

1 of 1 DOCUMENT

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COMMENT: **OUT OF STEP: WHEN THE CALIFORNIA STREET TERRORISM ENFORCEMENT AND PREVENTION ACT STUMBLES INTO PENAL CODE LIMITS**

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SUMMARY:

... The stunningly large penalty rested on the prosecution's ability to pile on both gun and gang enhancements for each substantive crime. ... " If a gang member defendant intends any felonious criminality whatsoever, his or her guilt, for enhancement purposes, is unmoored from the underlying offense to which it is tied and tossed into the big pot labeled "any criminal conduct. ... The Garcia court reasoned that, in order to support the specific intent element of a gang enhancement, there must be some evidence, other than the underlying crime to which the enhancement is attached, that the defendant sought to "promote, further or assist" criminal conduct of the gang. ... A defendant charged with crimes that are part of a single crime spree cannot be punished by more than one gang enhancement, because the multiple-punishment prohibition of California Penal Code section 654 permits only a single punishment for all violations that possess a single intent or objective. ...

TEXT:

[*1]

Introduction

It was a few days before Christmas when Jose ruined his life. ⁿ¹ After an all-night drug binge, he and a friend robbed two men at gunpoint in a parking lot, and then stole their car. ⁿ² After his arrest and indictment, nineteen-year-old Jose found himself facing a future he could not comprehend: more than a hundred years in prison. ⁿ³

The stunningly large penalty rested on the prosecution's ability to pile on both gun and gang enhancements for each substantive crime. ⁿ⁴ [*2] Although no one was hurt in the crime spree and Jose had no prior criminal record, his use of a gun and his connection with gang members, albeit loose, triggered statutorily imposed sentences that transformed several bad deeds deserving prison time into a devastating blow that would have effectively destroyed the young man's life. ⁿ⁵ Although Jose plea-bargained his way down to nineteen years, ⁿ⁶ the sentence still gutted his life, and the practice of piling gang enhancements onto every charged crime raises serious Double Jeopardy issues. ⁿ⁷

The Founding Fathers of the United States thought it important to include the Double Jeopardy Clause in the Bill of Rights.ⁿ⁸ Tucked beside other fundamental rights protecting criminal defendants, this clause has been interpreted by the United States Supreme Court to include three basic rights: protection from re prosecution for the same crime after an acquittal, protection from re prosecution for the same crime after a conviction, and protection against being punished for the same offense more than once.ⁿ⁹

Most state constitutions include their own double jeopardy clauses that are worded virtually identically to the federal clause.ⁿ¹⁰ Generally, these state counterparts intend the same general meaning as the federal clause.ⁿ¹¹ California has sprinkled the Clause's intent throughout its [*3] Penal Code; however, the prohibition against multiple punishment is most apparent in California Penal Code section 654.ⁿ¹² Although on its face this section's prohibition against punishment for the same "act or omission" is fairly straightforward, California courts have struggled over its application to sentencing enhancements, which add an additional statutory punishment on top of a criminal sentence.ⁿ¹³ Judicial analysis has resulted in the splitting of enhancements into two categories: status-based enhancements, derived from the nature of the offender, and conduct-based enhancements, which are based on the nature of the criminal act itself.ⁿ¹⁴ Currently, California courts exempt most status-based enhancements from the multiple-punishment prohibition because the status of an offender is not legally an "act or omission" as defined in section 654.ⁿ¹⁵ Conduct-based enhancements, however, are tied to the defendant's act itself,ⁿ¹⁶ and therefore courts have struggled over how and to what extent section 654 applies to these "acts."ⁿ¹⁷

This Comment focuses on how the multiple-punishment prohibition of section 654 applies to the enhancements of one particular California statute: the Street Terrorism Enforcement and Prevention ("STEP") Act, a piece of anti-gang legislation passed in 1988 in the wake of rampant gang-related violence in the Los Angeles area.ⁿ¹⁸ Specifically, this discussion centers on the imposition of multiple gang-enhancement provisions on a single defendant who engages in a single crime spree.ⁿ¹⁹ If section 654 does apply to gang enhancements, then the prosecutorial [*4] practice of attaching them to every criminal charge in an indictment violates the intent of this Penal Code section, an intent rooted in the Double Jeopardy clauses of both the California and United States Constitutions.ⁿ²⁰ The question potentially affects thousands of inmates who are now serving additional prison time because of gang enhancements.ⁿ²¹

Part I of this Comment provides a brief background on enhancements and the California statutes at issue.ⁿ²² Part II explores the courts' struggle in applying the multiple-punishment prohibition to enhancements and argues that application of section 654 to the STEP Act is particularly appropriate.ⁿ²³ Part III discusses how the gang statute fails in scenarios where it should work the best, and thus foils the legislative intent behind the law.ⁿ²⁴ Part IV presents a potential solution: a statutory amendment that would help avoid multiple-punishment concerns and allow the effective operation of enhancements when they are needed most in scenarios where a gang member commits several crimes during one transaction or "spree."ⁿ²⁵ Part V concludes by urging that under the current statutory scheme, section 654 prohibits punishment by multiple gang enhancements for a single crime spree.ⁿ²⁶

[*5]

I. A Gordian Knot: Enhancements, Penal Code Section 654, and the STEP Act

A brief look at the history and development of the mechanisms involved illustrates the clash between the multiple-punishment prohibition of the California Penal Code and the gang-enhancement provisions of the STEP Act.ⁿ²⁷ Enhancements are a relatively new breed of punishment, and California courts are still struggling with the basic question of whether section 654 even applies to them.ⁿ²⁸ At the same time, the test employed to apply section 654 to criminal acts has become more narrowly tailored in response to, or perhaps as a result of, the expanding body of judicial decisions applying section 654 to different crime statutes.ⁿ²⁹ This expansion includes statutes such as the STEP Act, which created punishments previously nonexistent and which was backed strongly by the majority of Californians.ⁿ³⁰ The disjunctive relationship among these three legislative tools unconstitutionally sweeps too many defendants up in an overly broad net.ⁿ³¹

A. Enhancements

An enhancement imposes additional prison time on a defendant's base sentence.ⁿ³² Such an added penalty is a statutorily imposed [*6] punishment that is triggered by either the nature of the defendant or of the offense itself.ⁿ³³ Since the term "enhancement" first appeared in the California Penal Code in 1977,ⁿ³⁴ the California legislature has adopted many forms of them, with acts triggering enhancements ranging from possession of a gun while committing a crime, to fleeing the scene after a vehicular manslaughter, to interference with a police horse.ⁿ³⁵ Most sentencing enhancements in California were enacted relatively recently,ⁿ³⁶ and so the struggle to reconcile them with the Double Jeopardy clauses of both the state and federal constitutions continues.

The definition of "enhancements" under California law is subject to some ambiguity because the wording of separate statutes sometimes overlaps,ⁿ³⁷ and sometimes the legislature does not explicitly refer to an additional penalty as an enhancement.ⁿ³⁸ While a host of aggravating or mitigating factors exists for a jury to weigh during sentencing,ⁿ³⁹ enhancements are a separate breed of sentencing tool, because much like the underlying crimes they enhance, they must be expressly charged and proven.ⁿ⁴⁰ Additionally, a statute that sets a minimum incarceration [*7] period for a defendant sentenced to an indeterminate period is not considered an enhancement.ⁿ⁴¹

Despite the lack of an exact definition of "enhancement," courts generally agree there are two types of enhancements: (1) status-based enhancements, which are based on the character of the offender, and (2) conduct-based enhancements, which are derived from the manner in which a crime is committed.ⁿ⁴² As discussed below, courts initially struggled over whether enhancements were subject to the multiple-punishment prohibition of section 654 because the nature of an enhancement more closely resembles an added penalty than an "act or omission" under that section.ⁿ⁴³

The type of enhancement has largely determined whether a court will find there is a violation of section 654.ⁿ⁴⁴ Status-based enhancements generally do not involve such a violation because the character traits of a defendant, or the facts of his or her past deeds, are not technically "acts or omissions."ⁿ⁴⁵ Conduct-based enhancements, however, can be subject to the prohibition against multiple punishment because these added penalties are based on "acts or omissions" as defined under section 654.ⁿ⁴⁶ Despite this general rule, to avoid a Double Jeopardy clash, either the [*8] California Legislature will carve out an express exception to section 654,ⁿ⁴⁷ or courts will interpret legislative intent in a way that prevents such a clash.ⁿ⁴⁸

B. California Penal Code Section 654's Prohibition Against Multiple Punishment and How Courts Apply It

The California Penal Code underscores the guarantees against multiple punishment that flow from the Double Jeopardy clauses of both the state and federal constitutions.ⁿ⁴⁹ More than a half-dozen sections of the Penal Code reinforce a defendant's rights to be protected from reprosecution after acquittal, reprosecution after conviction, and multiple punishments for the same offense.ⁿ⁵⁰ This Comment focuses on California Penal Code section 654, which has been the law in some form since 1872.ⁿ⁵¹

1. Section 654

Section 654(a) currently reads, "An act or omission that is punishable in different ways by different provisions shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."ⁿ⁵² Courts struggled to define the phrase "act or omission" under section 654 for years, and to some extent this struggle still continues.ⁿ⁵³ Does the word "act" refer only to underlying crimes, or [*9] does it encompass sentence enhancements that are not separate offenses, but rather are based on the same facts pertaining to an "act?"ⁿ⁵⁴ Initially, courts avoided the question altogether, partly because they first needed to clarify what constituted an indivisible act that could be punished separately from other acts that occurred almost simultaneously in time.ⁿ⁵⁵ Also, as noted supra, enhancements were not as common in the mid-twentieth century as they are today, and therefore enhancement-section 654 jurisprudence is still developing.ⁿ⁵⁶

2. The Neal Test

A milestone for judicial interpretation and application of the phrase "act or omission" in section 654 was reached in *Neal v. California*, where the California Supreme Court created an "intent and objective" test that looked to the defendant's overall goal in the commission of a crime.ⁿ⁵⁷ If several offenses in a crime spree were all committed with a single intent or objective, section 654 prohibits punishment for more than one of them.ⁿ⁵⁸ If, however, each crime in a spree could be committed without committing the others, then the act is divisible, and thus not subject to the prohibitions of section 654.ⁿ⁵⁹ The Neal court's interpretation of section 654's multiple-punishment ban applies not only to lesser-included offenses, but also to situations where one act is [*10] punishable under separate statutes.ⁿ⁶⁰

The Neal test, while retaining most of its weight, has been refined over the years, and courts have acknowledged that the limitless factual situations that could give rise to the application of section 654 require that there be no "universal construction."ⁿ⁶¹ To avoid a merger of multiple crimes into one, some courts have narrowly defined the length of time a defendant had a specific objective.ⁿ⁶² Another court has held that a person can hold two separate objectives in his or her mind simultaneously.ⁿ⁶³

While the Neal test made great strides in clarifying how section 654 applies to crimes, California appellate courts continue to disagree over whether the multiple-punishment prohibition applies to enhancements.ⁿ⁶⁴ Some courts say it is "well-accepted" that section 654 applies to enhancements,ⁿ⁶⁵ while others reject the idea, asserting that enhancements apply to "facts, not acts," thus rendering section 654 inapplicable.ⁿ⁶⁶ Despite this disagreement, the trend in California courts is to rule that the multiple-punishment prohibition applies to certain types of [*11] enhancements.ⁿ⁶⁷ Additionally, almost all courts agree that the multiple-punishment prohibition applies in cases involving a single act against a single victim.ⁿ⁶⁸

