th 225, 252–253 (metal detector points to nature of case, not

to defendant's character); *People v Jenkins* (2000) 22 C4th 900, 995–997 (no reflection on defendant's guilt or innocence need be inferred from use of metal detector).

- Making special arrangements for the jurors to enter and exit the courtroom through a private entrance to bypass the defendant's fellow gang members who are present in the courtroom. See *People v Miranda* (1987) 44 C3d 57, 115.

  ☛ **JUDICIAL TIP:** In the absence of special entrances and exits, the court may consider having the jurors take their breaks in the jury room to prevent them from having to pass the defendant's fellow gang members who are in the hall outside the courtroom.

- Temporarily closing the courtroom to additional spectators in view of the "unusual security risks" posed by the trial. See *People v Woodward* (1992) 4 C4th 376, 382–386.

- Closing the courtroom during the examination of a witness whose life would be subject to a substantial risk in appearing before the general public. See §3.4.

These security measures (unlike the use of physical restraints) are not inherently prejudicial to the defendant and thus need not be justified by compelling evidence of imminent threats to the security of the court. *People v Jenkins, supra,* 22 C4th at 997. The court need not hold a hearing before employing these measures, but may rely and act on the prosecutor's representations, as an officer of the court, that the trial poses certain risks. *People v Ayala, supra,* 23 C4th at 253.

Appendix A: Penal Code §186.22(b) Gang Allegation Summary

Prepared by Hon. Darrell Mavis and Hon. Gregory A. Dohi,
Superior Court of California, County of Los Angeles

People must prove:

1. The defendant committed (or attempted to commit) the crime for the benefit of, at the direction of, or in association with a **criminal street gang**.

2. The defendant intended to assist, further, or promote criminal conduct by gang members.

"Criminal street gang"—any ongoing organization, association, or group of three or more persons, whether formal or informal:

1. That has a **common name** or common identifying **sign or symbol**.

2. That has, as one or more of its **primary activities**, the commission of one or more crimes listed in Pen C §186.22(e)(1)–(25), (31)–(33).

3. Whose members, whether acting alone or together, engage/have engaged in a **pattern of criminal gang activity**.

"Primary activity"—one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group.

"Pattern of criminal gang activity" means:

1. The commission/attempted commission/conspiracy to commit/solicitation to commit/conviction of, or sustained juvenile petition for any combination of two or more of the following crimes (or two or more occurrences of one or more of the following crimes): Pen C §186.22(e)(1)–(25), (31)–(33).

   Note: If one or more of the crimes are in Pen C §186.22(e)(26)–(30), at least one of the crimes must also be from Pen C §186.22(e)(1)–(25), (31)–(33).

2. At least one of those crimes was committed after September 26, 1988.

3. Two of the crimes occurred within 3 years of each other.

4. Crimes were committed on separate occasions or were personally committed by two or more persons.

Notes:

The crimes establishing a pattern need not be gang-related.

The defendant does not have to be an active or current member of the alleged criminal street gang.

You may consider a charged crime in deciding whether one of the group's primary activities was commission of that crime and whether a pattern of criminal gang activity has been proved.

To find “a pattern of criminal gang activity” all jurors must agree that two or more crimes that satisfy the requirements were committed, but jurors do not have to all agree on which crimes were committed.

Appendix B: Participating in a Criminal Street Gang (Penal C § 186.22(a)) Summary

Prepared by Hon. Darrell Mavis and Hon. Gregory A. Dohi,
Superior Court of California, County of Los Angeles

People must prove:

1. The defendant **actively participated** in a **criminal street gang**

2. When the defendant participated in the gang, he or she knew that members of the gang engage in or have engaged in a **pattern of criminal gang activity**.

3. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by directly and actively committing a felony offense or by aiding and abetting a felony offense.

“Actively participated”—involvement with a criminal street gang in a way that is more than passive or in name only.

Notes:

The People do not have to prove that the defendant devoted all or a substantial part of his or her time or efforts to the gang, or that he or she was an actual member of the gang.

For definitions of “criminal street gang” and “pattern of criminal gang activity” see Appendix A: Penal Code §186.22(b) Gang Allegation Summary.

