LOS ANGELES
CITY ATTORNEY'S OFFICE
CRIMINAL AND SPECIAL LITIGATION BRANCH

GANG INJUNCTION GUIDELINES

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ADVISEMENTS

THE FOLLOWING GUIDELINES REPRESENT THE INTERNAL POLICY OF THE LOS ANGELES CITY ATTORNEY'S OFFICE AND APPLY SOLELY AND EXCLUSIVELY TO ATTORNEYS IN THE CRIMINAL AND SPECIAL LITIGATION BRANCH OF THE LOS ANGELES CITY ATTORNEY'S OFFICE.

THESE GUIDELINES DO NOT HAVE THE FORCE AND EFFECT OF LAW, ARE NOT INTENDED TO CREATE JUDICIALLY ENFORCEABLE STANDARDS, AND MAY NOT BE RELIED UPON BY ENJOINED GANG MEMBERS, DEFENDANTS, SUSPECTS OR OTHER PARTIES AS CREATING ANY RIGHTS, CLAIMS, OR DEFENSES.

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A.

DEFINITIONS AND PURPOSE

A.1: Definitions

As used in these Guidelines:

a) ***Criminal Branch*** refers to the Criminal and Special Litigation Branch of the Los Angeles City Attorney's Office.

b) ***Gang Deputy*** refers to a Deputy City Attorney within the Gang Prosecution and Prevention Section as well as any Deputy City Attorney prosecuting a case in which the defendant is a suspected gang member accused of violating a Gang Injunction.

c) ***Gang Injunction*** or ***Injunction*** refers to a court order, in the form of a preliminary or permanent injunction, issued against an identifiable criminal street gang as an unincorporated association or organization, the provisions of which seek to abate the gang's nuisance activity in a delineated geographic area known as the "Safety Zone."

d) ***Gang Supervisor*** refers to the Supervisor, an Assistant Supervisor or a Deputy In Charge of the Gang Prosecution and Prevention Section. It also may include the Director of Anti-Gang Programs and Operations and the Chief of the Criminal Branch when a Gang Supervisor is unavailable, or when the required recommendation, decision, approval or action so merits.

e) ***LAPD*** refers to the Los Angeles Police Department.

f) ***Reviewing Authority*** refers to the City Attorney and, by designation, the Deputy Chief, Citywide Branch Operations Division; the Deputy Chief, Safe Neighborhoods Division; the Deputy Chief, Special Operations Division, or a senior supervisor within one of these divisions, when determining, in accordance with the review processes established by these Guidelines, whether a person who has been served with a Gang Injunction should no longer be subject to enforcement of the Injunction.

A.2: Purpose

Gang Injunctions have proven to be one of the most effective legal tools available to law enforcement in suppressing and disrupting the criminal and often violent activities of Los Angeles street gangs and protecting the communities and neighborhoods they terrorize. Because of their success, in both the courts and the communities, there are currently more than 30 permanent Gang Injunctions

in place in the City of Los Angeles enjoining the activities of 50 criminal street gangs.

The principal purpose of these Guidelines is to ensure consistency and fairness in obtaining Gang Injunctions, fashioning their terms, identifying suspected gang members to be served, enforcing Gang Injunctions through contempt prosecutions, and sentencing gang members convicted of violating Gang Injunctions.

The Guidelines also create a new non-judicial process by which an individual who has been served with a Gang Injunction can seek to be removed from the Injunction based on reliable information that he or she is no longer (or never was) a gang member or acting to promote, further, or assist the gang's criminal and/or nuisance activity. In addition, the Guidelines create a new review process to periodically determine whether any gang members served with a Gang Injunction should be removed from the Injunction because of changed circumstances.

It should be noted that in many instances the Guidelines impose, as a matter of policy, standards more stringent than those under existing law. In no instance do the Guidelines seek to relax protections established by existing law or by the prior practices and policies of this Office for obtaining and enforcing Gang Injunctions.

Many of the Guidelines formalize in writing existing policies and practices. Others, however, create new standards and procedures or require supervisory level review or approval where no such review or approval was required before. Therefore, Gang Deputies must carefully review and become thoroughly familiar with these Guidelines.

B.

OBTAINING THE GANG INJUNCTION

B.1: Basic Requirements

As a matter of Criminal Branch policy, a Gang Injunction will be sought only when:

a) There is clear and convincing evidence that (i) an identifiable criminal street gang (ii) is engaged in nuisance activity (iii) within a defined geographic area (the proposed "Safety Zone"); *and*

b) The nuisance activity includes acts or threats of violence, drug dealing, the possession of illegal weapons or illegal possession of weapons, destruction or defacement of property, harassment of community members, or witness intimidation or retaliation; *and*

c) There is substantial reason to conclude that the Gang Injunction is likely to succeed to a significant degree in abating the nuisance activity.

B.2: Identifiable Criminal Street Gang

For purposes of these Guidelines, an "identifiable criminal street gang" is: (a) an ongoing organization, association or group of three or more persons, whether formal or informal, (b) with a common name or identifying sign or symbol, (c) which has as one of its primary activities one or more of the offenses referenced in Penal Code section 186.22, subdivision (f), and/or nuisance activity as defined in Civil Code sections 3479 and 3480, and (d) whose members individually or collectively engage in a pattern of criminal gang activity or in nuisance activity.

B.3: Pattern of Nuisance Activity

For purposes of these Guidelines, a "pattern of nuisance activity" consists of anything which affects at the same time an entire community or neighborhood or any considerable number of persons, *and* is:

a) Injurious to health, including, but not limited to, the illegal sale of controlled substances, so as to interfere with the comfortable enjoyment of life or property; *or*

b) Indecent or offensive to the senses, so as to interfere with the comfortable enjoyment of life or property; *or*

c) An obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; *or*

d) Unlawfully obstructing the free passage or use, in the customary manner, of any public park, square, street or highway; *or*

e) A nuisance *per se*.

B.4: Safety Zone

The proposed Safety Zone shall be no larger than deemed necessary to abate the targeted gang's nuisance activity.

B.5: Burden of Proof

The burden of proof for obtaining a Gang Injunction is clear and convincing evidence.

B.6: Likely to Abate the Nuisance Activity

In determining whether the proposed Gang Injunction is likely to succeed to a significant degree in abating the targeted gang's nuisance activity, all relevant factors, including (but not necessarily limited to) the following, should be considered and weighed.

Factors supporting the likely success of the proposed Gang Injunction in abating the nuisance activity of the targeted gang:

a) The targeted gang is territorial or an identifiable and distinct territorial clique of a transitory, opportunistic or criminal syndicate gang;

b) LAPD can readily identify suspected gang members;

c) The targeted gang's nuisance activities are confined geographically by surrounding territorial gangs or significant natural or man-made barriers;

d) There is substantial community support for a Gang Injunction;

e) The proposed Safety Zone is contained within or immediately adjacent to a Safer City Initiative area, CLEAR site or other special multi-agency project;

f) The proposed Gang Injunction is to be part of a broader plan for economic revitalization of a blighted area undertaken with law enforcement agencies, governmental entities and/or private partners; *and/or*

g) LAPD and the City Attorney's Office have sufficient available resources to enforce the proposed Gang Injunction.

Factors indicating that another strategy may be more effective in abating the nuisance activity of the targeted gang:

a) The targeted gang operates as a criminal syndicate and its criminal conduct is diffused across a sizeable geographic area;

b) The targeted gang's nuisance activity is generally limited to one or two buildings such that a nuisance abatement action against those properties may be sufficient to abate the targeted gang's nuisance activity;

c) It is likely to prove unusually difficult to identify and/or personally serve a sufficient number of suspected gang members for a court to find that the targeted gang as an entity has been given adequate notice of the Gang Injunction;

d) There are too few documented incidents of recent nuisance activity attributable to the targeted gang within the proposed Safety Zone to establish a continuing course of conduct or threat of a continuing course of conduct;

e) There is a substantial risk that the gang will be able to establish turf-based nuisance activity in another community; *and/or*

f) LAPD and the City Attorney's Office do not have sufficient available resources to adequately enforce the proposed Gang Injunction.

B.7: Decision to Seek a Gang Injunction

A request for a Gang Injunction shall be analyzed in the first instance by the Gang Deputy and a Gang Supervisor, in consultation with the designated LAPD gang expert(s). If they concur that the requirements of Guideline B.1 are met, the request and their recommendation shall be forwarded to the Director of Anti-Gang Programs and Operations, the Chief of the Criminal Branch and the City Attorney for prompt action thereon. The decision whether to proceed with the request rests with the City Attorney, who may delegate such decision-making at any time and in any case to the Chief of the Criminal Branch.

B.8: Coordination With the Local Branch and Safe Neighborhoods Division

Absent exigent circumstances, the Gang Deputy and Gang Supervisor should timely consult with the supervisor of the local Branch Office and attorneys in the Safe Neighborhoods Division to determine whether there are additional legal actions or other measures that could be taken within or around the proposed Safety Zone to abate the targeted gang's nuisance activity and/or improve the safety and quality of life of the members of the affected community.

C.

PROVISIONS OF THE GANG INJUNCTION AND NOTICE TO THE GANG

C.1: Narrowly Tailored

Each provision included in the proposed Gang Injunction should be narrowly tailored to abate a particular category of nuisance activity or a precursor to such nuisance activity.

C.2: Inclusion of Standard Provisions

To the extent available evidence justifies inclusion of any of the following provisions, the initial application to the court for a Gang Injunction shall include

the provision in the language set forth in Appendix A, unless a deviation is authorized by a Gang Supervisor:

a) *Do Not Associate*

b) *No Intimidation*

c) *No Firearms, Imitation Firearms, or Dangerous Weapons*

d) *Stay Away From Drugs*

e) *Stay Away From Alcohol*

f) *No Trespassing*

g) *Obey Curfew*

h) *No Graffiti or Graffiti Tools*

i) *No Forcible Recruiting*

j) *No Preventing a Member From Leaving the Gang*

k) *Obey All Laws.*

C.3: Inclusion of Special Provisions

Inclusion of a new or otherwise non-standard provision in the Gang Injunction must be approved by a Gang Supervisor.

Such special provisions could include, but are not necessarily limited to:

a) *Stay Away From School Grounds*

b) *Stay Away From Designated Locations*

c) *No Extortion Including Collection of "Rents" or "Taxes"*

d) *No Acting as Lookout*

e) *No Fighting*

f) *Stay Away From Rival Gang's Territory* (where the Gang Injunction operates against two or more gangs)

g) *No Contact With Minors Going to and From School*

h) *No Use of Gang Gestures in Public*

i) *No Wearing of Gang Clothing in Public*

j) *No Interference With a Person's Exercise of Civil Rights Based Upon Race, Ethnicity, Nationality, or Sexual Orientation*

k) *No Contact with Specified Individuals* (especially persons in jail or prison or on probation or parole)

l) *Obey Specified Laws.*

The Gang Deputy and Gang Supervisor should carefully research and analyze the applicable law to ensure the legality (and in particular the constitutionality) of the provision. To avoid repetition of effort, for each such approved provision the Gang Deputy shall distribute a memorandum to all attorneys within the Gang Prosecution and Prevention Section, the Director of Anti-Gang Programs and Operations and the Chief of the Criminal Branch that includes the language of the provision, a brief explanation of its intended purpose, and any research and/or analysis concerning its legality.

C.4: Notice to the Gang

The lawsuit requesting issuance of the Gang Injunction is filed against the gang as an unincorporated association or organization and not against individual gang members. However, to provide notice to the gang of the pendancy of the lawsuit, one or more designated gang members must be served with the summons, complaint, order to show cause and supporting documentation. To ensure that the court has a sufficient basis for finding that the gang as an entity received adequate notice of the lawsuit, the Gang Deputy should plan and make arrangements for the initial service of process on an adequate number of suspected gang members.

For purposes of this initial service of process, the Gang Deputy should select only suspected gang members with respect to whom there is substantial, admissible and credible evidence that they are, in fact, gang members.

D.

SERVICE OF SUSPECTED GANG MEMBERS FOR ENFORCEMENT PURPOSES

D.1: Coordination With LAPD

Upon issuance of the Gang Injunction, the Gang Deputy should: (a) provide appropriate training to the LAPD gang detail and any other officers who will be responsible for service and/or enforcement of the Gang Injunction; and (b) assist LAPD in creating an Injunction Enforcement Manual and keeping the Manual current.

D.2: Personal Service Required

A suspected gang member will not be subject to enforcement of the Gang Injunction unless he or she has been personally served with the Injunction. To implement this requirement, each application for Gang Injunction filed after the effective date of these Guidelines shall request that the court include the following language in the Gang Injunction:

> *No [NAME OF DEFENDANT GANG] member shall be prosecuted for violating any provision of this Order unless he or she has previously been personally served with a copy of this Order.*

D.3: Proof Beyond a Reasonable Doubt Required

A suspected gang member may be served with the Gang Injunction if, at the time of service, there is documented evidence establishing beyond a reasonable doubt that: (a) the suspected gang member is, in fact, a gang member; *and* (b) his or her participation in the enjoined gang during the past five (5) years has been more than nominal, passive, inactive, or purely technical.

D.4: Prior Approval of Gang Deputy Required

Before LAPD may serve a suspected gang member with a Gang Injunction, it must receive approval from the Gang Deputy responsible for enforcement of the Injunction (or a Gang Supervisor if the Gang Deputy is unavailable). To obtain such approval, LAPD must submit a request to the Gang Deputy, who shall determine whether the requirements of Guideline D.3 have been satisfied.

D.5: Exigent Circumstances and Excusable Neglect

If, because of exigent circumstances or excusable neglect, LAPD serves a suspected gang member with the Gang Injunction without first receiving the approval required by Guideline D.4, LAPD shall submit the request for approval to the Gang Deputy as soon as reasonably possible with an explanation of why prior approval was not obtained. The Gang Deputy, in consultation with a Gang Supervisor, may approve of the service retroactively if they determine that the requirements of Guideline D.3 have been satisfied, and that LAPD was, under the totality of the circumstances, acting reasonably. If the Gang Deputy and Gang Supervisor refuse to approve of the service, the person served shall not be subject to enforcement of the Gang Injunction.

D.6: Continuous Monitoring

The Gang Deputy responsible for enforcement of the Gang Injunction shall carefully monitor the ongoing process of serving suspected gang members with the Gang Injunction to ensure compliance with Guidelines D.1, D.2, D.3 and D.4.

Should the Gang Deputy conclude that those Guidelines are not being followed in material respects, he or she shall promptly notify a Gang Supervisor.

D.7: Service of Non-Gang Members Generally Not Permitted

Pending the adoption of specific guidelines regarding the service of non-gang members, individuals who are not gang members, and who may only be associated or affiliated with the gang, shall not be served with a Gang Injunction without the prior approval of the Director of Anti-Gang Programs and Operations, the Chief of the Criminal Branch, or the City Attorney.

E.

PROSECUTION FOR GANG INJUNCTION VIOLATION

E.1: Prosecution for Contempt

A person arrested for violating a Gang Injunction shall be prosecuted for contempt only if there is sufficient documented evidence to establish beyond a reasonable doubt that:

a) The person was a member of the enjoined gang, and therefore subject to the Gang Injunction, at the time of the alleged violation; *and*

b) The person violated one or more provisions of the Gang Injunction within the Safety Zone; *and*

c) The person had notice of the Gang Injunction at the time of the violation, having been personally served with a copy of the Gang Injunction prior to committing the violation.

E.2: Subpoena of LAPD Officers

Absent exigent circumstances, no more than twelve (12) LAPD officers shall be subpoenaed to appear at trial without the prior approval of a Gang Supervisor.

E.3: Filing of the Gang Enhancement Allegation

The misdemeanor gang enhancement allegation ("gang enhancement allegation") of Penal Code section 186.22, subdivision (d), shall only be filed when:

a) There is proof beyond a reasonable doubt that:

i) The Gang Injunction violation was committed for the benefit of, at the direction of, or in association with the enjoined gang; *and*

ii) The defendant acted with the specific intent to promote, further, or assist in any criminal conduct by gang members; *and*

b) One or more of the following circumstances applies:

i) The defendant was convicted of a Gang Injunction violation, crime of violence, or felony offense within five years of the Gang Injunction violation forming the basis of the current prosecution; *or*

ii) The defendant was on probation or parole for another offense (felony or misdemeanor) at the time of the Gang Injunction violation; *or*

iii) The Gang Injunction violation involved acts or threats of violence, drug dealing, the possession of illegal weapons or the illegal possession of weapons, harassment of community members, or witness intimidation or retaliation; *or*

iv) There is substantial reason to conclude that the Gang Injunction violation was motivated, in whole or in part, by racial animus; *or*

v) The defendant's violation of the Gang Injunction occurred within 1,000 feet of a school, park, or other public recreational area; *or*

vi) A Gang Supervisor approves of the filing.

