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AB-333 Participation in a criminal street gang: enhanced sentence. (2021-2022)

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Assembly Bill No. 333

CHAPTER 699

An act to amend Section 186.22 of, and to add Section 1109 to, the Penal Code, relating to criminal gangs.

[Approved by Governor October 08, 2021. Filed with Secretary of State October 08, 2021.]

LEGISLATIVE COUNSEL'S DIGEST

AB 333, Kamlager. Participation in a criminal street gang: enhanced sentence.

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. Existing law provides for an enhanced sentence, as specified, for a person who is convicted of a crime committed for the benefit of, at the direction of, or in association with, a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by the gang members. Existing law defines "pattern of criminal gang activity" for this purpose as the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of 2 or more of a list of specified offenses, provided at least one of these offenses occurred after the effective date of these provisions and the last of those offenses occurred within 3 years after a prior offense, and the offenses were committed on separate occasions, or by 2 or more persons. Under existing law, the specified offenses to form a pattern of criminal gang activity include, among others, burglary, looting, felony vandalism, and various personal identity fraud crimes.

This bill would also require that the crimes committed to form a pattern of criminal gang activity have commonly benefited a criminal street gang and that the common benefit from the offenses be more than reputational, as specified. The bill would remove looting, felony vandalism, and specified personal identity fraud violations from the crimes that define a pattern of criminal gang activity. The bill would prohibit the use of the currently charged crime to prove the pattern of criminal gang activity.

This bill would require, if requested by the defense in a case where a sentencing enhancement for participation in a criminal street gang is charged, that the defendant's guilt of the underlying offense first be proved and that a further proceeding on the sentencing enhancement occur after a finding of guilt. The bill would require 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.

For purposes of the enhancement, existing law defines "criminal street gang" as an ongoing organization, association, or group of 3 or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the enumerated criminal acts, 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.

This bill, instead, would define "criminal street gang" as an ongoing, organized organization or group of 3 or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the enumerated criminal acts,

having a common name or common identifying sign or symbol, and whose members collectively engage in, or have engaged in, a pattern of criminal gang activity.

Existing law, until January 1, 2022, requires the court, when applying the enhancement, to select the sentence that best serves the interests of justice. Existing law, on and after January 1, 2022, requires the court to instead order the imposition of the middle term of the sentence enhancement, unless there are circumstances in aggravation or mitigation.

This bill would extend to January 1, 2023, the requirement that the court select the sentence that best serves the interest of justice.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. This act shall be known, and may be cited, as the STEP Forward Act of 2021.

SEC. 2. The Legislature finds and declares all of the following:

(a) Current gang enhancement statutes criminalize entire neighborhoods historically impacted by poverty, racial inequality, and mass incarceration as they punish people based on their cultural identity, who they know, and where they live.

(b) Being designated as a gang member or associate negatively impacts a person's criminal legal system contact from start to finish by hindering pretrial release, influencing sentencing, incarceration, parole, and reentry, and can lead to deportation.

(c) No empirical studies have produced evidence showing that gang enhancements meaningfully reduce crime or violence.

(d) According to the Committee on Revision of the Penal Code's 2020 report:

(1) The gang enhancement statute is applied inconsistently against people of color, creating a racial disparity.

(2) The current statute disproportionately impacts communities of color, making the statute one of the largest disparate racial impact statutes that imposes criminal punishments.

(3) California reduced its prison population from about 163,000 in 2011 to about 125,000 in 2019. Yet during these years, the number of incarcerated people serving a gang enhancement increased by almost 40 percent.

(4) In Los Angeles alone, the state's largest jurisdiction, over 98 percent of people sentenced to prison for a gang enhancement are people of color.

(5) Gang enhancements can result in life sentences and may apply to minor crimes such as misdemeanors, even though the law promised to only be applied when "the provable purpose of the gang is to commit serious and violent crime. (Martin Baker, *Stuck in the Thicket: Struggling with Interpretation and Application of California's AntiGang STEP Act*, 11 Berkeley J. Crim. L. 101 (2006), quoting Criminal Street Gang Bill Passes Committee, Eagle Rock Sentinel (June 27, 1987)).

(6) Gang enhancement evidence can be unreliable and prejudicial to a jury because it is lumped into evidence of the underlying charges which further perpetuates unfair prejudice in juries and convictions of innocent people.

