
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: AB 333 **Hearing Date:** July 6, 2021
Author: Kamlager
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Urgency: No **Fiscal:** No
Consultant: SC

Subject: *Participation in a criminal street gang: enhanced sentence*

HISTORY

Source: Anti-Recidivism Coalition
NextGen
San Francisco Public Defender's Office
Silicon Valley De-Bug

Prior Legislation: SB 516 (Skinner), held in Sen. Approps. 2019
AB 264 (Low), Ch. 270, Stats. 2017
AB 1123 (Patterson), failed passage in Assembly Public Safety, 2013
SB 296 (Wright), vetoed, 2011
AB 2950 (Feuer), held on suspense in Assembly Approps., 2008
SB 1555 (Robbins), Ch. 1256, Stats. 1987
AB 2013 (Moore), Ch. 1242, Stats. 1987

Support: A. L. Costa Community Development Center; A New Way of Life Re-entry Project; Alameda County Public Defender's Office; Alliance for Boys and Men of Color; American Civil Liberties Union of California; American Civil Liberties Union California Action; Asian Americans Advancing Justice – California; Asian Solidarity Collective; Building Justice San Diego; Brotherhood Crusade; Cair California; California Attorneys for Criminal Justice; California Catholic Conference; California Coalition for Women's Prisoners; California Immigrant Policy Center; California Public Defenders Association; Californians for Safety and Justice; Californians United for a Responsible Budget (CURB); Caravan for Justice San Diego; Center on Juvenile and Criminal Justice; Center on Policy Initiatives; Ceres Policy Research; Change Begins With Me Indivisible Group; Chrysalis Center; Community Solutions for Children, Families and Individuals; Communities United for Restorative Youth Justice (CURYJ); Courage California; Criminal Justice Clinic, UC Irvine School of Law; Cure California; Del Cerro for Black Lives Matter; Democratic Club of Vista; Democratic Woman's Club of San Diego County; Drug Policy Alliance; East Bay Community Law Center; Ella Baker Center for Human Rights; Fresno Barrios Unidos; Friends Committee on Legislation of California; Hillcrest Indivisible; Homeboy Industries; Immigrant Legal Resource Center; Initiate Justice; Insight Center for Community Economic Development; Kern County Participatory Defense; La Defensa; Legal Services for Prisoners with Children; Los Angeles County District Attorney's Office; Mission Impact Philanthropy; National Association of Social Workers, California Chapter; National Center for Youth Law; Partnership for the Advancement of

New Americans; Peoples Collective for Justice and Liberation; Pillars of the Community; Prison Yoga Project; Prisoner Advocacy Network; Prosecutors Alliance of California; Public Health Advocates; Racial Justice Coalition of San Diego; Re:Store Justice; Riseup; Rubicon Programs; San Diego Progressive Democratic Club; San Diego County; San Diego County Building and Construction Trades Council; San Francisco District Attorney's Office; San Francisco Taxpayers for Public Safety; San Mateo County Participatory Defense; San Mateo County Private Defender Program; SD-QTPOC Colectivo; Secure Justice; Showing Up for Racial Justice (SURJ) At Sacred Heart in San Jose; SURJ San Diego; SURJ North County San Diego; Smart Justice California; Social Workers for Equity & Leadership; Starting Over, INC.; Success Stories Program; Team Justice; Think Dignity; UC California's Underground Scholars Initiative; Uncommon Law; Uprise Theatre; Urban Peace Institute; W. Haywood Burns Institute; We the People - San Diego; Young Women's Freedom Center

Opposition: California Coalition of School Safety Professionals; California Police Chiefs Association; California Peace Officers Association; California State Sheriffs' Association; City of Placentia; Kern County District Attorney's Office; Los Angeles County Sheriff's Department; Los Angeles Association of Deputy District Attorneys; Los Angeles School Police Association; Palos Verdes Police Officers Association; Peace Officers Research Association of California; Riverside Sheriffs' Association; San Bernardino County Sheriff's Department; San Diego County District Attorney's Office (oppose unless amended); San Diego Deputy District Attorneys Association (oppose unless amended); Santa Ana Police Officers Association

Assembly Floor Vote:

43 - 27

PURPOSE

The purpose of this bill is to 1) redefine the terms “pattern of criminal gang activity” and “criminal street gang” for purposes of the gang offense, enhancement, and alternate penalty under the STEP Act; 2) require bifurcation of gang-related prosecutions from prosecutions that are not gang-related; and remove specified offenses from crimes that qualify for a “pattern of criminal gang activity.”