The gang enhancement allegation shall not be filed solely to gain leverage in plea negotiations.

F.

SENTENCING OF GANG MEMBERS

F.1: Sentencing Goals

In negotiating a possible pre-trial disposition in a case in which the defendant is charged with violating a Gang Injunction, or in recommending to the court the sentence the defendant in such a case should receive following conviction at trial, the Gang Deputy shall seek a sentence that is consistent with traditional notions of specific and general deterrence, retribution, rehabilitation and restraint, but also that promotes the goals of obtaining the defendant's compliance with the Gang Injunction and abating the nuisance activity in which the gang has been found to be engaged.

F.2: Baseline Sentence

For purposes of these Guidelines, the Baseline Sentence in a case in which the defendant is charged with violating a Gang Injunction is 60 days in county jail.

F.3: Deriving the Proposed Sentence

In deriving a proposed sentence to offer the defendant as part of a pre-trial disposition, or to recommend to the court following conviction at trial, the Gang Deputy shall begin with the Baseline Sentence of 60 days in jail, and then apply appropriate mitigating and aggravating factors, including (but not necessarily limited to) the following, to derive the final proposed sentence.

Mitigating Factors:

a) The defendant accepted responsibility at an early stage of the proceedings;

b) The defendant's criminal history does not include any convictions for prior Gang Injunction violations, crimes of violence, or felony offenses;

c) The defendant is gainfully employed;

d) The defendant professes a desire to renounce the gang lifestyle and there is reasonable cause to believe that he or she is sincere;

e) The defendant graduated from high school or received a GED;

f) The defendant is under 21 years of age;

g) The defendant recognizes that he or she has a substance abuse problem and is willing to enroll in a program to help overcome that problem;

h) The defendant's violation of the Gang Injunction resulted in the destruction of property, but the defendant is willing to repair, restore, or replace the property or make restitution to the property owner; *and*

i) The defendant is willing to agree to a combination of probationary conditions that, in the Gang Deputy's judgment, will achieve the sentencing goals of Guideline F.1, given the available evidence of the defendant's character, reputation, history, personal traits, family and community support, and capacity and commitment to abide by the terms of the Gang Injunction.

Aggravating Factors:

a) The defendant was previously convicted of violating the

Gang Injunction, a crime of violence, or a felony offense;

b) The defendant was on probation or parole for another offense (felony or misdemeanor) at the time of the Gang Injunction violation;

c) The defendant's violation of the Gang Injunction involved acts or threats of violence, drug dealing, the possession of illegal weapons, or the illegal possession of weapons, harassment of community members, or witness intimidation or retaliation;

d) The defendant holds a leadership position in the gang;

e) There is substantial reason to conclude that the defendant derives all or some of his or her income from criminal activity (because, for example, the defendant has no visible lawful sources of income or any such sources of income cannot account for the defendant's lifestyle);

f) There is substantial reason to conclude that the Gang Injunction violation was motivated, in whole or in part, by racial animus;

g) The defendant is 21 years of age or older;

h) There is substantial reason to conclude that the defendant has a substance abuse problem, but the defendant refuses to seek help to overcome that problem;

i) There is substantial reason to conclude that the defendant is or has been involved in the recruitment of new gang members; *and*

j) The gang of which the defendant is a member has a documented history of extreme or racially motivated violence.

F.4: Striking of the Gang Enhancement Allegation

In any case in which the gang enhancement allegation has been filed, the Gang Deputy shall not agree to strike the allegation as part of a pretrial disposition unless:

a) The Gang Deputy, upon subsequent review of the case file, is firmly convinced that:

i) The allegation should not have been filed because the requirements of Guideline E.3 do not exist; *or*

ii) Application of the factors listed in Guideline F.3 would result in a proposed sentence of well below the mandatory minimum of 180 days; *and*

b) A Gang Supervisor approves the striking of the allegation.

F.5: Court's Refusal to Impose the Gang Enhancement

In any case in which the jury finds the gang enhancement allegation to be true, but the court refuses, pursuant to Penal Code section 186.22, subdivision (g), to impose the mandatory minimum misdemeanor sentence, the Gang Deputy shall promptly report the court's refusal and its stated reasons therefor to a Gang Supervisor and the Director of Anti-Gang Programs and Operations.

F.6: Standard Conditions of Probation

Unless otherwise approved by a Gang Supervisor, in any case in which the defendant is convicted of violating a Gang Injunction and the court indicates its intention to impose a sentence of probation, the Gang Deputy shall request as conditions of probation the court-approved "warrantless search and seizure condition" and the "gang condition."

F.7: Special Conditions of Probation

In any case in which the defendant is convicted of violating a Gang Injunction and the court indicates its intention to impose a sentence of probation, the Gang Deputy should request any special conditions of probation that the Gang Deputy believes are reasonably related to abating the nuisance activity in which the gang has been found to be engaged and/or that are reasonably related to preventing the defendant's future criminality.

Such special conditions may include, but are not necessarily limited to:

a) Stay away from specified persons or groups of persons;

b) Stay away from specified locations or areas;

c) Expansion of one or more provisions of the Gang Injunction;

d) Enroll in an approved substance abuse program;

e) Do not use or possess alcohol and/or controlled substances;

f) Repair or restore damaged property;

g) Community service;

h) GPS or other court-approved electronic monitoring;

i) Attend parenting classes as specified;

j) Enroll in an approved anger management or race relations program;

k) Participate in psychological counseling as required;

l) Do not use, own, or possess dangerous weapons;

m) Do not use or threaten to use force or violence against any person;

n) Enroll in an available gang intervention program;

o) Report to the court periodically;

p) Report to a probation officer periodically or as directed by the probation officer;

q) Report to a court-approved case manager or mentor;

r) Do not use specified computer hardware or software or access the Internet;

s) Enroll or stay in school, maintain a certain minimum grade point average, or enroll in or continue to attend an approved job training program; *or*

t) Use best efforts to obtain and/or retain lawful employment.

F.8: Victim Restitution

In any case in which the defendant is convicted of violating a Gang Injunction, and the violation involved the destruction or defacement of property or caused some other economic loss to the victim, the Gang Deputy shall request that the court order the defendant to make full restitution to the victim in accordance with Penal Code section 1202.4, subdivision (f), unless:

a) In the Gang Deputy's judgment, there is a compelling and extraordinary reason for the court not to order full restitution; *and*

b) A Gang Supervisor approves.

F.9: Gang Member Registration

In any case in which the defendant is convicted of violating a Gang Injunction, the Gang Deputy shall, unless otherwise approved by a Gang Supervisor, request that the court find that the defendant was convicted of a "gang related" crime, and, if the court so finds, ensure that the court advises the defendant of his or her duty to register with LAPD in accordance with the requirements of Penal Code section 186.30.

F.10: Referral to Federal Immigration Authorities

Upon conviction of a defendant for violating a Gang Injunction, the Gang Deputy shall forward the defendant's name and other requested identifying information to designated federal authorities to enable those authorities to determine whether the defendant is in the country illegally, and, if so, whether to prosecute the defendant federally and/or seek his or her deportation.

G.

REMOVAL FROM GANG INJUNCTION GENERALLY

G.1: Enforcement List

The Gang Deputy responsible for enforcement of the Gang Injunction, together with the designated LAPD gang expert, shall be responsible for creating, maintaining and updating a list of the persons who have been served with the Gang Injunction and remain subject to its enforcement (the "Enforcement List" or "List").

G.2: Removal From Enforcement List Generally

A person on the Enforcement List may be removed from the List by either of the following two non-judicial processes:

a) At the direction of the Reviewing Authority pursuant to the procedures specified in Guidelines H.1 through H.8 below; *or*

b) As a result of a Periodic Review conducted pursuant to the procedures specified in Guidelines I.1 through I.5 below.

G.3: Person Served No Longer Subject to Enforcement

A person served with a Gang Injunction, but who is subsequently removed from the Enforcement List pursuant to the procedures referenced above, shall no longer be subject to enforcement of the Gang Injunction.

Such removal represents an exercise of prosecutorial discretion, and does not constitute an admission, factual finding, or legal determination by the City Attorney's Office or LAPD that the person is not a gang member for any other purpose.

G.4: Removal Without Prejudice

Removal of a gang member from the Enforcement List is *without prejudice*. A gang member removed from the Enforcement List may be restored to the List by again serving him or her with the Gang Injunction, either personally or by mail, should evidence come to light that he or she remained a member of the gang;

rejoined the gang; or is acting, directly or indirectly, to promote, further, or assist the gang's criminal or nuisance activity.

G.5: Seeking Judicial Declaration Not Precluded

Nothing in these Guidelines precludes a person who has been served with a Gang Injunction from seeking a judicial declaration that he or she is not subject to enforcement of the Injunction.

G.6: Confidentiality of Removal Processes

To protect persons seeking to leave an enjoined gang, records relating to proceedings by which persons are removed from the Enforcement List shall be maintained as confidential to the extent permitted by law.

G.7: Participation of Other City Agencies

The Criminal Branch shall continue to work with the Community Development Department and all other appropriate City agencies to develop procedures and means by which such agencies can assist the Criminal Branch in determining whether a person served with a Gang Injunction should be removed from the Enforcement List.

H.

REMOVAL FROM THE ENFORCEMENT LIST AT THE DIRECTION OF THE REVIEWING AUTHORITY

H.1: Submission of Petition For Removal

A person served with a Gang Injunction may seek to be removed from the Enforcement List by submitting to the Reviewing Authority (through the Gang Prosecution and Prevention Section or LAPD) a written petition requesting removal from the Enforcement List (the "Petition").

H.2: Time Limit For Submission

To be considered, a Petition must be received by the City Attorney's Office or LAPD within 90 days of the Petitioner being personally served with the Gang Injunction, unless good cause is demonstrated, which could include the prior unavailability of this procedure to the Petitioner or recent completion of an educational, job training, or gang intervention program.

H.3: Contents of Petition

The Petition may, though need not be, submitted on a form to be developed and made available by the Criminal Branch and LAPD. The Petition should contain the following information:

a) The Petitioner's full name;

b) The Petitioner's date of birth;

c) The Petitioner's social security account number, or, if the petitioner has none, a copy of a valid and acceptable photo identification, such as a driver's license or school issued identification card;

d) The Petitioner's home address and telephone number;

e) The name, address and telephone number of the Petitioner's place of employment;

f) Any aliases or monikers the Petitioner uses or has used in the past;

g) A signed verification by the Petitioner that he or she:

i) No longer is (or never was) a member of the gang named in the Gang Injunction; *and*

ii) No longer is (or never was) a member of any other criminal street gang; *and*

iii) No longer is (or never was) acting, directly or indirectly, to promote, further, or assist any such gang's criminal or nuisance activity;

h) If the Petitioner claims to have previously been, but no longer is, a gang member, a statement explaining when, why and under what circumstances he or she ceased being a gang member;

i) A statement describing any facts supporting Petitioner's claim that he or she no longer is (or never was) a gang member;

j) A list of witnesses, including current contact information, who could support Petitioner's claim that he or she no longer is (or never was) a gang member; and

k) Any witness testimonials, letters from third parties, or other documentation or evidence supporting Petitioner's claim that he or she no longer is (or never was) a gang member.

H.4: Noncompliance With Petition Requirements

The failure of a Petition to comply fully with the requirements of Guideline H.3 shall not, standing alone, be reason enough for refusing to review or act upon the Petition; *provided, however*, that a Petition shall not be considered if the

Petitioner has: (a) failed to provide sufficient identifying information; or (b) failed to sign a verification regarding his or her status as a gang member.

Any other deficiencies in the Petition may be considered as a factor in determining whether the Petitioner qualifies to be removed from the Enforcement List.

H.5: Recommendation of Gang Deputy and LAPD Gang Expert

The Gang Deputy responsible for enforcement of the Gang Injunction, in consultation with the designated LAPD gang expert, shall promptly review the Petition and make a recommendation in writing to the Reviewing Authority. The Gang Deputy shall forward the Petition, the recommendation, and a copy of any evidence or other relevant and reliable information to the Reviewing Authority.

H.6: Consideration By the Reviewing Authority

The Reviewing Authority shall promptly review the Petition and all available evidence and other relevant and reliable information. Additionally, the Reviewing Authority may, in his or her discretion, hear informally, in person, telephonically, or in writing, from the designated LAPD gang expert, the Petitioner, or any other person believed to possess relevant information.

H.7: Decision of the Reviewing Authority

The Reviewing Authority shall direct that the Petitioner be removed from the Enforcement List if the Reviewing Authority is firmly convinced that the Petitioner:

a) No longer is (or never was) a member of the enjoined gang; *and*

b) No longer is (or never was) acting, directly or indirectly, to promote, further, or assist the gang's criminal and/or nuisance activity; *and*

c) No longer is (or never was) a substantial threat to act, directly or indirectly, to promote, further, or assist the gang's criminal and/or nuisance activity.

H.8: Communication of Decision

The Reviewing Authority shall communicate his or her decision regarding the Petition to the Gang Deputy responsible for enforcement of the Gang Injunction and the designated LAPD gang expert. If the Reviewing Authority grants the Petition, the Gang Deputy and LAPD gang expert shall ensure that the Petitioner is promptly removed from the Enforcement List.

I.

REMOVAL FROM THE ENFORCEMENT LIST AS A RESULT OF PERIODIC REVIEW

I.1: Periodic Review

For each Gang Injunction issued after the effective date of these Guidelines: Three years from the anniversary date that the Gang Injunction issued, or as soon thereafter as reasonably possible, and every three years thereafter, the Gang Deputy responsible for enforcement of the Gang Injunction, together with the designated LAPD gang expert, shall review all available relevant and reliable information concerning gang membership and affiliation for each person subject to enforcement of the Gang Injunction ("Periodic Review").

I.2: Purpose of Periodic Review

The purpose of the Periodic Review shall be to determine whether any person should be removed from the Enforcement List due to changed circumstances.

I.3: Standard for Removal

A person shall be removed from the Enforcement List if the Gang Deputy and designated LAPD gang expert reasonably conclude, based upon all available relevant and reliable information, that the person is: (a) no longer a member of the enjoined gang; *and* (b) no longer acting, directly or indirectly, to promote, further, or assist the gang's criminal or nuisance activity.

I.4: Rebuttal Presumption

For purposes of Guideline I.3, there shall be a rebuttal presumption that a person on the Enforcement List qualifies for removal from the List if, during the three years preceding the Periodic Review: (a) the person was not at any time in custody or on parole, probation, or a similar form of supervised release; *and* (b) the person had not been convicted of, charged with, or arrested for a crime of violence, a felony offense, or a violation of a Gang Injunction.

I.5: Determination Regarding Removal

Should, as a result of the Periodic Review, the Gang Deputy and designated LAPD gang expert reasonably conclude that a gang member should be removed from the Enforcement List, the Gang Deputy shall forward their recommendation and the reasons therefor to a Gang Supervisor, who shall review the recommendation and available evidence and information to determine whether the recommendation is reasonable in light of such evidence and information. The Gang Supervisor's determination may be reviewed by the City Attorney or his or her designee.

J.

BINDING POLICY, DEVIATION THEREFROM

J.1: Binding Policy

These Guidelines represent the official policy of the Criminal Branch and shall be followed and applied in good faith by all members of the Criminal Branch.

J.2: Effective Date

The effective date of these Guidelines shall be April 30, 2007.

J.3: Retention of Authority and Discretion

The City Attorney retains the authority and discretion to deviate from these Guidelines in any case in which justice and fairness so require, which authority and discretion the City Attorney may delegate at any time or in any case to the Chief of the Criminal Branch and/or the Director of Anti-Gang Programs and Operations.