C. The STEP Act

The Street Terrorism Enforcement and Prevention ("STEP") Act was enacted in 1988 to "eradicate" criminal activity of gang members by providing new crimes and sentencing enhancements related to membership in a street gang.ⁿ⁶⁹ The California Legislature acknowledged the state was in "crisis" because of "violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods."ⁿ⁷⁰ The law was developed at least partly in response to increased violence among street gangs in southern California.ⁿ⁷¹ Based loosely on the federal Racketeering Influenced and Corrupt Organizations (RICO) Act, which initially targeted the mafia in large cities, the STEP Act emerged amid heavy voter anti-violence sentiment and was the first comprehensive anti-gang statute in any state.ⁿ⁷²

In 2000, California voters passed Proposition 21, which changed parts of the STEP Act to make it easier to prove gang membership.ⁿ⁷³ In its current form, the STEP Act is a vital tool for prosecutors in their crackdown on gang violence.ⁿ⁷⁴ It continues to grow; just last year a [*12] provision was added to target identity theft by gang members.ⁿ⁷⁵

The Act has withstood numerous and varied constitutional attacks relating to its broadness, vagueness, and potential to infringe on "rights of free association."ⁿ⁷⁶ Yet, while the legislative intent behind the statute may be sound public policy, problems arise when the enhancement provisions are applied multiple times to the same defendant in the same indictment for a single transactional crime spree.ⁿ⁷⁷ This is primarily because all such enhancement allegations share the same intent, thus violating the Neal "intent and objective" test.ⁿ⁷⁸

II. Applicability of Penal Code Section 654's Prohibition Against Multiple Punishment to the STEP Act

California appellate courts continue to disagree over how and when to apply section 654 to enhancements.ⁿ⁷⁹ While judges generally agree section 654 does not apply to status-based enhancements, they often will perform multiple-punishment analyses for enhancements that are conduct-based using a case-by-case approach.ⁿ⁸⁰ Although gang

enhancements exhibit both status-based and conduct-based qualities, such enhancements are tightly bound to a defendant's acts, and thus they should be bound by section 654.ⁿ⁸¹ Additionally, the legislative history [*13] behind the STEP Act supports its inclusion within section 654's scope.ⁿ⁸²

A. How Section 654 Applies to Other Enhancements

Although California appellate courts generally agree that status-based enhancements do not violate section 654's prohibition against multiple punishment, there is no consensus as to the section's application to conduct-based enhancements.ⁿ⁸³ At least one court has permitted the use of different conduct-based enhancements for the same act;ⁿ⁸⁴ another has prohibited such dual punishment for the same conduct.ⁿ⁸⁵ Still others have scoured the language of statutes for express legislative exceptions to the application of section 654.ⁿ⁸⁶

1. Gun Enhancements

The California Supreme Court's analysis of a gun-enhancement statute in *People v. Oates* provides guidance with regard to the applicability of section 654 to the STEP Act.ⁿ⁸⁷ In *Oates*, the defendant fired two shots into a group of five people, seriously injuring one.ⁿ⁸⁸ The jury found that the same gun enhancement applied five times, one for each person present in the crowd, but the sentencing judge stayed all but two of them.ⁿ⁸⁹ The appellate court reversed, holding that such multiple [*14] use of the same enhancement for the same act was prohibited by section 654's bar against multiple punishments.ⁿ⁹⁰ The California Supreme Court then reversed the appellate court, holding that a careful reading of the gun-enhancement statute showed the legislature did not intend to limit the imposition of multiple enhancements for use of a gun when multiple victims were involved.ⁿ⁹¹ The court focused on the express statutory language of the gun-enhancement statute that limited the imposition of enhancements: "'Only one additional term of imprisonment under this section shall be imposed per person for each crime.'" ⁿ⁹² The court held that the number of enhancements was not limited by the number of injuries, or whether the crimes were part of the same transaction or occurrence; rather, the enhancements were limited to one for "'each crime.'" ⁿ⁹³

Upon examination, it is immediately clear that the STEP Act's gang-enhancement provisions contain no similar express limitation as to when the enhancements apply.ⁿ⁹⁴ They are not limited to "each crime" as in *Oates*, nor are they clearly limited to each transaction or occurrence, or each "qualifying injury."ⁿ⁹⁵ The enhancements apply broadly to every situation in which a defendant is involved in "any criminal conduct by gang members."ⁿ⁹⁶ This language offers no insight as to how section 654's multiple-punishment prohibition might limit the use of gang-related enhancements.ⁿ⁹⁷ If the *Oates* court meant that the California Legislature intended a single gun enhancement to be imposed for each crime because such a limitation was expressly stated in recognition of the multiple-punishment prohibition, then it seemingly follows that the STEP Act's lack of any such express limitation means the Legislature intended no limit to the number of enhancements that can be imposed on a single defendant for "any criminal conduct by gang members."ⁿ⁹⁸ This interpretation crashes head-on into the Neal "intent and objective" limitation used by courts in employing section 654.ⁿ⁹⁹ By applying multiple gang enhancements to a single person because that person [*15] possessed the "specific intent to promote ... any criminal conduct by gang members," ⁿ¹⁰⁰ such enhancements would all be based upon the same intent, the intent to promote, further, or assist any criminal conduct, and thus would violate section 654.ⁿ¹⁰¹

2. The One-Victim-One-Attack Rule

In addition to mining statutes for language that may or may not limit multiple use of conduct-based enhancements, California courts have also concluded that, if a conviction involves certain underlying felonies such as burglary and assault, it is wrong to apply two enhancements for great bodily injury resulting from a single attack against a single victim.ⁿ¹⁰² In *People v. Reeves*, the court explained that section 654 applies to great-bodily-injury enhancements because such penalty add-ons "for the same criminal conduct run directly counter to section 654's rule against multiple punishment in a way offender-status-based enhancements do not."ⁿ¹⁰³ The clear rule that emerges from such cases is that if there is only one victim and one attack, only a single conduct-based enhancement can apply despite there being more than one offense.

ⁿ¹⁰⁴ This reasoning can provide guidance to courts in determining how and when to apply multiple gang enhancements.
ⁿ¹⁰⁵

3. The Multiple-Victim Exception

This one-victim, one-attack rule meshes with an express exception to the application of section 654 that was created by the California [*16] Supreme Court in *Oates*.ⁿ¹⁰⁶ In that case, the court held that section 654 does not apply to crimes of violence when multiple victims are involved.ⁿ¹⁰⁷ The court based its reasoning on the Neal premise that a defendant who commits a crime in a way that threatens the safety of more than one person ""is more culpable than a defendant who harms only one person.""ⁿ¹⁰⁸ But this Neal rationale preceded the enactment of gang-based enhancements; plus, *Oates* only referred to enhancements such as those based on possession of a gun or extreme bodily injury.ⁿ¹⁰⁹ It remains an open question whether the California Supreme Court will apply the exception of violence involving multiple victims to gang enhancements.ⁿ¹¹⁰

California courts have also applied the multiple-punishment prohibition in cases involving more than one conduct-based enhancement statute.ⁿ¹¹¹ In *People v. Arndt*, the court struck two motor-vehicle-injury enhancements because they sprang from the same drunk-driving incident that had already been punished by enhancements for great bodily injury.ⁿ¹¹² While the court recognized the section 654 problem of applying enhancements from different statutes to the same single act, the opinion simultaneously supported multiple use of the same great-bodily-injury enhancement because the defendant injured several people, triggering the multiple-victim exception to the application of section 654.
ⁿ¹¹³

Since STEP Act enhancements all come from the same statute, the *Arndt* rule would likely permit the application of multiple gang [*17] enhancements to a single defendant if his or her crime spree encompassed multiple victims.ⁿ¹¹⁴ Unlike gang enhancements, however, great-bodily-injury enhancements possess no "intent" element, and so the argument that several of these add-ons would violate the Neal "intent and objective" test would have no merit and would shed little light on this issue.ⁿ¹¹⁵

4. Status-Based Enhancements

A prison term added because of a defendant's prior conviction or some other aspect of the defendant's character is a status-based enhancement, which is not subject to section 654's multiple-punishment prohibition.ⁿ¹¹⁶ Such enhancements are distinguishable from those that are conduct-based because they "apply to facts, not acts; they relate to the status of the recidivist offender engaging in criminal conduct, not to the conduct itself."ⁿ¹¹⁷ Courts will therefore sometimes justify prohibition of multiple status-based enhancements by exploring legislative intent rather than applying section 654.ⁿ¹¹⁸

For instance, courts will not impose more than one enhancement for a single prior conviction, which suggests the multiple-punishment ban can apply to a defendant's status, but only when a single past act is used twice for enhancement purposes.ⁿ¹¹⁹ In *People v. Flournoy*, the defendant was sentenced by the trial court to two five-year enhancements under two different provisions in the Penal Code for a single prior conviction.ⁿ¹²⁰ The appeals court reversed the ruling, holding that the defendant could not face enhancements for both a prior conviction and a prison term imposed for that same conviction, because it was not what lawmakers intended.ⁿ¹²¹ But while strongly suggesting the existence of a [*18] multiple-punishment issue, the court sidestepped any section 654 analysis, instead basing its holding on the lack of legislative intent to indicate the two enhancements should both be applied.ⁿ¹²²

Accordingly, application of the *Flournoy* court's reasoning to STEP Act enhancements suggests a defendant's status as a gang member can be punished by only one enhancement, regardless of how many underlying offenses result from a single crime spree or transaction.ⁿ¹²³ This conclusion may only be reached, however, if gang enhancements are held to be status-based, and this issue has not yet been decided by a California appellate court.ⁿ¹²⁴ California Supreme Court dicta have indicated that gang enhancements are more conduct-based than status-based because they are "inextricably intertwined" with the base offense.ⁿ¹²⁵ Adoption of this view would result in the status aspect of gang membership being

irrelevant in the analysis of whether gang enhancements violate the prohibition against multiple punishments. ⁿ¹²⁶

B. How Section 654 Applies to Gang Enhancements

The hybrid quality of gang enhancements distinguishes them from most other types of enhancements, which generally are either status-based or conduct-based but are rarely, if ever, both at the same time. ⁿ¹²⁷ While California appellate courts have not ruled on the specific issue of whether certain gang enhancements are more status-or conduct-based, the California Supreme Court has indicated they are more conduct-based, ⁿ¹²⁸ and thus they would be subject to multiple-punishment analysis.

