

**LEGAL
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IN CHALLENGING
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(AB 333)**

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In October 2021, the Legislature passed, and Gov. Gavin Newsom signed into law, Assembly Bill 333 (AB 333). AB 333 amended Penal Code section 186.22 and added a new statute, Penal Code section 1109. Law enforcement describes the new law as “a windfall for the violent, criminal street gangs who are wreaking havoc on the citizens of California.” Defense attorneys might have a different perspective.

PURPOSES BEHIND THE NEW LAW

The legislative intent behind the new law was to narrow applicability of gang enhancements that disproportionately result in mass incarceration of people of color. Comments to the Senate Rules Committee’s Floor Analysis of the bill stated, “The vague definitions and weak standards of proof that characterize gang enhancements have made their use one of the most devastating drivers of mass incarceration in the state.” (Sen. Rules Com., Rep. on Assem. Bill No. 333 (Reg. Sess. 2021–2022) as amended July 13, 2021, p. 5.) Senator Kamlager, the bill’s author, noted the law disproportionately applies to Blacks and Hispanics. (Sen. Com. on Public Safety, Rep. on Assem. Bill No. 333 (Reg. Sess. 2021–2022) as amended May 28, 2021, p. 6.) Even though white youth comprise the largest number of gang members, 92 percent of those who receive gang enhancements are Blacks and Hispanics, exposing a racist application in criminal cases that has resulted in collective trauma to countless families and communities. (*Ibid.*) Supporters of the bill explained that entire neighborhoods are criminalized “on the basis of ‘he was in this picture on Instagram, or he was in this rap video throwing hand signs.’” (*Id.* at p. 13.)

The Legislature’s expressly passed findings for AB 333 reflect the same points made in the committee reports. The Legislature found that “[c]urrent gang enhancement statutes criminalize entire neighborhoods historically

impacted by poverty, racial inequality, and mass incarceration as they punish people based on their cultural identity, who they know, and where they live.” (AB 333, § 2, subd. (a).) The gang enhancement is inconsistently applied against people of color and is one of the largest disparate racial impact statutes. (AB 333, § 2, subd. (d)(1)&(2), citing Com. on Revision of the Pen. Code 2020 Rep.) The Legislature acknowledged that “gang membership allegations by law enforcement officers are typically little more than guesses that are unreliable, based on assumptions at odds with empirical research, and racially discriminatory.” (AB 333, § 2, subd. (g), citations omitted.) Gang enhancement evidence “can be unreliable and prejudicial to a jury because it is lumped into evidence of the underlying charges which further perpetuates unfair prejudice in juries and convictions of innocent people.” (AB 333, § 2, subd. (d)(6), citing Com. on Revision of the Pen. Code 2020 Rep., emphasis added.)

The Legislature also found the California Supreme Court has recognized the highly prejudicial impact of gang evidence, citing *People v. Williams* (1997) 16 Cal.4th 153, 193. (AB 333, § 2, subd. (e).) It recognized the “[s]tudies suggest[ing] that allowing a jury to hear the kind of evidence that supports a gang enhancement before it has decided whether the defendant is guilty or not may lead to wrongful convictions.” (*Ibid.*, citing Eisen, et al., Examining the Prejudicial Effects of Gang Evidence on Jurors (2013) 13 J. Forensic Psychol. Pract. 1; Eisen, et al., Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt? (2014) 62 UCLA L.Rev. disc. 2; 2020 Annual Report, p. 46 [“Studies show that even merely associating an accused person with a gang makes it more likely that a jury will convict them.”])

AB 333’s IMPACT ON APPELLATE PRACTICE

AB 333 impacts our appellate practice in two primary ways. First, it changed the definition of a criminal street gang, particularly the definition of “predicate crimes.” Second, it enacted Penal Code section 1109, which mandates bifurcation of gang enhancements and gang crimes upon the defendant’s request. These changes will be discussed in turn.

I. NEW DEFINITION OF WHAT CONSTITUTES A GANG

A. The new law redefined “criminal street gang.” Under prior law, a gang was defined as “any ongoing organization, association, or group of three or more persons, whether formal or informal.” (§ 186.22, subd. (f).) Under the

new law, a gang is now defined as an “ongoing, **organized** association or group of three or more persons, whether formal or informal.”

