PROVING GANG OFFENSES AND ENHANCEMENTS

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In 1988 the Legislature enacted the California Street Terrorism Enforcement and Prevention (STEP) Act, which added Penal Code sections 186.20 et seq, effective September 26, 1988. The Legislature has stated the intent behind the STEP Act and codified its findings in Penal Code section 186.20:

> The Legislature, however, further finds that the State of California is in a state of crisis which had been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected. ... It is the intent of the Legislature in enacting this chapter to seek 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.

Several amendments to the STEP Act were enacted through Proposition 21, which went into effect on March 8, 2000, and are applicable to crimes committed after that date.

These materials are intended to assist attorneys in spotting potential issues in the adjudication of gang provisions arising under Penal Code section 186.22. This outline will focus on the determination of the gang provisions, rather than on the imposition of sentence. This outline is not designed to be a comprehensive guide to gang statutes, and it certainly does not include every recent case. Instead this article notes selected areas in which issues frequently arise in litigation under Penal Code section 186.22. The principle objective is to call attention to certain themes which cut across the various gang provisions and to assist attorneys in identifying issues.

Penal Code section 186.22 has three separate charging provisions.[1] The first provision is contained in 186.22, subdivision (a), and is a substantive offense for actively participating in and wilfully furthering felonious conduct by members of a criminal street

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[1] Also within the STEP Act, but not contained in section 186.22, are provisions for criminalizing gang recruitment (Pen. Code, § 186.26), and registration requirements for convicted criminal gang offenders (Pen. Code, § 186.30 et seq.), but these provisions will not be discussed here.

gang. The second provision is an enhancement allegation contained in section 186.22, subdivision (b)(1). The allegation is applicable to felony charges committed for the benefit of any criminal street gang with the specific intent to further criminal conduct by gang members. The third provision, contained in section 186.22, subdivision (d), is an alternate penalty provision, chargeable as either a felony or misdemeanor, for committing a public offense for the benefit of a criminal street gang with the specific intent to further criminal conduct by gang members.

Each element of the gang-related provisions must be supported by sufficient evidence that is reasonable, credible, and of solid value. (*In re Jorge G*. (2004) 114 Cal.App.4th 931, 944; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) The provisions share some common elements and also have unique elements unto themselves. The common elements will be discussed first.

I. The Criminal Street Gang Component.

The "criminal street gang"component of the gang provisions (i.e., the gang's existence) 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.)

A. *The Organization*.

The existing organizational and size characteristics required by the statute are three or more members which have a common name or identifying symbol. (Pen. Code, §186.22, subd. (f).) This element is usually established through expert testimony, but it can also be established by other sources. In *In re Nathaniel C*. (1991) 228 Cal.App.3d 990, this element was met by testimony from a juvenile witness identifying at least three participants in the incident as members of a street gang and claiming that there was a membership roll written on a friend's wall.

No common color or clothing is required, but a common color of clothing or style of dress may satisfy this element. Graffiti may be used to establish a common sign. It is not necessary to show both a common name and a common symbol; showing one is

enough to satisfy the statute. (*Id*. at p. 1001.)

But, the prosecutor must show that the gang is "ongoing." In *People v. Jeon* (Dec. 1, 2004, B170298 [nonpub. opn.]), the gang expert testified the Moraeshigae was not in the state-wide gang data base nor in the "gang book" maintained by the police department. Although the expert specialized in Korean gangs he had only 10 contacts with Moraeshigae members in the past 10 years. He had never spoken to any other officer who had contact with a Moraeshigae member, and admitted the only persons whom he believed were members of the Moraeshigae gang and who were still "on the street" were the defendant and one other person. Accordingly, this gang was not ongoing for purposes of the statute.

B. *Primary Activities*.

The phrase "primary activities" as used in the gang statute implies that the commission of one or more of the statutorily enumerated crimes is one of the group's chief or principal occupations. That definition would necessarily exclude the occasional commission of those crimes by the group's members. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322.) The 25 statutorily enumerated crimes can be found at Penal Code section 186.22, subdivision (e).[2]

The primary activities element can be established not only by evidence of past conduct by gang members, but also by reliance upon the presently charged conduct. (*Id*. at p. 323, *People v. Galvan* (1998) 68 Cal.App.4th 1135, 1140.)

