

California Criminal Street Gang Offenses and Enhancements

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[Note: these materials are adapted from an online outline which can be found at <http://www.fdap.org/gangs.shtml>. The online version contains hyperlinks to some of the statutory provisions, court decisions and court dockets.]

I. Introduction

The California Street Terrorism Enforcement and Prevention Act of 1988 (Cal. Pen. Code §186.20, et. seq.) ("The STEP Act"), created a substantive crime of being an active participant in a criminal street gang (§ 186.22(a)) and a [sentencing enhancement](#) for committing a felony for the benefit of a criminal street gang (§ 186.22(b)). [Proposition 21](#), enacted in 2000, added an alternative sentencing scheme for committing a felony or misdemeanor for the benefit of a criminal street gang (§ 186.22(d)). These provisions have been the subject of much litigation over the years. This article provides an outline of the several gang provisions and their elements, as well as some coverage of evidentiary issues. For additional research on evidentiary issues related to the admission of expert testimony on whether a defendant was a gang member and on whether an offense was committed for the benefit of a gang, consult the Sixth District Appellate Program's 2008 outline on [Challenging the Testimony of Gang Experts](#).

II. Constitutionality

- A. *STEP Act not unconstitutionally vague or overbroad*: "[O]ur STEP Act does not criminalize mere gang membership; rather, it imposes increased criminal penalties only when the criminal conduct is felonious and committed not only 'for the benefit of, at the direction of, or in association with' a group that meets the specific statutory conditions of a 'criminal street gang,' but also with the 'specific intent to promote, further, or assist in any criminal conduct by gang members.' (§ 186.22, subd. (b)(1).) These detailed requirements fully comport with due process." ([People v. Gardeley](#) (1996) 14 Cal.4th 605, 623-624, distinguishing [Lanzetta v. New Jersey](#) (1939) 306 U.S. 451.)
- B. Not so overboard or vague that it violates freedom of association or speech. ([People v. Gamez](#) (1991) 235 Cal.App.3d 957, 969-973, overruled on other grounds in [Gardeley](#), 14 Cal.4th at 624, fn.10.)

III. Definition of a "Criminal Street Gang"

The STEP Act, in subdivision (f), provides a unitary definition of "criminal street gang" to be used in its various provisions, including the substantive offense (subd. (a)) and the enhancement (subd. (b)). Subdivision (f) defines a "criminal street gang" as:

1. a group of three or more people;
2. having a **primary activity** of commission of one or more of the predicate crimes listed in paragraphs (1)-(25) and (31)-(33) of subdivision (e);
3. "having a common name or common identifying sign or symbol";
4. whose members engage in a **pattern of criminal gang activity**.

These terms are each explored further below.

A. "Any ongoing organization, association, or group of three or more persons, whether formal or informal."

To establish a gang exists, the prosecution must prove there is an "ongoing organization, association, or group of three or more persons, whether formal or informal." (§ 186.22, subd. (f).) This aspect of the gang definition has not been the subject of many published decisions. It appears that the "ongoing" nature of the group is simply established by satisfaction of the other elements of the gang definition, particularly the "pattern of criminal gang activity" element. (See e.g. *People v. Fiu* (2008) 165 Cal.App.4th 360, 388 (satisfaction of "pattern" element shows there was no "failure to demonstrate that the gang is an ongoing or continuing criminal enterprise rather than an 'off-again-on-again part-time organization'").)

B. Primary Activity

The prosecution must establish that the group has "a primary activity of commission of one or more of the predicate crimes listed in paragraphs (1)-(25) and (31)-(33) of subdivision (e)." (§ 186.22, subd. (f).)

1. *A chief or principal occupation*: "Primary activity" means "the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.)
2. *Consistent and repeated commission sufficient*: Proof that a "group's members consistently and repeatedly have committed criminal activity listed in the

gang statute" is sufficient to establish the gang's primary activity. (*Id.* at 324.)

3. *Occasional commission insufficient*: The occasional commission of crimes by the gang's members, however, is insufficient. (*Id.*)
4. *Past and current offenses considered*: The trier of fact may consider past offenses and the charged offenses in determining whether the primary activity element is satisfied. (*Id.* at 320, 323.)

C. Common name or common identifying sign or symbol

1. Sub-Group Cases

- a. Common use of name "Norteños" did not establish group as a street gang where expert testified that Norteño and Sureño are not the names of gangs and where individuals from a number of different Norteño cliques or gangs came together one day to attack Sureños. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 507-508.) "Under the circumstances, the questions of how such a diverse group, which, in [expert's] opinion, represented seven different Norteño gangs, could have been acting for the benefit of a street gang and whether the participants were doing so presented matters far beyond the common experience of the jury and justified expert testimony. (58 Cal.App.4th at 508-509.)
- b. Evidence of existence of gang sufficient, rejecting defendant's argument "the term 'Norteño' is merely the geographical identity of a number of local gangs with similar characteristics, but is not itself an entity." (*People v. Ortega* (2006) 145 Cal.App.4th 1344, 1355-1357 (noting, unlike *Valdez*, there was no testimony that Norteño was not the name of a gang).)
- c. Gang offense conviction and gang special circumstance finding reversed where evidence was sufficient to establish smaller group ("Small Town Peckerwoods") was a gang, but court could not determine whether jurors based verdicts solely on evidence of that group, "or also erroneously considered evidence related to some larger Peckerwood organization." (*People v. Williams* (2008) 167 Cal.App.4th 983, 985.) "[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." (*Id.* 167 Cal.App.4th at 988.)

2. Multiple Names: "The association of multiple names with a gang satisfies the statute's requirement so long as at least one name is common to the gang's members." (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1001.) In *Nathaniel C.*, the court held that the Name/Sign/Symbol element was satisfied where gang was known by two names and "there was graffiti which signified the gang, though no particular color or clothing was associated with gang membership." (*Nathaniel C.*, 228 Cal.App.3d at 1001.)