Existing law enacts the California Street Terrorism Enforcement and Prevention (STEP) Act which seeks the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs. (Pen. Code, §§ 186.20 & 186.21.)

Existing law states 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. (Pen. Code, § 186.22, subd. (a).)

Existing law provides that any person who is convicted of a felony committed for the benefits 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, shall, upon conviction, receive a sentence enhancement, as specified below: (Pen. Code §186.22, subd. (b).)

- Felony (other than specified) 2, 3, or 4 years
- Serious felony 5 years
- Violent felony 10 years
- Home invasion life min., 15 years until parole eligibility
- Carjacking life min., 15 years until parole eligibility
- Shooting from vehicle life min., 15 years until parole eligibility
- Extortion or witness intimidation life min., 7 years until parole eligibility

Existing law defines “pattern of criminal activity” to mean the conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this section and last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons:

- Assault with a deadly weapon or by means of force likely to produce great bodily injury;
- Robbery;
- Unlawful homicide or manslaughter;
- The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances;
- Shooting at an inhabited dwelling or occupied motor vehicle;
- Discharging or permitting the discharge of a firearm from a motor vehicle;
- Arson;
- Intimidation of witnesses and victims;
- Grand theft;
- Grand theft of a firearm, vehicle, trailer, or vessel;
- Burglary;
- Rape;
- Looting;

- Money laundering;
- Kidnapping;
- Mayhem;
- Aggravated mayhem;
- Torture;
- Felony extortion;
- Felony vandalism;
- Carjacking;
- The sale, delivery, or transfer of a firearm;
- Possession of a pistol, revolver, or other firearm capable of being concealed upon the person;
- Threats to commit crimes resulting in death or great bodily injury;
- Theft and unlawful taking or driving of a vehicle;
- Felony theft of an access card or account information;
- Counterfeiting, designing, using, or attempting to use an access card;
- Felony fraudulent use of an access card or account information;
- Unlawful use of personal identifying information to obtain credit, goods, services, or medical information;
- Wrongfully obtaining Department of Motor Vehicles documentation;
- Prohibited possession of a firearm;
- Carrying a concealed firearm;
- Carrying a loaded firearm. (Pen. Code, §186.22, subd. (e).)

This bill revises the definition of “pattern of criminal gang activity” to additionally require that the last of those offenses have occurred within three years of the current offense, that the offenses commonly benefited a criminal street gang, and the common benefit from the offenses is more than reputational.

This bill removes burglary, looting, felony vandalism, offenses related to unlawful theft of use of an access card, and unlawful use of personal identifying information from the crimes that define “pattern of criminal gang activity.”

This bill states that the currently charged offense shall not be used to establish the pattern of criminal gang activity.

Existing law defines “criminal street” gang to mean any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated, excluding the personal identity fraud violations (these must be combined with one of the other enumerated offenses in order to prove a pattern gang activity), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity. (Pen. Code, § 186.22, subd. (f) & (j).)

This bill revises the definition of “criminal street gang” to replace “ongoing organization, association” with “ongoing, organized association.”

Existing law gives the court broad authority to conduct criminal trials, including the authority to bifurcate offenses into separate trials. (Pen. Code, § 1044.)

Existing law requires the question of whether a defendant has suffered a prior conviction to be tried separately from the currently charged offense. (Pen. Code, § 1025.)

Existing law requires, when a defendant pleads not guilty by reason of insanity, the guilt and sanity phase to be tried in separate phases. (Pen. Code, § 1026.)

Existing law provides for a bifurcated trial process in determining guilt separately from punishment in cases where the death penalty may be imposed. (Pen. Code, § 190.1.)

This bill requires, if requested by the defense in a case where a sentencing enhancement for participation in a criminal street gang is charged shall be tried in separate phases as follows:

- The question of defendant’s guilt of the underlying offense must first be determined.
- If the defendant is found guilty of the underlying offense, there shall be further proceedings to the trier of fact on the question of the truth of the enhancement. Allegations that the underlying offense was committed for the benefit of, at the direction of, or in association with, a criminal street gang and that the underlying offense was committed with the specific intent to promote, further, or assist in criminal conduct by gang members shall be proved by direct or circumstantial evidence that a further proceeding on the sentencing enhancement occur after a finding of guilt.