Several recent cases have addressed the issue of the type and quantum of evidence sufficient to prove the "primary activities" element. In *In re Jorge G*. (2004) 117 Cal.App.4th 931, the court recognized that a gang's primary activities may be shown though expert testimony. But in that case the finding of a gang-related crime was reversed because no expert testimony was presented on the subject of the gang's primary activities. (*Id*. at pp. 944-945.)

In *People v. Perez* (2004) 118 Cal.App.4th 151, 160, evidence of a Hispanic gang's history of racial hatred and violent acts towards Asians, including several

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[2] These enumerated felonies are actually used for two purposes – the proof of the primary activities and to establish predicate offenses for the "pattern of gang activity" which will be discussed below.

retaliatory shootings over a period of less than a week and a beating of a child six years earlier. The Court of Appeal held that this evidence was insufficient to establish that the group's members "consistently and repeatedly" committed criminal activity as listed in the gang statute.

In contrast, in *People v. Vy* (2004) 122 Cal.App.4th 1209, the court found the "primary activities" prong satisfied where the evidence showed the existence of three serious, violent crimes by that took place over a period of less than three months where the gang involved was a small Asian gang in existence for only two years**.** The court declined to require that the criminal activities be "spread out" over the gang's entire existence. Rather, it held "the fact that [the gang's] level of criminal activity lay dormant for most of its existence does not preclude a finding that it was a gang under the enhancement statute, where there was evidence of consistent and repeated criminal activity during a short period before the subject crime." (*Id*. at pp. 1225-1226.)

C. *Pattern of Gang Activity*.

A gang engages in a "pattern of criminal gang activity" when its members participate in "two or more" statutorily enumerated criminal offense (the so called "predicate offenses"[3]) that are committed within a certain time frame and "on separate occasions, or by two or more persons." (Pen. Code, § 186.22, subd. (e); *People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.) The California Supreme Court has discussed the "pattern of gang activity" element in a trilogy of cases.

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[3] The term "predicate offenses" is not used by the statute. However, its use has been adopted by the case law, albeit reluctantly. "We use the term 'predicate offenses' throughout this opinion to describe the component crimes that constitute the statutorily required 'pattern of criminal gang activity.' We agree with the following observation by the Court of Appeal in *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1383, footnote 13 [citation], as to using the term 'predicate offenses' to describe the crimes that establish a **'**pattern of criminal gang activity': 'While the statute does not use the word 'predicate' it has become the accepted usage for reference to the statutorily required offenses. This is unfortunate since it implies precedence, which … is not a requirement, but it seems too well entrenched in the case law to change now." (*People v. Gardeley* (1996) 14 Cal.4th 605, 610, fn. 1.)

First, in *People v. Gardeley*, *supra*, 14 Cal.4th 605, the Court held that the qualifying offenses can be proven based upon the offenses the defendant is charged with committing, as well as upon past offenses, provided they occur within the washout period of three years. Thus, in *Gardeley*, the prosecution had established the statutorily required predicate offenses by (1) proof of defendant Gardeley's commission of the charged offense of aggravated assault (one of the statutorily enumerated offenses), and (2) an earlier incident in which a fellow gang member had shot at an occupied dwelling (also an enumerated offense). (*Id*. at p. 625.)

Then, in *People v. Louen* (1997) 17 Cal.4th 1, 5, the Court held that "evidence of the offense with which the defendant is charged and proof of another offense committed on the same occasion by a fellow gang member" was also sufficient to prove the statutorily required predicate offenses. There, the prosecutor established the offenses by evidence that (1) the charged crime of assault with a deadly weapon was committed by defendant Louen with a baseball bat, and (2) a separate assault with a deadly weapon on the same victim was committed contemporaneously by the defendant's fellow gang member with a tire iron. (*Id*. at p. 10.)

Finally, in *People v. Zermeno* (1999) 21 Cal.4th 927, the Court held that the combined activities of a defendant and an aider and abettor to a single crime, establishes only one predicate offense. (*Id*. at pp. 928-929, 931.) Thus, two separate offenses were not established by evidence that defendant *Zermeno* assaulted a victim and that a fellow gang member aided and abetted that assault by preventing anyone from stepping in.