D. "Pattern of Criminal Gang Activity":

1. *Statutory Definitions*: The statute defines the "pattern of criminal gang activity" element in subdivisions (e) and (j). Subdivision (e) provides that a pattern is established by the commission of certain predicate offenses by members of the gang:
 - a. "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" offenses listed in paragraphs (1)-(33) of subdivision (e);
 - b. "at least one of these offenses occurred after the effective date of this chapter", i.e. after September 26, 1988;
 - c. "the last of those offenses occurred within three years after a prior offense"; and
 - d. "the offenses were committed on separate occasions, or by two or more persons."

Subdivision (j) adds that the pattern cannot be established solely by proof of offenses listed in (e)(26)-(30); those offenses can only serve as a predicate for the pattern when coupled with an offense in the (e)(1)-(25), (31)-(33) ranges.

2. *Case Law*

- a. The predicate offenses need not be gang related, but must have been committed by gang members. (*People v. Gardeley* (1996) 14 Cal.4th 605.)

- b. The two or more predicate offenses establishing the pattern can be shown by:
 - i. two prior offenses;
 - ii. one prior offense + the current offense (*Gardeley*, 14 Cal.4th at 625); or
 - iii. the current charged offense committed by the defendant and the contemporaneous commission of a second predicate offense by a fellow gang member (*People v. Louen* (1997) 17 Cal.4th 1, 10 (two predicates established by D's ADW on victim and fellow gang member's contemporaneous separate ADW on same victim)).
- c. Admission of D's own prior participation in an extortion racket to prove pattern of criminal gang activity not an abuse of discretion under section 352 of the Evidence Code. (*People v. Tran* (2009) 177 Cal.App.4th 138, 99 Cal.Rptr.3d 122 (there is nothing in [subdivision (e)] that indicates that the defendant himself cannot be one of the 'two or more persons' who must have committed 'two or more' of the list of 33 crimes"), **rev. gr.** Dec. 2, 2009, [S176923](#).)
- d. Two predicate offenses are *not* established by D's assault on victim combined with fellow gang member's contemporaneous aiding and abetting of that same assault. (*People v. Zermeno* (1999) 21 Cal.4th 927, 931.)
- e. An offense occurring after the date of the charged offense does not constitute a predicate offense. (*People v. Godinez* (1993) 17 Cal.App.4th 1363, 1370, disapproved on other grounds in *People v. Russo* (2001) 25 Cal.4th 1124, 1134.)

IV. Substantive Gang Offense (Section 186.22, subd. (a))

A. Elements

Subdivision (a) of section 186.22 defines a stand-alone substantive crime which penalizes committing or aiding and abetting a felony while being an active participant in a gang:

(a) Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal

gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.

The active-participation offense has essentially three elements, although each of those elements, in turn, can be broken down into additional elements. The three elements are:

1. Active participation in a criminal street gang;
2. When the defendant participated in the gang, he/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 a felony by members of the gang by
 - a. directly and actively committing a felony; or
 - b. aiding and abetting a felony.

(Pen. Code § 186.22, subd. (1); CALCRIM no. 1400.) The terms "[criminal street gang](#)" and "[pattern of criminal gang activity](#)" activity are discussed above in section III. Other aspects of the crime, including the meaning of "active participation" and the requirement of a current felony, are discussed below.

B. Active Participation.

The parameters of "active participation" are established by both caselaw and statute:

1. *More than nominal or passive participation required.* "Active participation" means "taking part in" something "in a manner that is not passive." It is involvement that is "more than nominal or passive." (*People v. Castenada* (2000) 23 Cal.4th 743, 747.) Must have knowledge of the gang's pattern of criminal activity. (*In re Jose P.* (2003) 106 Cal.App.4th 458.)
2. *Leadership role not required.* The prosecution need not show that the defendant held a leadership role in the gang. (*Castenada*, 23 Cal.4th at 750.)
3. *Devotion of all or substantial part of time or efforts to gang not required:* "[I]t is not necessary for the prosecution to prove that the person devotes all, or a substantial part, of his or her time or efforts to the criminal street gang." (§ 186.22, subd. (i).)

4. *Gang membership not required.* (§ 186.22, subd. (i) ("nor is it necessary to prove that the person is a member of the criminal street gang")); see also *In re Jose P.* (2003)106 Cal.App.4th 458, 466; *People v. Valdez* (1997) 58 Cal.App.4th 494, 505.)
5. *Participation must be at or near time of crime.* "It is not enough that a defendant have actively participated in a criminal street gang at any point in time, however. A defendant's active participation must be shown at or reasonably near the time of the crime." (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509.)
6. *Examples*
 - a. D's participation more than nominal where in 14 months before offense D seen on seven occasions in the company of known gang members. On four of those occasions, cops gave him written notice that group was a gang under the STEP Act. D bragged to the officers that he "kicked back" with the gang. On date of crimes, D was armed with a handgun and committed offense typical of the gang. (*People v. Castenada* (2000) 23 Cal.4th 743, 752-753.)
 - b. Evidence of active participation sufficient where D had gang tattoo over eyebrow and on the back of his head, grew up in East Los Angeles, admitted being a member of gang, gave a gang moniker, crime committed was one of the gang's primary activities, and was committed in association with another gang member, despite gang detective not knowing of D before the crime and despite D's claim he had left the gang 10 years earlier. (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331.)
 - c. Where D had extensive knowledge of gang's current activities, evidence of active participation sufficient, despite D having no gang-related tattoos, not wearing gang clothing or flashing gang signs, and D's name had not come up as an active gang member in interviews with gang members, nor had D been seen in the presence of other gang members for 5 years. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509-1510.)

C. Felonious Criminal Conduct

The defendant must assist, further, or promote "felonious criminal conduct." This latter element is a stand-alone element, which is *not* part of the definitions of a criminal street gang.