APPENDIX "A"

STANDARD GANG INJUNCTION PROVISIONS

Defendant [Gang], all members of Defendant, and all persons acting under, in concert with, for the benefit of, at the direction of, or in association with Defendant, are enjoined and restrained from engaging in or performing, directly or indirectly, any of the following activities in the Safety Zone:

Do Not Associate: Driving, standing, sitting, walking, gathering or appearing, anywhere in public view or anyplace accessible to the public, with any known member of [Gang], but not including: (1) when all individuals are inside a school attending class or on school business, and (2) when all individuals are inside a church; provided however that this prohibition against associating shall apply to all claims of travel to or from any of those locations;

No Intimidation: Confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting or battering any person known to be a witness to any activity of [Gang], known to be a victim of any activity of [Gang], or known to be a person who has complained about any activity of [Gang];

No Firearms, Imitation Firearms, or Dangerous Weapons: Anywhere in public view or anyplace accessible to the public, (1) possessing any firearm, imitation firearm, ammunition, or dangerous weapon as defined in Penal Code section 12020, (2) knowingly remaining in the presence of anyone who is in possession of such firearm, imitation firearm, ammunition or dangerous weapon, or (3) knowingly remaining in the presence of such firearm, imitation firearm, ammunition or dangerous weapon. For purposes of this provision, an imitation firearm means a replica of a firearm that is so substantially similar in physical properties to an existing firearm as to lead a reasonable person to conclude that the replica is a firearm;

Stay Away From Drugs: Without a prescription, (1) selling, possessing, or using any controlled substance or related paraphernalia, including rolling papers and pipes used for illegal drug use, (2) knowingly remaining in the presence of anyone selling, possessing, or using any controlled substance or such related paraphernalia, or (3) knowingly remaining in the presence of any controlled substance or such related paraphernalia;

Stay Away From Alcohol: Anywhere in public view or any place accessible to the public, except on properly licensed premises, (1) possessing an open container of an alcoholic beverage, (2) knowingly remaining in the presence of anyone possessing an open container of an alcoholic beverage, or (3) knowingly remaining in the presence of an open container of an alcoholic beverage;

No Trespassing: Being present on or in any property not open to the general public, except (1) with the prior written consent of the owner, owner's agent, or the person in lawful possession of the property, or (2) in the presence of and with the voluntary consent of the owner, owner's agent, or the person in lawful possession of the property;

Obey Curfew: Being outside between the hours of 10:00 p.m. on any day and 5:00 a.m. of the following day, unless (1) going to or from a legitimate meeting or entertainment activity, (2) actively engaged in some business, trade, profession or occupation that requires such presence, or (3) involved in a legitimate emergency situation that requires immediate attention;

No Graffiti or Graffiti Tools: Damaging, defacing, or marking any public property or private property of another, or possessing any spray paint container or felt tip marker;

No Forcible Recruiting: Making any threats, or doing anything threatening, including striking or battering a person, destroying or damaging personal property, or disturbing the peace, to cause or encourage a person to join [Gang];

No Preventing a Member From Leaving the Gang: Making any threats, or doing anything threatening, including striking or battering a person, destroying or damaging personal property, or disturbing the peace, (1) to prevent a person from leaving [Gang], or (2) because a person is known to have left [Gang];

Obey All Laws: Failing to obey all laws that (1) prohibit violence and threatened violence, including murder, rape, robbery by force or fear, assault and battery, (2) prohibit interference with the property rights of others including trespass, theft, driving or taking a vehicle without the owner's consent, and vandalism, or (3) prohibit the commission of acts which create a nuisance including the illegal sale of controlled substances and blocking the sidewalk or street;

APPENDIX "B"

COMMENTARY

ADVISEMENTS

These Guidelines do not have the force and effect of law. As the Ninth Circuit Court of Appeals observed with respect to the U.S. Department of Justice's internal guidelines (known as the U.S. Attorney's Manual): "[T]hese guidelines . . . do not have the force of law. A court is not required to enforce an agency regulation unless compliance with the regulation is mandated by the Constitution or federal law. [Citation.] As this court held in *United States v. Welch*, 572 F.2d 1359, 1360 (9th Cir.), *cert. denied*, 439 U.S. 842 (1978), the court 'will not interfere with the Attorney General's prosecutorial discretion unless it is abused to such an extent as to be arbitrary and capricious and violative of due process,' and unless 'a breach of the Attorney General's in-house rules rises to this level,' this court has no authority to enforce them. . . . " (*United States v. Wilson* (9th Cir. 1980) 614 F.2d 1224, 1227-1228; *see also United States v. Rockwell International Corp.* (9th Cir. 1991) 924 F.2d 928, 939 [Reinhardt, J. concurring] [Where DOJ internal guidelines "expressly state that they 'do not establish any rights for corporations being reviewed under [them]' . . . Rockwell's claim that it had a right to have the Department of Justice comply with the guidelines is meritless."].)

B.

OBTAINING THE GANG INJUNCTION

B.1 Basic Requirements

This Guideline outlines the basic requirements that must be met before the Criminal Branch will apply to the court for a gang injunction. The first subsection reflects the legal requirements for obtaining a gang injunction; the other two subsections add requirements as a matter of Criminal Branch policy.

Subsection (a) summarizes the legal requirements for obtaining a Gang Injunction. (*See generally People ex rel. Gallo v. Acuna*, (1997) 14 Cal.4th 1090, *cert. denied*, 521 U.S. 1121 (1997) ("*Acuna*"); *In re Englebrecht (1998) 67 Cal.App.4th 486 ("Englebrecht I"); People v. Englebrecht* (2001) 88 Cal.App.4th 1236 ("*Englebrecht II*"); *see also* Commentary to Guidelines B.2, B.3 and B.4.)

Subsection (b) is intended to ensure that the targeted gang's nuisance activity includes acts sufficiently serious to warrant the commitment of the substantial resources necessary to obtain a gang injunction. It is not necessary that the gang's nuisance activity consists entirely of such acts; it is enough that it "includes" one or more of the enumerated categories of conduct.

Obtaining and enforcing compliance with a Gang Injunction represents a considerable long-term commitment of resources by the City Attorney's Office and LAPD. Subsection (c) is intended to ensure that before such a commitment is made the likely success of the gang injunction in abating the targeted gang's criminal and nuisance activities is thoroughly evaluated based upon available information about the gang, its activities, and the area in which the proposed gang injunction will operate.

B.2 Identifiable Criminal Street Gang

This definition of "identifiable criminal street gang" is based upon the definition of "criminal street gang" found in the California Street Terrorism Enforcement and Prevention Act, more commonly known as the "STEP Act." The definition is modified as suggested by the Court of Appeal in *Englebrecht II, supra*, 88 Cal.App.4th at p. 1258, for gang injunction cases.

The STEP Act's Definition of "Criminal Street Gang"

Penal Code section 186.22, subdivision (f) defines "criminal street gang" for purposes of the STEP Act as follows:

> As used in this chapter, "criminal street gang" means 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 in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive of subdivision (e), 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.

As stated by the Court of Appeal in *In re Nathaniel C.* (1991) 228 Cal.App.3d 990 (*"Nathaniel C."*): "'[C]riminal street gang' is the linchpin for the [STEP Act's] provisions. The phrase is defined specifically, and its application requires proof of multiple elements. A criminal street gang is defined as '[1] any ongoing organization, association, or group of three or more persons, whether formal or informal, [2] having as one of its primary activities the commission of one or more [enumerated offenses], [3] which has a common name or common identifying sign or symbol, [4] whose members individually or collectively engage or have engaged in a pattern of criminal gang activity.'" (*Id.* at p. 1000 [italics omitted].)

"Ongoing Organization, Association or Group of Three or More Persons"

"There was sufficient evidence that the [gang] met the first criterion of being an 'ongoing organization, association or group of three or more persons, whether formal or informal'" where "[t]here was testimony that the gang had a membership roll written on a wall," and "[t]he evidence also showed that the members, friends, and supporters of the

[gang] were capable of concerted actions such as the attempted retaliation against [a rival gang]." (*Nathaniel C., supra,* 228 Cal.App.3d at p. 1001.)

"Common Name or Common Identifying Sign or Symbol"

"The association of multiple names with a gang satisfies the statute's requirement [that the gang have 'a common name'] so long as at least one name is common to the gang's members." (*Nathaniel C, supra,* 228 Cal.App.3d at p. 1001.)

Graffiti, hand signs, tattoos, clothing and colors can provide evidence of the "common identifying sign or symbol" requirement. (*See Nathaniel C., supra,* 228 Cal.App.3d at p. 1001 ["[T]he gang practices expert testified there was graffiti which signified the gang, though no particular color or clothing was associated with gang membership. As anyone familiar with the modern urban environment is aware, graffiti function as symbols as well as a visual blight. . . . "]; *People v. Gamez* (1991) 235 Cal.App.3d 957, 977, fn. 7 ["Southside had a name and identified itself in a common manner on graffiti; it had its own hand signs . . . ."], *disapproved on other grounds by People v. Gardeley* (1996) 14 Cal.4th 605, 624, fn. 10 (*"Gardeley"*).)

"One of Its 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. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members. . . ." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323 (*"Sengpadychith"*).) "[E]vidence sufficient to show only *one* offense," therefore, "is not enough." (*In re Jorge G.* (2004) 117 Cal.App.4th 931, 945 (*"Jorge G."*) [italics in original].)

"Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony[.]" (*Sengpadychith, supra,* 26 Cal.4th at p. 324 [italics in original]; *see also Gardeley, supra,* 14 Cal.4th at p. 620 [Gang expert testimony provided substantial evidence that "the primary activity of the Family Crip gang was the sale of narcotics, but that the gang also engaged in witness intimidation," where the gang expert's opinion was based upon "conversations with the defendants and with other Family Crip members, his personal investigations of hundreds of crimes committed by gang members, as well as information from his colleagues and various law enforcement agencies."]; *Jorge G., supra,* 117 Cal.App.4th at p. 945 "[A] gang's primary activities may be shown through expert testimony[.]".)

"Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes are relevant in determining the group's primary activities." (*Sengpadychith, supra,* 26 Cal.4th at p. 323*; see also People v. Galvan* (1998) 68 Cal.App.4th 1135, 1140 ["[E]ither prior conduct or acts committed at the time of the charged offenses can be used to establish the 'primary activities' element of the gang[.]"].)

"[A]ctual convictions or proof beyond a reasonable doubt for these past activities [is] unnecessary. It [is] sufficient instead to provide credible testimony that the gang is known for committing one or more of the offenses listed." (*In re Elodio O.* (1997) 56 Cal.App.4th 1175, 1181, *disapproved on other grounds by Sengpadychith, supra*, 26 Cal.4th at pp. 322-323.)

"Pattern of Criminal Gang Activity"

The term "pattern of criminal gang activity" is defined by Penal Code section 186.22, subdivision (e) as:

> . . . [T]he 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 those offenses occurred after the effective date of this chapter [September 23, 1988] and the last of those offenses occurred within three years of the prior offense, and the offenses were committed on separate occasions, or by two or more persons.

Subdivision (e) then lists 33 offenses, commonly referred to as "predicate offenses," proof of two or more of which can form the basis of the "pattern of criminal gang activity." (*See People v. Zermeno* (1999) 21 Cal.4th 927, 930 (*"Zermeno"*) ["A gang engages in a 'pattern of criminal gang activity' when its members participate in 'two or more' statutorily enumerated criminal offenses (the so-called 'predicate offenses') that are committed within a certain time frame and 'on separate occasions or by two or more persons.' [Citation.]")]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1383, fn. 13 (*"Olguin"*) ["While the [STEP Act] does not use the word 'predicate' it has become the accepted usage for reference to the statutorily required offenses."].)

Offenses (1) through (25) include crimes of violence ranging from assault with a deadly weapon, to rape, to manslaughter and homicide. They also include robbery; witness intimidation; the use, sale and transfer of firearms; the manufacture and distribution of controlled substances; burglary, arson and felony vandalism; vehicle theft and carjacking; and grand theft, felony extortion and money laundering. Offenses (31) through (33) include illegal possession of a firearm, carrying a concealed firearm and carrying a loaded firearm.

Offenses (26) through (30) involve identity theft and credit card fraud. Subdivision (j) of section 186.22 places some limitations on the pairing of offenses (26) through (30) with the other enumerated offenses to establish the requisite pattern, instructing that:

> A pattern of gang activity may be shown by the commission of one or more of the offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), and the commission of one or more of the offenses enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive of subdivision (e). A pattern of gang activity cannot be established solely by proof of commission of

offenses enumerated in paragraphs (26) to (33)**,** inclusive, of subdivision (e), alone.

"To establish the predicate offenses that comprise the requisite 'pattern of criminal gang activity,' the STEP Act does not require a conviction thereof." (*Zermeno, supra,* 21 Cal.4th at p. 932, fn. 2.)

The charged offense may be considered as one of the predicate offenses in establishing the requisite pattern of criminal gang activity. (*See Gardeley, supra,* 14 Cal.4th p. 625; *Olguin, supra,* 31 Cal.App.4th at p. 1383; *In re Jose T.* (1991) 230 Cal.App.3d 1455, 1463; *In re Lincoln J.* (1990) 223 Cal.App.3d 322, 328.)

The STEP Act does not require that the pattern amount to or pose "a threat of continued criminal activity" because it does not incorporate the judicial gloss associated with the federal racketeering law's "pattern" requirement. (*See Olguin, supra,* 31 Cal.App.4th at pp. 1385-1386.) Nor does it require that each predicate offense be "gang related" or committed "for the benefit of, at the direction of, or in association with the gang." (*Gardeley, supra,* 14 Cal.4th at p. 610 ["We disagree that the predicate offenses must be 'gang related.'"] and at p. 621 ["Nothing in this statutory language [of Penal Code section 186.22(e)] suggests an intent by the Legislature to require 'two or more' predicate offenses to have been committed 'for the benefit of, at the direction of, or in association with' the gang, as defendants contend."].)

The Plurality Requirement

In *Nathaniel C.,* the Court of Appeal clarified that Section 186.22(e) "does not require that each predicate offense be committed by two or more persons. To constitute a 'pattern' the statute requires only the offenses be 'committed on separate occasions ***or*** by two or more persons . . . . ' [Citation.] The use of the disjunctive in defining 'pattern of criminal gang activity' means a pattern can be established by two or more incidents, each with a single perpetrator, or by a single incident with multiple participants committing one or more of the specified offenses. . . . " (228 Cal.App.3d at p. 1003 [italics in original, bold added].)

The California Supreme Court has held that the pattern requirement may be satisfied by proof of the defendant's commission of one of the enumerated offenses, and evidence of another gang member's earlier commission of an enumerated offense. (*See Zermeno, supra,* 21 Cal.4th at p. 931 [pattern element established "by proof of the defendant's commission of (1) 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)"] [discussing *Gardeley, supra,* 14 Cal.4th at p. 610].)

The Supreme Court also has held that the pattern requirement may be satisfied by proof that two gang members committed simultaneous offenses involving the same victim, as long as each gang member committed a separately chargeable offense. (*See Zermeno, supra,* 21 Cal.4th at p. 931 [pattern element established "by evidence of (1) the charged crime of assault with a deadly weapon, and (2) a separate assault with a deadly

weapon on the same victim committed contemporaneously with the charged offense by the defendant's fellow gang member"] [discussing *People v. Loeun* (1997) 17 Cal.4th 1, 10 ("*Loeun*")].)

The Supreme Court has further held, however, that the requisite plurality of predicate offenses is not established when a gang member commits a predicate offense and another gang member only aids and abets him in the commission of that offense. In such circumstances, only one offense has been committed. (*See Zermeno, supra,* 21 Cal.4th at p. 932 ["[W]e conclude that when defendant hit Garcia with the beer bottle and [defendant's fellow gang member] prevented Garcia's friends from coming to his aid, this was just one offense. Accordingly, this conduct did not satisfy the statutory requirement of 'two or more' predicate offenses to establish the 'pattern of criminal gang activity' under the STEP Act."].) In *Zermeno*, the Court distinguished its holding in *Loeun*, explaining that the defendant in that case "committed an assault with a deadly weapon (a baseball bat) contemporaneously with a fellow gang member's separate assault with a deadly weapon (a tire iron) on the same victim. We concluded in *Loeun* that these actions met the statutory requirement of 'two or more offenses' necessary to establish a 'pattern of criminal gang activity' [because they] involved two separate assaults by two different assailants, each one subject to criminal liability as a direct perpetrator, not merely as an aider and abettor." (*Id.* at pp. 932-933.)

The Primary Activities and Pattern Requirements in Gang Injunction Cases

In *Englebrecht II*, the Court of Appeal suggested the following modification to Penal Code section 186.22(f)'s definition of "criminal street gang" in cases in which the People are seeking an injunction to abate a gang's nuisance activity: "For purposes of a gang abatement injunction, the above definition [of Penal Code section 186.22(f)] would seem adequate with the modification the group have as one of its primary activities not the commission of the enumerated crimes, but rather the commission of acts constituting the public nuisance. And whose members individually or collectively engage in not necessarily a pattern of criminal activity, but rather a pattern of activity amounting to the public nuisance." (88 Cal.App.4th at p. 1258.)

Statutory Exclusion

The STEP Act expressly excludes from its definition of "criminal street gang" any "employees engaged in concerted activities for their mutual aid and protection, or the activities of labor organizations or their members or agents." (Penal Code § 186.23.)

Constitutionality

The California Supreme Court upheld the statutory definition of "criminal street gang" against a vagueness challenge in *People v. Gardeley, supra,* 14 Cal.4th at p. 623 ["These detailed requirements of the STEP Act [definition of 'criminal street gang'] are sufficiently explicit to inform those who are subject to it what constitutes a criminal street gang for purposes of the act. . . . In contrast, the New Jersey statute [at issue in *Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453] defined a gang merely by the phrase 'consisting

of two or more persons,' a term so vague that persons of ordinary intelligence would necessarily have to guess at its meaning and application, because the statute brought within its range any noncriminal association or group."].)