B. More significantly, the new law redefined the term “pattern of criminal gang activity,” that is, the predicate crimes element of a criminal street gang. Proof of a gang enhancement or gang participation crime requires the prosecution prove gang members “collectively engage in, or have engaged in, a pattern of criminal gang activity.” (§ 186.22, subd. (f).) Proving the pattern of criminal gang activity changed in several ways.

1. The new law removes **looting, felony vandalism**, and specified **personal identity fraud** violations from the crimes that can establish a “pattern of criminal gang activity.” A long list of crimes still exists; earlier bill versions would have removed burglary, but ultimately this did not occur. This change is unlikely to have much impact on our appellate practice. To highlight how dangerous gangs are, prosecutors typically use the most serious predicate crimes such as murder, assault, robbery, and gun possession.

2. **Predicate crimes must be committed by gang members.** Under prior law, the predicate offenses had to be committed on separate occasions, or by two or more **persons**. Under the new law, predicate offenses must be committed on separate occasions or by two or more gang **members**. (§ 186.22, subd. (e)(1).) Typically, the prosecutor introduces evidence the people who commit the predicate crimes are gang members. This is an issue we should check for, but it is unlikely to be a major point of our appellate litigation.

3. Arguably, predicate crimes must be committed “collectively” (subd. (f)), meaning by more than one person. The law’s prior version stated a gang means a group whose members “individually or collectively” engage in a pattern of criminal gang activity. However, subdivision (e)(1) states that predicate crimes must be committed “on separate occasions or by two or more gang members.” A split of authority exists as to whether each predicate crime must be committed by more than one gang member to be valid.

4. The new law expressly provides that “[t]he **currently charged offense shall not be used** to establish the pattern of criminal gang

activity.” (186.22, subd. (e)(2).) By itself, this is unlikely to result in the reversal of gang enhancements since prosecutors typically admit evidence of numerous predicate crimes. But if the evidence does not suffice to prove more than one alleged predicate crime, exclusion of the current offense under the new law will be significant.

5. The new law restricts the time frame during which predicate crimes can be committed. The old law required that “at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense.” The new law requires that “at least one of these offenses occurred after the effective date of this chapter, and the last of those offenses occurred within three years of the prior offense **and within three years of the date the current offense is alleged to have been committed.**”

6. The new law requires predicate crimes benefit the gang in a way that is more than reputational. The prior law did not require evidence the predicate crimes benefitted the gang in any way. Predicate crimes just had to be “committed on separate occasions, or by two or more persons.” (§ 186.22, subd. (e), prior law). Only the current crime had to either benefit the gang or be committed in association with gang members or at the direction of the gang. The new law requires that predicate offenses “**commonly benefited a criminal street gang, and the common benefit of the offense is more than reputational.**” (§ 186.22, subd. (e), new law.) Note that there is no change to the benefit requirement for the current offense.

The new law has a specific provision addressing this requirement. Section 186.22, subdivision (g), provides, “As used in this chapter, to benefit, promote, further, or assist means to provide a common benefit to members of a gang where the common benefit is more than reputational. Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant.”

II. LITIGATION ISSUES UNDER THE NEW VERSION OF SECTION 186.22

There are two ways to challenge gang enhancements and gang participation convictions under the new law. First, we can argue there was insufficient evidence to prove the gang enhancement or gang participation crime under the new law. An enhancement violates the Fourteenth Amendment's due process clause when there is no substantial evidence to support it. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476; *People v. Lewis* (2008) 43 Cal.4th 415, 507; *People v. Albillar* (2010) 51 Cal.4th 47, 59-60.) Insufficient evidence generally results in a reversal with a retrial prohibited under the Double Jeopardy Clause. (*Burks v. United States* (1978) 437 U.S. 1, 8.) However, it is unfair to the prosecution to prohibit retrial when it had no idea it had to prove certain elements. Thus, a finding of insufficient evidence to prove a gang enhancement under the new law does not bar retrial of the enhancement. (*People v. Figueroa* (1993) 20 Cal.App.4th 64, 70-71; *People v. Delgado* (2022) 74 Cal.App.5th 1067, 1091.)

