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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair  
2019 - 2020 Regular

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**Bill No:** SB 516                      **Hearing Date:** April 23, 2019  
**Author:** Skinner  
**Version:** March 25, 2019  
**Urgency:** No                              **Fiscal:** No  
**Consultant:** SC

**Subject:** *Evidence of Participation in a Criminal Street Gang*

### HISTORY

**Source:** Youth Justice Coalition  
Alliance for Boys and Men of Color

**Prior Legislation:** 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:** 2nd Call; American Academy of Pediatrics, California; American Civil Liberties Union; Anti-Recidivism Coalition; Black Lives Matter Sacramento; Cage-Free Repair; California Attorneys for Criminal Justice; California Coalition for Women Prisoners; California Families Against Solitary Confinement; California Civil Liberties Advocacy; California Immigrant Policy Center; California Immigrant Youth Justice Alliance; Californians United for a Responsible Budget; Center for Juvenile Law and Policy – Loyola Law School; Conservatives for Criminal Justice Reform; Drumming for Your Life Institute; Ella Baker Center for Human Rights; Fair Chance Project; Felony Murder Elimination Project; Girls Club of Los Angeles; Homeboys Industries; Homies Unidos; The Immigrant Youth Coalition; Initiate Justice; Local Choices for Global Respect; MEChA de UCLA; National Center for Youth Law; National Juvenile Justice Network; National Lawyers Guild of Los Angeles; People Power LA – West; Prisoner Advocacy Network; Rubicon Programs; San Jose/Silicon Valley NAACP; San Francisco No Injunctions Coalition; San Francisco Public Defender’s Office; Silicon Valley De-Bug; Spirit Awakening Foundation; Voice of the Silenced; W. Haywood Burns Institute; Women’s Leadership Project; Youth Justice Coalition; multiple individuals

**Opposition:** California District Attorneys Association; San Diego District Attorney’s Office

### PURPOSE

*The purpose of this bill is to require gang enhancements to be tried in separate phases from other criminal charges that do not require gang evidence.*

*Existing law* defines a “criminal street gang” as 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 enumerated criminal offenses, having a common name or identifying sign or symbol, and whose members individually or collectively engage in a pattern of criminal gang activity. (Pen. Code § 186.22, subd. (f).)

*Existing law* provides that 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 conduct by members of that gang, shall be punished by imprisonment in a country 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 immediately 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 gang activity” as the commission of, attempted commission of, conspiracy to commit, or solicitation of, or conviction of two or more enumerated offenses, provided at least one of the offenses occurred after the effective date of the statute and that the last of the offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons. (Pen. Code § 186.22, subd. (e).)

*Existing law* enacted a number of public safety provisions, including increased penalties for gang-related crimes, creation of a new crime of conspiracy related to gang activity, and required registration for adults and minors who have been convicted of participation in a street gang, or where the gang enhancement was found to be true. (Proposition 21, approved by voters in the March 7, 2000 election.)

*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* states that a case in which a defendant is charged under the gang statute shall be tried in separate phases as follows:

- The question of the defendant’s guilt shall be first determined. If the trier of fact finds the defendant guilty of the underlying offense and gang membership is an element of the offense, it shall at the same time determine the truth of the gang enhancement, notwithstanding a determination by the court that the evidence should be excluded;
- If the defendant is found guilty of the crime charged and there is an allegation of a gang enhancement, there shall be further proceedings to the trier of fact on the question of the truth of the enhancement. Evidence of the gang enhancement shall be bifurcated from the trial on the underlying offense.
- If a defendant is charged with a violation of being an active participant in a gang, this count shall be tried separately from all other counts that do not otherwise require gang evidence as an element of the crime.

## COMMENTS

### 1. Need for this Bill

According to the author of this bill:

Currently, the arguments for a gang enhancement occur at the same time that arguments are presented for the controlling offense. With the people watching the process - juries, victims, the general public or media who are in court, as well as the judge and other court personnel - an individual is judged not only by their actions, but by the past actions and notoriety of an entire neighborhood.

Furthermore, the application of gang enhancements disproportionately impacts people of color, promoting racial profiling that has ensured harsher policing, prosecution and sentencing based on the race of the individual and the racial demographics of their zip code.