The STEP Act itself includes a section that creates a separate offense for "active participation" in a street gang. ⁿ¹²⁹ This section establishes a substantive crime, completely severable from the [*19] enhancement provisions of the Act. ⁿ¹³⁰ The crime of "active participation" in a street gang contains elements that are rooted primarily in the status of the offender as a gang member. ⁿ¹³¹ As this section of the Act addresses the status aspect of gang affiliation, it follows that the enhancement provisions, located in other sections of the Act and tied to specific felonious acts, are conduct-based. ⁿ¹³² Furthermore, the fact that gang-enhancement provisions vary depending upon the underlying crime causes them to fit more within the definition of a conduct-based enhancement rather than a status-based one. ⁿ¹³³

C. Legislative Intent that Section 654 Applies to the STEP Act

Perhaps the strongest indication that section 654 applies to the STEP Act lies in the latter's legislative history. ⁿ¹³⁴ Proposition 21, passed by California voters in 2000, rewrote much of the gang statute. ⁿ¹³⁵ Section 37 of this Proposition reveals some of the legislative thought behind its enactment:

[*20]

It is the intent of the people of the State of California in enacting this measure that if any provision in this act conflicts with another section of law which provides for a greater penalty or longer period of imprisonment that the latter provision shall apply, pursuant to Section 654 of the California Penal Code. ⁿ¹³⁶

This plain acknowledgement that section 654 applies to "any provision" of the Act is strong evidence that the drafters and the voters were mindful of the multiple-punishment complications of the Act's enhancement provisions. ⁿ¹³⁷

Additionally, courts have looked at the STEP Act as a whole to determine legislative intent, indicating that section 654 would apply to both the gang-crime and gang-enhancement provisions. ⁿ¹³⁸ The multiple-punishment prohibition could arguably be viewed as a restriction on the Act's legislative intent to eradicate street-gang crime because, in a rare move, the Legislature actually declared California in a state of "crisis," indicating that the importance of stomping out gangs should take priority over any other statutes applicable to prosecuting gang criminality. ⁿ¹³⁹ However, as evidenced by section 37 of Proposition 21, section 654's prohibition nevertheless applies to the substantive parts of the Act. ⁿ¹⁴⁰ When substantive parts of a statute conflict with more general statements of the same statute, the substantive parts prevail. ⁿ¹⁴¹ Thus, Proposition 21's effect on the STEP Act would likely take priority over the general assertions of the Legislature in this case. ⁿ¹⁴²

The legislative underpinnings of the STEP Act, combined with the statute's wording that tightly binds gang-enhancement provisions to underlying crimes, strongly suggest that this law falls within the scope of [*21] section 654. ⁿ¹⁴³ Additionally, the different approaches of courts in applying the multiple-punishment prohibition to other enhancements underscore the increasing willingness of judges to perform the analysis in many contexts other than that of a prior-conviction enhancement. ⁿ¹⁴⁴ Given the likelihood that gang enhancements are subject to section 654, it is important to explore how the STEP Act runs afoul of multiple-punishment jurisprudence when it is applied to a single defendant accused of several crimes in a spree.

III. How the Language of the STEP Act and the Nature of Its Enhancements Combine to Restrict The Statute's Use in Gang Member Crime Sprees

The gang provisions of the STEP Act are some of the few, if not the only, penalty enhancements in the California Penal Code that require specific intent. ⁿ¹⁴⁵ This "specific intent" is a necessary element in proving any gang-enhancement allegation. ⁿ¹⁴⁶ Such intent must be aimed at promoting, furthering, or assisting "any criminal conduct" of a gang. ⁿ¹⁴⁷ While the intent to do any particular criminal act may be separate and distinct for purposes of the Neal test, ⁿ¹⁴⁸ and therefore be separately chargeable, the element of "specific intent" to promote, further or assist any gang activity will be the same for all gang enhancements alleged against a single defendant, because the STEP Act's use of the word "any" covers all types of criminal conduct. ⁿ¹⁴⁹ Although state and federal appellate courts differ on the interpretation of the phrase "any criminal conduct" in the statute, the similarity of gang crimes to those committed by means of conspiracy suggests the federal interpretation is the correct [*22] approach. ⁿ¹⁵⁰

The language of the STEP Act is not the only thing that entangles the statute in multiple-punishment problems. The nature of gang enhancements themselves gives rise to complications with the Neal "intent and objective" test because such provisions are partially status-based. ⁿ¹⁵¹ When a single defendant faces multiple gang-enhancement charges based on a single crime spree, it is unlikely the defendant had time to meet and confer with fellow gang members in order to "promote, further, or assist" in gang activity. ⁿ¹⁵² This "sharing" of the intent element by all gang enhancements alleged against one person, a sharing prohibited by section 654, is especially likely when the underlying crimes are part of a single crime spree, because the defendant has no time to confer with fellow gang members in order to establish a separate Neal objective or intent. ⁿ¹⁵³

A. The Language of the STEP Act in Light of Neal, Garcia, Romero and Conspiracy Law

The STEP Act calls for substantial punishment enhancements for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." ⁿ¹⁵⁴ The interplay of these words, "specific intent" and "any criminal conduct," creates a serious section 654 problem when more than one gang enhancement is imposed on a single defendant. ⁿ¹⁵⁵

[*23]

1. The Neal Test

The "intent and objective" test under Neal and its progeny prohibits multiple punishments for multiple acts committed "with a single intent and objective." ⁿ¹⁵⁶ This means that if all of a defendant's crimes are ""incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." ⁿ¹⁵⁷ In the context of the STEP Act, a defendant who triggers gang enhancements by being a confirmed gang member must have the "specific intent" to assist or further the gang's criminal activity. ⁿ¹⁵⁸ Giving the word "intent" in the statute its plain meaning, the word falls squarely within the broader "intent and objective" test that interprets section 654's prohibition against multiple punishment. ⁿ¹⁵⁹

This problem is best illustrated by a hypothetical. Imagine a daylong crime spree in which a gang member with a gun commits five murders, three assaults and two carjackings. In addition to piling a gun enhancement onto every substantive crime, a prosecutor tries to add a gang enhancement to every substantive crime in the spree. ⁿ¹⁶⁰ But while the gun enhancements would be permitted because they include no "intent" requirement, the prosecutor would be blocked from adding more than one gang enhancement because all of the gang enhancements spring from a single, identifiable objective: furtherance of the gang's criminal conduct. Unlike the underlying offenses, which arguably all have separate intents because they are divisible in time and are separate acts within the meaning of section 654, the acts used to justify gang enhancements are virtually impossible to separate temporally because they all share the common overall objective of furthering "any criminal [*24] conduct by gang members." ⁿ¹⁶¹ Even an attempt to differentiate separate acts giving rise to gang enhancements according to the different crimes to which they are attached will result in enhancements virtually

identical to each other, except for the underlying crime.ⁿ¹⁶² Such a close match violates the essence of section 654.ⁿ¹⁶³ If, however, the enhancements were purely conduct-based, and possessed neither an "intent" element nor a status aspect, their multiple use would not necessarily be prohibited.ⁿ¹⁶⁴

The problem is further exacerbated by the statute's use of the words "any criminal conduct by gang members" when describing the object of a defendant's specific intent.ⁿ¹⁶⁵ No matter what the crime, or how many crimes, all such illegal conduct flows from the same intent in the defendant's mind because this intent covers "any criminal conduct."ⁿ¹⁶⁶ If a gang member defendant intends any felonious criminality whatsoever, his or her guilt, for enhancement purposes, is unmoored from the underlying offense to which it is tied and tossed into the big pot labeled "any criminal conduct."ⁿ¹⁶⁷ Such a conceptual division of the gang enhancement from its underlying offense defeats the primary purpose of [*25] the enhancement, which is to punish more severely the manner in which a crime is committed.ⁿ¹⁶⁸ By watering down the "specific intent" to commit a particular crime and transforming it into the "specific intent" to commit "any criminal conduct," the STEP Act forces all gang enhancements to have an identical objective: any criminal conduct.ⁿ¹⁶⁹ Under Neal and its progeny, this objective can only be punished once under section 654.ⁿ¹⁷⁰

2. Garcia's View of Specific Intent

In *Garcia v. Carey*, the Ninth Circuit explored whether there was sufficient evidence to support a defendant's specific intent to further criminal gang conduct.ⁿ¹⁷¹ In concluding the evidence was insufficient, the court explained that "there is nothing in this record ... that would support an inference that [the defendant committed robbery] with the specific intent to facilitate other criminal conduct by the [the gang]."ⁿ¹⁷²

The Garcia court reasoned that, in order to support the specific intent element of a gang enhancement, there must be some evidence, other than the underlying crime to which the enhancement is attached, that the defendant sought to "promote, further or assist" criminal conduct of the gang.ⁿ¹⁷³ The court supported its position by distinguishing between two parts of the statute that are both requirements for gang enhancements: that a defendant must commit a crime "for the benefit of, at the direction of, or in association with a gang" and that the crime was committed "with the specific intent to promote, further or assist in any criminal conduct by gang members."ⁿ¹⁷⁴ If this latter specific intent requirement could be supported merely by the intent to commit the underlying crime and nothing more, it would render the other part of the statute redundant.ⁿ¹⁷⁵

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3. Romero's View of Specific Intent and Parallels with Conspiracy Law

In *People v. Romero*, decided the year after Garcia, a California court of appeal refused to follow the Ninth Circuit's reasoning.ⁿ¹⁷⁶ Rejecting the idea that the specific intent element for gang enhancements requires more proof than the underlying crime, the court simply stated that "by its plain language, the [STEP Act] requires a showing of specific intent to promote, further, or assist in 'any criminal conduct by gang members,' rather than other criminal conduct."ⁿ¹⁷⁷ As mentioned supra, this relatively new approach makes some of the statute's language superfluous and, perhaps more importantly, attempts to do an end-run around accepted and well-entrenched principles of conspiracy law.ⁿ¹⁷⁸

An oft-repeated tenet in conspiracy law is that "the gist of the offense of conspiracy is the conspiracy "which is single, although the object is to commit several crimes.""ⁿ¹⁷⁹ If there is only one agreement, there can be only one conspiracy, regardless of the number of statutes the agreement aims to violate.ⁿ¹⁸⁰ Likewise, ""Punishment for both conspiracy and the underlying substantive offense has been held impermissible [by section 654] when the conspiracy contemplated only the act performed in the substantive offense, or when the substantive offenses are the means by which the conspiracy is carried out.""ⁿ¹⁸¹

This reasoning, established and promoted in California courts long before there was ever such a thing as a gang enhancement,ⁿ¹⁸² undermines the principles behind the reasoning in *Romero*, which condoned multiple punishment for

both substantive offenses and the means by which they are carried out.ⁿ¹⁸³ Romero declared that the specific intent to further criminal gang activity can be exactly the same in scope as the specific [*27] intent to commit an underlying crime.ⁿ¹⁸⁴ Under principles of conspiracy law, section 654 prohibits multiple punishment when the criminal agreement contemplates nothing other than the underlying crime.ⁿ¹⁸⁵ In terms of specific intent, the distinction between both principles is virtually nonexistent.ⁿ¹⁸⁶

B. The Nature of Gang Enhancements

In addition to the statutory language, the nature of gang membership also causes the STEP Act to be particularly hamstrung by section 654.ⁿ¹⁸⁷ As discussed above, one way a gang enhancement differs from other enhancements in that it is a hybrid: it includes elements of both status-based and conduct-based enhancements.ⁿ¹⁸⁸ The status aspect relates to the defendant's peculiar qualities as one who knowingly affiliates with a criminal gang, while the conduct aspect is "inextricably intertwined" with the underlying offensive act itself.ⁿ¹⁸⁹ Since a gang enhancement requires proof of intent to further the gang's criminal conduct, and a primary way to develop such an intent is to confer with the gang, then section 654 may prohibit charging a defendant with more than one gang enhancement if he or she has not had time to confer with fellow gang members because such a defendant cannot have more than one gang-related Neal "objective."ⁿ¹⁹⁰