(7) People frequently receive gang enhancements based on the conduct of other people whom they have never even met.

(8) The social networks of residents in neighborhoods targeted for gang suppression are often mischaracterized as gangs despite their lack of basic organizational requirements such as leadership, meetings, hierarchical decisionmaking, and a clear distinction between members and nonmembers.

(9) People are also frequently automatically lumped into a gang social network simply because of their family members or their neighborhood.

(10) The California Attorney General's 2019 Annual Report on CalGang found that the demographics of those in the database were 65 percent Latinx, 24 percent Black, and 6 percent White.

(11) An audit by the Los Angeles Police Department of that annual report confirmed that the CalGang database includes unreliable and false information.

(e) California courts have long recognized how prejudicial gang evidence is. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 193.) Studies suggest that allowing a jury to hear the kind of evidence that supports a gang enhancement before it has decided whether the defendant is guilty or not may lead to wrongful convictions. (Eisen, et al., *Examining the Prejudicial Effects of Gang Evidence on Jurors* (2013) 13 J. Forensic Psychol. Pract. 1; Eisen, et al., *Probative or Prejudicial: Can Gang Evidence Trump*

Reasonable Doubt? (2014) 62 UCLA L. Rev. disc. 2; see also, 2020 Annual Report, p. 46 ["Studies show that even merely associating an accused person with a gang makes it more likely that a jury will convict them"].) The mere specter of gang enhancements pressures defendants to accept unfavorable plea deals rather than risk a trial filled with prejudicial evidence and a substantially longer sentence.

(f) Bifurcation of trials where gang evidence is alleged can help reduce its harmful and prejudicial impact.

(g) The STEP Act was originally enacted to target crimes committed by violent, organized criminal street gangs (Section 186.21 of the Penal Code). Proponents claimed the prosecution would be unable to prove an offense was committed for the benefit of, or in association with, a gang "except in the most egregious cases where a pattern of criminal gang activity was clearly shown." (Bill analysis of Assembly Bill 1555, Senate Committee on Judiciary (June 1987).) However, The STEP Act has been continuously expanded through legislative amendments and court rulings. As a result of lax standards, STEP Act enhancements are ubiquitous. Despite the frequent use of STEP enhancements, there is no empirical evidence indicating that they are effective in reducing gang crime. In fact, scholars have suggested that heavy-handed gang suppression tactics may be counterproductive. (Gangs, Crime and Violence in Los Angeles: Findings and Proposals from the District Attorney's Office (May 1992) pp. 145-146, 153 and fn. 306).

(h) Gang enhancements have also contributed to the size of, and given an air of legitimacy to, gang databases used by law enforcement. For decades, California law enforcement agencies documented allegations of gang membership against hundreds of thousands of people in confidential gang databases using criteria criticized as overbroad and ambiguous, prompting the Legislature to address concerns regarding fairness, accuracy, consistency, and transparency in the state's CalGang database (Chapter 797 of the Statutes of 2013 (Senate Bill 458); Chapter 752 of the Statutes of 2016 (Assembly Bill 2298); and Chapter 695 of the Statutes of 2017 (Assembly Bill 90)). As a result of this transparency, it has been revealed that gang membership allegations by law enforcement officers are typically little more than guesses that are unreliable, based on assumptions at odds with empirical research, and racially discriminatory (Sean Garcia-Leys and Nicole Brown, Analysis of the Attorney General's Annual Report on CalGang for 2018, Urban Peace Institute (2018)). In 2020, CalGang's largest user agency, the Los Angeles Police Department, withdrew entirely from the CalGang system, concluding that "LAPD's entry of individuals into the database appears haphazard at best" and "LAPD has no knowledge that other [agencies'] entries are not similarly flawed, or unreliable." (July 9, 2020, Interdepartmental Correspondence from Lizabeth Rhodes, Director of LAPD's Office of Constitutional Policing and Policy to Chief Moore, Chief of LAPD, p. 3)

(i) Gang enhancements and allegations have additionally been used to legitimize severe punishment, including the use of prolonged solitary confinement. Upon incarceration by the Department of Corrections and Rehabilitation, a person accused of being a gang member can affect a person's housing, access to programs, and often lead to a denial of parole.