B.3 Pattern of Nuisance Activity

"The use of civil injunctions to abate gang-related problems is a relatively new law enforcement approach that relies on the centuries-old public nuisance law." (*Englebrecht I, supra*, 67 Cal.App.4th at p. 492.)

Relevant Statutory Provisions

This Guideline is based on the definition of public nuisance found in Civil Code sections 3479 and 3480. Those sections provide as follows:

> **Section 3479 – Nuisance defined.** Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.
>
> **Section 3480 – Public nuisance.** A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

(*See also* Penal Code §§ 370 & 371; *Acuna, supra,* 14 Cal.4th at p. 1104 ["Section 370 of the Penal Code mirrors these civil provisions . . . . "]; *People ex rel. Busch v. Project Room Theater* (1976) 17 Cal.3d 42, 49 [noting "the substantial identity of definitions appearing in Penal Code sections 370 and 371, and Civil Code sections 3479 and 3480"].)

Civil Code section 3491 provides: "The remedies against a public nuisance are [¶] 1. Indictment or information; [¶] 2. A civil action; or [¶] 3. Abatement." (*See also Englebrecht I, supra,* 67 Cal.App.4th at p. 492.)

Code of Civil Procedure section 731 authorizes city attorneys to bring nuisance actions in the name of the People. It provides in relevant part that "[a] civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, . . . by the city attorney of any town or city in which such nuisance exists . . . . " (*See also Englebrecht I, supra,* 67 Cal.App.4th at p. 492.)

Underlying Theory

The theory behind the public nuisance doctrine was explained by the California Supreme Court in its watershed opinion in *Acuna*: "Unlike the private nuisance – tied to and designed to vindicate individual ownership interests in *land* – the 'common' or *public* nuisance emerged from distinctly different historical origins. The public nuisance doctrine is aimed at the protection and redress of *community* interests and, at least in theory, embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the 16th century." (14 Cal.4th at p. 1103 [italics in original].)

Elements

In *People ex rel. Busch v. Projection Room Theater, supra,* 17 Cal.3d 42, the California Supreme Court, in discussing Penal Code sections 370 and 371, stated the elements of a public nuisance as "**[1]** anything which alternatively is injurious to health or is indecent, or offensive to the senses; **[2]** the results of the act must interfere with the comfortable enjoyment of life or property; and **[3]** those affected by the [proscribed] act may be an entire neighborhood or a considerable number of persons, . . . [although] the extent of the annoyance or damage on the affected individuals may be unequal." (*Id.* at p. 49. [bracketed numbers added].)

"[M]ere apprehension of injury from a dangerous condition may constitute a nuisance where it interferes with the comfortable enjoyment of property. . . ." (*McIvor v. Mercer-Fraser Co.* (1946) 76 Cal.App.2d 247, 254.)

Conduct Need Not Be Criminal

To be enjoinable as a public nuisance, the acts complained of need not be criminal: "Acts or conduct which qualify as public nuisances are enjoinable as civil wrongs *or* prosecutable as criminal misdemeanors, a characteristic that derives not from their status as independent crimes, but from their inherent tendency to injure or interfere with a community's exercise and enjoyment of rights common to the public. It is precisely this recognition of – and willingness to vindicate – the value of community and the collective interests it furthers, rather than to punish criminal acts, that lies at the heart of the public nuisance as an equitable doctrine. . . . " (*Acuna, supra,* 14 Cal.4th at pp. 1108-1109 [italics in original]; *see also Englebrecht I, supra,* 67 Cal.App.4th at p. 492 ["Either criminal or noncriminal conduct may be abated. . . ."]; *Acuna, supra,* 14 Cal.4th at p. 1139, fn. 8 [Mosk, J. dissenting] ["That both criminal and noncriminal conduct can be enjoined as a public nuisance is clear under our statutory and case law."]; *cf.* Civil Code § 3369 ["Neither specific nor preventive relief can be granted . . . to enforce a penal law, except in a case of nuisance or as otherwise provided by law."].)

Conduct Must Be Reasonably
Within the Statutory Definition

Because "the ultimate legal authority to declare a given act or condition a public nuisance rests with the Legislature[,] the courts lack the power to extend the definition of

the wrong or to grant equitable relief against conduct not reasonably within the ambit of the statutory definition of a public nuisance." (*Acuna, supra,* 14 Cal.4th at p. 1107.) As the *Acuna* court elaborated, "[t]his lawmaking supremacy serves as a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a 'public nuisance.'" (*Ibid.*)

Acuna holds that typical turf-based gang activity will "reasonably fall within the statutory definition of a public nuisance." (14 Cal.4th at p. 1120.) As stated in that case:

> . . . Gang members not only routinely obstruct Rocksprings residents' use of their own property by such activities as dealing drugs from apartment houses, lawns, carports, and even residents' automobiles – but habitually obstruct the "free passage or use, in the customary manner," of the public streets of Rocksprings. It is likewise clear from this record that the conduct of gang members qualifies as "indecent or offensive to the senses" of reasonable area residents: The hooligan-like atmosphere that prevails night and day in Rocksprings – the drinking, consumption of illegal drugs, loud talk, loud music, vulgarity, profanity, brutality, fist-fights and gunfire – easily meet the statutory standard. Nor is it difficult to see how threats of violence to individual residents and families in Rocksprings, murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson and associated crimes, obstruct the free use of property and interference with the enjoyment of life of an entire community.

(*Ibid.*)

Interference Must Be Both
Substantial and Unreasonable

"[N]ot every interference with collective social interests constitutes a public nuisance. To qualify, and thus be enjoinable, the interference must be both *substantial* and *unreasonable*." (*Acuna, supra,* 14 Cal.4th at p. 1105 [italics in original]; *see also Englebrecht I, supra,* 67 Cal.App.4th at p. 492 ["A nuisance must be substantial and unreasonable to qualify as a public nuisance and be enjoinable."].)

"Substantial" is defined as "significant harm" that is "definitely offensive, seriously annoying or intolerable." (*Acuna, supra,* 14 Cal.4th at p. 1105.) It is measured objectively: "If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one." (*Ibid.*)

"Unreasonableness" is determined by "comparing the social utility of an activity against the gravity of the harm it inflicts . . . ." (*Ibid.*) It too is judged objectively: "[W]hether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable." (*Ibid.* [quoting *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938] [internal quotation marks omitted].)

Nuisance Per Se

California law recognizes that "the legislature has the power to declare certain uses of property a nuisance and such use thereupon becomes a nuisance *per se*." *(McClatchy v. Laguna Lands Ltd.* (1917) 32 Cal.App. 718, 725 [citation and internal quotation marks omitted].) "Nuisances *per se* are so regarded because no proof is required, beyond the actual fact of their existence, to establish the nuisance. No ill effects need be proved." (*Ibid.*)

Section 11.00, subdivision (l) of the Los Angeles Municipal Code ("LAMC") provides, in relevant part, that, "[i]n addition to any other remedy or penalty provided by this Code, any violation of any provision of this Code is declared to be a public nuisance and may be abated by the City or by the City Attorney on behalf of the people of the State of California as a nuisance by means of a restraining order, injunction or any other judgment in law or equity issued by a court of competent jurisdiction."

Some of the municipal ordinances that gangs typically violate include LAMC 41.03 [lookout for illegal acts]; 41.14 [injury to public property]; 41.18, subdivision (a) [obstruction of public sidewalk or street]; 41.19 [obstruction of entrance to place of public assemblage]; 41.24 [trespass on private property]; 41.27 [public consumption of alcohol]; 41.33 [interference with tenant's peaceful enjoyment of premises]; 41.47.2 [urinating or defecating in public]; 41.57 [loud and raucous noise]; 45.03 [curfew restrictions for minors]; 45.04 [juvenile loitering during school hours]; 49.84 and 49.85 [liability for acts of graffiti]; and 63.44 [regulations affecting park and recreation areas].

B.4 Safety Zone

This Guideline formalizes in writing existing Criminal Branch practice and policy. It is based upon the legal principle that "[a]n injunction may not burden the constitutional right of association more than is necessary to serve the significant governmental issue at stake." (*Englebrecht II, supra,* 88 Cal.App.4th at p. 1262; *see also Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 765 ("*Madsen*") [An injunction must "burden no more speech than necessary to serve a significant government interest."]; *Acuna, supra,* 14 Cal.4th at p. 1115 [To be "constitutionally sustainable," an injunction must meet "the requirement that the superior court's decree burden no more of defendants' speech than necessary to serve the significant governmental interest at stake."].)

In *Englebrecht I*, the Court of Appeal stated as follows in upholding a Safety Zone (referred to as a "Target Area") "considerably larger than the Target Area in Acuna":

> . . . [R]elative size is not determinative. What matters is whether the Target Area in this case burdened 'no more speech than necessary to serve a significant government interest.' [Citation.] The Target Area encompasses 'Eastside' – the turf of the Posole gang and the area that the gang has made a public nuisance. Despite its larger size, the Target Area is well defined by distinct boundaries – highways and major streets. The

> injunction specifically and narrowly describes the Target Area within legal requirements. There has been no showing that the target area is larger than it need be to abate the public nuisance. . . .

(67 Cal.App.4th at p. 495.)

B.5 Burden of Proof

A gang injunction is the product of a civil lawsuit brought by the City Attorney in the name of the People. In most civil actions, the plaintiff's burden of proof is by a preponderance of the evidence. (*See* Evid. Code § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."].) In *Englebrecht II*, however, the Court of Appeal raised the People's burden in gang injunction cases to clear and convincing evidence, reasoning as follows:

> We do not suggest, nor do we believe it necessary to find, before requiring proof by clear and convincing evidence, that the interests involved in the enjoined activities rise to the level of physical liberty or parental or First Amendment rights. The interests involve more than a mere dispute over property or money. The need for a standard of proof allowing a greater confidence in the decision reached arises not because the personal activities enjoined are sublime or grand but rather because they are commonplace, and ordinary. While it may be lawful to restrict such activity, it is also extraordinary. The government, in any guise, should not undertake such restrictions without good reason and without firmly establishing the facts making such restrictions necessary.

(88 Cal.App.4th at p. 1256.)

B.6 Likely to Abate the Nuisance Activity

The decision to commit the significant resources involved in obtaining and enforcing a gang injunction should be made only after a careful analysis of whether a gang injunction is the most effective and efficient means for combating the criminal conduct, nuisance activities and unwanted presence of a criminal street gang in a particular area. This Guideline lists some of the factors that experience has taught can be indicative of the likely success of a gang injunction in achieving its purpose. The list is not intended to be exclusive; any and all other relevant factors should be considered and weighed as part of this analysis.

B.7: Decision to Seek a Gang Injunction

Because obtaining and enforcing a new gang injunction may require the dedication of significant Criminal Branch resources for an extended period of time – which may, as a consequence, impact immediate and/or long-term Criminal Branch priorities – it is appropriate that the final decision whether to seek the gang injunction (assuming the requirements of Guideline B.1 are met) be made by the City Attorney, or, by delegation, the Chief of the Criminal Branch.

B.8: Coordination With Local Branch and Safe Neighborhoods Division

Experience has taught that gang injunctions are most effective when they are part of a collaborative effort and comprehensive strategy that employs other legal tools available to prosecutors within the Criminal Branch, including property abatement actions; forced evictions of tenants engaged in drug dealing or other illegal activity; graffiti abatement, prevention and clean-up projects; property manager training; and quality of life prosecutions.

At the same time, however, it is of paramount importance that all information that may reveal plans to seek a gang injunction be maintained as confidential pending filing of the application for gang injunction. Attorneys in the Criminal Branch with whom such information is shared, therefore, must act with the utmost diligence to protect and preserve the confidentiality of such information.

C.

PROVISIONS OF THE GANG INJUNCTION AND NOTICE TO THE GANG

C.1: Narrowly Tailored

This Guideline reflects the legal principle that injunctive relief "ought never to go beyond the necessities of the case." (*Anderson v. Souza* (1952) 38 Cal.2d 825, 840-841; *see also Madsen, supra*, 512 U.S. at p. 765 [As a "general rule, . . . injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."]; *People v. Mason* (1981) 124 Cal.App.3d 348, 354 [Injunctive relief may not extend "further than is absolutely necessary to protect the lawful rights of the parties seeking an injunction"; thus, it is "important for the trial court to limit the scope of the injunction, taking only those measures which would afford the People the relief to which they are entitled."].)

C.2: Inclusion of Standard Provisions

The use of standardized language in the application to a court for a gang injunction is beneficial for at least two reasons. First, experience confirms that these particular provisions are effective in abating the type of nuisance activity that allows gangs to terrorize and control neighborhoods. Second, the courts that regularly adjudicate applications for gang injunctions are familiar with the standardized language of most, if not all, of these provisions.

While this Guideline requires Gang Supervisor approval to deviate from the standard language in an application for a gang injunction, it is recognized that the court, in the course of a hearing, may indicate that it wants the language of a particular provision modified, and that the Gang Deputy may not have the opportunity to contact a Gang Supervisor for guidance. In such circumstances, the Gang Deputy must, and is

authorized to, use his or her best judgment in determining whether to agree or object to the proposed change.

The "Do Not Associate" Provision

The legality of these standard provisions should be beyond serious debate. The most controversial provision has been the "Do Not Associate" provision; however, its constitutionality is now well established, having been upheld against a variety of constitutional challenges by the Supreme Court in *Acuna* and the Court of Appeal in *Englebrecht I* and *II*.

In *Acuna*, enjoined gang members challenged the "Do Not Associate" provision of a preliminary injunction on freedom of association, overbreadth and vagueness grounds. The Supreme Court rejected each of these challenges.

In rejecting the First Amendment challenge, the *Acuna* court noted that "the United States Supreme Court has made it clear that, although the Constitution recognizes and shields from government intrusion a *limited* right of association, it does not recognize 'a generalized right of "social association."'" (14 Cal.4th at p. 1110 [italics in original] [quoting *Dallas v. Stanglin* (1989) 490 U.S. 19, 25].) Moreover, while the *Acuna* court recognized that "[t]he high court has identified two kinds of association entitled to First Amendment protection – those with an 'intrinsic' or 'intimate' value, and those that are 'instrumental' to forms of religious and political expression and activity" (*ibid*), it held that "the street gang's conduct in Rocksprings at issue in this case fails to qualify as either of the two protected forms of association." (*Id.* at p. 1111.) The *Acuna* court concluded that: (1) "in its activities within the four-block area of Rocksprings, the gang is not an association of individuals formed '*for the purpose* of engaging in protected speech or religious activities'" (*ibid.* [quoting *Board of Directors of Rotary International v. Rotary Club* (1987) 481 U.S. 537, 544] [italics added in *Acuna*]); and (2) "[w]e do not, in short, believe that the activities of the gang and its members in Rocksprings at issue here are either 'private' or 'intimate' as constitutionally defined. . . . " (*Id.* at p. 1112.)

In rejecting the overbreadth challenge, the *Acuna* court observed that "the trial court's interlocutory decree here does not embody broad and abstract commands of a statute. Instead, it is the product of a concrete judicial proceeding prompted by particular events . . . that led to a specific request by the City for preventive relief." (*Id.* at p. 1114.) The court continued: "Manifestly, the paradigm for an overbreadth challenge is not present in *this* case. Here, there is no possibility that the concerns motivating the high court in its classic overbreadth opinions – the 'chilling effect' of abstract, broadly framed statutes on the conduct of those not before the court [citation] – could place at risk *any* protected conduct other than that of defendants themselves. . . . There is accordingly no basis, legal or factual, for the professed concern that protected speech or communicative conduct by anyone *other* than defendants might be endangered by the terms of the trial court's injunction." (*Ibid.* [italics in original].)

Finally, in rejecting the vagueness challenge, the *Acuna* court held that as long as the prosecution was required to "establish a defendant's *own knowledge* of his associate's gang membership to meet its burden of proving conduct in violation of the injunction"

(*id.* at p. 1117 [italics in original]), "the text of [the 'Do Not Associate' provision] passes scrutiny under the vagueness doctrine." (*Id.* at p. 1118.)

Additionally, the *Acuna* court concluded that the "Do Not Associate" provision "compl[ied] with the constitutional standard announced by the Supreme Court in *Madsen*" (*id*. at p. 1120) – that it "burden no more speech than necessary to serve a significant government interest." (*Madsen, supra,* 512 U.S. at p. 765.) The court explained: "The provision's ban on all forms of association – 'standing, sitting, walking, driving, gathering or appearing anywhere in public view' – does not violate the *Madsen* standard merely because of its breadth. The provision seeks to ensure that, within the circumscribed area of Rocksprings, gang members have no opportunity to combine. [¶] It is the threat of *collective* conduct by gang members loitering in a specific and narrowly described neighborhood that the provision is sensibly intended to forestall. . . . " (14 Cal.4th at p. 1121 [italics in original].)