1. Gang Membership as Status-Based

Looking first at the status aspect of gang membership, courts generally concede that section 654 does not apply to status-based enhancements because they are based on facts, not on "acts or omissions."ⁿ¹⁹¹ However, as noted above, the California Supreme Court has carved out an exception where the multiple-punishment prohibition [*28] is applied to prevent the imposition of two different enhancements springing from the same prior conviction.ⁿ¹⁹² Using that logic as guidance,ⁿ¹⁹³ it follows that the imposition of two enhancements based on gang membership will likewise result in multiple punishment for a single preexisting fact: affiliation with a violent gang. Although gang enhancements have been distinguished from those dealing with prior convictions, both types link the defendant with some past event, or at least with some trait or fact that exists independently and temporally separate from the act of the underlying offense.ⁿ¹⁹⁴ While courts have been quick to sidestep the issue of whether section 654 prohibits multiple enhancements for the same prior act, it seems clear that courts are wary of how close multiple enhancements for a single prior event come to the prohibition against multiple punishment.ⁿ¹⁹⁵

2. Gang Membership as Conduct-Based

The conduct-based aspect of gang enhancements also serves to expose the STEP Act more fully to the prohibitions of multiple punishment.ⁿ¹⁹⁶ Most conduct-based enhancements currently on the books in California involve one level of fact-finding.ⁿ¹⁹⁷ For example, application of a gun enhancement begins with the essential factual question whether a gun was used during the criminal act.ⁿ¹⁹⁸ Certain drug-related enhancements rely on proving the quantity possessed was over a certain amount.ⁿ¹⁹⁹ Interference with a police horse or dog can be enhanced upon a finding that the animal suffered extreme bodily [*29] injury.ⁿ²⁰⁰ The commission of two or more fraud-or embezzlement-related crimes will be enhanced if the total amount taken is more than \$ 100,000.ⁿ²⁰¹

Gang enhancements, in contrast, involve both physical and mental elements.ⁿ²⁰² Not only must a defendant be proven to be a gang member through testimony, tattoos, clothing, and other outward facts, but a mens rea must also be established that indicates the defendant had the specific intent to further criminal gang activity.ⁿ²⁰³ This double tier of fact-finding, requiring both mens rea and actus reus, makes a gang-enhancement triggering act look more like an underlying offense than most other types of enhancement triggers.ⁿ²⁰⁴ The more similar an enhancement trigger is to an underlying crime, the closer it is to coming within the scope of the "intent and objective" test established in Neal to implement the prohibitions of section 654.ⁿ²⁰⁵ This is because section 654 was established before enhancements existed and focused exclusively on prohibiting multiple punishments for substantive crimes.ⁿ²⁰⁶

IV. The Need for a Statutory Amendment

By prohibiting multiple gang enhancements for multiple underlying offenses, section 654 foils the heightened vigilance of the California Legislature in battling the "crisis" of criminal street-gang violence.ⁿ²⁰⁷ Where the enhancements are needed most, when gang members embark on crime sprees that result in multiple substantive offenses being charged in one proceeding, the STEP Act triggers the application of section 654 and falls short in extending punishment because application of only one enhancement will be allowed.ⁿ²⁰⁸

A partial solution to this problem entails amending the STEP Act to [*30] expressly permit more than one gang enhancement to apply to a defendant for the same transaction when there are multiple victims.ⁿ²⁰⁹ Courts have been quick to find exceptions to section 654's multiple-punishment prohibition regarding enhancement statutes.ⁿ²¹⁰ An express recognition of the heightened dangers of gang crime sprees would simplify judicial interpretation and strike harder at the "crisis" the Legislature has been so bent on resolving for nearly twenty years.ⁿ²¹¹

However, any STEP Act amendment would likely be challenged under section 654's multiple-punishment prohibition. The real issue boils down to a clash between the nature of gang enhancements as penalty add-ons and a defendant's constitutional right not to be punished twice: whether a conduct-based enhancement that requires both mens rea and actus reus can be worded so as to avoid the "intent and objective" test of Neal. Even the most meticulously worded amendment would not solve the underlying dilemma of how to punish an affiliation and the underlying crime that is the object of that affiliation without punishing someone twice for the same thing. It has been an ongoing concern in conspiracy law, which parallels gang enhancements in terms of a defendant's criminal associations.ⁿ²¹²

A good first step in any amendment would be to change the phrase "any criminal conduct by gang members" to "a criminal act by gang members," thus making the intent element of gang enhancements apply to specific acts rather than to all criminal conduct.ⁿ²¹³ This may help avoid some section 654 challenges by allowing a defendant's objective to be divided into separate intents, a method courts have adopted to allow multiple punishments for substantive crimes.ⁿ²¹⁴

V. Conclusion

A defendant charged with crimes that are part of a single crime spree cannot be punished by more than one gang enhancement, because [*31] the multiple-punishment prohibition of California Penal Code section 654 permits only a single punishment for all violations that possess a single intent or objective.ⁿ²¹⁵ Just like California conspiracy law, which allows only one conspiracy charge per agreement no matter how many underlying criminal objectives exist,ⁿ²¹⁶ gang enhancements of the STEP Act are based on the single affiliation of a defendant with one criminal gang. Aside from the multiple-victim exception to the application of section 654 to enhancements, there is no way to impose multiple gang enhancements on one defendant without a virtually identical overlap of objectives.ⁿ²¹⁷ This overlap not only violates Neal's intent and objective test, but also mandates that the Legislature rework the STEP Act to avoid multiple-punishment issues.ⁿ²¹⁸ The conflict between federal and state courts over the scope of the specific-intent element of California gang enhancements underscores the need for a legislative amendment.ⁿ²¹⁹

The prosecutorial disregard of the multiple-punishment prohibition as it applies to gang enhancements has likely added countless years to the sentences of those convicted of gang-related activity.ⁿ²²⁰ Gang enhancements give prosecutors an incredibly powerful weapon, because once gang membership has been established and a single gang enhancement is proven, it takes little, if any, additional effort to prove further gang enhancements.ⁿ²²¹ Since these added charges afford [*32] enormous advantages for prosecutors at the plea-bargaining stage, many arguably redundant charges that would have been blocked by section 654 never have had a chance to be fully litigated.

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional Law Bill of Rights Fundamental Rights Procedural Due Process Double Jeopardy Criminal Law & Procedure Criminal Offenses Crimes Against Persons Terrorism Terroristic Acts Penalties Criminal Law & Procedure Criminal Offenses Weapons Use General Overview

FOOTNOTES:

n1. See Defendant's Waiver of Rights Regarding Entry of Plea and Any State or Federal Writs and Appeals, *People v. Ramirez*, No. MS033593A (Monterey County Super. Ct. 2004). This was a real case settled through plea bargain. *Id.*

n2. *Id.*

n3. The substantive crimes charged included violations of California Penal Code sections 211 (West 2007), 215 (West 1999), 245(a)(2) (West 2007) and California Vehicle Code Section 10851 (West 1997). *Id.* The enhancements alleged were those set forth in California Penal Code sections 186.22(b)(1) and 12022.53(b). *Id.* The enhancements alone, if found true for each crime, amounted to a minimum sentence of 80 years. *Id.* Although in theory the total possible sentence amounted to more than a hundred years as expressed in the plea bargain agreement, in practice the prison terms would likely have been limited by California Penal Code section 1170.1, which permits only one third of "subordinate" terms to be imposed after the initial "principal" term. Cal. Penal Code § 1170.1(a) (West 2007).

n4. See Defendant's Waiver of Rights Regarding Entry of Plea and Any State or Federal Writs and Appeals, *People v. Ramirez*, No. MS033593A (Monterey County Super. Ct. 2004). The gun enhancement used was California Penal Code section 12022.53(b). *Id.* The gang enhancement used was California Penal Code section 186.22(b)(1). *Id.*

n5. See Defendant's Sentencing Memorandum, *People v. Ramirez*, No. MS033593A (Monterey County Super. Ct. 2004); Defendant's Waiver of Rights Regarding Entry of Plea and Any State or Federal Writs and Appeals, *People v. Ramirez*, No. MS033593A (Monterey County Super. Ct. 2004).

n6. See *id.*

n7. The Double Jeopardy issue arises in the context of California Penal Code section 654, which prohibits punishing a defendant twice for the same "act or omission." No credible statewide data exist on how many people are actually charged with and convicted of gang enhancements. See Megan Garvey & Richard Winton, *Tracking of Gang-Related Crime Falls Short*, L.A. Times, Jan. 24, 2003, at A1; Telephone Interview with Wes McBride, President, California Gang Investigators Association, in Fremont, Cal. (Nov. 10, 2006). County District Attorney offices vary in how they use the gang enhancements of California Penal Code section 186.22(b). Orange County, for example, alleges gang enhancements in almost every case of the approximately 1,200 gang-related cases they prosecute every year. This use involves alleging such enhancements for each underlying offense, whether they are part of a crime spree or not. Other offices, however, use enhancements much less. Id. Telephone Interview with Bruce Moore, Gang Unit member, Orange County District Attorney, in Fremont, Cal. (Nov. 27, 2006).

n8. U.S. Const. amend. V.

n9. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), overruled on other grounds by *Alabama v. Smith*, 490 U.S. 794 (1989); see U.S. Const. amend. V.

n10. A few examples of state statutory language are Ala. Const. art. I, § 9; Cal. Const. art. I, § 15; Ky. Const. § 13.

n11. See e.g., *People v. Nutt*, 677 N.W.2d 1, 7 (Mich. 2004) ("Our Double Jeopardy Clause is essentially identical to its federal counterpart ..."); *McNair v. Hayward*, 666 P.2d 321, 323 (Utah 1983) ("We conclude that [both the federal and state Double Jeopardy] guarantees have the same content."); see also *Burnett v. Commonwealth*, 3 S.W.3d 359, 360 (Ky. 1999).

n12. Those sections containing wording related directly or indirectly to the Double Jeopardy Clause are California Penal Code sections 654, 687, 793, 794, 1023, 1101, 1188 and 1387. The focus of this article is section 654.

n13. See *People v. Arndt*, 90 Cal. Rptr. 2d 415, 420 (Cal. Ct. App. 1999). For a basic overview of California sentencing enhancements and the applicability of section 654, see B.E. Witkin, *California Criminal Law*, ch. IX, Punishment § 132 (3d ed. 2000). See also Cal. Penal Code § 654 (West 2007).

n14. *People v. Coronado*, 906 P.2d 1232, 1238 (Cal. 1995).

n15. *People v. Rodriguez*, 253 Cal. Rptr 633, 634 (Cal. Ct. App. 1988) (stating that status-based enhancements "apply to facts, not acts; they relate to the status of the recidivist offender engaging in criminal conduct, not to the conduct itself."). California Penal Code section 654(a) applies only to an "act or omission." Cal. Penal Code § 654(a) (West 2007).

n16. See *People v. Hernandez*, 94 P.3d 1080, 1085 (Cal. 2004).

n17. See, e.g., *People v. Martinez*, 34 Cal. Rptr. 3d 14, 16-18 (Cal. Ct. App. 2005).

n18. See Cal. Penal Code § 654 (West 2007); Cal. Penal Code § 186.21 (West 2007); Lizabeth N. De Vries, Comment, Guilt by Association: Proposition 21's Gang Conspiracy Law Will Increase Youth Violence in California, 37 U.S.F. L. Rev. 191, 195-96 (2002).

n19. While the argument presented in this article could apply to the use of multiple gang enhancements on a single defendant who commits several crimes at different times and places, all of which are presented in a single indictment, the focus here is more narrow and explores only the use of such enhancements on crimes that are part of a single spree.

n20. See U.S. Const. amend. V; Cal. Const. art. I, § 15; Cal. Penal Code § 654 (West 2007); see also *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), overruled on other grounds by *Alabama v. Smith*, 490 U.S. 794 (1989); McBride Interview, *supra* note 7 (addressing the lack of data on how often STEP Act enhancements are used). At the very least, some county prosecutors use them on a regular basis and attach them to each substantive crime that is arguably gang-related. Moore Interview, *supra* note 7.