1. *Any felony.* The felony need not be one of the predicate offenses listed in subdivision (e). (*People v. Salcido* (2007) 149 Cal.App.4th 356, 368-369.)
2. *Must the felonious criminal conduct be "gang-related"?* The California Supreme Court has asked the parties to brief this question in *People v. Albillar*, No. [S163905](#); oral argument: Oct. 5, 2010 at 1:30 p.m. in Fresno. (Briefs [here](#); court of appeal opinion [here](#).)
3. *Direct Perpetrator or Aider & Abettor.*
 - a. *Aider & Abettor.* "[A] person who violates section 186.22(a) has also aided and abetted a separate felony offense committed by gang members." (*People v. Castenada* (2000) 23 Cal.4th 743, 749-750.)
 - b. *Defendant is Direct Perp. Aided by Gang Member.* Despite the plain language of subdivision (a) sounding like it only applies to aiders and abettors ("who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang"), the "felonious criminal conduct" element can be satisfied where D is either the direct perpetrator or an aider and abettor. (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 436; see also *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1305-1308.) In *Ngoun*, the defendant "was aided and abetted by at least one other gang member." (*People v. Sanchez*, 179 Cal.App.4th at 1307 (citing *Ngoun*, 88 Cal.App.4th at 437).)
 - c. *Defendant is Direct Perp. Not Aided by Gang Member.* There is a split on the question of whether the "felonious criminal conduct" element can be satisfied where the defendant is the direct perpetrator acting alone or acting only with non-gang members. In *People v. Salcido* (2007) 149 Cal.App.4th 356, 367-368, the Fifth Appellate District held that the felonious criminal conduct element is satisfied where the the defendant is a gang member acting as the sole perpetrator, without any involvement of other gang members. (See also *Sanchez*, 179 Cal.App.4th at 1308 (had it been raised, under authority of *Salcido* would reject argument that D must be acting in concert with other gang members).) In contrast, in a 2-1 decision the Third Appellate District held that the felonious criminal conduct element is not satisfied by a gang member acting alone. (*People v. Rodriguez* (2010) ___ Cal.App.4th___ (No. [C060227](#), filed Sept. 20, 2010).) This question may be resolved in *Albillar*, No. [S163905](#) (to be argued Oct. 5) (see section IV(C)(2) above), in which the Court asked the parties to brief whether subdivision (a) should be interpreted to mean felonious criminal gang-related conduct.

4. Misdemeanors elevated to a felony due to active participation in a criminal street gang cannot constitute the felonious criminal conduct element of a conviction under section 186.22(a). (*People v. Lamas* (2007) 42 Cal.4th 516, 524 [due process violated by basing § 186.22(a) gang violation on misdemeanor weapons offenses---§ 12025(b)(3) (carrying a concealed weapon) and § 12031(a)(2)(C) (carrying a loaded firearm in public)---elevated to felonies by virtue of gang participation].)

D. Penalty

1. *Possible Sentence*. A violation of the substantive gang offense (subd. (a)) is a wobbler punishable by up to a year in county jail or 16 months or 2 years or three years in state prison.
2. *Multiple Punishment (Section 654.)*
 - a. Cases holding that section 654 does not bar multiple punishment for substantive gang offense and underlying felony: *People v. Herrera* (1999) 70 Cal.App.4th 1456 (gang participation and two counts of attempted murder); *People v. Ferraez* (2003) 112 Cal.App.4th 925 (gang participation and possession of drugs with intent to sell); *In re Jose P.* (2003) 106 Cal.App.4th 458 (gang participation and robbery).
 - b. *Cases holding 654 does bar multiple punishment*: *People v. Vu* (2006) 143 Cal.App.4th 1009 (gang participation and conspiracy to commit murder; 186.22 punishment must be stayed); *People v. Tran* (2009) 177 Cal.App.4th 138, 99 Cal.Rptr.3d 122 (following *Vu* and distinguishing *Herrera*, 186.22 punishment must be stayed in light of conviction for murder where shooting of bystander thought to be rival gang member had dual purpose of intent to kill and intent to promote gang), **rev. gr.** Dec. 2, 2009, [S176923](#).); *People v. Sanchez* (2009) 179 Cal.App.4th 1297 (criticizing *Herrera* and holding 186.22 punishment must be stayed where defendant convicted of gang participation and robbery).
 - c. The Court of Appeal in *Sanchez*, 179 Cal.App.4th 1297, provided a very thorough analysis of the cases applying 654 in this area. The *Sanchez* Court was very critical of *Herrera*, which the *Sanchez* court described as "*categorically*" holding "that section 654 *never* precludes multiple punishment for both gang participation and the underlying felony require a specific intent." (179 Cal.App.4th at 1311 (emphasis in orig.)) In finding 654 to bar multiple punishment for gang participation and robbery, the court

in *Sanchez* found "the most analogous line of cases involves convictions for both felony murder and the underlying felony. It has long been held that section 654 bars multiple punishment under these circumstances." (*Id.* at 1315.) In *People v. Duarte* (2010) 185 Cal.App.4th 194, 110 Cal.Rptr.3d 222, rehearing granted, the Court of Appeal followed *Sanchez* in holding that section 654 barred multiple punishment for both street terrorism and discharge of a firearm with gross negligence. However, on June 22, 2010, the Court of Appeal granted rehearing on its own motion in *Duarte*. (See [docket](#).)

- d. Cases suggest that a line could be drawn barring multiple punishment when the felonious criminal conduct underlying the 186.22(a) conviction is based on an offense of conviction, but allowing multiple punishment when the conduct underlying the 186.22(a) conviction is based on conduct which is not an offense of conviction in the current case. (*Jose P.*, 106 Cal.App.4th at 470 ("We note first that the instant robbery was not the only felonious act upon which the court could have based its finding that the minor had committed the section 186.22(a) crime. The minor had also been found guilty of attempted robbery in April 2001. Given his continuous involvement with the Norteños this crime could have served as the basis for the court's finding that he violated section 186.22(a). In that case, the home invasion robbery and the substantive gang crime would have no acts in common."); *Duarte*, 110 Cal.Rptr.3d at 232 (rehearing granted June 22, 2010) ("The Attorney General argues the *Sanchez* court[']s interpretation of section 654 would render the street terrorism statute a nullity. We disagree. As the *Jose P.* court noted, the prosecution has the option of relying on a felony not charged in the instant case to satisfy the felonious conduct element of the street terrorism offense. [Citation.]").)