This bill requires that a charge for active participation in a criminal street gang be tried separately from all other counts that do not otherwise require gang evidence as an element of the crime. This charge may be tried in the same proceeding with an allegation of an enhancement for participation in a criminal street gang.

This bill states that its provisions shall be known, and may be cited, as the STEP Forward Act of 2021.

COMMENTS

1. Need for This Bill

According to the author of this bill:

California's gang enhancements are one of the many sentencing enhancements used to extend a person's sentence. The vague definitions and weak standards of proof that characterize gang enhancements have made their use one of the most devastating drivers of mass incarceration in the state.

They are notoriously racially motivated, applied inconsistently and disproportionately against people of color— 92% of people who receive gang enhancements are people of color. These enhancements are responsible for the collective trauma of countless families and communities. AB 333 seeks to address these harms by making changes to the law in order to reduce their harmful and racist application in criminal cases, and making the standards for applying a gang enhancement more rigorous.

2. Background: The Gang Statute

Penal Code Section 186.22 has three separate charging provisions. First, subdivision (a) of the statute contains the criminal offense of gang participation. It prohibits actively participating in a criminal street gang combined with willfully promoting, furthering, or assisting in any felonious conduct by members of that gang. The gravamen of the offense is the "participation in the gang itself." (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467, fns. omitted.)

The second provision is an enhancement allegation contained in subdivision (b)(1). If pleaded and proved, it increases the sentence for an underlying felony. The allegation is applicable to any felony "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." Additionally, this provision specifies longer enhancements if the underlying felony is a serious felony (additional term of five years) or a violent felony (additional term of ten years). (Pen. Code, § 186.22, subd. (b)(1)(B)-(C).)

The third, subdivision (d) of the statute, is an alternate penalty allegation which technically applies to all felonies and misdemeanors "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," but whose practical application is to raise the sentences only for gang-related misdemeanors.

The "criminal street gang" component of the gang provisions (i.e., the gang's existence) is a component of all three provisions and requires proof of three essential elements: (1) that there be an "ongoing association" involving three or more participants, having a "common name or common identifying sign or symbol"; (2) that the group has as one of its "primary activities" the commission of one or more specified crimes; and (3) the group's members either separately or as a group "have engaged in a pattern of criminal gang activity." (*People v. Gardeley* (1996) 14 Cal.4th 605, 617; *In re Jose P.* (2003) 106 Cal.App.4th 458, 466-467.)

The substantive gang offense, section 186.22, subdivision (a), is chargeable as either a felony or misdemeanor. The gravamen of the offense is the “participation in the gang itself.” (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467, fn. omitted.) The crime of participation in a criminal street gang requires proof of two elements which are not part of the enhancement: *active participation* in a gang, and *knowledge* that its members engage or have engaged in a pattern of criminal activity. (*People v. Bautista* (2005) 125 Cal.App.4th 646, 656, fn. 5; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467.) A person need not be a gang member to be guilty of the offense. (*People v. Robles, supra*, 23 Cal.4th at p. 1114, fn 4; *In re Jose P.* (2003) 106 Cal.App.4th 458, 466; *In re Lincoln J.* (1990) 223 Cal.App.3d 322.) All that is required is “active participation,” which means “more than a nominal or passive involvement.” (*People v. Castenada* (2000) 23 Cal.4th 743, 749-750; *In re Jose P.* (2003) 106 Cal.App.4th 458, 466.)

The sentencing enhancement, section 186.22, subdivision (b)(1), cannot be imposed unless the defendant is convicted of a felony. To receive a gang enhancement, the defendant need not be a current and active member of a gang. (*In re Ramon T.* (1997) 57 Cal.App.4th 201.) In addition to the criminal street gang components discussed above, there are two other essential elements that must be proven: (1) that the charged crime(s) were committed for the benefit of, at the direction of, or in association with the gang; and (2) that they were committed with the specific intent to promote, further or assist in criminal conduct by gang members. (CALCRIM 1401; *People v. Gardeley* (1996) 14 Cal.4th 605, 619; *People v. Louen* (1997) 17 Cal.4th 1, 11; *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207-208; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484-485.) “Association with the gang” refers to a connection or association between the crime and the gang. (*People v. Albillar* (2010) 51 Cal.4th 47, 62.)