n21. Defendants who are not directly convicted of gang enhancements nevertheless are affected by the allegation of such enhancements in the plea bargaining stage, and they may have less bargaining power when facing more charges. See, e.g., Defendant's Waiver of Rights Regarding Entry of Plea and Any State or Federal Writs and Appeals, *People v. Ramirez*, No. MS033593A (Monterey County Super. Ct. 2004). About one in four prisoners nationwide have gang affiliations. George Knox, A National Assessment of Gangs and Security Threat Groups (STGs) in Adult Correctional Institutions: Results of the 1999 Adult Corrections Survey, National Gang Crime Research Center (1999), <http://www.ngcrc.com/ngcrc/page7.htm>. No credible data exist, however, on how many people are actually charged with and convicted of gang enhancements. See Megan Garvey & Richard Winton, Tracking of Gang-Related Crime Falls Short, *L.A. Times*, Jan. 24, 2003, at A1. Each of the fifty-eight district attorneys' offices in California uses gang enhancements to varying degrees. See McBride Interview, *supra* note 7.

n22. See *infra* notes 27-78 and accompanying text.

n23. See *infra* notes 79-144 and accompanying text.

n24. See *infra* notes 145-206 and accompanying text.

n25. See *infra* notes 207-214 and accompanying text.

n26. See *infra* notes 215-221 and accompanying text.

n27. This Comment does not discuss California sentencing guidelines and scenarios in which courts stay or reduce enhancement sentences. The focus here is on the theoretical problem of reconciling section 654 with the gang-enhancement statute, not on the practical possibility that courts may avoid the issue entirely by choosing not to impose enhancement penalties. See also *supra* note 3, regarding the statutory limits on certain sentences expressed in California Penal Code section 1170.1.

n28. See *infra* notes 64-68 and accompanying text.

n29. See *infra* notes 61-63 and accompanying text; see also *Neal v. State*, 357 P.2d 839, 843-44 (Cal. 1960). For some examples of how the Neal test has been limited, see *infra* notes 62-63 and accompanying text.

n30. See *infra* notes 69-76 and accompanying text. Proposition 21, which amended parts of the STEP Act and criminalized more conduct by juveniles, passed easily in 2000. See De Vries, *supra* note 18, at 193, 198.

n31. The constitutional issue relates to the Double Jeopardy Clause, the essence of which lies partly in section 654. See U.S. Const. amend. V; Cal. Const. art. I, § 15; Cal. Penal Code § 654(a) (West 2007); see also *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (holding that the Double Jeopardy Clause contains three basic protections), overruled on other grounds by *Alabama v. Smith*, 490 U.S. 794 (1989). The exact number of convicts affected by gang enhancements is not known because no agency tracks such statistics. McBride Interview, *supra* note 7. It is clear, however, that these enhancements are used and create longer sentences for many defendants. For example, Orange County alone charges approximately 1,200 cases annually that involve gang activity, and gang enhancements are alleged in virtually all of them. See Moore Interview, *supra* note 7.

n32. Cal. Ct. R. 4.405(3) (stating that an enhancement is "an additional term of imprisonment added to the base term" that may or may not be longer than the term of the underlying crime).

n33. See B.E. Witkin, *California Criminal Law*, ch. IX, Punishment § 281 (3d ed. 2000).

n34. California Rule of Court 405 became effective July 1, 1977. It was renumbered as Rule 4.405 effective Jan. 1, 2001. Cal. Ct. R. 4.405.

n35. See Cal. Penal Code § 12022(a) (West 2007) (possession of gun); Cal. Veh. Code § 20001(c) (West 2007) (fleeing scene of crime); Cal. Penal Code § 600(b) (West 2007) (interference with police horse). The California Penal Code used to contain a non-exhaustive list of all

criminal enhancements. The Legislature repealed this statute, California Penal Code section 666.7, in 2006. Cal. Stats. 2006, ch. 901 (S.B. 1422), § 7.

n36. See, e.g., Cal. Penal Code § 186.11 (West 2007) (enhancement for multiple felonies involving fraud or embezzlement, added in 1995); Cal. Penal Code § 667.17 (West 2007) (enhancement for impersonating a police officer during commission of a felony, added in 1998); Cal. Penal Code § 186.22 (West 2007) (enhancements for gang activity, added in 1988); Cal. Penal Code § 12022.3 (West 2007) (enhancement for use of a weapon during commission of certain sexual offenses, added in 1979); Cal. Penal Code § 667.15 (West 2007) (enhancement for showing child pornography to a minor during commission of sexual offense on minor, added in 1993).

n37. See B.E. Witkin, California Criminal Law, ch. IX, Punishment § 281(2) (3d ed. 2000).

n38. See *People v. Jones*, 857 P.2d 1163, 1166-67 (Cal. 1993) (refusing to impose two enhancements under separate statutes because they overlapped too much in violation of multiple-punishment prohibition).

n39. See Cal. Ct. R. 4.437 (discussing the process for filing a statement of aggravating or mitigating factors in regard to sentencing); see also *Cunningham v. California*, 127 S. Ct. 856, 871 (2007) (holding that the Sixth Amendment requires that any aggravating factor that might support a sentence above a state's statutory maximum must be weighed by a jury and proven beyond a reasonable doubt).

n40. *People v. Whitten*, 28 Cal. Rptr. 2d 123, 126 (Cal. Ct. App. 1994) ("Enhancements must be specifically charged and found true."); see B.E. Witkin, California Criminal Law, ch. IX, Punishment § 281(1) (3d ed. 2000) ("An aggravating circumstance that is relied upon to impose the upper term is not an enhancement."). In the recent United States Supreme Court decision of *Cunningham v. California*, the Court overruled the California Supreme Court's stance on the province of weighing aggravating or mitigating factors. *Cunningham*, 127 S. Ct. at 871. In a six-to-three decision, the Court held that the Sixth Amendment of the United States Constitution required that any aggravating factor that might support a sentence above a state's statutory maximum must be weighed by a jury and proven beyond a reasonable doubt. *Id.*

n41. *People v. Jefferson*, 980 P.2d 441, 451 (Cal. 1999) (stating that a minimum term is not an enhancement "because it is not an 'additional term of imprisonment' and it is not added to a 'base term.'").

n42. See *People v. Coronado*, 906 P.2d 1232, 1238 (Cal. 1995); *People v. Martinez*, 34 Cal. Rptr. 3d 14, 17 (Cal. Ct. App. 2005); *People v. Arndt*, 90 Cal. Rptr. 2d 415, 420 (Cal. Ct. App. 1999).

n43. Cases that have decided California Penal Code section 654 is not applicable to enhancements include: *People v. Rodriguez*, 253 Cal. Rptr. 633, 634 (Cal. Ct. App. 1988) (status-based enhancements); *People v. Parrish*, 217 Cal. Rptr. 700, 705 (Cal. Ct. App. 1985). Cases holding section 654 "generally" does not apply include: *People v. Le*, 200 Cal. Rptr. 839, 846 n.11 (Cal. Ct. App. 1984) (citing *People v. Boerner*, 174 Cal. Rptr. 629, 631 (Cal. Ct. App. 1981); *People v. Stiltner*, 182 Cal. Rptr. 790, 797 (Cal. Ct. App. 1982). Cases that have said section 654 does apply to enhancements include: *People v. Price*, 6 Cal. Rptr. 2d 263, 266 (Cal. Ct. App. 1992); *People v. Mixon*, 275 Cal. Rptr. 817, 826 (Cal. Ct. App. 1990); *People v. Vaughn*, 257 Cal. Rptr. 229, 230 (Cal. Ct. App. 1989) (citing *People v. Moringlane*, 179 Cal. Rptr. 726, 729 (Cal. Ct. App. 1982)).

n44. See *infra* notes 80-86 and accompanying text.

n45. *Rodriguez*, 253 Cal. Rptr. at 634 (stating that status-based enhancements are based on "facts, not acts.").

n46. See *Martinez*, 34 Cal. Rptr. 3d at 18 (citing *People v. Bautista*, 22 Cal. Rptr. 3d 845 (Cal. Ct. App. 2005)); *People v. Jones*, 98 Cal. Rptr. 2d 329, 333 (Cal. Ct. App. 2000); *People v. Hernandez*, 94 P.3d 1080, 1085 (Cal. 2004).

n47. See *People v. Cartwright*, 46 Cal. Rptr. 2d 351, 359 (Cal. Ct. App. 1995) ("The Legislature may create exceptions to the statutory prohibition of Section 654.") (citations omitted)); see also *People v. Hicks*, 863 P.2d 714, 719 (Cal. 1993) (holding that "an examination of legislative history" supports the premise that enactment of a certain enhancement "created an exception to Section 654's application.").

n48. *People v. Oates*, 88 P.3d 56, 67 (Cal. 2004) (citing *People v. King*, 851 P.2d 27, 39 (Cal. 1993) (holding multiple enhancements applied because the Legislature did not expressly prohibit them in these circumstances).

n49. See Cal. Penal Code §§654, 687, 793, 794, 1023, 1101, 1188, 1387 (West 2007).

n50. *Id.*

n51. California Penal Code section 654 was originally enacted in 1872. To a lesser degree, the discussion in this Comment also applies to California Penal Code section 1170(b), which arguably includes language issuing from Double Jeopardy reasoning by prohibiting the dual use of a fact to prove both an aggravating sentencing factor and an enhancement. See Cal. Penal Code § 1170(b) (West 2007).

n52. Cal. Penal Code § 654(a) (West 2007) (emphasis added).

n53. In *Neal v. State*, the court began developing a test to apply section 654. *Neal v. State*, 357 P.2d 839, 843-44 (Cal. 1960). The definition of "act or omission," however, has yet to be hammered out by the California Supreme Court. See *People v. Reeves*, 109 Cal. Rptr. 2d 728, 760 (Cal. Ct. App. 2001) (explaining that the California Supreme Court has not yet resolved the issue).

n54. There is no evidence showing that, in establishing California Penal Code section 654, the Legislature considered that anything other than substantive crimes would be subject to this section's multiple-punishment prohibition. With this lack of express direction, combined with the creation of new and more complex enhancements, it is no surprise California courts have taken significantly divergent views on what is encompassed by the word "act" in section 654.

n55. One early case in which this issue arose was *People v. Greer*, 184 P.2d 512, 521 (Cal. 1947) (holding that it would be "artificial" to conclude that the forcible removal of a rape victim's clothing was an act separate and punishable apart from the rape itself), overruled on other grounds by *People v. Fields*, 914 P.2d 832 (Cal. 1996). A leading case exploring this issue is *Neal v. State*, 357 P.2d 839 (Cal. 1960).

n56. See supra note 36 for when many commonly used enhancements were created.

n57. Neal, 357 P.2d at 843-44.

n58. Id. The Neal test had its fair share of critics, who saw nothing related to an "intent" or "objective" in the literal language of section 654. See *People v. Latimer*, 858 P.2d 611, 616 (Cal. 1993). Justice Schauer, one of the dissenters in Neal, believed the "intent and objective" test would allow smart criminals to craft their crime sprees so that they all aimed at a single intent. *People v. Latimer*, 858 P.2d 611, 615 (Cal. 1993) (quoting *Seiterle v. Superior Court*, 369 P.2d 697, 700-01 (Cal. 1962)) (Schauer, J., dissenting). Justice Dabney, a dissenter in the vacated California court of appeal opinion in Latimer, had pointed out that "punishment is to be commensurate with culpability. However, the test created in Neal fails to achieve this objective." *People v. Latimer*, 8 Cal. Rptr. 2d 883, 894 (Cal. Ct. App. 1992) (Dabney, J., dissenting), vacated by Latimer, 858 P.2d 611.