V. Gang Enhancement

Subdivision (b) of section 186.22 defines, not a stand-alone offense like subdivision (a), but a sentencing enhancement which applies where the defendant committed the felony "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members."

A. Application and Elements

1. This enhancement applies even in the absence of active or current participation in a gang. (*In re Ramon T.* (1997) 57 Cal.App.4th 201, 207.)
2. The term "[criminal street gang](#)" is discussed above in section III.
3. Gang membership not required. (*People v. Bragg* (2008) 161 Cal.App.4th 1385.)
4. Elements
 - a. "for the benefit of, at the direction of, or in association with any criminal street gang"
 - b. "specific intent to promote, further, or assist in any criminal conduct by gang members"
5. *CALCRIM 1401 Held Adequate*. CALCRIM no. 1401 adequately defines the intent element by requiring that "[t]he defendant intended to assist, further, or promote criminal conduct by gang members." The omission of the word "specific" from the definition does not establish that the instruction inadequately defines the "specific intent." (*People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1104-1105.)
6. *Sufficiency of the Evidence*
 - a. Note: this outline separates cases involving the sufficiency of the evidence and the admissibility of the evidence. When considering one area, be sure to look to the other, particularly when considering [expert testimony](#). The cases in the two areas touch on very closely-related concerns and often reference each other.
 - b. *Is Expert Testimony Sufficient by Itself to Prove For-the-Benefit and "Specific Intent" Elements?*
 - i. In *People v. Ramon* (2009) 175 Cal.App.4th 843 and *In re Frank S.* (2006) 141 Cal.App.4th 1192, the Fifth District---relying on its earlier decision in *People v. Killebrew* (2002) 103 Cal.App.4th 644 (an admissibility of evidence case)---the Fifth District found expert opinion insufficient to support gang enhancements.
 - ii. In *Ramon*, the prosecutor failed to prove the receiving-stolen-property offense and various firearm offenses were

committed for benefit of gang and with required specific intent where defendant and fellow gang member were stopped in gang territory in stolen truck with handgun under the driver's seat. Expert's opinion---which the court found to be an "improper opinion" and insufficient to justify the enhancement---was based on (1) the defendants belonging to the same gang; (2) being in that gang's territory when they were stopped; and (3) the nature of the crimes. (*People v. Ramon* (2009) 175 Cal.App.4th 843.) The Court of Appeal in *Ramon* distinguished one case in which the expert opinion was supplemented with the defendant's admission to being the member of one gang and getting permission from another gang to sell drugs at a specified location (*People v. Ferraez* (2003) 112 Cal.App.4th 925) and another case in which the motive was at issue and the expert opinion was augmented by the evidence that the defendant asked the victim "where are you from" immediately before shooting him (*People v. Zepeda* (2001) 87 Cal.App.4th 1183). (*Ramon*, 175 Cal.App.4th at 852-853.)

iii. In *People v. Ochoa* (2009) 179 Cal.App.4th 650, 661, Fn.6, the Court of Appeal criticized *Ramon*, explaining that the specific intent requires only that the defendant promote criminal conduct by *gang members*, not that he promote criminal activity by *a gang*. In *Ochoa*, the Court, although critical of *Ramon*, found the gang enhancement was not supported by substantial evidence. (179 Cal.App.4th at 663.) "The sergeant's testimony, as to how defendant's crimes would benefit Moreno Valley 13, was based solely on speculation, not evidence. An appellate court cannot affirm a conviction based on speculation, conjecture, guesswork, or supposition. [Citations.]" (*Id.*) "The gang enhancement cannot be sustained based solely on the defendant's status as a member of the gang and his subsequent commission of crimes." (*Id.*)

c. *Generic Expert Testimony Insufficient to Establish Specific Intent Element.* The Ninth Circuit has held that the specific intent element is not satisfied merely by generic expert testimony that the charged crimes would have enhanced the status of the gang. (*Briceno v. Scribner* (9th Cir.2009) 555 F.3d 1069, 1078-1079.) In addition, the specific intent element is not satisfied by evidence of the defendant's gang membership combined with generic expert

testimony that the gang was turf-oriented, and where there was no evidence of what other criminal activity of the gang was intended to be furthered by the charged crime. (*Garcia v. Carey* (9th Cir.2005) 395 F.3d 1099, 1102-1104.) On one hand, state courts have agreed that "A gang experts [sic] testimony alone is insufficient to find an offense gang related." (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657 (citing *People v. Ferraez* (2003) 112 Cal.App.4th 925, 931).) On the other hand, California Court of Appeal decisions reject *Briceno* and *Garcia*. (See e.g. *People v. Vazquez* (2009) 178 Cal.App.3d 347, 353-354 ("There is no statutory requirement that this 'criminal conduct by gang members' be distinct from the charged offense, or that the evidence establish specific crimes the defendant intended to assist his fellow gang members in committing"); *People v. Romero* (2006) 140 Cal.App.4th 15, 19-20; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 (requisite intent to further criminal conduct by fellow gang members satisfied by defendant's commission of a robbery with two fellow gang members).)

d. **Impending Clarification on Sufficiency of Evidence and Weight of Expert Testimony from Cal. Supreme Court:** *People v. Albillar* ,

No.S163905; oral argument: Oct. 5, 2010 at 1:30 p.m. in Fresno.

(Briefs [here](#); court of appeal opinion [here](#).)

- i. Question Presented: "Does substantial evidence support defendants' convictions under Penal Code section 186.22, subdivision (a), and the true findings with respect to the enhancement under Penal Code section 186.22, subdivision (b)?"
- ii. *Albillar*, involving a rape in concert by two brothers and their cousin, will likely resolve the conflict between the Ninth Circuit and California courts regarding whether the specific intent element is satisfied by evidence of the defendant's gang membership combined with expert testimony that the charged crimes would enhance the status of the gang.
- iii. Further action is deferred pending *Albillar* in *Emery v. Clark*, No. S182670, in which the Cal. Supreme Court has granted the Ninth Circuit's request that the Supreme Court answer the following questions of state law:
 1. "Does California's criminal street gang enhancement statute, in particular the element of 'specific intent to promote, further, or assist in any criminal conduct by

gang members' ... section 186.22(b)(1), [footnote omitted] require proof that the defendant specifically intended to promote, further, or assist in *other* criminal gang activity, apart from the offense of conviction? [Citations.]" (*Emery v. Clark* (2010) 604 F.3d 1102, 1103-1104 (emphasis in orig.).)