Second, we can argue gang enhancements and gang participation convictions must be reversed because the jury was not instructed on the statute's new elements. When jury instructions are deficient for omitting an element of an offense or enhancement, they implicate the defendant's federal constitutional Due Process rights. (*People v. Flood* (1998) 18 Cal.4th 470, 502–503; *People v. Sek* (2022) 74 Cal.App.5th 657, 668.) Reversal is required unless the government can prove the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Sek, supra*, at p. 668.) Even if the evidence is arguably sufficient to prove a gang enhancement, the jury instruction argument could result in reversal under the stringent *Chapman* standard of prejudice.

III. SPECIFIC ISSUES TO CONSIDER

Most of our litigation will involve cases tried before the new law became effective. Since Santa Clara County takes so long to produce records, there are still many pending cases that may involve issues covered by AB 333.

A. **RETROACTIVITY** Under settled California law, newly enacted statutes which mitigate punishment for a crime are presumed to apply retroactively to all cases not yet final. (*In re Estrada* (1965) 63 Cal.2d 740, 746.) This rule applies to statutory amendments “which redefine, to the benefit of defendants, conduct subject to criminal sanctions” or enhancements. (*Tapia v.*

Superior Court (1991) 53 Cal.3d 282, 301.) In *People v. Lopez* (2021) 73 Cal.App.5th 327, 343, the Attorney General conceded, and the court held, that defendants whose cases are not yet final on appeal are entitled to AB 333's ameliorative effects. The Attorney General consistently concedes the new section 186.22 is retroactive to cases not yet final on appeal. No case has disagreed.

B. A GANG MUST BE “ORGANIZED” No published cases have yet addressed this issue. It is conceivable a gang expert could have failed to provide sufficient evidence that the gang involved in a prosecution was “organized.” That term is not defined in the new statute. “Organized” is defined in Merriam Webster as “having a formal organization to coordinate and carry out activities.” In prosecutions in 2022 and beyond, a gang expert can no doubt satisfy this requirement by describing a gang's organization. But in cases tried before 2022, this is an issue we should consider.

C. MOST-RECENT PREDICATE CRIME MUST HAVE BEEN COMMITTED WITHIN THREE YEARS OF CURRENT OFFENSE This new provision has resulted in one published reversal. In *People v. Ramos* (2022) 77 Cal. App. 5th 1116, 1128, the prosecutor introduced evidence of crimes committed in 2010 and 2012 but the current offense was committed in 2018, leading to reversal of the gang enhancement.

D. DO PREDICATE CRIMES HAVE TO BE COMMITTED BY MORE THAN ONE GANG MEMBER? Section 186.22(e)(1) states that predicate offenses must be “committed on separate occasions or by two or more members.” Subdivision (f) contains the definition of a criminal street gang. One required element is that “members **collectively** engage in, or have engaged in, a pattern of criminal gang activity.” The prior law said more broadly, “whose members **individually or collectively** engage in” a pattern or criminal gang activity. This change in the statute has resulted in conflicting opinions.

People v. Delgado (2022) 74 Cal.App.5th 1067: The court held “collectively” means committed by more than one person, and thus rejected “the People's contention that proof that individual gang members committed the predicate offenses on separate occasions is sufficient to show the gang members ‘collectively’ engaged in a pattern of criminal activity.” (*Id.* at p. 1073.) Therefore, a predicate offense committed by a single gang member does not count.

People v. Lopez (2021) 73 Cal.App.5th 327: The new law “require[s] the prosecution to prove collective, *not merely individual*, engagement in a pattern of criminal gang activity.” (*Id.* at p. 345, emphasis added.)

People v. E.H. (2022) 75 Cal.App.5th 467: The opinion originally held the evidence relating to six predicate offenses was insufficient under the new law because they all appeared to be committed “by a single gang member acting individually, rather than collectively, with at least one other gang member.” However, as modified on March 18, 2022, the court deleted this sentence.

People v. Clark (2022) 81 Cal.App.5th 133: This court disagreed with both *Delgado* and *Lopez*. (*Clark, supra*, at pp. 144-145.) Subdivision (e)(1) states that predicate crimes must be “committed on separate occasions or by two or more members.” The *Clark* court reasoned requiring each predicate crime be committed by more than one gang member would mean the “separate occasions” language in subdivision (e)(1) would be surplusage. (*Clark, supra*, at p. 145.) *Clark* concluded that “a pattern of criminal gang activity may be established by (1) two gang members who separately committed crimes on different occasions, or (2) two gang members who committed a crime together on a single occasion.” (*Id.* at pp. 145-146.)