n59. Neal, 357 P.2d at 843-44; see also *Latimer*, 858 P.2d at 620 (holding that a defendant could not be punished for both rape and kidnapping because the intent and objective of the kidnapping was to consummate the rape).

n60. Neal, 357 P.2d at 843-44; see *People v. Saffle*, 5 Cal. Rptr. 2d 648, 650 (Cal. Ct. App. 1992) (holding that "section 654 applies when there is a course of conduct which violates more than one statute but constitutes an indivisible transaction.") (citing *People v. Maese*, 164 Cal. Rptr. 485, 494 (Cal. Ct. App. 1980)).

n61. See, e.g., *People v. Beamon*, 504 P.2d 905, 912-14 (Cal. 1973) (reaffirming the Neal rule that section 654 limits "multiple convictions arising out of either an act or omission or a course of conduct deemed to be indivisible in time.").

n62. *People v. Harrison*, 768 P.2d 1078, 1085 (Cal. 1989) (holding that multiple sex crimes committed closely in time can each have consecutive, and therefore separate, objectives); *People v. Slobodion*, 191 P.2d 1, 5-6 (Cal. 1948); *People v. Bright*, 277 Cal. Rptr. 612, 614 (Cal. Ct. App. 1991).

n63. *People v. Booth*, 248 Cal. Rptr. 64, 66-67 (Cal. Ct. App. 1988) (finding that "dual objectives of rape and theft" could exist simultaneously in defendant's mind).

n64. Cases that have decided California Penal Code section 654 is not applicable to enhancements include *People v. Rodriguez*, 253 Cal. Rptr. 633, 634 (Cal. Ct. App. 1988) (status-based enhancements); *People v. Parrish*, 217 Cal. Rptr. 700, 705 (Cal. Ct. App. 1985). Cases holding section 654 "generally" does not apply include *People v. Le*, 200 Cal. Rptr. 839, 846 n.11 (Cal. Ct. App. 1984) (citing *People v. Boerner*, 174 Cal. Rptr. 629, 631 (Cal. Ct. App. 1981); *People v. Stiltner*, 182 Cal. Rptr. 790, 797 (Cal. Ct. App. 1982). Cases that have said section 654 does apply to enhancements include: *People v. Price*, 6 Cal. Rptr. 2d 263, 266 (Cal. Ct. App. 1992); *People v. Mixon*, 275 Cal. Rptr. 817, 826 (Cal. Ct. App. 1990); *People v. Vaughn*, 257 Cal. Rptr. 229, 230 (Cal. Ct. App. 1989) (citing *People v. Moringlane*, 179 Cal. Rptr. 726, 729 (Cal. Ct. App. 1982)); *People v. Dobson*, 252 Cal. Rptr. 423, 426 (Cal. Ct. App. 1988), disapproved of on other grounds, *People v. Jones*, 18 P.3d 674, 682 (Cal. 2001)).

n65. See *Price*, 6 Cal. Rptr. at 266; *Mixon*, 275 Cal. Rptr. at 826; *Vaughn*, 257 Cal. Rptr. at 230 (citing *Moringlane*, 179 Cal. Rptr. at 729).

n66. See *Rodriguez*, 253 Cal. Rptr. at 634 (status-based enhancements); *Parrish*, 217 Cal. Rptr. at 705; see also *Le*, 200 Cal. Rptr. at 846 n.11 (citing *Boerner*, 174 Cal. Rptr. at 631); *Stiltner*, 182 Cal. Rptr. at 797.

n67. More-recent cases tend to rule that section 654 does not apply to status-based enhancements but do apply to those that are conduct-based. See supra note 45 and accompanying text; see also *People v. Arndt*, 90 Cal. Rptr. 2d 415, 420 (Cal. Ct. App. 1999).

n68. See *People v. Akins*, 65 Cal. Rptr. 2d 338, 342 (Cal. Ct. App. 1997) ("Nearly all of the cases that have applied Section 654 to limit enhancements have done so in the context of a single act committed against a single victim.").

n69. Cal. Penal Code § 186.22 (West 2007). For a broad look at the STEP Act's effect on juveniles, see *De Vries*, supra note 18, at 195-96.

n70. Cal. Penal Code § 186.21 (West 2007).

n71. See De Vries, *supra* note 18, at 195-96; Placido Gomez, *It is Not So Simply Because An Expert Says It Is So: The Gang Expert Testimony Regarding Membership in Criminal Street Gangs*, 34 *St. Mary's L.J.* 581, 591-92 (2003) (tracing how gang injunctions were first used by prosecutors in Southern California).

n72. De Vries, *supra* note 18, at 195. At least a dozen other states have adopted statutes in response to the threat posed by criminal street gangs. David R. Truman, *The Jets and the Sharks are Dead: State Statutory Responses to Criminal Street Gangs*, 73 *Wash. U. L.Q.* 683, 688 n.27 (1995). Three states, Louisiana, Georgia and Missouri, have adopted legislation virtually identical to that of California. *Id.* at 710.

n73. De Vries, *supra* note 18, at 193.

n74. The use of STEP Act enhancement provisions by county district attorneys varies across the state. McBride Interview, *supra* note 7. L.A. County "doesn't use [the STEP Act] very well anymore. Orange County does it very well." *Id.* Orange County uses the STEP Act in "virtually all" of the 1,200 or so gang-related cases that the office prosecutes each year. Moore Interview, *supra* note 7.

n75. See Cal. Penal Code § 186.22(e)(29) (West 2007) (stating that a pattern of criminal gang activity includes the offense of "unlawful use of personal identifying information to obtain credit, goods, services, or medical information.").

n76. See B.E. Witkin, *California Criminal Law*, ch. VII, *Crimes Against People* § 25(4) (3d ed. 2000) (listing cases challenging the Act on these bases); see also Alexander A. Molina, *Comment, California's Anti-Gang Street Terrorism Enforcement and Prevention Act: One Step Forward, Two Steps Back?*, 22 *Sw. U. L. Rev.* 457, 462-71 (1993) (reviewing where the two primary constitutional challenges have arisen: free association and due process).

n77. See *infra* notes 156-164 and accompanying text.

n78. See *id.*

n79. See *People v. Martinez*, 34 Cal. Rptr. 3d 14, 16-18 (Cal. Ct. App. 2005); see also *supra* note 64.

n80. See *Martinez*, 34 Cal. Rptr. 3d at 16-18; see also *People v. Reeves*, 109 Cal. Rptr. 2d 728, 761 (Cal. Ct. App. 2001) ("Multiple enhancements for the same criminal conduct run directly counter to section 654's rule against multiple punishment in a way offender-status-based enhancements do not."); *People v. Arndt*, 90 Cal. Rptr. 2d at 420; *People v. Coronado*, 906 P.2d 1232, 1238 (Cal. 1995); *People v. Moringlane*, 179 Cal. Rptr. 726, 729 (Cal. Ct. App. 1982) ("A substantial number of cases hold or otherwise indicate that Penal Code section 654 does in appropriate circumstances bar the imposition of multiple sentence enhancements for the commission of a single act." (citations omitted)).

n81. While appellate courts are still split on this issue, a recent California Supreme Court decision suggests gang enhancements should be viewed as conduct-based. See *People v. Hernandez*, 94 P.3d 1080, 1085 (Cal. 2004) ("A prior conviction allegation relates to the defendant's status and may have no connection to the charged offense; by contrast, the criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense.") (emphasis in original). The status aspect of the enhancement relates to a defendant's affiliation with a gang, something usually proven with evidence based on six general criteria relating to the defendant personally. See *Gomez*, *supra* note 71, at 611-12 (describing criteria used in San Antonio, Texas). The conduct aspect of gang enhancements relates to the act of furthering gang activity through the underlying criminal offense. See Cal. Penal Code § 186.22(b) (West 2007).

n82. See *infra* notes 134-142 and accompanying text.

n83. See *Reeves*, 109 Cal. Rptr. 2d at 760 (explaining that the California Supreme Court has not yet resolved the issue of whether California Penal Code section 654 always applies to enhancements). The court in *Reeves* prohibited multiple enhancements for great bodily injury under California Penal Code section 12022.7. *Id.* at 761; see also *People v. Flores*, 171 Cal. Rptr. 365, 369-70 (reasoning that the Legislature did not intend multiple use of a firearm enhancement on the same defendant under California Penal Code section 12022.5) (citing *People v. Harvey*, 602 P.2d 396, 400 (Cal. 1979)).

n84. See, e.g., *Martinez*, 34 Cal. Rptr. 3d at 18.

n85. See, e.g., *Moringlane*, 179 Cal. Rptr. at 729.

n86. See *People v. Cartwright*, 46 Cal. Rptr. 2d 351, 359 (Cal. Ct. App. 1995); *People v. Hicks*, 863 P.2d 714, 719-20 (Cal. 1993); *People v. Ramirez*, 39 Cal. Rptr. 2d 374, 382-83 (Cal. Ct. App. 1995).

n87. *People v. Oates*, 88 P.3d 56, 64-69 (Cal. 2004).

n88. *Id.* at 58.

n89. *Id.* at 58-59.

n90. *Id.* at 59.

n91. *Id.* at 67.

n92. *Id.* at 60 (quoting Cal. Penal Code § 12022.53(f)) (emphasis added).

n93. Oates, 88 P.3d at 60 (emphasis added).

n94. See Cal. Penal Code § 186.22 (West 2007).

n95. See Oates, 88 P.3d at 60; Cal. Penal Code § 186.22(b) (West 2007).

n96. See Cal. Penal Code § 186.22(b)(1) (West 2007).

n97. See Cal. Penal Code § 186.22(b) (West 2007).

n98. The use of the word "shall" in California Penal Code section 186.22(b) suggests courts must impose as many gang enhancements as there are felonies. *Id.*

n99. See *Neal v. State*, 357 P.2d 839, 843-44 (Cal. 1960).

n100. Cal. Penal Code § 186.22(b)(1) (West 2007). The relevant portion reads:

Any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished [with the following enhancements]

Id.

n101. See Neal, 357 P.2d at 843-44, 55 Cal. 2d at 19.

n102. People v. Reeves, 109 Cal. Rptr. 2d 728, 761 (Cal. Ct. App. 2001); see also People v. Arndt, 90 Cal. Rptr. 2d 415, 422 (Cal. Ct. App. 1999); People v. Akins, 65 Cal. Rptr. 2d 338, 342 (Cal. Ct. App. 1997).

n103. Reeves, 109 Cal. Rptr. 2d at 761 (citing Arndt, 90 Cal. Rptr. 2d at 421).

n104. See Reeves, 109 Cal. Rptr. 2d at 761. If the legislature expressly provides otherwise, however, this rule does not apply. See People v. Oates, 88 P.3d 56, 60-61 (Cal. 2004).

n105. This one-victim-one-attack rule is not much help when exploring section 654's application to gang enhancements in the context of a crime spree. However, it appears to be a sound guidepost when navigating the general area of section 654 and conduct-based enhancements.

n106. Oates, 88 P.3d at 67, 32 Cal. 4th at 1066.