2. "Is gang expert testimony tied to the facts of the case-regarding the centrality of 'respect' in gang culture, and how the defendant's use of lethal force to avenge a minor slight to a member of an affiliated gang would enhance the 'respect' he gets from other gang members, raise his status within the gang hierarchy, and teach the community not to interfere with even the most minor criminal activities of his fellow gang members-sufficient to satisfy the requirement that the murder was committed with the 'specific intent to promote, further, or assist in any criminal conduct by gang members' within the meaning of section 186.22(b)(1)? [Citations.]" (*Id.* at 1104.)
3. "Does evidence that the defendant committed the attempted robbery and murder in concert with the brother of a young gang member, whom the victim allegedly 'disrespected,' satisfy the requirement that the crimes were committed with the specific intent to 'assist in any criminal conduct by gang members' within the meaning of section 186.22(b)(1)? [Citations.]" (*Id.* at 1104.)

B. Penalty

1. Enhancing Determinate Terms: when the underlying felony is penalized by a determinate term, then the length of the enhancement is determined by subdivisions (b)(1) or (b)(4).
 - a. Basic term: 2, 3 or 4 years consecutive to the felony. (§ 186.22(b)(1)(A).) If on the grounds of, or within 1,000' of, school when school is open or in use by minors, "that fact shall be a circumstance in aggravation of the crime in imposing a term under paragraph (1)." (§ 186.22(b)(2).)
 - b. Enhancing a serious felony: additional term of five years. (§ 186.22(b)(1)(B).)

- c. Enhancing a violent felony: additional term of ten years. (§ 186.22(b)(1)(C).)
 - d. When the underlying crime is one of the crimes listed in subdivisions (b)(4)(B) or (C), the penalty is an indeterminate term in state prison with a minimum term consisting of *the greater of either*:
 - i. the usual term for that offence plus any enhancement (§ 186.22(b)(4)(A)); *or*
 - ii. 15 years if the felony is home invasion robbery, carjacking, discharge of a firearm at an inhabited dwelling house (and other targets), or drive-by shooting resulting in GBI or death (§ 186.22(b)(4)(B));
 - iii. 7 years if the felony is extortion (§ 519) or threats to victims and witness (§ 136.1) (§ 186.22(b)(4)(C)).
 - e. *Example under subdivision (b)(4)*: Where defendant was convicted of a violation of section 246 and had one strike and a 25-to-life gun-use enhancement, the minimum term would be the usual term for the offense and enhancement under (b)(4)(A)---i.e. 56, 60 or 64 years (3, 5, or 7, plus 25-to-life for the gun, all doubled)---because it exceeded the 15-year minimum term provided for under (b)(4)(B). (*People v. Sok* (2010) 181 Cal.App.4th 88, 95-96.)
 - f. Except as provided in subdivision (b)(4), when the underlying crime is punishable by life in prison, the defendant "shall not be paroled until a minimum of 15 calendar years have been served." (§ 186.22(b)(5).)
2. *Enhancing Indeterminate Terms*: when the underlying felony is penalized by an indeterminate term, then the defendant must serve a minimum of 15 years prior to parole eligibility. This is so even when the underlying felony already has a minimum parole eligibility term longer than the 15 years provided for in (b)(5), such that the gang enhancement has no practical effect. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1006-1007 (holding that the subd. (b)(5) minimum term applies to murder, which is punishable by a term of years to life, thus rejecting state's argument that (b)(5) only applies to straight life terms); *see also People v. Johnson* (2003) 109 Cal.App.4th 1203, 1238-139; *People v. Harper* (2003) 109 Cal.App.4th 520; *but see People v. Herrera* (2001) 88 Cal.App.4th 1353, 1363-1365 (majority holds that life term for first degree murder can be enhanced by a

- determinate term under (b)(1) because 15-year minimum parole eligibility period under (b)(5) could not supersede the 25-year minimum term for first degree murder.)
3. *Felonies which are both either serious or violent and punishable by an indeterminate life term.*
 - a. Where defendant is subject to indeterminate life term under subdivision (b)(4) for a gang-related violation of section 246, 10-year gang enhancement for violent felonies under subdivision (b)(1)(C) of section 186.22 does not apply. (*Sok*, 181 Cal.App.4th at 95-96.)
 - b. Subdivision (b)(5) applies to both straight life-terms and a term-of-years to life such that both are exempted from the 10-year gang enhancement for violent felonies in (b)(1)(C). (*People v. Lopez* (2005) 34 Cal.4th 1002, 1007.)
 4. *Trial Court Has Discretion to Strike:* "Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition." (§ 186.22, subd. (g).)
 5. *Relationship to Gun-Use Enhancements:*
 - a. *Felony enhanced to life term by 186.22(b) is a felony punishable by life for purposes of 12022.53.* A gang enhancement which increases the penalty of the underlying offense---shooting at an occupied vehicle (§ 246) in this case---to a life term, under subdivision (b)(4) of section 186.22, makes the offense a qualifying predicate offense for application of a section 12022.53 firearm enhancement. (*People v. Jones* (2009) 47 Cal.4th 566, 577-578 (citing § 12022.53(a)(17) (predicate offenses for .53 enhancements include a "felony punishable by ... imprisonment in the state prison for life").)
 - b. *Felony enhanced to life term by 12022.53 not a felony punishable by life for purposes of 186.22(b)(5).* When a felony with a non-life determinate term is enhanced with an indeterminate life term under section 12022.53, the crime is *not* "a felony punishable by imprisonment for life" within the meaning of subdivision (b)(5) of section 186.22, which requires a 15-year minimum term when the

underlying felony is punishable by life in prison. (*People v. Montes* (2003) 31 Cal.4th 350, 352; *Sok*, 181 Cal.App.4th at 94-95.) "[S]ection 186.22(b)(5) applies only where the felony by its own terms provides for a life sentence." (*Id.*)