SEC. 3. Section 186.22 of the Penal Code, as amended by Section 178 of Chapter 561 of the Statutes of 2017, is amended to read:

186.22. (a) A person who actively participates in a criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in 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.

(b) (1) Except as provided in paragraphs (4) and (5), a person who is convicted of a felony committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the person has been convicted, be punished as follows:

(A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion.

(B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years.

(C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years.

(2) If the underlying felony described in paragraph (1) is committed on the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school, during hours in which the facility is open for classes or school-related programs or when minors are using the facility, that fact shall be a circumstance in aggravation of the crime in imposing a term under paragraph (1).

(3) The court shall select the sentence enhancement 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 the sentencing in accordance with the provisions of subdivision (d) of Section 1170.1.

(4) A person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

(A) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 3046, if the felony is any of the offenses enumerated in subparagraph (B) or (C) of this paragraph.

(B) Imprisonment in the state prison for 15 years, if the felony is a home invasion robbery, in violation of subparagraph (A) of paragraph (1) of subdivision (a) of Section 213; carjacking, as defined in Section 215; a felony violation of Section 246; or a violation of Section 12022.55.

(C) Imprisonment in the state prison for seven years, if the felony is extortion, as defined in Section 519; or threats to victims and witnesses, as defined in Section 136.1.

(5) Except as provided in paragraph (4), a person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served.

(c) If the court grants probation or suspends the execution of sentence imposed upon the defendant for a violation of subdivision (a), or in cases involving a true finding of the enhancement enumerated in subdivision (b), the court shall require that the defendant serve a minimum of 180 days in a county jail as a condition thereof.

(d) A person who is convicted of a public offense, punishable as a felony or a misdemeanor, that is committed for the benefit of, at the direction of, or in association with, a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members, shall be punished by imprisonment in a county jail not to exceed one year, or by imprisonment in a state prison for one, two, or three years, provided that a person sentenced to imprisonment in the county jail shall be imprisoned for a period not to exceed one year, but not less than 180 days, and shall not be eligible for release upon completion of sentence, parole, or any other basis, until the person has served 180 days. If the court grants probation or suspends the execution of sentence imposed upon the defendant, it shall require as a condition thereof that the defendant serve 180 days in a county jail.

(e) (1) As used in this chapter, "pattern of criminal gang activity" means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of, two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter, and the last of those offenses occurred within three years of the prior offense and within three years of the date the current offense is alleged to have been committed, the offenses were committed on separate occasions or by two or more members, the offenses commonly benefited a criminal street gang, and the common benefit of the offense is more than reputational:

(A) Assault with a deadly weapon or by means of force likely to produce great bodily injury, as defined in Section 245.

(B) Robbery, as defined in Chapter 4 (commencing with Section 211) of Title 8.

(C) Unlawful homicide or manslaughter, as defined in Chapter 1 (commencing with Section 187) of Title 8.

(D) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture a controlled substance as defined in Section 11007 of the Health and Safety Code.

(E) Shooting at an inhabited dwelling or occupied motor vehicle, as defined in Section 246.

(F) Discharging or permitting the discharge of a firearm from a motor vehicle, as defined in subdivisions (a) and (b) of Section 12034 until January 1, 2012, and, on or after that date, subdivisions (a) and (b) of Section 26100.

(G) Arson, as defined in Chapter 1 (commencing with Section 450) of Title 13.

(H) The intimidation of witnesses and victims, as defined in Section 136.1.

(I) Grand theft, as defined in subdivision (a) or (c) of Section 487.

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

(K) Burglary, as defined in Section 459.

(L) Rape, as defined in Section 261.

(M) Money laundering, as defined in Section 186.10.

(N) Kidnapping, as defined in Section 207.

(O) Mayhem, as defined in Section 203.

(P) Aggravated mayhem, as defined in Section 205.

(Q) Torture, as defined in Section 206.

(R) Felony extortion, as defined in Sections 518 and 520.

(S) Carjacking, as defined in Section 215.

(T) The sale, delivery, or transfer of a firearm, as defined in Section 12072 until January 1, 2012, and, on or after that date, Article 1 (commencing with Section 27500) of Chapter 4 of Division 6 of Title 4 of Part 6.

(U) Possession of a pistol, revolver, or other firearm capable of being concealed upon the person in violation of paragraph (1) of subdivision (a) of Section 12101 until January 1, 2012, and, on or after that date, Section 29610.