Even though the trends show that there is a rise in female and white male gang members gang punishment is disproportionately applied to young men of color.

Studies reveal that the weaker the evidence the more extralegal factors such as gang evidence prejudice jurors. The simple label of “gang member” can invoke a visceral response in the minds of jurors biasing them against the accused especially when the evidence is weak. Several studies have examined this bias by simulating trials only changing whether gang evidence was introduced to the jury.

In one study when prosecutors argued the accused was simply gang affiliated guilty verdicts rose from 48% to 60%. When prosecutors introduced evidence of documented gang membership convictions rose to 64%.

Another study explored the difference in conviction rates if the evidence of guilt was very weak. That study found when gang evidence was introduced to the jury guilty verdicts increased almost three to one.

Currently, “gang evidence is admissible if it is logically relevant to some material issue other than character evidence, is not more prejudicial than probative, and is not cumulative.” (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) As a result, gang evidence may be relevant to establish the defendant’s motive, intent, or some fact concerning the charged offense other than criminal propensity as long as the probative value of the evidence outweighs its prejudicial effect. (*People v. Williams* (1997) 16 Cal.4th 153, 193.) The burden is placed on the accused to show that the gang evidence’s probative value is outweighed by the threat of undue prejudice.

SB 516 would require the jury in a criminal case to first determine guilt on the substantive crime charged with no reference to any gang evidence, then if convicted, the same trier of fact would determine if the defendant is guilty of the gang enhancement or a gang offense under Penal Code section 186.22.

Courts have consistently reiterated the extreme prejudice of gang evidence at trial. The California Supreme court said: “The authorization we found in Calderon for bifurcation of a prior conviction allegation also permits bifurcation of the gang enhancement. The predicate offenses offered to establish a “Pattern of criminal gang activity” 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*, 33 Cal.4th 1040, 1049.)

Requiring gang evidence to be tried separately from the underlying offense would ensure even application of bifurcation across California and provide the necessary safeguards to due process.

SB 516 reduces racial bias, and brings greater balance and fairness to California’s court system, ensuring that people are first judged by their own actions before being judged on whether it was in connection with a gang.

## 2. 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."

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, fns. 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.)

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.) 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 requires that a charge of active participation in a gang be tried separately from any other charges that do not otherwise require gang evidence as an element of the offense.

#### 4. Bifurcation of Trial Phases

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. 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.

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.)

## 5. Argument in Support

According to California Attorneys for Criminal Justice:

SB 516 would require a case where a person is charged with actively participating in a criminal street gang to be tried separately, in phases. These phases would separate the charge of gang affiliation with other charges.

Gang affiliation has a strong influence on jurors. Being labeled a "gang member" can have negative implications on other criminal charges by causing jurors to see the evidence through the "gang member" perspective. A recent study in the UCLA Law Review found informing a jury the defendant is a gang member significantly increases the likelihood of guilty verdict and convictions even when reasonable doubt has been established.

This study shows bifurcation is necessary to providing defendants access to justice by potentially reducing the effects of bias on jurors.

## 6. Argument in Opposition

According to the California District Attorneys Association:

Regarding motive, in particular, depriving a jury of gang evidence would severely undermine prosecutions in cases involving crimes like witness intimidation, criminal threats, drive by shootings and human trafficking. Such cases often involve inexplicable violence and victimization that can only be explained in the context of the street gang subculture. By removing this context it would prevent the jury from considering the explanation or incentive for a crime. (*See People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167-1168 ["Because a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence"].) Because of the plain relevance of street gang evidence when litigating the underlying charges, statutory exclusion of that evidence would also run afoul of California's Truth in Evidence Provision. (Cal. Const. Art. I, Sec. 28(d) ["relevant evidence shall not be excluded in any criminal proceeding"].)

The changes made by SB 516 are unnecessary to protect defendants from being improperly prejudiced by gang evidence. Trial courts already possess the authority to exclude irrelevant evidence from trials under Evidence Code Section 352. Where evidence of criminal street gang membership creates a danger that a jury might improperly be influenced against the defendant the California Supreme Court has already recognized that trial courts may bifurcate the trial. (Hernandez, 33 Cal.4<sup>th</sup> at 1048.)

**-- END --**