In *Englebrecht II,* the Court of Appeal rejected the contention that "that portion of the injunction forbidding gang members from being seen together in public in the target area is more burdensome than necessary since it unnecessarily infringes on protected family relationships." (88 Cal.App.4th at pp. 1261-1262.) It explained:

> Collective activity by gang members is at the core of the nuisance the injunction justifiably attempts to abate. While it may be that many gang members are also related by family, and while the injunction's associational restrictions may affect, in the target area, contact between those family members, those facts are not determinative. The injunction places no restrictions on contact between any individuals outside the target area. In the target area the injunction merely requires gang members not to associate in public. While the injunction may place some burden on family contact in the target area, it by no means has, in our view, a fundamental impact on general family association.

(*Id.* at p. 1263; *see also Englebrecht I, supra*, 67 Cal.App.4 at p. 496 ["Engelbrecht misreads the injunction. It does not enjoin him from being in the Target Area; he is free to visit his grandmother and other relatives who reside there. What the injunction prohibits is his association with other Posole gang members within the Target Area. . . ."].)

The *Englebrecht II* court thus concluded that "the injunction as issued has a limited impact on familial relationships," and "any liberalization of the injunction to try to allow greater familial contact in the target area would limit the effectiveness of the injunction." (88 Cal.App.4th at p. 1263; *see also Englebrecht I, supra,* 67 Cal.App.4th at p. 496 ["T]he fact that some Posole gang members live or have relatives who live in the Target Area does not transform their gang activities into 'intimate' or 'intrinsic' associational activities. The gang activities remain nonintimate activities. The familial nexus of some Posole gang members to the Target Area does not bestow constitutional protection on associational gang activity, which is often criminal or terrorizing or both."].)

The Other Standard Provisions

The remaining standard provisions are derived from or analogous to state criminal statutes and/or Los Angeles City ordinances:

No Intimidation: Penal Code sections 136.1 [intimidation of witnesses and victims], 186.26 [soliciting or recruiting for gangs], and 422 [criminal threats].

No Firearms, Imitation Firearms or Dangerous Weapons: Penal Code sections 12020 [possession of certain dangerous weapons], 12025 [carrying concealed weapon], 12028, subdivision (a) [firearms and other weapons as nuisance], and 12031 [carrying loaded weapon].

Stay Away From Drugs: Penal Code sections 647 [disorderly conduct] and 653f, subdivision (d) [solicitation of drug sales]; Health and Safety Code sections 11054-11058 [controlled substances defined], 11530 [loitering in a public place], and 11532 [loitering for drug-related purpose].

Stay Away From Alcohol: LAMC section 41.27 [public consumption of alcohol].

No Trespassing: Penal Code sections 602 [trespass] and 647 [disorderly conduct]; LAMC section 41.24 [trespass on private property].

Obey Curfew: LAMC sections 45.03 [curfew restrictions for minors], 45.04 [juvenile loitering during school hours], and 63.44 [presence in park after hours].

No Graffiti or Graffiti Tools: Penal Code sections 594 [vandalism], 594.2 [possession of graffiti tools], and 640.6 [graffiti prohibited]; LAMC sections 49.84 and 49.85 [liability for acts of graffiti].

No Forcible Recruiting: Penal Code section 186.26 [soliciting or recruiting for gangs].

No Preventing a Member From Leaving the Gang: Penal Code sections 186.26 [soliciting or recruiting for gangs] and 422 [criminal threats].

C.3: Inclusion of Special Provisions

Gang Deputies are encouraged to propose new injunctive provisions that they believe may be more effective at abating particular categories of nuisance activity than the standard provisions, or that they believe are needed to abate a category of nuisance activity not adequately addressed by the standard provisions. Before proposing such a provision, the Gang Deputy should attempt to find an analogous prohibition created by statute or ordinance.

The Gang Deputy also should analyze the proposed provision to ensure that it is not vulnerable to constitutional challenge on the grounds that it is vague, overbroad,

violates equal protection, or impermissibly interferes with the exercise of a fundamental right. (*See generally* Penal Code § 186.21 ["The Legislature . . . finds that the State of California is in a state of crisis which has 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. . . . "]; *Acuna, supra,* 14 Cal.4th at p. 1112 ["Freedom of association, in the sense protected by the First Amendment, 'does not extend to joining with others for the purpose of depriving third parties of their lawful rights.'"][quoting *Madsen, supra,* 512 U.S. at p. 776]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 632 ["Activities of an association which deprive third parties of their lawful rights fall outside the constitutional pale. The commission of crimes is the most apparent manifestation of such unprotected conduct. The performance of acts that constitute a civil nuisance is another."]; *Englebrecht I, supra,* 67 Cal.4th at pp. 496-499 [Concluding that a provision enjoining the possession and use of pagers or beepers in the Target Area was unconstitutionally overbroad because "constitutionally protected communications are swept within its ambit"; "[s]uch an all-encompassing ban on pagers and beepers poses a greater burden on the defendants' right to free speech than is necessary to serve the district attorney's legitimate interest in curtailing illegal gang activity and abating the public nuisance in the Target Area"; "there was no attempt made below to create a nexus between the use of pagers and beepers and the public nuisance, which the preliminary injunction is intended to abate"; and "[t]here was no attempt to narrow the provision so that it enjoins the use of these devices to abet criminal activities – e.g., to facilitate drug sales or to assist fellow gang members to elude the police – the type of conduct that has contributed to the public nuisance."].)

C.4: Notice to the Gang

Generally

This Guideline is based upon well established legal principles that the criminal street gang itself can be named as the defendant in a gang injunction; that effective service on the gang can be accomplished through service on an adequate number of designated gang members; and that gang members receiving notice of the injunction are bound by its terms, even if not individually named in the injunction or as parties in the action that led to its issuance.

Suing the Gang as an Unincorporated Association

A criminal street gang may be sued as an "unincorporated association." Code of Civil Procedure section 369.5, subdivision (a) provides that an "unincorporated association, whether organized for profit or not, may sue and be sued in the name it has assumed or by which it is known." (*See Barr v. United Methodist Church* (1979) 90 Cal.App.3d 259, 265 ("*Barr*") ["The trend of case law has been the rejection of legal niceties to assure full recognition of the unincorporated association as a separate legal entity."].)

Criminal street gangs easily satisfy the definition of an unincorporated association: "The criteria applied to determine whether an entity is an unincorporated association are no more complicated than (1) a group whose members share a common purpose, and (2) who function under a common name under circumstances where fairness requires the group be recognized as a legal entity. Fairness includes those situations where persons dealing with the association contend their legal rights have been violated. [Citation.] Formalities of quasi-corporate organization are not required." (*Barr, supra,* 90 Cal.App.3d at pp. 266-267.)

Serving the Gang as an Unincorporated Association

Code of Civil Procedure section 416.40 governs service of an unincorporated association. Section 416.40, subdivision (c) provides: "A summons may be served on an unincorporated association . . . by delivering a copy of the summons and of complaint . . . [¶] When authorized by Section 18220 of the Corporations Code, as provided by that section." (C.C.P. § 416.40(c).)

Corporations Code section 18220 provides for service of an unincorporated association in some circumstances "by delivery of a copy of the process to one or more of the association's members designated in the order and by mailing a copy of the process to the association at its last known address." It provides in full as follows:

> If designation of an agent for the purpose of service of process has not been made as provided in Section 18200, or if the agent designated cannot with reasonable diligence be found at the address specified in the index referred to in Section 18205 for delivery by hand of the process, and it is shown by affidavit to the satisfaction of a court or judge that process against an unincorporated association cannot be served with reasonable diligence upon the designated agent by hand or the unincorporated association in the manner provided for in *Section 415.10* [by personal delivery] *or 415.30 of the Code of Civil Procedure* [by first-class mail and return of written acknowledgement of receipt] or subdivision (a) of *Section 415.20 of the Code of Civil Procedure* [by leaving copy at office and thereafter mailing copy by first-class mail], ***the court or judge may make an order that service be made upon the unincorporated association by delivery of a copy of the process to one or more of the association's members designated in the order and by mailing a copy of the process to the association at its last known address. Service in this manner constitutes personal service upon the unincorporated association.*** [Emphasis added.]

Because criminal street gangs generally do not have fixed addresses for service of process, courts can, and do, excuse compliance with the "mailing a copy of the process to the association at its last known address" requirement, and allow service on the gang by serving one or more "designated" members. (*See Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 313 ["It is well settled that strict compliance with statutes governing service of process is not required. Rather, in deciding whether service was valid, the statutory provisions regarding service of process should be liberally construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant. [Citations.] Thus, substantial compliance is sufficient."].)

A Gang Injunction Binds All Members of the Enjoined Class Who Receive Notice of It

It is a well settled principle of California law that an injunction may enjoin an identified class of persons, and, moreover, upon receiving notice of the injunction, a member of the class is subject to the injunction, even though he or she was not a named party in the civil action that led to the injunction, did not receive notice of that action, and did not have an opportunity to contest issuance of the injunction.

The classic statement of this principle appears in the oft-cited case of *Berger v. Superior Court* (1917) 175 Cal. 719 ("*Berger*"), in which the California Supreme Court declared:

> . . . [I]t has been a common practice to make the injunction run also to classes of persons through whom the enjoined party may act, such as agents, servants, employees, aiders, abetters, etc. though not parties to the action, and this practice has always been upheld by the courts, and any of such parties violating its terms with notice thereof are held guilty of contempt for disobedience of the judgment. But the whole effect of this is simply to make the injunction effectual against *all* through whom the *enjoined party* may act, and to prevent the prohibited action by persons acting in concert with or in support of the claim of the *enjoined party*, who are in fact *his* aiders and abetters. As we have said, this practice is thoroughly settled and approved by the courts . . . .

(*Id*. at p. 721 [italics in original.; *accord People ex rel. Gwinn v. Kothari* (2000) 83 Cal.App. 4th 759, 766.)

No Due Process Violation

In *Ross v. Superior Court* (1977) 19 Cal.3d 899, the defendants, elected members of the Plumas County Board of Supervisors, contended that "the judgment of contempt is invalid because they were not bound by the injunctive order which the trial court found they had willfully disobeyed." (*Id*. at p. 905.) Asserting that "neither Plumas County nor they, as individuals, were named defendants in the [action in which the injunction was sought and issued], and that they received no notice and were afforded no opportunity to defend that action," defendants complained that they had been "denied due process by being held in contempt for violating the injunctive order issued in that case." (*Ibid.*)

In unequivocally rejecting defendants' due process claim, the Supreme Court stated:

> The United States Supreme Court faced and explicitly rejected an almost identical due process contention over three-quarters of a century ago in *In re Lennon* (1897) 166 U.S. 548 . . . . In *Lennon*, an employee of a railroad company who had been found in contempt for violating the terms of an injunction issued against his employer, maintained that the contempt injunction was invalid in that he had not personally been a party to the action in which the injunction had been issued. The Supreme Court responded: "The facts that [the employee] was

> not a party to such suit, nor served with process of subpoena, nor had notice of the application made by the complainant for the mandatory injunction, nor was served by the officers of the court with such injunction are immaterial, so long as it was made to appear that he had notice of the issuing of an injunction by the court. To render [an employee] amenable to an injunction it is neither necessary that he should have been party to the suit in which in the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have actual notice. [Citations.]" (166 U.S. at p. 554.)

(*Id.* at pp. 905-906.)

Application to Gang Injunction Cases

In *Acuna*, the action that led to issuance of the gang injunction named as defendants the gang as well as 38 individual members. In addressing the issue of who may be bound by the injunction, the Supreme Court observed that "the City *could* have named the gangs themselves as defendants and proceeded against them." (14 Cal.4th at p. 1125 [italics in original].) Citing *Berger*, *In re Lennon* and Federal Rule of Civil Procedure 65, subdivision (d), the *Acuna* court explained:

> We see nothing in this case – where instead of naming the gang organizations themselves as parties, the City named as individual defendants all 38 gang members it was able to identify – that removes it from the usual rule applied in *Berger v. Superior Court, supra*, 175 Cal. 719, and many other cases. The City's evidence in support of preliminary equitable relief demonstrated that it was the gang itself, acting through its membership, that was responsible for creating and maintaining the public nuisance in Rocksprings. Because the City *could* have named the gangs themselves as defendants and proceeded against them, its decision to name individual gang members instead does not take the case out of the familiar rule that both the organization and the members through which it acts are subject to injunctive relief.

(*Ibid.* [italics in original].)

Neither Specific Intent to Further an Unlawful Goal Nor Individualized Proof of Criminal Nuisance Activity are Required

In *Acuna*, the Supreme Court flatly rejected the defendants' contention that "they may not be bound by the injunction except on proof that each possessed 'a specific intent to further an unlawful aim embraced by [the gang].'" (14 Cal.4th at pp. 1122-1123 [quoting *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 925] [bracketed language in original].) The court found that for purposes of issuing the preliminary injunction, "it is enough to observe that there was sufficient evidence before the superior court to support the conclusions that the gang and its members present in Rocksprings were responsible for the public nuisance, that each of the individual defendants either admitted gang membership or was identified as a gang member, and that each was observed by police officials in the Rocksprings neighborhood." (*Id.* at p. 1125.)

The *Acuna* court also held that "individualized proof" of gang members committing acts contributing to the alleged public nuisance "is not a condition to the entry of preliminary relief based on a showing that it is the gang, acting through its individual members, that is responsible for the conditions prevailing in Rocksprings." (*Ibid.* ["Although all but three of the eleven defendants who chose to contest entry of the preliminary injunction . . . were shown to have committed acts, primarily drug related, comprising specific elements of the public nuisance, such individualized proof is not a condition to the entry of preliminary relief based on a showing that it is the gang, acting through its individual members, that is responsible for the conditions prevailing in Rocksprings."]; *see also Englebrecht II, supra*, 88 Cal.App.4th at p. 1261 ["It does not appear . . . *Acuna* requires for a sufficient demonstration of membership any showing the individual had engaged in nuisance activities."].)

D.

SERVICE OF SUSPECTED GANG MEMBERS FOR ENFORCMENT PURPOSES

D.2: Personal Service Required

This Guideline formalizes in writing longstanding Criminal Branch policy.

D.3: Proof Beyond a Reasonable Doubt Required

Subsection (a) of this Guideline is intended to limit service of the Gang Injunction to gang members only. (*See* Guideline D.4.)

Subsection (b) is derived from language in *Englebrecht II*, addressing whether the defendant was an "active gang member" subject to the gang injunction in that case. (88 Cal.App.4th at pp. 1257-1261.) The court in that case settled on the following two-part test for determining whether a person is an "active gang member" – the first part being based upon the STEP Act's definition of "criminal street gang" (Penal Code § 186.22, subd. (f)), and the second part coming from language in *People v. Green* (1991) 227 Cal.App.3d 692, 700, and *People v. Castenada* (2000) 23 Cal. 4th 743, 747, 752, defining "active participation" as used in Penal Code section 186.22, subdivision (a):

> We conclude for the purposes of a gang injunction an active gang member is a person who participates in or acts in concert with an ongoing organization, association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of acts constituting the enjoined public nuisance, having a common name or common identifying sign or symbol and whose members individually or collectively engage in the acts constituting the enjoined public nuisance. ***The participation or acting in concert must be more than nominal, passive, inactive or purely technical.***

(*Englebrecht II, supra*, 88 Cal.App.4th at p. 1261 [emphasis added].)

The five (5) year period was added to ensure that evidence of gang membership was not so stale as to lack reliability.

Subsection (b) reflects a Criminal Branch policy judgment and not a legal requirement. (*See In re Ramon T.* (1997) 57 Cal.App.4th 201, 207 ["We decline to read a requirement into subdivision (b) of section 186.22 that violation of that act requires either 'active' or 'current active' participation in a gang."].)

D.4: Prior Approval of Gang Deputy Required

This Guideline creates a new procedural safeguard as a matter of Criminal Branch policy. No such procedure is legally required.

In determining whether the available evidence is sufficient to prove gang membership beyond a reasonable doubt, the Gang Deputy should consider the totality of the circumstances. Though not necessarily dispositive, evidence of the existence of two or more of the following criteria represents strong proof of gang membership:

1) The individual admitted to being a gang member in a non-custodial situation;

2) The individual was identified as a gang member by a reliable informant or source (such as a registered gang member);

3) The individual was identified as a gang member by an untested informant or source with corroboration;

4) The individual was witnessed wearing distinctive gang attire;

5) The individual was seen displaying gang hand signs or symbols;

6) The individual has gang tattoos;

7) The individual frequents gang hangouts;

8) The individual openly associates with documented gang members; or,

9) The individual has been arrested, alone or with known gang members, for a crime usually indicative of gang activity.