(V) Threats to commit crimes resulting in death or great bodily injury, as defined in Section 422.

(W) Theft and unlawful taking or driving of a vehicle, as defined in Section 10851 of the Vehicle Code.

(X) Prohibited possession of a firearm in violation of Section 12021 until January 1, 2012, and on or after that date, Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.

(Y) Carrying a concealed firearm in violation of Section 12025 until January 1, 2012, and, on or after that date, Section 25400.

(Z) Carrying a loaded firearm in violation of Section 12031 until January 1, 2012, and, on or after that date, Section 25850.

(2) The currently charged offense shall not be used to establish the pattern of criminal gang activity.

(f) As used in this chapter, "criminal street gang" means an ongoing, organized 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 in subdivision (e), having a common name or common identifying sign or symbol, and whose members collectively engage in, or have engaged in, a pattern of criminal gang activity.

(g) As used in this chapter, to benefit, promote, further, or assist means to provide a common benefit to members of a gang where the common benefit is more than reputational. Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant.

(h) 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.

(i) Notwithstanding any other law, for each person committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities for a conviction pursuant to subdivision (a) or (b) of this section, the offense shall be deemed one for which the state shall pay the rate of 100 percent of the per capita institutional cost of the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, pursuant to former Section 912.5 of the Welfare and Institutions Code.

(j) In order to secure a conviction or sustain a juvenile petition, pursuant to subdivision (a) it is not necessary for the prosecution to prove that the person devotes all, or a substantial part, of their time or efforts to the criminal street gang, nor is it necessary to prove that the person is a member of the criminal street gang. Active participation in the criminal street gang is all that is required.

(k) This section shall remain in effect only until January 1, 2023, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2023, deletes or extends that date.

SEC. 4. Section 186.22 of the Penal Code, as amended by Section 179 of Chapter 561 of the Statutes of 2017, is amended to read:

186.22. (a) A person who actively participates in a criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in 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.

(b) (1) Except as provided in paragraphs (4) and (5), a person who is convicted of a felony committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the person has been convicted, be punished as follows:

(A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion.

(B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years.

(C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years.

(2) If the underlying felony described in paragraph (1) is committed on the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school, during hours in which the facility is open for classes or school-related programs or when minors are using the facility, that fact shall be a circumstance in aggravation of the crime in imposing a term under paragraph (1).

(3) The court shall order the imposition of the middle term of the sentence enhancement, unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its choice of sentencing enhancements on the record at the time of the sentencing.

(4) A person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

(A) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 3046, if the felony is any of the offenses enumerated in subparagraph (B) or (C) of this paragraph.

(B) Imprisonment in the state prison for 15 years, if the felony is a home invasion robbery, in violation of subparagraph (A) of paragraph (1) of subdivision (a) of Section 213; carjacking, as defined in Section 215; a felony violation of Section 246; or a violation of Section 12022.55.

(C) Imprisonment in the state prison for seven years, if the felony is extortion, as defined in Section 519; or threats to victims and witnesses, as defined in Section 136.1.

(5) Except as provided in paragraph (4), a person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served.

(c) If the court grants probation or suspends the execution of sentence imposed upon the defendant for a violation of subdivision (a), or in cases involving a true finding of the enhancement enumerated in subdivision (b), the court shall require that the defendant serve a minimum of 180 days in a county jail as a condition thereof.

(d) A person who is convicted of a public offense, punishable as a felony or a misdemeanor, that is committed for the benefit of, at the direction of, or in association with, a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members, shall be punished by imprisonment in a county jail not to exceed one year, or by imprisonment in a state prison for one, two, or three years, provided that a person sentenced to imprisonment in the county jail shall be imprisoned for a period not to exceed one year, but not less than 180 days, and shall not be eligible for release upon completion of sentence, parole, or any other basis, until the person has served 180 days. If the court grants probation or suspends the execution of sentence imposed upon the defendant, it shall require as a condition thereof that the defendant serve 180 days in a county jail.