The *Delgado* court relied on the Legislative intent to dramatically limit the scope of the gang enhancement as a basis for reading the new language narrowly. (*Delgado, supra*, 74 Cal.App.5th at p. 1089.) *Clark* criticized *Delgado* for relying on legislative history, deciding it was wrong to rely on legislative history because, in its view, the statute’s language was unambiguous. However, the Legislature specifically changed the language in subdivision (f) to delete “whose members ~~individually or collectively~~ engage in” a pattern or criminal gang activity. *Clark’s* analysis renders this change in language meaningless. There is an ambiguity, a tension between the new limiting language in subdivision (f) and the broader language in subdivision (e). Therefore, it is appropriate to turn to legislative history to resolve the ambiguity.

The Supreme Court **granted the petition for review in *Clark*** on October 19, 2022. The issue: “Can the People meet their burden of establishing a ‘pattern of criminal gang activity’ under Penal Code section 186.22 as amended by Assembly Bill No. 333 (Stats. 2021, ch. 699) by presenting evidence of individual gang members committing separate predicate offenses,

or must the People provide evidence of two or more gang members working in concert with each other during each predicate offense?”

E. PREDICATE CRIMES MUST BENEFIT THE GANG IN A WAY THAT IS MORE THAN REPUTATIONAL Previously, predicate crimes did not have to be gang related. (*People v. Gardeley* (1996) 14 Cal.4th 605, 609–610 [“We disagree that the predicate offenses must be ‘gang related.’”].) This is the most significant change in the new statute, as predicate offenses must benefit the gang in a way that is more than reputational.

People v. Montano (2022) 80 Cal.App.5th 82, 104: Reversed gang enhancements. The Attorney General conceded the gang expert failed to describe how the predicate offenses benefited the gang in a way that was more than reputational.

People v. Rodriguez (2022) 75 Cal.App.5th 816, 822: Reversed all gang enhancements. No evidence showed the predicate offenses benefited the gang.

People v. E.H. (2022) 75 Cal.App.5th 467: E.H. was tried as an adult for six counts of robbery with gang enhancements. He challenged the gang enhancements solely on the basis of deficient jury instructions under the new law; the court applied the *Chapman* standard and reversed. An expert had testified crimes like robbery can provide a monetary benefit to the gang by bringing in money that can be used to purchase firearms or other things a gang needs. He also said when gang members commit violent crimes the gang’s reputation for violence is enhanced. Since it was not clear the jury based its findings on a valid basis (financial gain as opposed to reputation), the gang enhancements could not stand.

People v. Vasquez (2022) 74 Cal.App.5th 1021: Gang enhancements and vicarious firearm enhancements reversed for insufficient evidence that the predicate offenses benefited the gang in a way that was more than reputational. The court said it was “unsurprising” the evidence was insufficient since the prosecution had no idea it had to prove this element. (*Id.* at p. 1032.) The Attorney General conceded the evidence was insufficient.

People v. Sek (2022) 74 Cal.App.5th 657: Gang enhancements and vicarious firearm enhancements reversed on the basis the jury was not instructed predicate crimes had to benefit the gang in a way that was more than reputational. The Attorney General conceded the instructional error but argued it was harmless because the gang expert “testified about benefits to

the gang that were not merely reputational.” (*Id.* at p. 668.) The court of appeal did not find the error harmless because the expert also testified about reputational benefits. “Although there was a great deal of evidence of benefits to the gang that went beyond reputational, we cannot rule out the possibility that the jury relied on reputational benefit to the gang as its basis for finding the enhancements true. Thus, the instructional error on this question was not harmless under the *Chapman* standard.” (*Id.* at p. 669.)

People v. Lopez (2021) 73 Cal.App.5th 327: As noted above, the court reversed a gang enhancement because the predicate crimes were not committed “collectively” by more than one gang member. The court also found “the People did not prove that the predicate offenses commonly benefitted a criminal street gang and that the benefit was more than reputational.” (*Id.* at p. 346.) The court further found reversal was required because the jury was not instructed on the new requirements that apply to the predicate crimes’ element.