The presence of an individual in the CAL GANGS database is not determinative of gang membership for purposes of these Guidelines. The Gang Deputy should exercise independent and informed judgment based on all available evidence and the totality of the circumstances.

D.5: Exigent Circumstances and Excusable Neglect

This Guideline recognizes the reality that interacting with gang members can be dangerous police work, and that LAPD officers in the field, when presented with an unexpected opportunity to serve a suspected gang member, may not be able to stop and contact the Gang Deputy for approval. The Guideline is intended to provide LAPD with flexibility in such situations, while implementing safeguards to ensure that the proof beyond a reasonable doubt standard is satisfied in each case in which a suspected gang member is served with the Gang Injunction.

D.7: Service on Nonmembers Generally Not Permitted

Gang injunctions typically enjoin the gang itself, "all members of [the gang]," and "all persons acting under, in concert with, for the benefit of, at the direction of, or in association with [the gang]."

This final category would include associates and affiliates of the gang. It also could include property and business owners and managers who, with notice of the injunction, willfully aid and abet the gang's criminal or nuisance activities in violation of the injunction.

The law is clear that an individual who is not directly bound by a court order may nevertheless be prosecuted for violating it, if he or she, having notice of the order, violates it in concert with a person who is directly bound by the order. In the words of the Court of Appeal, "a nonparty to an injunction is subject to the contempt power of the court when, with knowledge of the injunction, the nonparty violates its terms *with or for* those who are restrained." (*People v. Conrad* (1997) 55 Cal.App.4th 896, 903 ("*Conrad*") [italics in original]; *see also Berger, supra,* 175 Cal. at p. 721 ["[P]ersons not parties to the action may be bound by an injunction if they have knowledge of it, provided they are servants or agents of the defendants or act in collusion or combination with them. . . . "] [citation and internal quotation marks omitted]; *In re Berry* (1968) 68 Cal.2d 137, 155-156 ("*Berry*") ["We recognize that the direction of injunctive orders to persons 'in active concert or participation with' specifically named parties defendant is approved by long-standing custom and practice, and we agree that an ascertainable class of persons is described by such language."]; Fed. R. Civ. P. 65, subd. (d) [An injunction is "binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."].)

On the other hand, it is not enough that the nonparty commits acts prohibited by the order, even though those acts were done with the same purpose as the restrained party, if both parties are acting independently: "[I]n addition to knowledge of the injunction, some actual relationship with an enjoined party is required to bring a nonparty within the injunction's scope. An enjoined party . . . has to be demonstrably implicated in the nonparty's activity. Mere 'mutuality of purpose' is not enough." (*Conrad, supra,* 55 Cal.App.4th at p. 903; *see also Berger, supra,* 175 Cal. at p. 721 ["[I]t is generally held that a theory of disobedience of the injunction cannot be predicated on the act of a person not in any way included in its terms or acting in concert with the enjoined party

and in support of his claims. . . . "]; *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979 ["[O]ne not included in the terms of a restraining order or injunction, who does not act in concert with any of the parties enjoined or in support of their claims, but is moved by some independent purpose of his own, cannot be held in contempt of court because he does some act forbidden to those who are bound by the restraining order or injunction."].)

The Criminal Branch believes that the expanded use of gang injunctions to enjoin non-gang members, including associates, affiliates, wannabes, or others acting in concert with the gang or its members, requires further consideration; thus, a Guideline governing service of gang injunctions on persons who are not believed to be gang members is not proposed at this time.

Nevertheless, there may be situations presenting sufficient reasons for enjoining the conduct of a non-gang member by serving him or her with the gang injunction. This Guideline makes allowance for such situations by permitting service on the nonmember with the approval of the Director of Antigang Programs and Operations, the Chief of the Criminal Branch or the City Attorney.

E.

PROSECUTION FOR GANG INJUNCTION VIOLATION

E.1: Prosecution for Contempt

Penal Code Section 166(a)(4)

Violations of a gang injunction are prosecuted as contempt pursuant to Penal Code section 166, subdivision (a)(4), which provides that "every person guilty of any contempt of court, of any of the following kinds, is guilty of a misdemeanor: [¶] (4) Willful disobedience of the terms as written of any process or court order . . . lawfully issued by any court . . . ." The punishment for a violation of Section 166(a)(4) is not more than six months in county jail, a fine of not more than $1,000, or both. (Penal Code § 19.)

Elements

The elements of a violation of Section 166(a)(4) are: (1) a court issued a written order; (2) the defendant knew about the order and its contents; (3) the defendant had the ability to follow the order; and (4) the defendant willfully violated the order. (*See* CALCRIM 2700; *see also* 2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Governmental Authority, § 30 at pp. 1119-1122.)

Notice of the Gang Injunction

Proof that the defendant was served with the order will suffice to establish that he or she had notice of it. (*See People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 939 ["[S]uch knowledge as a defendant must be shown to possess, in order to be found guilty

of *willful violation* of a court order, may be shown by evidence that he was personally served with the order and that he knew that fact. . . . [¶] We have been unable to find any requirement in the law of contempt, whether arising in criminal court or in the civil court, that a party to the action who is duly served with a preliminary order must be shown independently to have, subjectively, some additional information before being held to answer for disobedience. Cases which do search for such additional information have the premise that no personal service occurred."] [italics in original]; *see also In re Felthoven* (1946) 75 Cal.App.2d 465, 468 ["In order to punish for constructive contempt of court, it must appear that the order upon which the contempt proceeding is based has been served on the accused, or that he was present when the order was made, or that he had knowledge of it."]; *People v. Hadley* (1924) 66 Cal.App. 370, 379 ["In order that one may be punished for contempt because of the violation of an order of court, it is essential that such person either have actual notice of the making of the order or that personal service of the order be had upon him prior to the time he is charged with its violation."].)

Challenging the Validity of the Underlying Order

California does not adhere to the collateral bar rule, which holds that the asserted invalidity of a court order may not be raised as a defense in a contempt prosecution for violating that order. (*See People v. Gonzalez* (1996) 12 Cal.4th 804, 818 (*"Gonzalez"*) ["Some other jurisdictions require persons affected by injunctive orders to challenge the injunctive order directly, and in the meantime, to obey the order. Disobedience of the order is punished as contempt whether the order is valid or not. This is known as the 'collateral bar' rule. California law is otherwise. . . ."].)

"The rule is well settled in California that a void order cannot be the basis for a valid contempt judgment." (*Gonzalez, supra*, 12 Cal.4th at p. 817; *see also Berry, supra*, 68 Cal.2d at p. 147 ["In this state it is clearly the law that the violation of an order in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt."].) As explained in *Gonzalez*: "Section 166 has defined misdemeanor contempt as involving only the violation of 'lawfully issued' orders ever since the statute was first enacted in 1872. Further, out of a concern to protect the constitutional rights of those affected by invalid injunctive orders on pain of punishment for contempt, this court has firmly established that a person subject to a court's injunction may elect whether to challenge the constitutional validity of the injunction when it is issued, or to reserve that claim until a violation of the injunction is charged as a contempt of court. That is ***the defendant in a contempt proceeding in this state may challenge the validity of an injunction, the violation of which is the basis for the contempt prosecution, even if no such claim was made when the injunction issued.*** [Citations.]" (12 Cal.4th at p. 818 [emphasis added].)

Thus, in California, "a person affected by an injunctive order has available to him two alternative methods by which he may challenge the validity of such order on the ground that it was issued without or in excess of jurisdiction." (*Berry, supra*, 68 Cal.2d at p. 148; *see also Gonzalez, supra*, 12 Cal.4th at p. 818.) *First*: "He may consider it a more prudent course to comply with the order while seeking a judicial declaration as to its jurisdictional validity." (*Berry, supra*, 68 Cal.2d at p. 148.) *Second*: "[H]e may conclude that the exigencies of the situation or the magnitude of the rights involved

render immediate action worth the cost of peril." (*Id.* at p. 149.) In that case, "such a person, under California law, may disobey the order and raise his jurisdictional contentions when he is sought to be punished for such disobedience. If he has correctly assessed his legal position, and it is therefore finally determined that the order was issued without or in excess of jurisdiction, his violation of such void order constitutes no punishable wrong. [Citations.] If, however, the final determination is otherwise he may be punished." (*Ibid.*)

The court in *Berry* made clear, furthermore, that when it spoke of an order issued without or in excess of jurisdiction, "the 'jurisdiction' in question extends beyond mere subject matter or personal jurisdiction," and includes "any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis*. . . ." (68 Cal.2d at p. 147 [citation and internal quotation marks omitted]; *see also Gonzalez*, *supra*, 12 Cal.4th at p. 123.)

E.2: Subpoena of LAPD Officers

This Guideline seeks to control the considerable costs associated with LAPD overtime by limiting to twelve (12) the number of LAPD officers a Gang Deputy can subpoena to testify at a trial involving a gang injunction violation, unless a Gang Supervisor approves otherwise or exigent circumstances exist.

To prove a contempt charge based upon a gang injunction violation, the prosecutor will ordinarily require testimony from the officers who personally served the defendant, the arresting officers who witnessed the violation, officers who can provide evidence of the defendant's gang membership, and one or more gang experts. A recently completed review of Criminal Branch practice indicates that rarely should the number of LAPD officers needed to testify at the trial of a gang injunction violation case exceed twelve, even when potential officer unavailability due to vacation or scheduling conflicts is taken into account.

At the same time, the Guideline recognizes that there will undoubtedly be cases requiring the Gang Deputy to subpoena more than twelve officers for trial. In such cases, the Guideline does not prohibit the service of additional subpoenas; it simply requires that the Gang Deputy first consult with and obtain the approval of a Gang Supervisor before issuing the additional subpoenas.

The Guideline additionally contemplates that there may be circumstances in which the Gang Deputy needs to exceed the twelve subpoena limit but does not have time or is unable to reach a Gang Supervisor. In such a case, the Guideline authorizes the Gang Deputy to do what is necessary to ensure that the officers' whose testimony is required are present or available to testify.

E.3: Filing of the Gang Enhancement Allegation

Penal Code section 186.22(d)

Penal Code section 186.22, subdivision (d) provides for, in certain gang-related misdemeanor prosecutions, a maximum one-year sentence with a mandatory minimum sentence of 180 days in county jail. It states in relevant part that:

> Any person who is convicted of a public offense punishable as . . . a misdemeanor, which is 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 be punished by imprisonment in the county jail not to exceed one year, . . . provided that any 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 he or she has served 180-days. If the court grants probation or suspends execution of sentence imposed upon the defendant, it shall require as a condition thereof that the defendant serve 180-days in a county jail.*** [Emphasis added.]

"Committed For the Benefit Of, at the Direction Of or In Association With, Any Criminal Street Gang"

The first prong of Section 186.22(d) "requires that the crime be committed (1) for the benefit of, (2) at the direction of, *or* (3) in association with a gang." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 ("*Morales*") [italics in original, additional italics omitted].)

Although "it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang," generally, "the jury could reasonably infer the requisite association from the very fact defendant committed the charged crimes in association with fellow gang members." (*Morales, supra*, 112 Cal.App.4th at p. 1198.)

Testimony by a gang expert may provide substantial evidence that the offense was committed for the benefit of the gang. (*See Olguin, supra,* 31 Cal.App.4th at p. 1384 [Gang expert testimony that Southside Gang benefited from one of its members being recruited by another gang to participate in the shootings of members of a third gang, "because it 'promoted the respect of the Southside Gang,'" supported jury's finding that gang enhancement applied: "It is difficult to imagine a clearer need for expert explication than that presented by a subculture in which this type of mindless retaliation promoted 'respect.' But [the gang expert] explained that 'respect' is often synonymous with fear among gangs, and his expertise enabled him to recognize the benefit Southside would realize from the fact another gang called upon one of its members when it needed serious muscle."].)

"Committed . . . With the Specific Intent to Promote

Further or Assist in Any Criminal Conduct By Gang Members"

"As to the second prong of the enhancement, all that is required is a specific intent 'to promote, further, or assist in any criminal conduct by gang members.' (§ 186.22, subd. (b)(1).) Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime." (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 [citing *Morales, supra*, 112 Cal.App.4th at p. 1198].)

Notably, "specific intent to *benefit* the gang is not required. What is required is the 'specific intent to promote, further or assist in any criminal conduct by gang members. . . .'" (*Morales, supra,* 112 Cal.App.4th at p. 1198 [italics in original] and pp. 1198-1199 ["[D]efendant's intentional acts, when combined with his knowledge that those acts would assist crimes by fellow gang members, afforded sufficient evidence of the requisite specific intent."].)

Additional Requirements as a Matter of Criminal Branch Policy

Subsections (a)(i) and (a)(ii) of this Guideline state the legal requirements for the enhancement to apply. The requirement of subsection (b) was added as a matter of Criminal Branch policy, to ensure that the gang enhancement allegation is applied consistently and only in the most serious of gang injunction violation cases.

F.

SENTENCING OF GANG MEMBERS

F.1: Sentencing Goals
F.2: Baseline Sentence
F.3: Deriving the Proposed Sentence

These Guidelines are intended to provide internal guidance to Gang Deputies in the sentencing of gang members convicted of gang injunction violations. They reflect the policy judgments of the Criminal Branch – their goal being to achieve fairness and consistency in the sentencing of such defendants.

Guidelines F.2 and F.3 establish a sentencing regime applicable to cases in which the defendant is convicted of violating a gang injunction. They are intended to grant Gang Deputies broad discretion in fashioning individualized sentencing proposals that achieve the goals identified in Guideline F.1, while at the same time channeling the exercise of that discretion.

F.5: Court's Refusal to Impose the Gang Enhancement

Penal Code section 186.22, subdivision (g) allows the court to refuse to impose the 180-day mandatory minimum sentence. It states in relevant part: "Notwithstanding

any other law, the court may . . . refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would be best served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would be best served by that disposition."

This Guideline requires the Gang Deputy to report all such refusals to a Gang Supervisor and the Director of Anti-Gang Programs and Operations.

F.6: Standard Conditions of Probation
F.7: Special Conditions of Probation

Probation Generally

California law contains a patchwork of provisions governing the imposition of probation. (*See* 3 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Punishment, § 502 at p. 684 ("Witkin: Punishment") ["This conditional release of the convicted defendant is the subject of a series of complicated and frequently amended statutes. . . . "].)

"Probation is not a matter of right but an act of grace and clemency." (*People v. Cortez* (1962) 199 Cal.App.2d 839, 843.) "The purpose of probation is rehabilitation." (*People v. Hacker* (1993) 13 Cal.App.4th 1049, 1058.) "The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and what conditions should be imposed." (*People v. Welch* (1993) 5 Cal.4th 228, 233 ("*Welch*"); *see also* Witkin: Punishment, *supra*, § 532 at p. 718.)

Penal Code section 1202.7 declares that "the primary considerations in the granting of probation" are "[t]he safety of the public, which shall be a primary goal through the enforcement of court-ordered conditions of probation; the nature of the offense; the interests of justice, including punishment, reintegration of the offender into the community, and the enforcement of conditions of probation; the loss to the victim; and the needs of the defendant. . . ."

As stated by the California Supreme Court in reversing a trial court's grant of probation: "The paramount concern in sentencing must be the protection of society. The interests of the defendant are of legitimate but secondary concern. Granting a convicted criminal the qualified liberty of probation subjects society to the risk that it will continue to be victimized during the period when he would otherwise be confined. In determining whether to grant probation the judge must therefore satisfy himself that the risks inherent in that disposition are outweighed by the potential benefits. We are mindful that society, as well as defendant, would benefit if he were rehabilitated through psychiatric treatment while on probation. But, on this record, the chances are slight. . . . " (*People v. Warner* (1978) 20 Cal.3d 678, 689.)

"Probation" and "Conditional Sentence" Defined

Penal Code section 1203, subdivision (a) defines "probation" and "conditional sentence" as follows:

> As used in this code "probation" means the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of a probation officer. As used in this code, "conditional sentence" means the suspension of the imposition or execution of a sentence and the order of revocable release in the community subject to conditions established by the court without the supervision of a probation officer. It is the intent of the Legislature that both conditional sentence and probation are authorized whenever probation is authorized in any code as a sentencing option for infractions or misdemeanors.

Procedure in Misdemeanor Cases

Penal Code section 1203, subdivision (d) outlines the procedure for imposing probation in misdemeanor cases:

> If a person is convicted of a misdemeanor, the court may either refer the matter to the probation officer for an investigation and a report or summarily pronounce a conditional sentence. . . . If the case is not referred to the probation officer, in sentencing the person, the court may consider any information concerning the person that could have been included in a probation report. The court shall inform the person of the information to be considered and permit him or her to answer or controvert the information. For this purpose, upon the request of the person, the court shall grant a continuance before the judgment is pronounced.