The opinion of a gang expert alone may provide substantial evidence to sustain the gang enhancement, but the record must provide some evidentiary support that the crime was committed for the benefit of, or at the direction of, or in association with a criminal street gang, not just the defendant’s record of prior offenses and past gang activities or affiliations. (*People v. Soriano* (2021) 65 Cal.App.5th 278, 286, citing *People vs. Ochoa* (2009) 179 Cal.App.4th 650, 657 and *People v. Grant* (2020) 57 Cal.App.5th 323, 330.) Appellate courts in recent years have reversed gang enhancements for insufficient evidence where a gang member was acting alone, the defendant’s fellow gang members were unaware of the crime, and where no gang signs were displayed and no gang attire was worn during the crime. (*Id.* at p. 286.)

Finally, section 186.22, subdivision (d), is neither a crime nor an enhancement. Rather, “[i]t provides for an alternate sentence of one, two, or three years when it is proven that the underlying offense has been committed for the benefit of, or in association with, a criminal street gang.” (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 899.) When it is applied to misdemeanors, the provision requires a minimum term of 6 months imprisonment. Application of the provision is not limited to “wobblers.” (*Id.* at p. 901-903.) The provision applies to all felonies and all misdemeanors. (*Id.* at p. 903.)

3. Gang Members vs. Active Participants

Under existing law, in order to prove the elements of the substantive offense, the prosecution must prove that defendant: (a) is an active participant of a criminal street gang, (b) that he or she had knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and (c) he or she willfully promoted, furthered, or assisted in ... felonious criminal conduct by members of that gang. (*People v. Lamas* (2007) 42 Cal.4th 516, 524.) Thus, the statute distinguishes between gang members and active participants.

As to the active participation requirement, that statute says it is not necessary to prove that the defendant is a member of the criminal street gang. (Penal Code Section 186.22(i); see also *In re Jose P.* (2003) 106 Cal.App.4th 458, 466.)

The California Supreme Court has previously construed the phrase "active participation" in subdivision (a) of Penal Code Section 186.22 as being "some enterprise or activity" in which the defendant's participation is more than "nominal or passive." (*People v. Castaneda* (2000) 23 Cal.4th 743, 747, 749-750; see also *In re Jose P.* (2003) 106 Cal.App.4th 458, 466.) California jury instructions also echo this definition of "active participant." Relevant portions instruct the jury that "[a]ctive participation means involvement with a criminal street gang in a way that is more than passive or in name only. (See CALCRIM No. 1400.)

This bill also requires that the crimes committed to from a pattern of criminal gang activity have commonly benefitted the criminal street gang and that the common benefit from the offenses is more than reputational. This bill also prohibits the use of the currently charged offense to prove a pattern of criminal gang activity. Additionally, this bill removes some of the offenses that define a pattern of criminal gang activity. Specifically, burglary, looting, felony vandalism, and specified personal identity fraud violations from the enumerated offenses.

4. Bifurcation of Trial Phases

Although bifurcation is provided as a statutory right in certain situations, the court also has broad authority to grant bifurcation when requested. (Pen. Code, § 1044.) In cases where gang evidence is to be introduced, the California Supreme Court has acknowledged that such evidence could be highly prejudicial:

The predicate offenses offered to establish a "pattern of criminal gang activity" (§ 186.22, subd. (e)) need not be related to the crime, or even the defendant, and evidence of such offenses may be unduly prejudicial, thus warranting bifurcation. Moreover, some of the other gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt.

(*People v. Hernandez* (2004) 33 Cal. 4th 1040, 1049.) To mitigate the prejudice to the defendant, the Court held that a trial court has the discretion, but is not required, to bifurcate the trial on the gang enhancement, thereby allowing the prejudicial gang evidence to be introduced only after the defendant has been convicted of the underlying crime. (*Ibid.*) However, requests for bifurcation are rarely granted:

When asked how often a gang enhancement is bifurcated, Deputy Public Defender 1 replied, "About as often as the Clippers win the Championship," which means never. While this is perhaps a slight exaggeration, Deputy Public Defender 1 believed that gang enhancements are rarely bifurcated because of the prosecutorial advantages of a gang enhancement and because of judges' concerns for judicial efficiency. In Deputy District Attorney 2's example, he said the trial judge ordered bifurcation of the enhancement because of the highly prejudicial nature of the gang evidence. As a result, the gang enhancement and all of the evidence used to determine the gang enhancement were presented after the jury had already found the defendant guilty of the underlying crime so that such evidence would not prejudice the jury's determination of guilt. While this

makes the underlying conviction more difficult for the prosecution to prove, Deputy District Attorney 2 conceded that this approach was probably fairer.