People v. Cooper, 2022 WL 130661 (B304490) Jan. 14, 2022; review granted May 11, 2022, No. S273134. This unpublished case is significant. In it the Supreme Court will consider what evidence suffices to prove a benefit is more than “reputational.” Appellant argued gang enhancements had to be reversed because the jury was not instructed that the predicate offenses must commonly benefit the gang and the benefit must be more than reputational. The court of appeal disagreed. “The prosecution introduced evidence of convictions for robbery in 2012 and sale of narcotics in 2016. Detective Sumner testified that the offenses were committed by Leuders Park gang members, and that robbery and sale of narcotics are some of the gang’s primary activities. The evidence was uncontradicted. The benefit to the gang of robbery and sale of narcotics is more than reputational. The evidence of gang involvement in the instant case is beyond dispute.”

If that is all the evidence the prosecution must present under the new law, you know a gang expert will testify the crimes alleged as predicate offenses are some of the gang’s primary activities. Under *Cooper* no further evidence will be required. But what if a gang member sold drugs and pocketed the money? Or, what if a gang member robs a store and pockets the money without sharing it with the gang? As long as those crimes are some of a gang’s primary activities, the mere commission of the identified crimes suffices to prove a pattern of criminal gang activity.

Per the Supreme Court docket: “The issue to be briefed and argued is limited to the following: Must any of defendant's sentencing enhancements be vacated due to recent statutory changes requiring that the offenses necessary to establish a pattern of criminal gang activity . . . commonly benefited a criminal street gang, and the common benefit from the offense is more than reputational (Pen. Code, § 186.22, subd. (e)(1), as amended by Stats. 2021, ch. 699, § 3)?” (Internal quotation marks omitted.) The court also denied the Attorney General’s request for publication.

F. DO THE NEW GANG STATUTE ELEMENTS APPLY TO OTHER STATUTES THAT INCORPORATE THE DEFINITION OF A

CRIMINAL STREET GANG? The consensus is that the new definition of a criminal street gang applies to crimes and enhancements that specifically incorporate section 186.22. This includes sections 182.5 [gang conspiracy], 12022.53(e) [vicarious firearm enhancement], and 190.2(a)(22) [gang-related special circumstance].

However, courts disagree whether it is unconstitutional to apply the new law to the gang-related special circumstance on the basis it is an unlawful amendment to Proposition 21, the voter initiative that enacted section 190.2(a)(22).

People v. Montano (2022) 80 Cal.App.5th 82, 104: Vicarious firearm enhancements under section 12022.53(e) reversed along with gang enhancements when evidence was insufficient to prove the predicate crimes benefitted the gang in a way that was more than reputational.

People v. Lee (2022) 81 Cal.App.5th 232: “The express reliance by both the firearm enhancement statutes and gang-murder special-circumstance statutes on the definition of a criminal street gang in section 186.22 means that appellants are entitled to the benefit of this change in the law” as to the special circumstance and the vicarious firearm enhancement. (*Id.* at p. 240.) The court rejected the argument that the amendment cannot apply to the special circumstance because it was enacted by voters in Proposition 21. (*Id.* at pp. 242-245.)

People v. Rojas (2022) 80 Cal.App.5th 542: Amendments to section 186.22 cannot be applied to section 190.2(a)(22) [the gang-related special circumstance] because that special circumstance was passed by Proposition 21 and AB 333 was not passed by a two-thirds majority. The court distinguishes *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270,

which dealt with a similar issue involving Senate Bill No. 1437. One justice dissented. Review was granted on October 19, 2022, to address the question: “Does Assembly Bill No. 333 (Stats. 2021, ch. 699) unconstitutionally amend Proposition 21, if applied to the gang-murder special circumstance (Pen. Code, § 190.2, subd. (a)(22))?”

People v. Lopez (2021) 73 Cal.App.5th 327, 346: Sections 12022.53(e) [vicarious gun enhancement] and section 190.2(a)(22) [gang-related special circumstance] must be reversed since they refer specifically to section 186.22.

IV. PENAL CODE SECTION 1109: BIFURCATION

In addition to amending the definition of what constitutes a criminal street gang, AB 333 enacted section 1109, which requires bifurcation of gang enhancements (§ 186.22(b) and (d)) and gang participation crimes (§ 186.22(a)) upon request by the defense. The primary issues for our practice concern whether section 1109 is retroactive to cases not yet final on appeal, and whether it applies to the gang conspiracy statute (§ 182.5) and the gang-related special circumstance (§ 190.2(a)(22)).