As Witkin explains: "Generally, in both infraction and misdemeanor cases, the court may either refer the matter to the probation officer for an investigation and a report or summarily pronounce a conditional sentence. . . . [¶] When the court has requested a probation report under P.C. 1203.10 or C.C.P. 131.3, no judgment can be pronounced unless the report has been made available to the court, the prosecuting attorney, and the defendant or his or her attorney. (P.C. 1203d and C.C.P. 131.5.)" (Witkin: Punishment, *supra*, § 530 at pp. 716-717.)

Penal Code section 1203b authorizes the court to impose probation without referring the matter to a probation officer for a report and without ordering probation officer supervision: "All Courts shall have power to suspend the imposition or execution of a sentence and grant a conditional sentence in misdemeanor and infraction cases without referring such cases to the probation officer. Unless otherwise ordered by the court, persons granted a conditional sentence in the community shall report only to the court and the probation officer shall not be responsible in any way for supervising or accounting for such persons."

According to Witkin, "[t]hese statutory provisions establish two alternative kinds of supervision: by the court, or, if ordered by the court, by the probation officer. If the judge does not order supervision by the probation officer, the judge must nevertheless undertake the performance of two of the functions of that officer: (a) furnishing the probation papers that inform the defendant of his or her rights . . . , and (b) requiring the

defendant to report, in order that his or her conduct may be supervised." (Witkin: Punishment, *supra*, § 531 at pp. 717-718.)

Defendant's Right to Refuse Probation

"It is settled that a criminal defendant has the right to refuse probation and undergo a sentence." (*People v. Brown* (2001) 96 Cal.App.4th Supp. 1, 42; *see also People v. Balestra* (1999) 76 Cal.App.4th 57, 69; *People v. Beal* (1997) 60 Cal.App.4th 84, 86-87; Witkin: Punishment, *supra*, § 544 at pp. 729-730.)

Maximum Term

Penal Code section 1203a affixes the maximum term of probation in misdemeanor cases:

> . . . Any such court [in a misdemeanor case] shall have power to suspend the imposing or the execution of the sentence, and to make and enforce the terms of probation for a period not to exceed three years; provided, that when the maximum sentence provided by law exceeds three years imprisonment, the period during which sentence may be suspended and terms of probation enforced may be for a longer period than three years, but in such instance, not to exceed the maximum time for which sentence of imprisonment might be pronounced.

"Because a misdemeanor sentence cannot be over 1 year . . . , the [more than 3 years] proviso can only apply to consecutive sentences, which may aggregate more than 1 year. . . . " (Witkin: Punishment, *supra*, § 543 at p. 728.)

Suspending Imposition or Execution of Sentence

Penal Code section 1203.1, subdivision (a) authorizes the court to suspend imposition or execution of sentence:

> The court, or judge thereof, in the order granting probation, may suspend the imposing or the execution of sentence and may direct that the suspension may continue for a period of time not exceeding the maximum possible term of the sentence, except as hereinafter set forth, and upon those terms and conditions as it shall determine. The court, or judge thereof, in the order granting probation and as a condition therefore, may imprison the defendant in county jail for a period not exceeding the maximum time fixed by law in the case.

In speaking of this provision, Witkin has observed: "The meager statutory language does not adequately describe the distinct procedures that have developed in granting probation. The only express statement is in P.C. section 1203(a) . . . . The decisions interpreting this statement have established the rule that a *suspension of sentence*, in whole or in part, is the equivalent of probation." (Witkin: Punishment, *supra*, § 538 at p. 724 [italics added].)

When the court suspends imposition of sentence, "the judge suspends imposing the sentence, by refraining from any pronouncement of judgment. Without the pronouncement and entry of judgment, the judge cannot commit the defendant to the prison authorities, and the effect is necessarily the equivalent of probation granted. The defendant is within the jurisdiction of the court, subject to the supervision of the probation officer and the conditions of probation imposed by the court." (*Id.*, § 539 at p. 725.)

When the court suspends execution of sentence, "the judge first pronounces judgment of guilt and imposes sentence of imprisonment, then suspends execution of the sentence or some part of it, i.e., refrains from commitment of the defendant to the prison authorities, and places him or her on probation." (*Id.*, § 540 at pp. 725-726.)

The gang enhancement provision, Penal Code section 186.22(d), expressly states that in cases in which the enhancement is found to apply, "[i]f the court grants probation or suspends execution of sentence imposed upon the defendant, it shall require as a condition thereof that the defendant serve 180-days in a county jail."

Specific Statutorily Authorized Conditions of Probation

Penal Code section 1203.1, subdivision (a) lists a number of specific conditions of probation the court is authorized to impose. It provides that "[t]he following shall apply to this subdivision," and then states:

(1) The court may fine the defendant in a sum not to exceed the maximum Fine provided by law in the case.

(2) The court may, in connection with granting probation, impose either imprisonment in a county jail or a fine, both, or neither.

(3) The court shall provide for restitution in proper cases. The restitution order shall be fully enforceable as a civil judgment forthwith and in accordance with Section 1202.4 of the Penal Code.

(4) The court may require bonds for the faithful observance and performance of any or all of the conditions of performance.

Penal Code section 1203.1, subdivision (c) authorizes the court to require the probationer to perform "public work" in lieu of jail. It provides in relevant part that "in counties or cities and counties where road camps, farms or other public work is available the court may place the probationer in the road camp, farm, or other public work instead of in jail. . . . "

Penal Code section 1203.1, subdivision (d) authorizes the court, "in all cases of probation," to "require as a condition of probation that the probationer go to work and earn money for the support of his or her dependents or to pay any fine imposed or reparation condition, to keep an account of his or her earnings, to report them to the probation officer and apply those earnings as directed by the court."

Penal Code section 1203.1, subdivision (g) authorizes the court, subject to certain limitations, to require "any defendant who has been convicted of a nonviolent or nonserious offense and ordered to participate in community service as a condition of probation . . . to engage in the removal of graffiti in performance of the community service. . . . "

"Other Reasonable Conditions"

Penal Code section 1203.1, subdivision (j) authorizes the court to impose "other reasonable conditions" of probation. (*See Welch, supra,* 5 Cal.4th at p. 233 ["Some probation conditions – particularly those involving confinement in county jail or payment of restitution and other fines and costs – are statutorily mandated or recommended in certain cases. . . . Most conditions, however, stem from the sentencing court's general authority to impose any 'reasonable' condition that 'it may determine' is 'fitting and proper to the end justice may be done . . . .' (§ 1203.1.)"].) Subsection (j) provides in relevant part that:

> The court may impose and require any or all of the above-mentioned terms of imprisonment, fine, and conditions, and ***other reasonable conditions***, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer. . . .

(Penal Code § 1203.1, subd.(j) [emphasis added].)

"The law on the validity of probation conditions [imposed pursuant to Section 1203.1(j)] is settled." (*People v. Berry* (2006) 146 Cal.App.4th 20, 26.) As stated by the Supreme Court more than 30 years ago: "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . . ' [Citation.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal ***is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality***." (*People v. Lent* (1975) 15 Cal.3d 481, 486 [emphasis added]; *see also People v. Carbajal* (1995) 10 Cal.4th 1114, 1121; *Welch, supra,* 5 Cal.4th at pp. 233-234; *People v. Berry, supra,* 146 Cal.App.4th at p. 26.)

The trial court has "broad discretion" in fixing terms of probation pursuant to Section 1203.1(j). (*See People v. Lent, supra,* 15 Cal.3d at p. 486 ["The Legislature has placed in trial judges a broad discretion in the sentencing process, including the determination as to whether probation is appropriate and, if so, the conditions thereof."].) "As with any exercise of discretion, the sentencing court violates this standard when its determination is arbitrary and capricious or exceeds the bounds of reason, all of the circumstances being considered." (*Welch, supra,* 5 Cal.4th at p. 234 [citation and internal quotation marks omitted].)

The Warrantless Search and Seizure Condition

The court-approved "warrantless search and seizure" condition reads: "**Submit your person and property to search and seizure** at any time of the day or night by any peace officer, with or without a warrant, probable cause, or reasonable suspicion." (Superior Court, County of Los Angeles: Misdemeanor Sentencing Memorandum – General Misdemeanors, CRIM 086 (Rev. 09/01/05) [bold in original].)

The constitutionality of this condition should now be beyond serious debate in light of the United States Supreme Court's 2006 decision in *Samson v. California* (2006) 126 S.Ct. 2193 ("*Samson*"). In that case, the Court held that a suspicionless search of a parolee on the street, conducted under the authority of Penal Code section 3067, subdivision (a), did not violate the United States Constitution. (*See Samson, supra,* 126 S.Ct. at p. 2202 ["[W]e conclude that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee."].) Section 3067(a) reads very similarly to the court-approved probation condition quoted above. It requires that every prisoner eligible for parole "shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without cause." (Penal Code § 3067, subd. (a).)

Samson's holding was recently extended by the Ninth Circuit Court of Appeals to a search of a parolee's residence conducted pursuant to Section 3067(a). In *United States v. Lopez* (9th Cir. 2007) 474 F.3d 1205 ("*Lopez*"), the court held that although "*Samson* involved a suspicionless search of a parolee's person, not of a parolee's residence[,] . . . we conclude that this is not a significant difference in light of the Supreme Court's rationale." (*Id.* at p. 1213.) The court explained:

> . . . The California parole-search statute at issue in *Samson* also governed Lopez's conditions of parole. Lopez signed a Notice and Conditions of Parole form that gave Lopez notice that his person, his property, and his residence were subject to a warrantless, suspicionless search at any time. The Supreme Court founded its holding in *Samson* on the conclusion that under a parole-search statute, such as California's, parolee's do "not have an expectation of privacy that society would recognize as legitimate." [126 S.Ct.] at 2199. If under the California parole-search statute, a parolee has no expectation of privacy in his person, we reason that a parolee has no legitimate expectation of privacy in his residence either, at least when the parolee is present. Any other rule would diminish the protection to society given by the search condition of parole, permitting search at any time . . . .

(*Ibid.*)

Although *Samson* and *Lopez* concerned a parole condition, their holdings should apply with equal force to similarly worded probation conditions. As the *Lopez* court observed, the Ninth Circuit has "consistently recognized that there is no constitutional difference between probation and parole." (*Id.* at p. 1214 [quoting *Motley v. Parks* (9th Cir. 2005) 432 F.3d 1072, 1083, fn. 9 (en banc)] [internal quotation marks omitted]; *cf.*

In re Stevens (2004) 119 Cal.App.4th 1228, 1233 ["The criteria for assessing the constitutionality of conditions of probation also applies to conditions of parole."].)

Parenthetically, it should be noted that "[u]nder California precedent . . . an officer would not act reasonably in conducting a suspicionless search absent knowledge that the person stopped for the search is a parolee." (*Samson, supra*, 126 S.Ct. at p. 2202 [citing *People v. Sanders* (2003) 31 Cal.4th 318, 331-332].) Similarly, the Ninth Circuit has held, en banc, that "before conducting a warrantless search pursuant to a parolee's parole condition, law enforcement officers must have probable cause to believe that the parolee is a resident of the house to be searched." (*Motley v. Parks, supra*, 432 F.3d at p. 1080.) In addition, as the Supreme Court noted in *Samson*, "[t]he concern that California's suspicionless search system gives officers unbridled discretion to conduct searches . . . is belied by California's prohibition on 'arbitrary, capricious or harassing' searches." (*Samson, supra*, 126 S.Ct. at p. 2202 [quoting *People v.* Reyes (1998) 19 Cal.4th 743, 752, 753-754 and citing *People v Bravo* (1987) 43 Cal.3d 600, 610].)

The warrantless search and seizure probation condition is reasonably related to deterring future criminality by convicted gang members; indeed, it is essential to this objective. Therefore, in all gang injunction violation cases in which probation is to be imposed, Guideline F.6 requires that the Gang Deputy advocate for imposition of this condition, unless a Gang Supervisor approves otherwise.

The "Gang Condition"

The court-approved "gang condition" provides: "**Do not associate with any persons known by you to be criminal street gang members,** affiliates, or associates, and stay away from all places where you know such persons congregate, except in an authorized anti-gang program. Obey any gang injunction that applies to you." (Superior Court of California, County of Los Angeles: Misdemeanor Sentencing Memorandum – General Misdemeanors, CRIM 086 (Rev. 9/01/05) [bold in original].)

Recently, the Ninth Circuit Court of Appeals upheld imposition of a similar condition of supervised release (which replaced parole in the federal system), concluding that the condition was "reasonably related to [the defendant's] rehabilitation and to protection of the public." (*United States v. Ross* (2007) U.S.App.LEXIS 2777, *8.) The condition in that case recited that: "You shall not associate with known neo-Nazi/white supremacist members, known neo-Nazi/white supremacist affiliates, or any other organization that advocates engaging in criminal activity or overthrowing the United States government. In addition, you shall not possess neo-Nazi/white supremacist paraphernalia." (*Id.* at p.*3.)

Citing cases in which it had upheld restrictions on possessing computer equipment and accessing the Internet, contacting children and possessing sexually stimulating materials, membership and participation in a motorcycle club, and association with Irish organizations, the Ninth Circuit noted that it has "frequently permitted restrictions on supervised release that infringe on fundamental rights, including First Amendment rights." (*Id.* at p.*5.) Regarding the case before it, the court stated:

> Special conditions "may seek to prevent reversion into a former crime inducing lifestyle by barring contact with old haunts and associates, even though the activities may be legal." [Citations.] Restricting [the defendant] from associating with known neo-Nazi/white supremacist members or affiliates is just such a condition. It advances the purposes of supervised release like the condition prohibiting a defendant convicted of exporting firearms to the United Kingdome from associating with the Irish Republican movement . . . , and prohibiting a defendant convicted of being a felon in possession of a firearm from being involved in any motorcycle club activities. . . .

(*Id.* a p.*6.)

Imposition of the gang condition is reasonably related both to the crime of which the defendant was convicted (violating the gang injunction) as well as his or her potential future criminality. Accordingly, in all gang injunction violation cases in which probation is to be imposed, Guideline F.6 requires that the Gang Deputy advocate for imposition of this condition, unless a Gang Supervisor approves otherwise.

Probation Violation

Penal Code section 1203.1, subdivision (j) provides that, "should the probationer violate any of the terms or conditions imposed by the court in the matter, it shall have authority to modify and change any and all the terms and conditions and to reimprison the probationer in the county jail with the limitations of the penalty of the public offense involved[.]"

F.8: Victim Restitution

This Guideline requires the Gang Deputy to advocate for restitution in any gang injunction violation case in which there is a measurable economic loss to an identifiable victim, unless there truly are compelling and extraordinary reasons for not doing so and a Gang Supervisor agrees. A victim's fear of retaliation if the defendant is ordered to make restitution may, depending upon the basis and severity of that fear, constitute a compelling and extraordinary reason for not demanding restitution on behalf of the victim.

Constitutional Mandate

Article I, section 28, subdivision (b) of the California Constitution, which was added by voter initiative in 1982, provides in relevant part that "all persons who suffer losses as a result of criminal activity shall have the right to restitution," and that "[r]estitution shall be ordered from the convicted persons ***in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss***, unless compelling and extraordinary reasons exist to the contrary." [Emphasis added.]

Implementing Statutory Provisions

Penal Code section 1202.4 implements this constitutional mandate. It provides in relevant part that:

> (a)(1) It is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime.
>
> * * *
>
> (f) . . . [I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court ***shall require that the defendant make restitution to the victim or victims*** in an amount established by court order, based upon the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court ***shall order full restitution*** unless it finds compelling and extraordinary reasons for not doing so, and states them on the record.

(Penal Code § 1202.4 [emphasis added].)

Inability to Pay Not Relevant

Penal Code section 1202.4, subdivision (g) provides that: "A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution order, nor shall inability to pay be a consideration in determining the amount of restitution."

Amount

Penal Code section 1202.4, subdivision (f)(3) provides, among other things, that "the restitution order . . . shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as a result of the defendant's criminal conduct, including, but not limited to, all of the following," and then lists a number of categories of potential economic loss, including the following:

> (A) Full or partial payment for the value of stolen or damaged property. The value of stolen or damaged property shall be the replacement cost of like property, or the actual cost of repairing the property when repair is possible.
>
> (B) Medical expenses.
>
> (C) Mental health counseling expenses.
>
> (D) Wages or profits lost due to injury incurred by the victim . . . .
>
> (E) Wages or profits lost by the victims . . . due to time spent as a

witness or in assisting the police or prosecution. . . .

(Penal Code § 1202.4, subd. (f)(3)(A)-(E).)

Restitution as a Condition of Probation

Penal Code section 1202.4, subdivision (m) provides that: "In every case in which the defendant is granted probation, the court shall make the payment of restitution fines and orders imposed pursuant to this section a condition of probation. Any portion of a restitution order that remains unsatisfied after a defendant is no longer on probation shall continue to be enforceable by a victim pursuant to Section 1214 until the obligation is satisfied."