The attempted commission of one of the enumerated crimes can qualify as a predicate offense. (*People v. Vy*, *supra*, 122 Cal.App.4th 1209, 1227; Pen. Code, § 186.22, subd. (e).)

To fall within the "statutorily defined period," at least one of the predicate offenses must have occurred after the effective date of the gang-enhancement statute (September 26, 1988), and the last of the predicate offenses must have occurred "within three years after a prior offense." (*In re I.M.* (2005) 125 Cal.App.4th 1195, 1206; Pen. Code, § 186.22, subd. (e).) Crimes occurring after the charged offense cannot serve as predicate offenses. (*People v. Duran*, *supra,* 97 Cal.App.4th 1448.)

The prosecutor has no duty to prove that the two or more persons perpetrating the predicate offenses were gang members at the time of the offense. And the predicate offenses need not have been committed for the benefit of or in association with the gang.

(*People v. Augborne* (2002) 104 Cal.App.4th 362.) Nor does the prosecutor have to prove that the alleged predicate offenses resulted in actual conviction. (*People v. Zermeno* (1999) 21 Cal.4th 927, 932, fn. 2.)

However, certified court records, including minute orders and abstracts of judgment, may be used to establish convictions for the predicate offenses. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1460-1462.

Since a pattern of criminal activity contemplates a continuous course of conduct, the jury is not required to unanimously agree on the predicate offenses. (*People v. Funes* (1994) 23 CalApp.4th 1506, 1525.)

II. Section 186.22, Subdivision (a): The Substantive Offense.

Penal Code section 186.22, subdivision (a) creates a separate and distinct crime chargeable as either a felony or misdemeanor. This section provides:

> "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years."

The gravamen of the offense is the "*participation in the gang itself*." (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467, fns. omitted.) Subdivision (a) requires the following elements to be shown:

> 1. A person actively participated in a criminal street gang;
> 2. The members of that gang engaged in or have engaged in a pattern of criminal gang activity;
> 3. That person knew that the gang members engaged in or have engaged in a pattern of criminal gang activity; and
> 4. That person either directly and actively committed or aided and abetted [another] [other] member[s] of that gang in committing the crime[s].
> (CALJIC No. 6.50; CALCRIM 1400; see also *People v. Robles* (2000) 23 Cal.4th 1106.)

Thus, the offense of participation in a criminal street gang (Pen. Code, § 186.22, subd. (a) 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 violating section 186.22, subdivision (a). (*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." To qualify as a person who "actively participates" in a criminal street gang under section 186.22, subdivision (a), a person must have "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.)

Examples:

1. Sufficient evidence of active participation: *People v. Castenada*, *supra*, 23 Cal.4th at p. 752-753 [defendant bragged to police about his gang association and was found in gang company on seven occasions in the 14 months before committing armed robbery in the gang's territory]; *People v. Robles*, *supra*, 23 Cal.4th at p. 1116 [defendant bragged he was a member of the "La Mirada Locos" street gang, was in the company of persons wearing gang attire, and was carrying a loaded gun]; *In re Jose P*., *supra*, 106 Cal.App.4th at pp. 462-464, 467-468 [minor admitted association with the Norteño gang, stated he would do what gang members asked of him, and had been found in the company of gang members on eight prior occasions].

2. Insufficient evidence of active participation: *In re Jesse H*. (Feb. 23, 2005, H026624 [nonpub. opn.] [Except for a relatively recent gang tattoo, there was no evidence that the minor, who was found in possession of a gun in a red pouch while sleeping in bed, continued to associate with Norteño gang members after his last police contact some 15 months earlier. Thus, active participation had not been proven].

While active participation is a requirement, a defendant need not "have the intent

to ... commit [a] particular felony." (*People v. Ngoun* (2001) 88 Cal.App.4th 432*,* 436.) The focus of section 186.22, subdivision (a), is on the defendant's objective to promote, further, or assist the gang regardless of who commits the felony. (*Ibid*.) Further, the argument that Penal Code section 186.22(a) applies only to aiders and abettors and not to direct perpetrators has been rejected. (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 436.)