(Yoshino, *California's Criminal Gang Enhancements: Lessons from Interviews with Practitioners* (2008) 18 So. Cal. L. Rev. 117, 137, fn. omitted.) Even when the gang evidence is prejudicial, other factors favor joinder resulting in a denial of the request for bifurcation: "Trial of the counts together ordinarily avoids the increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials." (*People v. Hernandez, supra*, 33 Cal. 4th 1050 citing *Frank v. Superior Court* (1989) 48 Cal.3d 632, 639.)

This bill states that when a person is charged a crime and a gang enhancement is alleged, the defendant's guilt for the underlying crime must first be determined and if the defendant is found guilty, then the jury may determine whether the gang allegation is true. The bill specifies that Allegations that the underlying offense was committed for the benefit of, at the direction of, or in association with, a criminal street gang and that the underlying offense was committed with the specific intent to promote, further, or assist in criminal conduct by gang members shall be proved by direct or circumstantial evidence. When a person is charged with the substantive offense of active participation in a gang, any other crimes that do not require gang evidence as an element of the crime shall be tried separately, however, this charge may be tried in the same proceedings as a gang enhancement.

5. Committee on the Revision of the Penal Code

On January 1, 2020, the Committee on the Revision of the Penal Code ("Committee") was established within the Law Review Commission to study the Penal Code and recommend statutory reforms. (SB 94, Ch. 25, Stats. 2019; Gov. Code, § 8280.) The Committee's objectives are as follows:

- 1) Simplify and rationalize the substance of criminal law;
- 2) Simplify and rationalize criminal procedures;
- 3) Establish alternatives to incarceration that will aid in the rehabilitation of offenders; and,
- 4) Improve the system of parole and probation.

(Gov. Code, § 8290.5, subd. (a).) In making recommendations to achieve these objectives, the Committee may recommend adjustments to the length of sentence terms. (Gov. Code, § 8290.5, subd. (b).) The Committee is required to prepare an annual report that describes its work in the prior calendar year and its expected work for the subsequent calendar year. (Gov. Code, § 8293, subd. (b).)

After holding meetings over the course of a year and hearing from multitudes of witnesses, including Governor Newsom, former Governor Brown, Attorney General Becerra, and other stakeholders involved in the criminal justice system such as law enforcement groups, public defenders, victims' advocates, and formerly incarcerated individuals, on February 9, 2021, the Committee released its first annual report describing the Committee's work and recommendations. The Committee members unanimously recommended ten reforms to the Penal Code. (See clrc.ca.gov/CRPC/About/History.html [as of June 27, 2021].)

One of the Committee's recommendations is to limit gang enhancements to the most dangerous offenses:

Gang enhancements are applied inconsistently and disproportionately against people of color, and fail to focus on the most dangerous, violent, and coordinated criminal activities. The Committee therefore recommends the following: 1. Focus the definition of "criminal street gang" to target organized, violent enterprises. 2. Remove nonviolent property crimes from the list of predicate gang-related felonies. 3. Require the defendant to know the person responsible for any predicate gang-related offense. 4. Prohibit use of the current offense as proof of a "pattern" of criminal gang activity. 5. Require direct evidence of current and active gang involvement and violence, and limit expert witness testimony. 6. Bifurcate direct evidence of gang involvement from the guilt determination at trial.

(*Annual Report and Recommendations 2020*, Committee on Revision of the Penal Code, p. 44.) Background information provided in the Committee's report indicate that the enhancement has been greatly expanded since it was originally enacted and its application is racially disproportionate:

As originally enacted, the [STEP] Act aimed to eliminate gangs by creating a three-year enhancement for gang-related offenses. Since then, the scope of the enhancement and severity of related punishments have greatly expanded. Lawmakers, courts, and voters who enacted Proposition 21 in 2000 have increased the penalties that accompany the enhancement and broadened its application. Not only were punishments made longer, but it became easier to charge gang enhancements. This is because the list of predicate offenses, which must be established to prove the existence of a gang, has also ballooned and includes many nonviolent offenses. Under current law, a person charged with a gang enhancement does not even have to know the person responsible for predicate offenses.