People do not have to prove that every perpetrator involved in the pattern of criminal gang activity was a member of the criminal street gang at the time such activity was taking place.

Appendix C: Predicate Offenses and Primary Activities

Prepared by Hon. Darrell Mavis and Hon. Gregory A. Dohi,
Superior Court of California, County of Los Angeles

Predicate Offenses and Primary Activities (Pen C §186.22(e)(1)–(25), (31)–(33))

- Assault with deadly weapon or by force likely to produce great bodily injury (Pen C §245)
- Robbery (Pen C §§211–214)
- Unlawful homicide or manslaughter (Pen C §§187–199)
- Sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture specified controlled substances (Health & S C §§11054–11058)
- Shooting at an inhabited dwelling or occupied motor vehicle (Pen C §246)
- Discharging or permitting the discharge of a firearm from a motor vehicle (Pen C §26100(a),(b))
- Arson (Pen C §§450–457.1)
- Intimidation of witnesses and victims (Pen C §136.1)
- Grand theft (Pen C §487(a), (c))
- Grand theft of any firearm, vehicle, trailer, or vessel (Pen C §487(a), (c)–(d))
- Burglary (Pen C §459)
- Rape (Pen C §261)
- Looting (Pen C §463)
- Money laundering (Pen C §186.10)
- Kidnapping (Pen C §207)
- Mayhem (Pen C §203)
- Aggravated mayhem (Pen C §205)
- Torture (Pen C §206)
- Felony extortion (Pen C §§518, 520)
- Felony vandalism (Pen C §594(b)(1))
- Carjacking (Pen C §215)
- Sale, delivery, or transfer of a firearm (Pen C §§27500–27590)
- Possession of pistol, revolver, or firearm capable of being concealed on person (Pen C §29610)
- Threats to commit crimes resulting in death or great bodily injury (Pen C §422)
- Theft and unlawful taking or driving of a vehicle (Veh C §10851)
- Prohibited possession of a firearm (Pen C §§29800–29875)
- Carrying a concealed firearm (Pen C §25400)
- Carrying a loaded firearm (Pen C §25850)

Predicate Offenses (Pen C §186.22(e)(26)–(30))

- Felony theft of an access card or account information (Pen C §484e)
- Counterfeiting, designing, using, or attempting to use an access card (Pen C §484f)
- Felony fraudulent use of an access card or account information (Pen C §484g)
- Unlawful use of personal identifying information to obtain credit, goods, services, or medical information (Pen C §530.5)
- Wrongfully obtaining Department of Motor Vehicles documentation (Pen C §529.7)

Appendix D: Petition for Review of Denial of Request to Remove Name From Gang Database

A person may petition the superior court to seek a review of a local law enforcement agency's denial of a request under Pen C §186.34 to remove a person's name from a shared gang database. Pen C §186.35. A shared gang database is defined as any database (1) accessed by a law enforcement agency that designates a person as a gang member or associate, or includes or points to information, including, but not limited to, fact-based or uncorroborated information, that reflects a designation of that person as a gang member or associate; and (2) is accessed by an agency or person outside of the agency that created the records that populate the database. Pen C §186.34((a)(2), (4). Appendix D

Petition. The petition may be brought by the person seeking review or by his or her attorney, or if the person is under 18 years of age, by his or her parent or guardian or an attorney on behalf of the parent or guardian. Pen C §186.35(a). The petition must be filed in either the superior court of the county in which the law enforcement agency is located or, if the person filing the petition is a California resident, in the county where the person resides. Pen C §186.35(b); Cal Rules of Ct 3.2300(d)(3). Filing must occur within 90 days calendar days of the law enforcement agency's mailing or personal service of the verification of its decision to deny the request for removal from the shared gang database or the date that the request is deemed denied under Pen C §186.34(e). Pen C §186.35(b); Cal Rules of Ct 3.2300(d)(2). A copy of the petition and any attachments must be served either personally or by mail on the law enforcement agency as provided in CCP §§1011–1013a within the same 90-day period. Proof of service must be filed in the superior court with the petition. Pen C §186.35(b); Cal Rules of Ct 3.2300(d)(5).