And just as with any other substantive offense, a defendant cannot be convicted of the substantive gang offense if it is a necessarily included offense of another charge for which the defendant was convicted. (See *People v Flores* (2005) 129 Cal App 4th 174.) In *Flores*, a conviction for the substantive gang offense under section 186.22, subdivision (a) was reversed because it was a lesser included offense of carrying a firearm while an active participant in a criminal street gang, in violation of Penal Code section 12031, subdivision (a)(2)(c). (*Id*. at p. 184.) But "the offenses of attempted murder, robbery, vehicle theft, receiving stolen property, and mayhem are not necessarily included in the offense of street terrorism under either the statutory test or the pleadings test." (*People v. Burnell* (Sept. 15, 2005, G032624) __ Cal.App.4th __ [2005 WL 2234134].)

III. Section 186.22, subdivision (b)(1): The Enhancement.

The street gang enhancement provides, in pertinent part:

> "…any person who is convicted of a *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, shall, upon conviction of that *felony*, in addition and consecutive to the punishment prescribed for the *felony* or attempted *felony* of which he or she has been convicted, be punished as follows…" (Pen. Code, §186.22, subd. (b)(1), emphasis added.)

Under the clear language of the statute, Penal Code section 186.22(b)(1) cannot be imposed unless a 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 in Section I above, there are two other essential elements that must be proven:

1. that the charge 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.

(CALJIC No. 17.24.2; 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.)

As to the "benefit/direction/association" element, the "typical close case is one in which one gang member, acting alone, commits a crime." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) But *Morales* also recognized "it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang." (*Ibid*.)

Examples:

1. Sufficient Evidence: *In re Ramon T*., *supra*, 57 Cal.App.4th 201, 208 [where the assault and battery was committed to free another gang member from the arresting officer's grasp]; *People v. Olguin*, *supra*, 31 Cal.App.4th 1355, 1382-1383 [shooting was precipitated by crossing out gang graffiti, replacing it with another gang's name, and shouting that name to rival gang members].

2. Insufficient evidence: *People v. Green* (Feb. 28, 2003, B156722 [nonpub. opn.]) [Evidence that defendant was member of criminal street gang, that he was selling cocaine base in area dominated by gang, that anyone selling drugs in that area had to be member or have received permission from gang, and that gangs used money from selling drugs to purchase weapons, was insufficient to show that defendant was selling cocaine for the benefit of, at direction of, or in association with street gang, absent showing that gang actually received proceeds of sale or that gang received benefit from sale.]; *People v. Perez* (Aug. 13, 2002, E028521 [nonpub. opn.]) [Evidence was insufficient to support finding that attempted premeditated murder and carjacking were for benefit of, at direction of, or in association with criminal street gang, though defendants were

> members of a gang that, according to expert, stole "a lot of cars," where the gang was not active in neighborhood where the offenses occurred, the crimes were not carried out within sight or hearing of local witnesses to intimidate them, and defendants did not eliminate any witnesses, use stolen car to commit further gang crimes, or refer to the gang before, during, or after commission of crimes]; *People v. Robinson* (Mar. 13, 2003, B156454 [nonpub. opn.] [In murder and attempted murder prosecution, evidence was insufficient to support benefit/direction/association element, even though testimony was presented that defendant was a gang member, where there was nothing to indicate that defendant was aware that alleged victim was a member of a rival gang, and there was no shouting of gang names or flashing of gang signs].

Generally the courts have also considered whether the defendant acted alone as indicative of specific intent, (i.e., that the crime was committed for personal reasons as opposed to for the gang). (But see *Garcia v. Carey* (9th. Cir. 2005) 395 F.3d 1099 [While the evidence established that a gang member committed a robbery with other gang members, the evidence was insufficient to show that the gang member had the specific intent to facilitate other criminal conduct by the gang in committing the robbery where there was nothing inherent in the robbery to indicate that it furthered some other crime, and the police expert on gang activity established only that the gang was "turf-oriented," the robbery was committed on the gang's turf, and that gang members committed other robberies].)

Examples:

> 1. Sufficient evidence of specific intent: *People v Morales*, *supra*, 112 Cal.App.4th 1176 [There was sufficient evidence of defendant's specific intent to promote, further, or assist in any criminal conduct by gang members where there was evidence that defendant intended to commit robberies, that he intended to commit them in association with other gang members, and that he intended to aid and abet the robberies the other gang members actually committed].
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> 2. Insufficient evidence: *In re Jesse H.* (Feb. 23, 2005, H026624 [nonpub. opn.] [Sleeping in bed while having a gang tattoo and possessing a gun

and/or ammunition is not sufficient to support a finding that the items were possessed with the specific intent to promote, further, or assist in any criminal conduct by gang members].