- c. *Montes* and *Jones* Reconciled: "the life term imposed in *Montes* under section 12022.53 was a sentence enhancement, whereas in [*Jones*] the life term was imposed under section 186.22(b)(4), a penalty provision." (*Jones*, 47 Cal.4th at 577, fn.5.)
- d. *No Dual Use of Firearm Use.*
 - i. It is improper to use defendant's gun-use to both impose a section 12022.5 enhancement and to impose a 10-year sentence enhancement under section 186.22(b)(1)(C) for committing a violent felony to benefit a gang. (The defendant's crime was a violent felony only because of the gun use. (§ 667.5(c)(8).) Section 1170.1(f) bars application of more than one enhancement provision for use of a firearm in a single offense. (*People v. Rodriguez* (2009) 47 Cal.4th 501.)
 - ii. "[S]ection 12022.53 gun enhancement should not be used both to establish the minimum term of the indeterminate life term under section 186.22, subdivision (b)(4)(A), and as a separate enhancement of that life term." (*Sok*, 181 Cal.App.4th at 98 (citing 12022.53(f)) Note: in *Sok*, the Court expressed some uncertainty about this holding: "the issue is not free from doubt and could, in at least certain circumstances, produce a somewhat anomalous result."
- e. Effect of Subdivision (e) of Section 12022.53.
 - i. 12022.53(e)(1): punishments under section 12022.53 usually apply only to personal use or discharge, but when offense is committed to benefit a gang, those punishments apply even if another principal, but not the defendant, used or discharged a firearm. (*People v. Brookfield* (2009) 47 Cal.4th 583, 590.)
 - ii. 12022.53(e)(2): If D personally uses or discharges firearm, both 186.22 and 12022.53 enhancements apply. If a principal, but not D, uses or discharges a firearm, "there is no imposition of an 'enhancement for participation in a criminal

street gang ... in addition to an enhancement imposed pursuant to' section 12022.53." (*Brookfield*, 47 Cal.4th at 590.)

- iii. Limitation in subdivision (e)(2) of section 12022.53---barring imposition of both 186.22 and 12022.53 enhancements when defendant receives a 12022.53 enhancement for co-principal's gun use or discharge---applies, not just to fixed-term gang enhancements, but also when defendant receives a life term under section 186.22(b). (*Brookfield*, 47 Cal.4th at 591-595 (rejecting AG's argument that the (e)(2) limitation applies only to fixed-term enhancements under 186.22(b), but not to life terms under that section).) "In choosing which of those two provisions to apply, the trial court must, consistent with section 12022.53's subdivision (j), choose the provision that will result in a greater sentence." (*Id.* at 596.) Accordingly, in *Brookfield*, the non-shooter defendant could not be subject to both the life term provided for under 186.22(b)(4) for a gang-related shooting at an inhabited dwelling and a 10-year gun enhancement under 12022.53(b). (*Id.* at 586-587.) Likewise, a non-shooter cannot be subject to both a minimum 15-year parole eligibility term under 186.22(b)(5) for a gang-related premeditated attempted murder and a 25-year gun enhancement under 12022.53(d) and (e)(1). (*People v. Gonzalez* (no. B207856, Jan. 12 2010) 180 Cal.App.4th 1420 (striking 186.22(b)(4) 15-year minimum term and applying 7-year parole eligibility term under § 3046 for premeditated attempted murder).)
- iv. "An enhancement for participation in a criminal street gang ... shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense." (§ 12022.53(e)(2).) Where the jury made no finding the defendant personally used a gun and the court imposes a section 12022.53 enhancement for personal gun use by a principal, the court must impose and stay the gang enhancement, unless it exercises its discretion to strike the gang enhancement under subdivision (g) of section 186.22. (*People v. Sinclair* (2008) 166 Cal.App.4th 848.)

- 6. *Dual Use of GBI*: Under section 1170.1(g), which bars multiple enhancements for great bodily injury on the same victim in a single offense, defendant could not be subject to both a section 12022.7(a) three-

People v. Gonzalez(2009) 178 Cal.App.4th 1325 (applying the reasoning of *People v. Rodriguez* (2009) 47 Cal.4th 501).)

7. *Three Strikes Law*:

- a. *Gang Enhancement Not Doubled*. Enhancements are added after determination of the base term and are not doubled when the defendant has a prior strike. (*Sok*, 181 Cal.App.4th at 93-94.)
- b. *Subd. (b)(5) Min. Term Doubled*. Subdivision (b)(5), by setting a minimum sentence to be served prior to parole eligibility, sets the penalty for the underlying crime and is thus not a sentence enhancement. Therefore, that minimum term can be doubled under the Three Strikes Law. (*People v. Jefferson* (1999) 21 Cal.4th 86, 90, 100-101.)

VI. Alternative Sentencing Scheme (Subdivision (d))

Subdivision (d) of section 186.22, added by Proposition 21, created an alternative sentencing scheme for a "public offense punishable as a felony or a misdemeanor" committed to benefit a criminal street gang. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 899.)

- A. *Same elements as (b)(1) enhancement*. Subdivision (d) applies to felonies "committed for the benefit of, at the direction of or in association with, any criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22(d).) These requirements identical to those found in the subdivision (b)(1) enhancement. The differences are subdivision (d) applies to both misdemeanors and felonies and subdivision (d) has a different penalty scheme.
- B. *Not limited to wobblers*. Despite utilizing a phrase associated with wobblers---"punishable as a felony or a misdemeanor"---the Legislature did not intend to limit its scope to wobblers. It applies to any felony or any misdemeanor. (*Robert L.*, 30 Cal.4th at 900-909, esp. 900.)
- C. *Enhancement (b) and alternative sentencing scheme (d) are mutually exclusive*. A "misdemeanor, converted to a felony by [section 186.22,] subdivision (d) [is not also] subject to the felony enhancement provided in

[section 186.22,] subdivision (b)(1)." (*People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1448-1449.)