n107. Id. at 64-65 ("The limitations of section 654 do not apply to crimes of violence against multiple victims." (quoting People v. King, 851 P.2d 27, 39 (Cal. 1993))).

n108. Oates, 88 P.3d at 65 (quoting Neal v. State, 357 P.2d 839, 844 (Cal. 1960)).

n109. Oates, 88 P.3d at 59-67. California Penal Code section 186.22 first appeared in 1988. Cal. Penal Code § 186.22 (West 2007). Neal was decided in 1960. Neal v. State, 357 P.2d 839 (Cal. 1960).

n110. This has much to do with the culpability of the defendant and regularizing the judicial premise that a penalty should be commensurate with the crime. If a crime involves more than one victim, culpability should increase. For this important purpose behind section 654, see Neal, 357 P.2d at 844 ("A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person."). See also People v. Pantoja, 18 Cal. Rptr. 3d 492, 504 (Cal. Ct. App. 2004) (quoting Neal, 357 P.2d at 844).

n111. People v. Arndt, 90 Cal. Rptr. 2d 415, 418 (Cal. Ct. App. 1999).

n112. Id. at 422-23. The code sections were California Penal Code section 12022.7 (enhancement for great bodily injury) and California Vehicle Code section 23558 (formerly section 23182), which also enhances punishment for "bodily injury or death." Id. at 422.

n113. Id. at 421; see Cal. Penal Code § 12022.7 (West 2007); see also supra notes 106-110 and accompanying text, regarding the judicially created "multiple victims of violence" exception to the application of section 654.

n114. See Arndt, 90 Cal. Rptr. 2d at 421.

n115. See Cal. Penal Code § 12022.7 (West 2007); Neal, 357 P.2d at 843-44; see also *infra* note 145.

n116. *People v. Rodriguez*, 253 Cal. Rptr. 633, 634 (1988).

n117. *Id.*; see also *People v. Coronado*, 906 P.2d 1232, 1239 (Cal. 1995) (stating that section 654 is inapplicable because "prior prison term enhancements are attributable to the defendant's status as a repeat offender; they are not attributable to the underlying criminal conduct which gave rise to the defendant's prior and current convictions." (citations omitted)).

n118. See *People v. Jones*, 857 P.2d 1163, 1166-67 (Cal. 1993) (holding that the legislative intent of California Penal Code section 667 prohibited punishing a defendant twice for the same prior offense); see also *People v. Flournoy*, 32 Cal. Rptr. 2d 188, 192 (1994).

n119. *Jones*, 857 P.2d at 1166-67; see also *Flournoy*, 32 Cal. Rptr. 2d at 192.

n120. *Flournoy*, 32 Cal. Rptr. 2d at 189.

n121. *Id.* at 192 ("The voters undoubtedly did not intend the two enhancements to be cumulative."); see Cal. Penal Code § 667.6 (West 2007).

n122. *Flournoy*, 32 Cal. Rptr. 2d at 191 ("Unlike the Court of Appeal in *Jones*, we will not decide what effect, if any, Section 654 has upon the two statutes in question.").

n123. See supra notes 121-22 and accompanying text.

n124. The "hybrid" nature of gang enhancements, i.e., their connection to both the status of an offender and to the offender's conduct, is discussed infra at notes 187-190 and accompanying text.

n125. *People v. Hernandez*, 94 P.3d 1080, 1085 (Cal. 2004).

n126. This is because California Penal Code section 654 generally does not apply to status-based enhancements. See *People v. Coronado*, 906 P.2d 1232, 1239 (Cal. 1995); *People v. Martinez*, 34 Cal. Rptr. 3d 14, 17 (Cal. Ct. App. 2005); *People v. Moringlane*, 179 Cal. Rptr. 726, 729 (Cal. Ct. App. 1982); *People v. Arndt*, 90 Cal. Rptr. 2d 415, 420 (Cal. Ct. App. 1999).

n127. See, e.g., Cal. Penal Code § 667.6 (West 2007) (status-based); Cal. Penal Code § 12022.53 (West 2007) (conduct-based).

n128. See *Hernandez*, 94 P.3d at 1085.

n129. Cal. Penal Code § 186.22(a) (West 2007).

n130. The enhancement provisions fall under California Penal Code section 186.22(b). See Cal. Penal Code § 186.22(b) (West 2007).

n131. Initially courts interpreted "active participation" to mean that a defendant must spend a "substantial part" of time in activities related to

the gang. See *People v. Green*, 278 Cal. Rptr. 140, 145-46 (Cal. Ct. App. 1991), overruled by *People v. Castenada*, 3 P.3d 278 (Cal. 2000). This aspect of *Green*, however, was overruled in *People v. Castenada*, which held that active participation in a street gang means only involvement that is "more than nominal or passive." *Castenada*, 3 P.3d at 281. Thus "active participation" does not relate to a specific action but rather to numerous acts that, when taken as a whole, suggest gang membership. See *id.* at 285. The status-based elements required for a conviction for active participation in a criminal street gang include 1) "the existence of a [] street gang," 2) "defendant's membership in that gang," and 3) "the commission of two or more predicate crimes within three years." See *Truman*, *supra* note 72, at 709. To prove gang membership, local law enforcement agencies use numerous factors to identify gang affiliation. *Gomez*, *supra* note 71, at 610. But most agencies boil these factors down into five basic criteria that were first introduced by the California Youth Gang Task Force in 1988: (1) the person admits being a gang member; (2) the person has tattoos, clothing or other marks that signify association with a particular gang; (3) the person "has been arrested while participating in activities with a known gang member"; (4) a reliable informant has provided information that places the person in a known gang; and (5) "close association with known gang members has been confirmed." *Id.* The majority of these criteria are based on the status of the defendant rather than on a specific act. See *id.*

n132. See Cal. Penal Code §§186.22(a), (b) (West 2007); see also *Hernandez*, 94 P.3d at 1085 (holding that the STEP Act gang-enhancement provisions are "inextricably intertwined" with the underlying offense(s)).

n133. The gang-enhancement provisions divide felonies into three types: standard felonies, serious felonies, and violent felonies. Cal. Penal Code § 186.22(b)(1) (West 2007). The added penalty varies for each type, underscoring how closely intertwined the enhancements are to the actual conduct of the defendant rather than his or her own characteristics. See *id.*

n134. See California Proposition 21, § 37 (2000), available at <http://primary2000.ss.ca.gov/VoterGuide/Propositions/21text.htm>.

n135. See *id.*

n136. *Id.*

n137. See *id.*

n138. See *People v. Superior Court*, 15 Cal. Rptr. 3d 921, 925 (Cal. Ct. App. 2004) ("We should look to the STEP Act as a whole to determine the Legislature's intent.") (citing *Clean Air Constituency v. Cal. State Air Res. Bd.*, 523 P.2d 617, 624-25 (Cal. 1974)); see also *Clean Air Constituency*, 523 P.2d at 624-25 ("[Courts] should construe every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.").

n139. See Cal. Penal Code § 186.21 (West 2007).

n140. See California Proposition 21, *supra* note 134.

n141. See *People v. Superior Court*, 15 Cal. Rptr. 3d 921, 925 (Cal. Ct. App. 2004); see also *Garcia v. McCutchen*, 940 P.2d 906, 912 (Cal. 1997) (holding that specific parts of a statute prevail over the general parts "'only when the two sections cannot be reconciled.'") (quoting *People v. Wheeler*, 841 P.2d 938, 943 (Cal. 1992)).

n142. See *People v. Superior Court*, 15 Cal. Rptr. 3d 921, 925 (Cal. Ct. App. 2004); see also *Garcia*, 940 P.2d at 912.

n143. Of particular note are California Penal Code sections 186.22 (b)(1)(B) and (b)(1)(C). If the felony is a serious felony, as defined in subdivision (c) of California Penal Code section 1192.7, the person shall be punished by an additional term of five years. Cal. Penal Code § 186.22(b)(1)(B) (West 2007). If the felony is a violent felony, as defined in subdivision (c) of California Penal Code section 667.5, the person shall be punished by an additional term of ten years. Cal. Penal Code § 186.22(b)(1)(C) (West 2007).

n144. See *supra* notes 87-113 and accompanying text.

n145. Although a few enhancements require "intent" as opposed to "specific intent," the vast majority of enhancements contain no intent element whatsoever. See, e.g., Cal. Penal Code § 600(c) (West 2007); Cal. Penal Code § 667.6 (West 2007); Cal. Penal Code § 12022(a) (West 2007); Cal. Penal Code § 12022.53 (West 2007); Cal. Penal Code § 12022.7 (West 2007).

n146. See Cal. Penal Code § 186.22(b)(1) (West 2007).

n147. Id.

n148. *Neal v. State*, 357 P.2d 839, 843-44 (Cal. 1960).

n149. See Cal. Penal Code § 186.22(b) (West 2007); see also *infra* notes 171-175 and 176-186 and accompanying text (discussing how state courts and the Ninth Circuit have taken different approaches to determining the scope of this specific intent in the context of the STEP Act).

n150. *Garcia v. Carey*, 395 F.3d 1099, 1103-05 (9th Cir. 2005) (granting writ of habeas corpus on gang enhancements because evidence did not support inference that the defendant committed robbery with intent to further other criminal activity of the gang); *People v. Romero*, 43 Cal. Rptr. 3d 862, 865 (Cal. Ct. App. 2006).

n151. See *Neal*, 357 P.2d at 843-44. The problem with the status aspect of gang enhancements in the context of the *Neal* "intent" test is that the intent to further gang criminality rests upon a defendant's affiliation with a gang. This affiliation exists conceptually and temporally apart from the defendant's criminal conduct, creating a situation where the defendant's intent must rely, at least in part, on the intent of the gang. If the defendant has time to meet and confer with gang members, and thus has time to form the requisite intent, then no issue may arise. However, in the case of a crime spree where no time exists for the defendant to meet with fellow gang members, then the problem of the status-based aspect of gang enhancements arises.

n152. Id.; see Cal. Penal Code § 186.22(b)(1) (West 2007).

n153. See Neal, 357 P.2d at 843-44; see also supra note 151.

n154. Cal. Penal Code § 186.22(b)(1) (West 2007) (emphasis added).

n155. See infra notes 158-170 and accompanying text.

n156. See *People v. Latimer*, 858 P.2d 611, 616 (Cal. 1993); Neal, 357 P.2d at 843-44.

n157. *Latimer*, 858 P.2d at 614 (quoting Neal, 357 P.2d at 843-44).

n158. Cal. Penal Code §§186.22(b)(1), (4) (West 2007).

n159. For a discussion of statutory construction, see *People v. Jefferson*, 980 P.2d 441, 446 (Cal. 1999) (quoting *Hsu v. Abbara*, 891 P.2d 804, 809 (Cal. 1995)) ("The goal of statutory construction is to ascertain and effectuate the intent of the Legislature."); see Neal, 357 P.2d at 843-44. The "intent" for gang-enhancement purposes is entirely separate from the "intent" required for commission of an underlying offense. While commission of various crimes can obviously establish a separate intent for the act of committing each offense, the intents for purposes of gang enhancements are all the same: the intent to further the gang's criminal activity. See Cal. Penal Code § 186.22(b)(1) (West 2007).

n160. This happened in *People v. Ramirez*, a case settled in plea bargain. See Defendant's Waiver of Rights Regarding Entry of Plea and Any State or Federal Writs and Appeals, *People v. Ramirez*, No. MS033593A (Monterey County Super. Ct. 2004). Statistics are scarce, however, on

how often such enhancements are charged in indictments. See Megan Garvey & Richard Winton, Tracking of Gang-Related Crime Falls Short, L.A. Times, Jan. 24, 2003, at A1.