IV. Section 186.22, Subdivision (d): The Alternate Penalty Provision.

A criminal street gang allegation made pursuant to Penal Code section 186.22, subdivision (d), is not a substantive offense because it does not set forth elements of a new crime. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 899.) Neither is it a sentencing enhancement because it does not add an additional term of confinement to the base term. (*Ibid*.) Rather, "it provides for an alternate sentence[4] when it is proven that the underlying offense has been committed for the benefit of, or in association with, a criminal street gang." (*Ibid*.)

Application of subdivision (d) is not limited to "wobblers." (*Id*. at p. 901-903.) The provision also applies to all felonies and all misdemeanors. (*Id*. at p. 903.)

Once the special allegation is proven, the court has the discretion to punish the underlying offense either as misdemeanor or a felony. (*People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1444.) Thus, subdivision (d) provides an option to punish gang-related misdemeanors more severely. But, it does not allow a court to impose two terms of imprisonment. (*Id*. at p. 1445.)

V. Evidentiary Considerations.

A. *Bifurcation*.

Just as a trial court has the discretion to bifurcate the determination of the truth of an alleged prior conviction from the determination of the defendant's guilt of the charged offense, it also has the discretion to bifurcate the trial of a gang enhancement from the guilt phase. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048-1049.) However, "[a] prior conviction allegation relates to the defendant's status and may have no connection to the charged offense; by contrast, the criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense. (*Id*. at p.

[4] The alternate sentence provided for in Penal Code section 186, subdivision (d), is one, two, or three years.

1048.) "Evidence of the defendant's gang affiliation--including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like--can help prove identity, motive, modus operandi, specific intent, means of applying force or fear or other issues pertinent to the guilt of the charged crime." (*Id*. at p. 1049.) "So less need for bifurcation generally exists with the gang enhancement than with a prior conviction allegation." (*Id*. at p. 1048.)

B. *The Use of Expert Testimony*.

Evidence Code section 720, subdivision (a), provides, in relevant part: "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates." Expert testimony on criminal street gangs has been deemed appropriate for establishing most of the requirements of Penal Code section 186.22. (*People v. Hernandez* (2004) 33 Cal.4th 1040; *People v. Williams* (1997) 16 Cal.4th 153, 196; *People v. Gardeley* (1996) 14 Cal.4th 605, 617; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370.)

Case law recognizes that police officers may testify as experts about the sociology, psychology, customs and methods of operations of street gangs. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930; *People v. Gamez* (1991) 235 Cal.App.3d 957, 966; *People v. McDaniels* (1980) 107 Cal.App.3d 898, 905.) This includes testifying about the gang's composition and size, their primary activities, and an individual defendant's membership in or association with the gang. (*People v. Killebrew* (2002) 103 Cal. App. 4th 644, 657.) The courts have also sanctioned gang expert testimony on "whether and how a crime was committed to benefit or promote a gang." (*Ibid*.) In fact, the gang expert may testify to opinions which comment on the ultimate issues to be resolved by the trier of fact. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 508-510; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370-1371.)

However, a gang expert is prohibited from testifying about whether an individual had specific knowledge or possessed a certain specific intent. *(People v. Killebrew*, *supra*, 103 Cal.App.4th 644, 658.) In *Killebrew*[5], the defendant was convicted of

[5] The case includes an extensive list of cases involving expert gang testimony and provides a useful guideline for arguing when the prosecution has relied too heavily on "expert" opinion testimony as a substitute for real evidence in a gang case.

conspiring to possess a handgun, even though he did not have a handgun in his possession. A police officer testified as an expert on gangs to establish not only defendant's membership, but also his subjective knowledge and intent to possess the handgun. He was allowed to testify that when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun. The court held the testimony about subjective knowledge and intent was inadmissible. Further the evidence was insufficient to establish that defendant was involved in a conspiracy to possess the handgun.