The racially disproportionate application of gang enhancements is particularly concerning. Director of Systemic Issues Litigation at the Office of the State Public Defender Lisa Romo explained to the Committee in September 2020: "Although social science tells us [gang] members come in all races and all ethnicities, law enforcement officers are taught that gang members are people of color. This means that communities of color are overpoliced, and white gang members can pass." Civil Rights attorney Sean Garcia-Leys testified to the Committee that police often have difficulties knowing the difference between active gang members, former gang members, and people who are non-members but are "meshed in a gang social network by virtue of family and neighborhood." Another problem with gang enhancements is that the evidence considered in court can be unreliable and prejudicial to a jury. San Joaquin County Deputy District Attorney Kevin Rooney, who specializes in gang prosecutions, agreed that bifurcating evidence of gang involvement from evidence related to the underlying charges would reduce the risk of unfairly prejudicing juries and convicting innocent people. Empirical research corroborates this assessment. Studies show that even merely associating an accused person with a gang makes it more likely that a jury will convict them. (*Id.* at pp. 45-45, fn. omitted.)

This bill would codify several of the Committee's recommendations. Specifically, this bill revises the definition of "criminal street gang" to target ongoing organized organizations, removes specified property crimes and personal identity fraud crimes from the list of crimes that define pattern of criminal gang activity, prohibits use of the current offense as proof of a pattern of criminal gang activity, and requires evidence of gang involvement to be bifurcated from the trial on the underlying offense or any other offenses that do not require gang evidence as an element.

6. Cunningham vs. California Case

The Sixth Amendment right to a jury applies to any factual finding, other than that of a prior conviction, necessary to warrant any sentence beyond the presumptive maximum. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *Blakely v. Washington* (2004) 524 U.S. 296, 301, 303-04.)

In *Cunningham v. California* (2007) 549 U.S. 270, the United States Supreme Court held California's determinate sentencing law (DSL), whereby specified crimes are punished by one of three statutory terms of imprisonment, known as the lower, middle, or upper term, violated a defendant's right to trial by jury guaranteed under the Sixth Amendment to the U.S. Constitution. (*Id.* at p. 274.) At the time, the DSL stated that, ". . . when a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (Prior Pen. Code, §1170, subd. (b).) Specifically the Court held that "[b]ecause circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, . . . the DSL violates *Apprendi's* bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Id.* at pp. 288-289.) The Court concluded: "Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the sentence cannot withstand measurement against our Sixth Amendment precedent." (*Id.* at p. 293.)

The Supreme Court provided direction as to what steps the Legislature could take to address the constitutional infirmities of the DSL:

As to the adjustment of California's sentencing system in light of our decision, the ball . . . lies in [California's] court. We note that several States have modified their systems in the wake of *Apprendi* and *Blakely* to retain determinate sentencing. They have done so by calling upon the jury - either at trial or in a separate sentencing proceeding - to find any fact necessary to the imposition of an elevated sentence. As earlier noted, California already employs juries in this manner to determine statutory sentencing enhancements. Other States have chosen to permit judges genuinely to exercise broad discretion . . . within a statutory range, which, everyone agrees, encounters no Sixth Amendment shoal. California may follow the paths taken by its sister States or otherwise alter its system, so long as the State observes Sixth Amendment limitations declared in this Court's decisions." (*Cunningham, supra*, 549 U.S. at pp. 293-294.)

Following *Cunningham*, the Legislature amended the DSL, specifically Penal Code sections 1170 and 1170.2, to make the choice of lower, middle, or upper prison terms one within the sound discretion of the court. (See SB 40 (Romero), Ch. 3, Stats. 2007.) This approach was embraced by the California Supreme Court in *People v. Sandoval* (2007) 41 Cal.4th 825, 843-

852. The procedure removes the mandatory middle term and the requirement of weighing aggravation against mitigation before imposition of the upper term. Now, the sentencing court is permitted to impose any of the three terms in its discretion, and need only state reasons for the decision so that it will be subject to appellate review for abuse of discretion. (*Id.* at pp. 843, 847.)

The statute that this bill amends contains the language that added by the Legislature in response to *Cunningham*. Specifically, Penal code section 186.22, subdivision (b) provides that a person subject to the gang enhancement shall be punished by an additional term of two, three, or four years and states that “the court shall select the sentence that, in the court’s discretion, best serves the interests of justice and shall state the reasons for its choice on the record at the time of sentencing in accordance with the provisions of subdivision (d) of Section 1170.1.” This provision will sunset on January 1, 2022 and the statute will revert back to the language that was found unconstitutional in *Cunningham* requiring the court to impose the middle term of the enhancement unless there are aggravating or mitigating circumstances.