Community Service In Lieu of Restitution

Penal Code section 1202.4, subdivision (n) provides that: "If the court finds and states on the record compelling and extraordinary reasons why a . . . full restitution order should not be required, the court shall order, as a condition of probation, that the defendant perform specified community service, unless it finds and states on the record compelling and extraordinary reasons not to require community service in addition to the finding that restitution should not be required. Upon revocation of probation, the court shall impose restitution pursuant to this section."

F.9: Gang Member Registration

The Registration Requirement

Penal Code sections 186.30, 186.31, 186.32 and 186.33 were added as an amendment to the STEP Act by the voters' passage of Proposition 21 in the March 2000 election. (*See Jorge G., supra,* 117 Cal.App.4th at p. 938; *People v. Bailey* (2002) 101 Cal.App.4th 238, 241-242 ("*Bailey*").)

These provisions establish a system of registration for persons convicted of gang-related crimes akin to that for those convicted of sex offenses (*see* Penal Code § 290), certain narcotics–related crimes (*see* Health & Safety Code § 11590), and arson (*see* Penal Code § 457.1). Like these other statutes, the gang registration law is "concerned with assisting law enforcement to prevent and detect repeat crimes of kinds deemed highly susceptible to recidivism." (*In re Alva* (2004) 33 Cal.4th 254, 265, fn. 5 ("*Alva*"); *see also People v. Adams* (1990) 224 Cal.App.3d 705, 710 ["Registration requirements generally are based on the assumption that persons convicted of certain offenses are more likely to repeat the crimes and that law enforcement's ability to prevent certain crimes and its ability to apprehend certain types of criminals will be improved if these repeat offenders' whereabouts are known."]; *Bailey, supra,* 101 Cal.App.4th at p. 245 ["[T]he underlying purpose of the [gang] registration provision is to enhance law enforcement officers' ability to prevent gang-related crime by keeping informed of the location of known gang associates."]; *Jorge G., supra,* 117 Cal.App.4th at p. 943 ["The voters' purpose in enacting the registration provisions of Proposition 21 was similar to the

Legislature's purpose in enacting sex-offender registration requirements to facilitate surveillance of offenders by law enforcement."].)

Penal Code section 186.30 requires, in relevant part, that "any person convicted in a criminal court . . . in this state of . . . [a]ny crime that the court finds is gang related at the time of sentencing or disposition" must "register with the chief of police of the city in which he or she resides. . . . " (Penal Code § 186.30, subd. (a) & (b)(3).) Section 186.30 further provides that the person must register "within 10 days of release from custody or within 10 days of his or her arrival in any city, county, or city and county to reside there, whichever occurs first." (Penal Code § 186.30, subd. (a).)

"Gang Related" Crime

The term "gang" as appears in the phrase "gang related" has been interpreted as being synonymous with "criminal street gang" as defined in Penal Code section 186.22(f). (*See People v. Martinez* (2004) 116 Cal.App.4th 753, 761, fn. 6 (*"Martinez"*) [We think that the term 'gang' in section 186.30 is synonymous with the term 'criminal street gang' as defined in section 186.22, subdivision (f)."]; *Jorge G., supra*, 117 Cal.App.4th at p. 940 ["[W]e do not believe the voters intended to make a distinction between the two expressions ['gang' and 'criminal street gang']. We instead conclude the terms are used interchangeably and that the voters intended 'gang related' to mean 'related to a criminal street gang.' . . . [¶] As a result, we adopt the definition of 'criminal street gang' set forth in section 186.22, subdivisions (e) and (f), as a limiting construction of the word 'gang' in section 186.30, subdivision (b)(3)."].)

In *Jorge G.*, the Court of Appeal held that "[g]ang-related crimes within the meaning of section 186.30, subdivision (b)(3), surely include, but are not limited to, all crimes committed for the benefit of, at the direction of, or in association with a criminal street gang." (117 Cal.App.4th at p. 941.) In reaching this conclusion, the court noted that "[i]t is evident that in enacting Proposition 21, the voters intended to address broadly the problem of crimes related to criminal street gangs," and observed that the word "related" was appropriately chosen "to achieve [this] broad purpose" because it "can encompass a wide variety of relationships." (*Ibid; see also Martinez, supra*, 116 Cal.App.4th at pp. 761- 762 ["[A] crime is 'gang related' in this context when it was committed, in the words of subdivision (b)(1) of section 186.22, for the benefit of, at the direction of, or in association with a street gang."] [citations and internal quotation marks omitted].)

Under this standard, "the crime itself must have some connection with the activities of a [criminal street] gang." (*Martinez, supra*, 116 Cal.App.4th at p. 961.) "Thus, a crime committed by a defendant in association with other gang members or demonstrated to promote gang objectives may be gang related." (*Id.* at p. 762.)

However, while "a defendant's history of participation in gang activities or criminal offenses may prove that a crime not otherwise or intrinsically gang related nevertheless falls within the meaning of section 186.30" (*ibid.*), "a *crime* may not be found gang related within the meaning of section 186.30 based *solely* upon the

defendant's criminal history and gang affiliations." (*Id.* at p. 761 [first italics in original, second italics added].)

The Court of Appeal in *Jorge G.* held that "the fact that the subject crime was gang related need be proved only by a preponderance of the evidence." (*Jorge G., supra*, 117 Cal.App.4th at p. 944.) The court reached this conclusion based upon its "decision that registration pursuant to section 186.30 is not punishment for purposes of due process under *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466, 490]." (*Ibid.; cf. Alva, supra*, 33 Cal.4th at p. 262 ["[W]e conclude that California's law requiring the mere *registration* of convicted sex offenders is not a punitive measure subject to either state or federal proscriptions against punishment that is 'cruel' and/or 'unusual'."] [italics in original].)

As virtually all prosecutions of gang members for violating a gang injunction will involve a "gang related" crime, this Guideline requires the Gang Deputy to request in all such cases that the court find that the defendant committed a gang-related crime, so as to trigger the registration requirement of Penal Code sections 186.30. If for some reason the Gang Deputy believes that this provision is inapplicable in a particular case, the Guideline allows the Gang Deputy to adopt that position where a Gang Supervisor agrees.

The Advisement Requirement

Penal Code section 186.31 provides that: "At the time of sentencing in adult court . . . the court shall inform any person subject to Section 186.30 of his or her duty to register pursuant to that section. This advisement shall be noted in the minute order. The court clerk shall send a copy of the minute order to the law enforcement agency with jurisdiction for the last known address of the person subject to registration under Section 186.30. The parole officer or probation officer assigned to that person shall verify that he or she has complied with the registration requirements of Section 186.30."

The Registration Process

Penal Code section 186.32 requires the registrant to appear at the law enforcement agency, submit fingerprints and a current photograph, and provide a written and signed statement that furnishes information required by the law enforcement agency. (Penal Code § 186.32(a)(2)(A), (C) & (D).) It also requires the registrant to advise the law enforcement agency, in writing, of his or her new address within ten days of changing addresses. (Penal Code § 186.32(b).)

A registrant does not have a right to the assistance *or presence* of counsel during the registration process. (*See People v. Sanchez* (2003) 105 Cal.App.4th 1240, 1245–1246 ["[T]he trial court did not err in refusing to require the law enforcement agency to permit defendant's attorney to assist him during the registration process" for the reasons that: (1) "the Sixth Amendment right to counsel does not attach when a person attempts to register pursuant to section 186.32 because it is not contemplated that the registrant will be the subject of criminal proceedings at the time"; and (2) "[a]ny hazard of incrimination is speculative and insufficient to implicate defendant's right to remain silent and the related right to have counsel present."].)

Unlike sex offender registration, which is lifetime in duration, gang registration "shall terminate five years after the last imposition of a registration requirement pursuant to Section 186.30." (Penal Code § 186.32(c).)

Subdivision (d) of Section 186.32 provides that: "The statements, photography and fingerprints required under this section shall not be open to inspection by any person other than a regularly employed peace or other law enforcement officer."

The "Any Information" Requirement

Penal Code section 186.32 requires the registrant to provide "[a] written statement, signed by the [registrant], giving ***any information*** that may be required by the law enforcement agency . . . ." (Penal Code § 186.32, subd. (a)(2)(C) [emphasis added]; *see also Sanchez, supra,* 105 Cal.App.4th at p. 1243 ["[T]he written statement required by section 186.32 was intended to improve law enforcement's ability to prevent gang-related crimes by keeping the agency informed of the registrants' whereabouts."].)

To preserve the constitutionality of this requirement, the Courts of Appeal have given it a limiting construction, "to mean that the registrant may be required to provide information enabling law enforcement to identify and locate the registrant." (*Jorge G., supra,* 117 Cal.App.4th at pp. 947–953 [As so construed, the "any information" requirement was not impermissibly vague, did not violate the rights of self-incrimination, free speech or privacy, was not an unconstitutional delegation of legislative authority, and did not amount to cruel or unusual punishment.].)

In *Bailey*, the Court of Appeal held that "section 186.32, subdivision (a)(2)(C) . . . may reasonably be construed to require descriptive or identifying information that aids law enforcement in monitoring the whereabouts of gang members and thus preventing gang-related violent crimes. So viewed, section 186.32 is not unconstitutionally vague." (101 Cal.App.4th at p. 245.) The court further held that, "[f]or the same reasons," the provision did not "abridge free speech and freedom of association," did not "compel answers to unlimited questions from law enforcement officers," was not "impermissibly overbroad," and, because, "[i]nasmuch as we have determined the questioning is limited to descriptive information about the registrant, it does not implicate the Fifth or Sixth Amendment." (*Id.* at pp. 245-246.)

Similarly, in *Sanchez*, the Court of Appeal "construed the requirement that the registrant give 'any information' . . . to mean that the registrant must provide information from which the law enforcement agency could locate him or her," including such information as "the person's full name, any aliases or gang monikers or change of name, the person's date of birth, residence address, description and license plate number of any vehicle the person owns or drives, and any information regarding the persons' employment or school." (105 Cal.App.4th at pp. 1243-1244.)

Additionally, the *Sanchez* court specifically upheld against constitutional challenge "the trial court's order requiring defendant to disclose his 'alias and/or monikers'. . . . " (*Id.* at p. 1245.) The court reasoned that: "Just as routine booking

information concerning a person's identity and address is not incriminatory, neither is the limited disclosure contemplated by the modified registration requirement in this case. In requiring defendant to list his or her 'alias and/or monikers' the order merely requires revelation of all names by which he is known to others, including but not limited to those names by which he is known among gang members. Requiring the defendant to disclose all his aliases, including his gang names, is consistent with the purpose of the registration requirement, i.e., minimizing the 'significant threat' to public safety and health posed by criminal street gangs." (*Ibid*.)

At the same time, however, the *Sanchez* court held that the "portion of the trial court's order requiring defendant to identify 'areas frequented' is impermissibly vague and must be stricken." (*Id.* at p. 1244.) It concluded that "[t]he trial court's order fails to accord defendant due process in that 'areas frequented' has no fixed meaning such that defendant can know what information he is expected to disclose and places excessive discretion in law enforcement for its interpretation." (*Ibid.*)

Likewise, in *Jorge G.*, the court rebuffed the People's attempt to "have us interpret the statute to allow police to demand from registrants the identities and whereabouts of other members of their gangs" because "criminalizing a refusal to name and help locate one's gang associate would violate the constitutional protection against self-incrimination." (117 Cal.App.4th at p. 949.) The court explained, "to require disclosure of the identities of other gang members with whom the registrant associates would obviously help in proving that the registrant is a knowing participant in the gang." (*Id.* at p. 950.)

Failure to Register

Penal Code section 186.33, subdivision (a) makes it a misdemeanor to knowingly fail to register. It provides: "Any person required to register pursuant to Section 186.30 who knowingly violates any of its provisions is guilty of a misdemeanor."

F.10: Referral to Federal Immigration Authorities

Undocumented immigrants now comprise a significant percentage of the membership of criminal street gangs, and often times are the most violent members of such gangs. Deportation of gang members who are in the country illegally has proven to be an effective means for disrupting and suppressing gang activity.

This Guideline establishes a new protocol for ensuring that gang members who enter this county illegally, *and* are thereafter convicted of violating a gang injunction, are brought to the attention of the appropriate federal authorities, who can prosecute them for violating federal laws and/or seek their deportation.

This Guideline does not affect LAPD Special Order No. 40. It applies only to Gang Deputies and not to LAPD officers. Therefore, it will not discourage victims and witnesses from cooperating with LAPD, one of the principal purposes underlying Special Order No. 40.

Furthermore, this Guideline only comes into play after the defendant has been duly convicted of contempt for violating a gang injunction. As a consequence, no question will remain concerning the defendant's status as a gang member at the time of the referral: he or she either will have admitted to being a member as part of a plea bargain, or will have been shown to be one beyond a reasonable doubt at trial.

In addition, identifying information is provided to federal authorities for *all* defendants convicted of violating gang injunctions, not just those who may be suspected of being in the country illegally. Thus, the Gang Deputy will not have to exercise judgment or discretion in determining whether to refer a defendant to federal authorities as being in the country illegally.

G.

Removal From Gang Injunction Generally

A person served with a gang injunction as a suspected gang member, but who maintains that he or she no longer is (or never was) a gang member, may seek a judicial declaration to that effect. If the court grants the requested relief, the person will not be subject to enforcement of the injunction. (*See Berry, supra*, 68 Cal.2d at p. 148.)

To address concerns that such a formal judicial procedure is too cumbersome a means for seeking removal from a gang injunction, and would require the assistance of counsel, the Guidelines create a new non-judicial process for obtaining such relief. The process is easily initiated with the submission of an informal petition to the City Attorney's Office. The petition is reviewed by a senior supervising attorney in the Criminal Branch who is outside of the gang injunction enforcement area. Furthermore, the process is designed to be simple, so that a person seeking removal from a gang injunction can obtain a determination without having to retain counsel.

The Guidelines also create a new periodic review process. Every three years, the Gang Deputy responsible for enforcement of the gang injunction and the assigned LAPD gang expert will review the available information as to each gang member who has been served, and determine whether there are changed circumstances, such that the gang member should no longer be subject to enforcement of the injunction.

Because of concerns that gangs may attempt to retaliate against members seeking to extricate themselves from the organization, records relating to removal proceedings should be maintained as confidential to the extent permitted by law. (*See* Government Code § 6254, subd. (f) [records of investigations conducted by, and records of intelligence information and security procedures of, state or local police agencies, investigatory or security files compiled by state and local police agencies, and any investigatory or security files compiled by any other state or local agency for law enforcement purposes are exempt from disclosure under California Public Records Act ("CPRA")]; *see also* Government Code § 6254, subd. (k) & Evidence Code § 1040.)

H.

REMOVAL FROM THE ENFORCEMENT LIST AT THE DIRECTION OF THE REVIEWING AUTHORITY

These Guidelines are intended to create a relatively simple, informal and expeditious, yet still highly reliable, process by which a person served with a gang injunction can seek a determination that he or she no longer is (or never was) a gang member, and therefore should not be subject to enforcement of the injunction.

In determining whether to remove a person from a gang injunction, the "Reviewing Authority," unlike a court, is not limited to consideration of "evidence" in its traditional form, such as affidavits, declarations and testimony under oath. Instead, he or she may look to any "relevant and reliable information," which may include letters, emails, verbal reports, field interviews or other information provided by family members, community leaders, employers, teachers, ministers, landlords, former gang members, intervention specialists, probation officers and knowledgeable law enforcement personnel.

Removal of a person from a gang injunction at the direction of the Reviewing Authority represents an exercise of prosecutorial discretion. It is not an admission, factual finding, or legal determination by the City Attorney's Office or LAPD cognizable in a court of law.

I.

REMOVAL FROM THE ENFORCEMENT LIST AS A RESULT OF PERIODIC REVIEW

These Guidelines create a new process by which the available information of gang membership is reviewed every three years to determine whether changed circumstances warrant removing a person or persons from the gang injunction. Such changed circumstances may include, but are not necessarily limited to, the absence of formal contact with the criminal justice system or law enforcement for a period of three years, unless the contact involves only a minor offense.

While removal from a gang injunction at the direction of the Reviewing Authority requires the submission of a petition, and the determination is limited to the person submitting the petition, the periodic review process occurs automatically every three years, and will encompass every gang member subject to enforcement of the injunction at the time of the review.

Like the Reviewing Authority, the Gang Deputy, LAPD gang expert and Gang Supervisor conducting the periodic review are not limited to consideration of "evidence" in its traditional form; rather, they are to consider "all available relevant and reliable information" bearing on each gang member's status.

As with removal at the direction of the Reviewing Authority, removal as a result of a Periodic Review represents an exercise of prosecutorial discretion, and not an admission, factual finding, or legal determination by the City Attorney's Office or LAPD cognizable in a court of law.