Additionally, the fact that the prosecution has presented the opinion of an expert on an issue does not *ipso facto* constitute sufficient evidence to prove that issue. (*People v. Basset* (1968) 69 Cal.2d 122, 141.) "Expert evidence is really an argument of an expert to the court and is valuable only in regard to the proof of the facts and the validity of the reasons advanced for the conclusions." (*People v. Martin* (1948) 87 Cal.App.2d 581, 584.) Therefore, "any material that forms the basis of an expert's opinion must be reliable . . . for the law does not accord the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based." (*People v. Gardeley*, *supra*, 14 Cal.4th 605, 618.)

In *Gardeley*, the Supreme Court addressed the type of matter on which an expert may rely in formulating their opinion. It may be premised on material that is not admitted into evidence--or on material that is not ordinarily admissible, such as hearsay--as long as that material is reliable and of a type that is reasonably relied upon by experts in the particular field in forming their opinions. (*Ibid*.)

But "[c]onclusional testimony that gang members have previously engaged in the enumerated offenses, based on nonspecific hearsay and arrest information which does not specify exactly who, when, where and under what circumstances gang crimes were committed, does not amount to substantial evidence." (*In re Jose T*. (1991) 230 Cal.App.3d 1455, 1462.) Likewise, "vague, secondhand testimony cannot constitute substantial evidence that the required predicate offense by a gang member occurred." (*In re Nathanial C*., *supra*, 228 Cal.App.3d at p. 1003.) In *Nathaniel C*., the expert, a South San Francisco police officer, had no personal knowledge of the predicate offense and only repeated what San Bruno police told him they believed about the shooting.

Recently, in *People v. Thomas* (2005) 130 Cal.App.4th 1202, the court held that a gang expert can base his opinion on conversations with gang members and the contents of

those conversations can be admitted without violating *Crawford v. Washington* (2004) 514 U.S. 36 [124 S.Ct. 1354]. The court found no error under *Crawford*[6] because the statements were not admitted for their truth, and *Crawford* did not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions.

C. *Admission of Gang Evidence*.

The admission of gang evidence creates a risk the jury will infer the defendant has a criminal disposition; therefore, its admission should be carefully scrutinized. (*People v. Carter* (2003) 30 Cal.4th 1166, 1195.)

Not all testimony from a police officer on the subject of gangs is admissible. Thus, in *People v. Bojorquez* (2002) 104 Cal.App.4th 335, at pp. 344, found it was error to admit extensive expert testimony regarding gangs to show that a witness' "forgetful accounts of the events" was influenced by gang practice or retaliation when "there was no evidentiary link between this notion and [the witness'] situation." Likewise, in *People v Avitia* (2005) 127 Cal.App.4th 185, the court held evidence of gang graffiti should not have been admitted on a charge of grossly negligent discharge of a firearm. Since no gang enhancement was alleged and there was no evidence the charged crimes were related to any gang activity, the graffiti was irrelevant to any contested issue. The error was prejudicial, in that it undercut defendant's credibility, which was key to his claim that he was simply conducting target practice with a pellet gun.

In contrast, in *People v. Carter*, *supra*, 30 Cal.4th at p. 1195, the Supreme Court found evidence of gang affiliation and habits was relevant to show identity and motive.

D. *Impermissible Inferences*.

Membership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion. (*In re Wing Y*. (1977) 67 Cal.App.3d 69, 79.) In *Wing Y*., the prosecutor presented evidence that the defendant was a member of a criminal gang. (*Id*. at pp. 78-79.) The Court of Appeal reversed, finding that admission of the evidence allowed unreasonable inferences to be made by the trier of fact that the

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[6] *Crawford* holds that whenever the state offers "testimonial" hearsay evidence against a defendant, the Sixth Amendment's Confrontation Clause requires a showing of unavailability, as well as a prior opportunity for cross-examination.

minor Wing was guilty of the offense charged on the theory of guilt by association. (*Id*. at p. 79.)

The Ninth Circuit has reached the same result, observing:

> Except in *West Side Story*, gang members do not move in lock-step formation. Gang movements are, in fact, often more chaotic than concerted. [Citation.] Membership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting. (*Mitchell v. Prunty* (9th Cir. 1997) 107 F.3d 1337, 1342, overruled in part on unrelated grounds in *Santamaria v. Horsley* (9th Cir. 1998) 133 F.3d 1242, 1248; see also *United States v. Garcia* (9th Cir. 1998) 151 F.3d 1243, 1246 [membership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting.])