(e) (1) As used in this chapter, "pattern of criminal gang activity" means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of, two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter, and the last of those offenses occurred within three years of the prior offense and within three years of the date the current offense is alleged to have been committed, the offenses were

committed on separate occasions or by two or more members, the offenses commonly benefited a criminal street gang, and the common benefit from the offenses is more than reputational:

- (A) Assault with a deadly weapon or by means of force likely to produce great bodily injury, as defined in Section 245.
- (B) Robbery, as defined in Chapter 4 (commencing with Section 211) of Title 8.
- (C) Unlawful homicide or manslaughter, as defined in Chapter 1 (commencing with Section 187) of Title 8.
- (D) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture a controlled substance as defined in Section 11007 of the Health and Safety Code.
- (E) Shooting at an inhabited dwelling or occupied motor vehicle, as defined in Section 246.
- (F) Discharging or permitting the discharge of a firearm from a motor vehicle, as defined in subdivisions (a) and (b) of Section 12034 until January 1, 2012, and, on or after that date, subdivisions (a) and (b) of Section 26100.
- (G) Arson, as defined in Chapter 1 (commencing with Section 450) of Title 13.
- (H) The intimidation of witnesses and victims, as defined in Section 136.1.
- (I) Grand theft, as defined in subdivision (a) or (c) of Section 487.
- (J) Grand theft of any firearm, vehicle, trailer, or vessel.
- (K) Burglary, as defined in Section 459.
- (L) Rape, as defined in Section 261.
- (M) Money laundering, as defined in Section 186.10.
- (N) Kidnapping, as defined in Section 207.
- (O) Mayhem, as defined in Section 203.
- (P) Aggravated mayhem, as defined in Section 205.
- (Q) Torture, as defined in Section 206.
- (R) Felony extortion, as defined in Sections 518 and 520.
- (S) Carjacking, as defined in Section 215.
- (T) The sale, delivery, or transfer of a firearm, as defined in Section 12072 until January 1, 2012, and, on or after that date, Article 1 (commencing with Section 27500) of Chapter 4 of Division 6 of Title 4 of Part 6.
- (U) Possession of a pistol, revolver, or other firearm capable of being concealed upon the person in violation of paragraph (1) of subdivision (a) of Section 12101 until January 1, 2012, and, on or after that date, Section 29610.
- (V) Threats to commit crimes resulting in death or great bodily injury, as defined in Section 422.
- (W) Theft and unlawful taking or driving of a vehicle, as defined in Section 10851 of the Vehicle Code.
- (X) Prohibited possession of a firearm in violation of Section 12021 until January 1, 2012, and, on or after that date, Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.
- (Y) Carrying a concealed firearm in violation of Section 12025 until January 1, 2012, and, on or after that date, Section 25400.
- (Z) Carrying a loaded firearm in violation of Section 12031 until January 1, 2012, and, on or after that date, Section 25850.

(2) The currently charged offense shall not be used to establish the pattern of criminal gang activity.

(f) As used in this chapter, "criminal street gang" means an ongoing, organized 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 in subdivision (e), having a common name or common identifying sign or symbol, and whose members collectively engage in, or have engaged in, a pattern of criminal gang activity.

(g) As used in this chapter, to benefit, promote, further, or assist means to provide a common benefit to members of a gang where the common benefit is more than reputational. Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant.

(h) 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.

(i) Notwithstanding any other law, for each person committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities for a conviction pursuant to subdivision (a) or (b) of this section, the offense shall be deemed one for which the state shall pay the rate of 100 percent of the per capita institutional cost of the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, pursuant to former Section 912.5 of the Welfare and Institutions Code.

(j) In order to secure a conviction or sustain a juvenile petition, pursuant to subdivision (a) it is not necessary for the prosecution to prove that the person devotes all, or a substantial part, of their time or efforts to the criminal street gang, nor is it necessary to prove that the person is a member of the criminal street gang. Active participation in the criminal street gang is all that is required.

(k) This section shall become operative on January 1, 2023.

SEC. 5. Section 1109 is added to the Penal Code, to read:

1109. (a) If requested by the defense, a case in which a gang enhancement is charged under subdivision (b) or (d) of Section 186.22 shall be tried in separate phases as follows:

(1) The question of the defendant's guilt of the underlying offense shall be first determined.

(2) If the defendant is found guilty of the underlying offense and there is an allegation of an enhancement under subdivision (b) or (d) of Section 186.22, 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.

(b) If a defendant is charged with a violation of subdivision (a) of Section 186.22, this count shall 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 under subdivision (b) or (d) of Section 186.22.