- D. *Prosecutor's Election Between (b)(1) and (d)*. "[W]here the crime is a wobbler, the prosecutor must elect whether to prosecute the offense under section 186.22(d) (and thus not have the option of charging the section 186.22, subdivision (b)(1) enhancement), or charge the crime as a felony and allege the section 186.22, subdivision (b)(1) enhancement." (*Robert L.*, 30 Cal.4th at 907, fn.18.)
- E. *Punishment*: county jail not to exceed one year, or state prison for one, two, or three years. Minimum term of 180 days in county jail, even if sentence suspended. (§ 186.22(d).)

VII. Evidentiary Issues

A. Bifurcation

The trial court has discretion to bifurcate trial of a gang enhancement from trial of guilt on charged offences. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048-1049.) But a gang enhancement is intertwined with the charged offense such that "less need for bifurcation generally exists with the gang enhancement than with a prior conviction allegation. [Citation.]" (*Id.* at 1048.) Bifurcation is not necessary when "the evidence supporting the gang enhancement would be admissible at a trial of guilt." (*Id.* at 1049-1050.) Even where some of the evidence would not be admissible as to the charged offense, bifurcation may not be required. (*Id.* at 1050.) When the gang evidence is also related to the charged offense, the burden is on the defendant seeking bifurcation to clearly establish a substantial danger of prejudice. (*Id.* at 1050.)

Note: the question of bifurcation is closely tied to the question of unfair prejudice, which is discussed immediately below.

B. Unfair Prejudice/Due Process (EC § 352)/Improper Character Evidence (EC § 1101(a).)

1. *Careful Scrutiny*. "[E]ven if the evidence is found to be relevant, the trial court must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224; see also *People v. Williams* (1997) 16 Cal.4th 153, 193.)

2. *Error Found.*

- a. In *Albarran*, the Court of Appeal found error in the admission of extensive testimony (70 pages of RT) about the identities of the defendant's fellow gang members, their other crimes and police contacts, graffiti threats to kill police officers, and reference to the Mexican Mafia, all of which was irrelevant to the charged crimes and only tangentially related to the gang allegations. (*Id.* at 227-228.) The Court also found the error violated due process. "[T]he facts concerning the threat to police officers, the Mexican Mafia evidence and evidence identifying other gang members and their unrelated crimes, had no legitimate purpose in this trial. The trial court's ruling on the new trial motion in which it broadly concluded the gang evidence was admissible to prove motive and intent for the underlying charges was arbitrary and fundamentally unfair." (*Id.* at 230.) "This case presents one of those rare and unusual occasions where the admission of evidence has violated federal due process and rendered the defendant's trial fundamentally unfair." (*Albarran*, 149 Cal.App.4th at 232.)
- b. In *People v. Memory* (2010) 182 Cal.App.4th 835, the Court of Appeal found prejudicial error in the admission of "gang-type evidence" regarding a motorcycle club: "There was no foundation that the Jus Brothers were a gang or a criminal enterprise; the evidence was not probative on motive, but instead was used to show defendants' criminal disposition; the limited probative value of the evidence to show identity and bias of certain witnesses could have been handled with considerably less evidence; and the evidence was inflammatory. Much of the evidence admitted, and argued by the prosecution, was inadmissible character evidence." (*Id.* at 838.)
3. *Mexican Mafia Reference.* "[M]ore than one California court has recognized references to the Mexican Mafia are extremely prejudicial." (*Id.* at 230, fn.15 (citing *People v. Hisquierdo* (1975) 45 Cal.App.3d 397, 405; *People v. Ayala* (2000) 23 Cal.4th 225, 276-277).)
4. *No Error Found.* Courts have found the admission of gang evidence proper where it was relevant to show intent or motive for the charged offense or when relevant to the element of the gang enhancement. (E.g. *People v. Garcia* (2008) 168 Cal.App.4th 261, 278-279 (gang evidence, including evidence on gang's culture, was relevant to motive and intent in aiding and abetting murder); *People v. Gutierrez* (2009) 45 Cal.4th 789, 820 (no error in admitting gang evidence unrelated to charged crimes where it was directly related to elements of gang enhancement and court gave

limiting instruction); *People v. Leon* (2010) 181 Cal.App.4th 452, 458-463 (evidence of defendant's gang moniker "Chucky"---derived from a homicidal doll from a movie---was relevant to show shooting was with the intent to kill and with premeditation and deliberation; evidence was not unduly prejudicial).)

5. *Gang Evidence in Cases Not Involving Gang Enhancement*. "In cases not involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1050 (citing *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905); *People v. Hernandez* (2009) 178 Cal.App.4th 1510, 1541-1542 (no error in admission of gang evidence against non-gang member where was abundant evidence shooting was gang related and that defendant had participated for the benefit of gang).)

C. Limiting Instructions

1. *No Sua Sponte Duty (generally)*. There is no sua sponte duty to give a limiting instruction when gang evidence is admissible for one purpose but not for another. (*Hernandez*, 33 Cal.4th at 1051; *People v. Jones* (2003) 30 Cal.4th 1084, 1116.)
2. *Sua Sponte duty (exception)*. The Court has recognized a possible exception. A sua sponte duty to give a limiting instruction might exist in an extraordinary case where the evidence at issue was "a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*Hernandez*, 33 Cal.4th at 1051 (citing *People v. Collie* (1981) 30 Cal.3d 43, 63-64 and *People v. Farnam* (2002) 28 Cal.4th 107, 163-164).)
3. No error in admitting gang evidence unrelated to charged crimes where it was directly related to elements of gang enhancement and court gave limiting instruction. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 820.)

D. Expert Testimony

1. Practice Note: this outline separates cases involving the sufficiency of the evidence and the admissibility of the evidence. When considering one area, be sure to look to the other, particularly when considering expert testimony. The cases in the two areas touch on very closely-related concerns, and some are discussed both here and in the discussion of the adequacy of the proof of the mental state elements for the [gang enhancement](#).