A. RETROACTIVITY OF SECTION 1109

The following cases have found section 1109 retroactive to non-final cases on appeal:

People v. Ramos (2022) 77 Cal.App.5th 1116

People v. Burgos (2022) 77 Cal.App.5th 550, review granted July 13, 2022, S274743 (one justice dissenting)

People v. Montano (2022) 80 Cal.App.5th 82

The following cases found section 1109 NOT retroactive to non-final cases on appeal:

People v. Perez (2022) 78 Cal.App.5th 192, 206-207, review granted August 1, 2022, S275090

People v. Ramirez (2022) 79 Cal.App.5th 48, review granted August 17, 2022, S275341.

People v. Lee (2022) 78 Cal.App.5th 192, review granted October 19, 2022.

People v. Boukes (2022) 83 Cal.App.5th 937, agreed with *Perez* and *Ramirez*.

The Supreme Court was faced with the issue whether section 1109 is retroactive to cases not yet final in *People v. Tran* (2022) 13 Cal.5th 1169. It dodged the issue, however, because it held any error in trying the case with the gang enhancement was harmless. (*Id.* at p.1208.) It noted the split of authority but declined “to resolve this split here because we conclude that any asserted error in failing to bifurcate was harmless as to Tran's guilty verdicts and penalty judgment. *People v. Burgos, supra*, 77 Cal.App.5th 550 is now the lead case on this issue: “Does the provision of Penal Code section 1109 governing the bifurcation at trial of gang enhancements from the substantive offense or offenses apply retroactively to cases that are not yet final?”

The disagreement centers on whether section 1109 reduces punishment. Cases finding section 1109 applies retroactively find it indirectly does reduce punishment since convictions are more likely when the jury hears extensive gang evidence. They also reason it makes no sense for one part of AB 333 to be retroactive (the amendment to § 186.22) but not the other part. The Supreme Court will resolve the issue.

B. STANDARD OF PREJUDICE

In *People v. Burgos, supra*, 77 Cal.App.5th 550, the majority opinion considered whether the failure to bifurcate a gang enhancement might be structural error, or federal constitutional error requiring reversal unless the error was harmless beyond a reasonable doubt. (*Id.* at p. 568.) The court did not resolve this issue since it held reversal was required even under the lower standard for state law error. (*Id.* at pp. 568-569.) In *People v. Tran, supra*, 13 Cal.5th at p. 1209, the Supreme Court held the failure to bifurcate is only a state law error. To obtain reversal we must persuade the court it was reasonably likely the verdicts on the underlying crimes would have been different if the gang enhancement had been bifurcated. (*Id.* at pp. 1209-1210.)

For us, the standard of prejudice adopted by the *Tran* court is unfortunate, as most unpublished cases have found the failure to bifurcate harmless under the *Watson* standard.

C. DOES BIFURCATION APPLY TO OTHER CRIMES THAT REFERENCE SECTION 186.22?

Section 1109(a) states that upon defense request “a case in which a gang enhancement is charged under **subdivision (b) or (d) of Section 186.22** shall be” bifurcated. Section 1109(b) states a gang participation crime charged under **section 186.22(a)** shall also be bifurcated upon request. However, the statute makes no mention of the gang special circumstance (§ 190.2(a)(22)) or the gang conspiracy statute (§ 182.5.)

In *People v. Montano, supra*, 80 Cal.App.5th at pp. 1109-1110, the court held section 1109 does not apply to the gang-related special circumstance. The court recognized its holding “creates a potential for mischief. Prosecutors may now be incentivized to plead section 190.2(a)(22) allegations in purportedly gang-related homicide cases to introduce evidence that might otherwise be excluded because of section 1109. A gang-murder allegation could also be used to leverage the type of one-sided plea bargains Assembly Bill 333 was intended to mitigate and prevent.” Despite this potential for mischief, the court decided it could not rewrite the law.

The court in *Montano* noted sections 182.5 (gang conspiracy) and 12022.53(e) also are not mentioned in section 1109. It recognized the limited interpretation of section 1109 could lead to absurd results, where a prosecutor could avoid bifurcation by pleading a special circumstance or a gang conspiracy. Nevertheless, it decided it was up to the Legislature to amend the law if it so desired.