n161. See Neal, 357 P.2d at 843-44; Cal. Penal Code § 186.22(b)(1) (West 2007). But see *People v. Romero*, 43 Cal. Rptr. 3d 862 (2006), which is discussed *infra* at notes 176-186 and accompanying text.

n162. Numerous elements must be proven to successfully prosecute a gang enhancement. See *supra* note 131. In addition to proving the elements of the underlying felony, a prosecutor must also show "1) the existence of a criminal street gang, 2) the defendant's membership in that gang," 3) a pattern of criminal activity, 4) that defendant committed the underlying felony for the benefit of, at the direction of, or in association with a gang and 5) that defendant had the specific intent to promote, further or assist in any criminal conduct by the gang. See Truman, *supra* note 72, at 709. If all of these elements were proven for one underlying offense, it would make it much simpler for the prosecution to prove the same elements for other underlying offenses. All the elements of each enhancement would likely be identical to each other except for the underlying crime, raising the question whether two such enhancements qualify as the "same offense" in Double Jeopardy jurisprudence. A separate argument relating to the dual use of facts is meritless because the dual use of facts concerns aggravating or mitigating factors. See Cal. Penal Code § 1170(b) (West 2007); Cal. Ct. R. 4.420(d) (stating that "[a] fact that is an element of the crime may not be used to impose the upper term [of a sentence].").

n163. The essence of California Penal Code section 654 is rooted in the multiple-punishment prohibition of the federal and state constitutions. If two conduct-based enhancements are virtually identical in terms of their elements that must be proven, it seems that two such closely related charges would be violative of the purpose of the multiple-punishment prohibition. See *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), overruled on other grounds by *Alabama v. Smith*, 490 U.S. 794 (1989); see also U.S. Const. amend. V; Cal. Const. art I, § 15.

n164. The enhancement for great bodily injury, for example, contains no "intent" element and thus courts have permitted its multiple application to a single defendant. See *People v. Arndt*, 90 Cal. Rptr. 2d 415, 421 (Cal. Ct. App. 1999).

n165. Cal. Penal Code § 186.22(b)(1) (West 2007) (emphasis added).

n166. See *id.*

n167. See *id.* (emphasis added).

n168. See *Neal v. State*, 357 P.2d 839, 844 (Cal. 1960) ("The purpose of the protection against multiple punishment is to insure that the defendant's punishment will be commensurate with his criminal liability.").

n169. See Cal. Penal Code § 186.22(b)(1) (West 2007).

n170. *Neal*, 357 P.2d at 843-44; *People v. Latimer*, 858 P.2d 611, 620 (Cal. 1993).

n171. *Garcia v. Carey*, 395 F.3d 1099, 1103-04 (9th Cir. 2005).

n172. *Id.* at 1103 (emphasis added).

n173. *Id.*

n174. *Id.* at 1103 n.5 (citing *People v. Olguin*, 37 Cal. Rptr. 2d 596, 609 (1994)); see Cal. Penal Code § 186.22(b) (West 2007).

n175. See Garcia, 395 F.3d at 1103, n.5; see also Cal. Penal Code § 186.22(b)(1) (West 2007).

n176. *People v. Romero*, 43 Cal. Rptr. 3d 862, 865 (Cal. Ct. App. 2006).

n177. *Id.*

n178. The basic conspiracy principle concerns section 654's prohibition against punishment for both the object of a conspiracy and the conspiracy itself if the criminal agreement had no other object in mind when it was made. However, if the scope of the conspiracy is greater than the underlying crime for which a defendant has been punished, punishment for the conspiracy will also stand. See *infra* notes 179-186 and accompanying text.

n179. *People v. Nasworthy*, 210 P.2d 83, 89 (Cal. 1949).

n180. B.E. Witkin, *California Criminal Law*, ch. IX, Punishment § 173 (3d ed. 2000).

n181. *People v. Vargas*, 110 Cal. Rptr. 2d 210, 255 (Cal. Ct. App. 2001) (quoting *People v. Ramirez*, 236 Cal. Rptr. 404, 411-12 (Cal. Ct. App. 1987)).

n182. See, e.g., *Nasworthy*, 210 P.2d at 89.

n183. See *People v. Romero*, 43 Cal. Rptr. 3d 862, 865-66 (Cal. Ct. App. 2006). The "means by which" a conspiracy is carried out is virtually identical to promotion or furtherance of criminal gang activity in the context of the STEP Act. See *Vargas*, 110 Cal. Rptr. 2d at 255 (quoting *Ramirez*, 236 Cal. Rptr. at 411-12).

n184. See *Romero*, 43 Cal. Rptr. 3d at 865.

n185. See B.E. Witkin, *California Criminal Law*, ch. IX, Punishment § 173 (3d ed. 2000 & Supp. 2006) (citing *Vargas*, 110 Cal. Rptr. 2d at 254-55); see also *Vargas*, 110 Cal. Rptr. 2d at 255 (quoting *Ramirez*, 236 Cal. Rptr. at 411-12).

n186. The only real difference is that conspiracy is a substantive crime while a gang enhancement is a penalty add-on. But both must be found true by the trier of fact, and only through evidence supporting each element beyond a reasonable doubt.

n187. See *supra* note 151.

n188. See *supra* notes 127-128 and accompanying text.

n189. *People v. Hernandez*, 94 P.3d 1080, 1085 (Cal. 2004); see also *supra* note 131.

n190. *Neal v. State*, 357 P.2d 839, 843-44 (Cal. 1960).

n191. See, e.g., *People v. Rodriguez*, 253 Cal. Rptr. 633, 634 (Cal. Ct. App. 1988); see also Cal. Penal Code § 654(a) (West 2007).

n192. See *People v. Jones*, 857 P.2d 1163, 1166-67 (Cal. 1993).

n193. See *id.*

n194. *People v. Hernandez*, 94 P.3d 1080, 1085 (Cal. 2004). In *Hernandez*, the court also recognized the advantage of bifurcating trials involving both prior convictions and gang-enhancement allegations due to the potential for prejudice since both involve evidence that may be collateral to the issue at bar. *Id.* at 1086 (stating that some gang evidence "may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt.").

n195. See *Jones*, 857 P.2d at 1166-67; see also *People v. Flournoy*, 32 Cal. Rptr. 2d 188, 191 (Cal. Ct. App. 1994).

n196. Insofar as courts generally agree that the application of California Penal Code section 654 to conduct-based enhancements is not blocked in the way it is for status-based enhancements. See *supra* notes 83-126 and accompanying text.

n197. See *infra* notes 198-201 and accompanying text. Very few enhancements contain any "intent" element, and the only one listed containing a "specific intent" element is California Penal Code section 186.22(b). Cal. Penal Code § 186.22(b) (West 2007).

n198. Cal. Penal Code § 12022.53(b) (West 2007).

n199. Cal. Health & Safety Code § 11370.4 (West 2007).

n200. Cal. Penal Code § 600 (West 2007).

n201. Cal. Penal Code § 186.11(a)(1) (West 2007).

n202. See Cal. Penal Code § 186.22(b) (West 2007); see also supra note 131.

n203. See Cal. Penal Code § 186.22(b) (West 2007); see also supra note 131.

n204. See Cal. Penal Code § 186.22(b) (West 2007); see also supra note 131 (illustrating how many elements must be proven to successfully allege a gang enhancement).

n205. See *Neal v. State*, 357 P.2d 839, 843-44 (Cal. 1960). Neal's "intent and objective" test came before most enhancements even existed and focused on the analysis of substantive crimes. *Id.*

n206. See supra note 54.

n207. See Cal. Penal Code § 186.21 (West 2007) (containing legislative findings that the gang problem had caused a statewide "crisis"); see also supra notes 69-78 and accompanying text.

n208. This assumes that gang members who embark on crime sprees involving multiple offenses are generally more dangerous than those who commit only one crime, a premise based on the Neal rationale that enhancements are supposed to punish more severely those defendants who commit crimes in more dangerous or harmful ways. Neal, 357 P.2d at 844.

n209. Courts typically scour statutes for legislative intent when applying California Penal Code section 654 to enhancements. See *People v. Jones*, 857 P.2d 1163, 1166-67 (Cal. 1993); see also *People v. Flournoy*, 32 Cal. Rptr. 2d 188, 192 (Cal. Ct. App. 1994).

n210. See *infra* notes 106-115 and accompanying text (discussing the multiple victim exception); see also *Flournoy*, 32 Cal. Rptr. 2d at 192.

n211. See Cal. Penal Code § 186.21 (West 2007).

n212. See *supra* notes 185-186 and accompanying text.

n213. See Cal. Penal Code § 186.22(b)(1) (West 2007).

n214. See *People v. Harrison*, 768 P.2d 1078, 1088 (Cal. 1989) (holding that multiple sex crimes committed closely in time can each have consecutive, and therefore separately punishable, objectives); *People v. Booth*, 248 Cal. Rptr. 64, 66-67 (1988) (stating that "dual objectives of rape and theft" could exist simultaneously in defendant's mind).

n215. For the "intent and objective test," see *Neal v. State*, 357 P.2d 839, 843-44 (Cal. 1960).

n216. See B.E. Witkin, *California Criminal Law*, ch. IX, Punishment § 173 (3d ed. 2000 & Supp. 2006) (citing *People v. Vargas*, 110 Cal. Rptr. 2d 210, 254-55 (Cal. Ct. App. 2001)); see also *Vargas*, 110 Cal. Rptr. 2d at 255 (quoting *People v. Ramirez*, 236 Cal. Rptr. 404, 411-12 (Cal. Ct. App. 1987)).

n217. See *supra* notes 106-115 and accompanying text; see also *People v. Oates*, 88 P.3d 56, 67 (Cal. 2004).

n218. *Neal*, 357 P.2d at 843-44; see *supra* notes 156-170 and accompanying text.

n219. See *supra* notes 171-175 and 176-186 and accompanying text (discussing *Garcia v. Carey*, 395 F.3d 1099 (9th Cir. 2005) and *People v. Romero*, 43 Cal. Rptr. 3d 862 (Cal. Ct. App. 2006)).

n220. There is wide dispute over how many inmates have ties to gangs. Estimates range from 11.7 percent nationwide to more than 25 percent. National Alliance of Gang Investigators Associations, 2005 National Gang Threat Assessment 5 (2005) (estimating that 11.7 percent of inmates are gang affiliated), available at [http://www.ojp.usdoj.gov/BJA/what/2005 threat assesment.pdf](http://www.ojp.usdoj.gov/BJA/what/2005%20threat%20assessment.pdf); George Knox, A National Assessment of Gangs and Security Threat Groups (STGs) in Adult Correctional Institutions, National Gang Crime Research Center, [http://www.ngcrc.com/ngcrc /page7.htm](http://www.ngcrc.com/ngcrc/page7.htm) (last visited Apr. 20, 2007). No credible data exist, however, on how many people are actually charged with and convicted of gang enhancements. See Megan Garvey & Richard Winton, *Tracking of Gang-Related Crime Falls Short*, *L.A. Times*, Jan. 24, 2003, at A1; see also *supra* note 7.

n221. This is because the elements of gang enhancements, including the existence of a gang, the gang's activities and the defendant's affiliation, will all be the same as they relate to a single defendant. If the elements are proven for one enhancement, they can apply to all others. See *supra* note 111 (discussing some of the elements necessary to prove a gang enhancement).