2. *Gang Culture & Habits is Proper Subject of Expert Testimony*
 - a. The subject matter of gang culture and habits meets the criterion of section 801 of the Evidence Code. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617; *People v. Gonzalez* (2006) 38 Cal.4th 932, 944.)
 - b. "Whether members of a street gang would intimidate persons who testify against a member of that or a rival gang is sufficiently beyond common experience that a court could reasonably believe expert opinion would assist the jury." (*Gonzalez*, 38 Cal.4th at 945.)
3. *Expert Testimony on Ultimate Question of Defendant's Subjective State of Mind.*
 - a. *Error Found.* Several cases, beginning with *People v. Killebrew*, have held it was error to allow an expert to testify as to the ultimate questions under the gang enhancement statute (subd. (b)) of whether the crime was committed to benefit the gang and with specific intent to promote, further, or assist in any criminal conduct by gang members. (*People v. Ramon* (2009) 175 Cal.App.4th 843, 851; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658; see also *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 ("To allow the expert to state the minor's specific intent for the knife without any other substantial evidence opens the door for prosecutors to enhance many felonies as gang-related and extends the purpose of the statute beyond what the Legislature intended").)
 - b. *No Error Found.* But expert opinion on the ultimate question of intent might not be impermissible when the opinion is not the only evidence reflecting on the defendant's state of mind. (*People v. Roberts* (2010) 184 Cal.App.4th 1149, 1194 (finding no error in admission of expert's opinion on intent, while noting that "*Killebrew* does not generally prohibit such testimony" and in *Killebrew* "[t]he expert's opinion was the only evidence the prosecution offered to establish the elements of the crime.").)
 - c. *Hypothetical Questions Distinguished.* Expert testimony in response to hypothetical questions regarding defendant's motivation and likely reaction to gang challenges was not improper opinion evidence on the ultimate question of guilt. (*People v. Ward* (2005) 36 Cal.4th 186, 209-211.) "[W]e read *Killebrew* as merely 'prohibit[ing] an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial.'" (*Gonzalez*, 38 Cal.4th at 946 (quoting *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551.)) "It would be incorrect to read *Killebrew* as barring the questioning of

expert witnesses through the use of hypothetical questions regarding hypothetical persons." (*Id.* at 946, fn.3.) In *Gonzalez*, 38 Cal.4th 932, the Court held there was no error in admitting testimony that a hypothetical witness would have been intimidated; "The [expert] witness did not express an opinion about whether the particular witnesses in this case had been intimidated." (38 Cal.4th at 946-947.)

- d. **Thinly-Disguised Hypotheticals - Review Pending** in *People v. Xue Vang* (2010) 185 Cal.App.4th 309, [[opn.](#); [order mod'g opn.](#)] rev. gr. Sept. 15, 2010, [S184212](#). 319-320;. (*Xue Vang*, 185 Cal.App.4th at 319-322.) In *Vang*, the Court of Appeal (4th Dist., Div. 1) held that the rule of *Killebrew* barring expert opinion on the actual defendant's intent may not be circumvented with thinly-disguised hypotheticals. (185 Cal.App.4th at 319-322.) The Court of Appeal, however, found the error harmless. (185 Cal.App.4th at 322-323.) On September 15, 2010, the California Supreme Court granted review in *Vang*, limiting the questions presented to: "(1) whether the Court of Appeal correctly found that the trial court erred in permitting the use of hypothetical questions of the prosecution expert witness and (2) if so, whether the Court of Appeal correctly found the error to be harmless."

4. Foundation:

- a. *Inadequate foundation absent explanation of source of expert's knowledge gang was involved in a crime.* There was an inadequate foundation for a gang expert's testimony on the gang's primary activities when, without giving specifics or explaining how he obtained the information, the expert merely testified that he "kn[e]w that the gang had been involved in" assaults and murders. (*In re Alexander L.* (2007) 149 Cal.App.605, 611-612.) Note: the observation about the lack of foundation in *Alexander L.* was made in the context of a finding of insufficient evidence, but that observation also goes to the question of admissibility.
- b. *Inadequate foundation for photograph downloaded from internet in absence of expert testimony it was not faked.* Photograph of one defendant flashing a gang sign downloaded from a co-defendant's MySpace page inadequately authenticated and erroneously admitted. Although defendant conceded the photograph depicted her face, there was no expert testimony establishing that the photograph was not faked. The error was nevertheless harmless. (*People v. Beckley* (2010) 185 Cal.App.4th 509, 513-517.)

- c. *Inadequate foundation provided for document downloaded from internet in absence of evidence of who created it.* Prosecution offered as evidence "purported roster of gang's members" downloaded from internet by a detective. The detective did not know who created the list or whether the author had firsthand knowledge of the gang's membership. Although the document was "presumed to be an accurate representation of the web page," "the evidence was insufficient to show that the writing was what it purported to be—a roster of the Southside Compton Crips." Accordingly, the document "should have been excluded as unauthenticated and, therefore, irrelevant. Like the photograph, the list's admission was harmless. (*Beckley*, 185 Cal.App.4th at 517-518.)
5. *Confrontation Clause - Hearsay:* Expert can testify to their opinions and relate information and sources on which they rely because the expert is subject to cross-examination and the materials on which the expert bases the opinion are not admitted for their truth. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427.)

VIII. Cross-References

- *Serious Felony.* "[A]ny felony offense, which would also constitute a violation of Section 186.22" constitutes a "serious felony." (Pen. Code § 1192.7, subd. (c)(28).)
- *Murder special circumstance:* "The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang." (§190.2, subd. (a)(22).)
- *Weapon misdemeanors elevated to a felony.* Misdemeanor gun offenses of carrying a loaded firearm in public or carrying a concealed weapon are elevated to felonies where the defendant was "an active participant in a criminal street gang, as defined in subdivision (a) of section 186.22." (Pen. Code § 12031(a)(2)(C) (elevating carrying a loaded firearm in public to a felony) and 12025(b)(3) (elevating carrying a concealed weapon to a felony).) (Note: the misdemeanor conduct cannot support the 186.22 active-participant finding element of the firearms offenses themselves, such that the felony firearm convictions had to be reversed in addition to the reversal of the 186.22(a) conviction. (*People v. Lamas* (2007) 42 Cal.4th 516, 525-527.)