The petitioner seeking review must attach to the petition either (Cal Rules of Ct 3.2300(d)(1)(B)):

The law enforcement agency's written verification, if one was received, of its decision denying the person's request under Pen C §186.34 to remove his or her name or, if the request was filed by a parent or guardian on behalf of a child under 18, the name of the child from the shared gang database; or

If the law enforcement agency did not provide written verification responding to the person's request under Pen C §186.34(e) within 30 days of submission of the request, a copy of the request and written documentation submitted to the law enforcement agency contesting the designation.

Record. The law enforcement agency must serve the record on the person filing the petition and must file the record in the superior court in which the petition was filed within 15 days after the date the petition is served on the law enforcement agency. Cal Rules of Ct 3.2300(e)(1)(A)–(B). The contents of the record are limited to documents that support its decision to designate the person in shared gang database. Cal Rules of Ct 3.2300(e)(2). If the record contains any documents that are part of a juvenile case file or are confidential under Welf & I C §827 or have been sealed, the law enforcement agency must include a cover sheet providing notification of such documents in the record. Cal Rules of Ct 3.2300(e)(1)(C). The procedures set out in records Cal Rules of Ct 2.550 and 2.551 apply to any record sought to be filed under seal. Cal Rules of Ct 3.2300(e)(1)(D). If the law enforcement agency does not timely file the required record, the superior court clerk must serve the law enforcement agency with a notice indicating that the

agency must file the record within 5 court days of service of the clerk's notice or the court may order the law enforcement agency to remove the name of the person from the shared gang database. Cal Rules of Ct 3.2300(e)(4).

Written argument. The person filing the petition may include in the petition or separately serve and file a written argument explaining why, based on the record specified in Pen C §186.35(c), the law enforcement agency has failed to establish by clear and convincing evidence the gang membership, associate status, or affiliated status of the person so designated by the law enforcement agency in the shared gang database. Cal Rules of Ct 3.2300(f)(1)(A). The law enforcement agency may serve and file a written argument explaining why, based on the record specified in Pen C §186.35(c), it has established by clear and convincing evidence of the active gang membership, associate status, or affiliate status of the person. Cal Rules of Ct 3.2300(f)(1)(B). Except for any required attachment to a petition, when an argument is included in the petition, nothing may be attached to an argument and an argument must not refer to any evidence that is not in the record. Cal Rules of Ct 3.2300(f)(1)(D). Any written argument must be served and filed within 15 days after the law enforcement agency serves the record in the proceeding. Cal Rules of Ct 3.2300(f)(2).

Oral argument. The court may set the case for oral argument at the request of either party or on its own motion. Cal Rules of Ct 3.2300(g)(1). The person filing the petition or the law enforcement agency may request oral argument or inform the court that they do not want to participate in oral argument. Any such request for or waiver of oral argument must be served and filed within 15 days after the law enforcement agency serves the record in the proceeding. Cal Rules of Ct 3.2300(g)(2). If oral argument is set, the clerk must send notice at least 20 days before the oral argument date. The court may shorten the notice period for good cause; in that event, the clerk must immediately notify the parties by telephone or other expeditious method. Cal Rules of Ct 3.2300(g)(3). If the responding party indicates that the record contains information from a juvenile case file or documents that are sealed or confidential under Welf & I C §827, the argument must be closed to the public unless the crime charged allows for public access under Welf & I C §676. Cal Rules of Ct 3.2300(g)(4).

Decision. The evidentiary record for the court's determination of the petition is limited to the agency's statement of the basis of its designation of the person in the shared gang database made under Pen C §186.34(c) or (d), and to the documentation provided to the agency by the person contesting the designation under Pen C §186.34(e). Pen C §186.35(c); If, on de novo review and any arguments presented to the court, the court finds that the law enforcement agency has failed to establish by clear and convincing evidence the active gang membership, associate status, or affiliate status of the person so designated in the shared gang database, the court must order the law enforcement agency to remove the name of the person from the shared gang database. Pen C §186.35(d); Cal Rules of Ct 3.2300(h).

The court must serve on the Attorney General a copy of any order under Cal Rules of Ct 3.2300(e)(4) or (h) to remove a name from a shared gang database. Cal Rules of Ct 3.2300(i).

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