Earlier this year, this committee passed SB 567 (Bradford) which would make changes to the DSL so that any factors relied upon by the court to impose a sentence higher than the middle term would have to be plead and proved by a jury. Should a similar provision be added to this bill in order to avoid the law reverting back to the unconstitutional version or, as an alternative, should the existing language be extended for one year?

7. Argument in Support

According to the San Francisco Public Defender’s Office, a co-sponsor of this bill:

AB 333 brings essential corrections to the Penal Code § 186.22, which has allowed young Black and Latinx people who live and grow up in poor neighborhoods to be prosecuted and persecuted based on their friendships, family associations and simply the street where their family’s home is.

The Unintended Consequences of the 1991 STEP Act

As public defenders we have defended many clients facing gang allegations and charges. We have experienced first-hand how gang officers, and then the assigned prosecutors, use guilt by association, and often nothing more, to claim gang membership or gang affiliation. We have then listened to prosecutors argue to the jury that the mere fact of alleged gang affiliation means the defendant is guilty of the substantive offense.

Current law allows broad and unfettered discretion regarding law enforcement’s terminology and definitions.

There is no methodology or established social science to the broad and speculative testimony of law enforcement allowed to testify as “experts.” Our young clients sitting in court, often charged with assault or firearm possession, are incredulous that they can be accused of being a gang member based on decades old convictions of people they have never met and don’t know. This is due to low legal standards required under current section 186.22 to establish both “pattern of criminal gang activity” and “for the benefit of” or “in association with.”

In San Francisco, where any knowledgeable community member will tell you “there are no organized Black criminal street gangs,” our Black clients who live in housing project areas have been prosecuted as gang members — for crimes like burglary or gun possession — even though the police testify that there is no formal leadership [no shot-callers], no hierarchy, no economic organization, no initiation process, no specific colors or articles of clothing, no code of conduct, etc. Thus, entire neighborhoods are criminalized on the basis of “he was in this picture on Instagram, or he was in this rap video throwing hand signs.”

The STEP Act has had a racially disproportionate impact on Black and Brown youth.

According to CDCR’s 2019 data, 92% of the men in prison with gang enhancements are Black or Latinx. The number of people sentenced to state prison with a gang enhancement increased 40% between 2011 and 2019.

The STEP Act has criminalized Black family relationships in San Francisco, particularly when used in conjunction with gang injunctions. We know of cousins who cannot walk down the street together to attend a community barbecue for fear of being arrested for violating the gang injunction. Although San Francisco has two white alleged “criminal street gangs,” white youth here are never prosecuted as gang members.

8. Argument in Opposition

According to the California Police Chiefs Association:

Existing law makes it a crime, punishable as either a misdemeanor or a felony, to actively participate in a criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity and to actively promote, further, or assist in felonious criminal conduct by members of that gang. AB 333 requires proof that the pattern offense commonly benefits at least one specifically identified member of the gang other than the person who committed the offenses, thus limiting the use of any pattern offenses to a few limited crimes. It also requires proof that the common benefit from the offenses is more than reputational, thus rising up in the gang ranks or promoting the gang through fear will not be enough. It further requires the defendant know the person or people responsible for committing the offenses used to establish the pattern of criminal gang activity, which will be difficult to prove with less senior gang members. In addition, the charged offense shall not be used to establish a pattern of criminal gang activity, thus narrowing the definition of pattern offenses as well as removing crimes from the list of pattern offenses, including burglary, felony vandalism, felony theft of an access card, felony fraudulent use of an access card, and ID theft.

AB 333 changes the definition of a street gang as it requires the existence of an ongoing organization, association, or group of three or more persons, whether formal or informal, with an established hierarchy, thus eliminating gangs without such hierarchy. This bill also requires bifurcation of the substantive crime and the gang special allegation at the request of defense. A prosecutor will not be allowed

to argue that the substantive crime was gang motivated. Finally, by removing the word “any,” the proposed bill appears to reject the previous case law’s broader interpretation of the requirement to promote, further or assist in any criminal conduct by gang members or any felonious criminal conduct by members of the gang, thus, limiting the interpretation to only felonious gang-related conduct, as well as criminal conduct distinct from the charged offense.

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