

**SUBJECT:** Restoring "criminal street gang" enhanced penalty offense

**COMMITTEE:** Juvenile Justice and Family Issues — favorable, without amendment

**VOTE:** 8 ayes — Goodman, Cook, Brady, H. Cuellar, De La Garza, Naishtat, Puente, Van de Putte

0 nays

1 absent — Williamson

**SENATE VOTE:** On final passage, April 10 — voice vote

**WITNESSES:** (*On House companion, HB 1447*):

For — Bobbie Villareal, Tarrant County District Attorney's Office; Jim Houck, Fort Worth Police Department

Against — None

**DIGEST:** SB 294 would amend Penal Code sec. 71.02 to create a specific offense of committing or conspiring to commit certain crimes with the intent to establish, maintain, or participate as a member of a criminal street gang. Crimes included in the offense would include murder, capital murder, arson, aggravated robbery, aggravated assault, promotion of prostitution and others.

A "criminal street gang" would be defined as three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities.

The bill would also reenact various sections of the Civil Practice and Remedies Code that refer to and rely on the definition of "criminal street gang." The reference in those reenacted sections to the reckless discharge of a firearm would be deleted. The bill would take effect September 1, 1995.

SUPPORTERS  
SAY:

SB 294 would restore to state law an offense for committing certain crimes such as murder, aggravated assault and promotion of prostitution with the intent to establish, maintain, or participate as a member of a criminal street gang. This offense, in general, allows the punishment of the underlying crime to be enhanced to the punishment that is one category higher than the most serious offense that was committed. This enhancement offense relating to a criminal street gang member was enacted in 1991, but it was not made part of the Penal Code revisions that took effect September 1, 1994.

Penal Code sec. 71.02 requires that local prosecutors prove that a person committed the offense with intent to establish, maintain, or participate in a combination or in the profits of a combination. A combination is three or more persons who collaborate in carrying on criminal activities. The prosecutor must show that at least three people were participating in the offense. Local prosecutors have a difficult time using the combination enhancement provision because gangs often purposely use two people, rather than three or more, in a drive-by shooting, to avoid the enhanced penalties.

The bill would allow the prosecutor to show that the person was a member of a gang and that the gang member committed the offense with the intent to participate as a member of a criminal street gang, a critical distinction that does not require three people to commit or conspire to commit the crime. The prosecutor could still use the "combination" definition if more appropriate, but the bill would also give the "criminal street gang" option.

In addition, even if a combination is shown, certain gang evidence cannot be brought in under the definition of a combination because a combination does not specifically refer to gangs. Evidence such as testimony from gang experts and pieces of gang paraphernalia, such as gang symbols like colored bandannas, is often excluded. This limitation sometimes prevents the jury from understanding the full context of a crime such as a drive-by murder that is done because of a gang turf war.

The bill would also reenact provisions of the Civil Practice and Remedies Code that became defunct because they relied on the definition of criminal street gang that was not included in the Penal Code revision. All of the

provisions relate to common and public nuisances. Although the provisions remain in statute, they need to be reenacted with the restoration of the criminal street gang definition. The bill would delete references in the reenacted law to the now non-existent Penal Code provision regarding reckless discharge of a firearm.

**OPPONENTS  
SAY:**

The definition of criminal street gang could be applied in an unconstitutionally broad manner that could include militias and even fraternities, and was not included in the Penal Code revisions because of such problems.

Moreover, the criminal street gang offense is not necessary because a court can already enhance penalties if the person has been convicted of a felony before, and the intent here is to enhance penalties for people who have shown a propensity for crime. This bill would allow a two-month member of a gang with a clean record to get inappropriately enhanced penalties.

Furthermore, under current law the neutral term "combination" is used to enhance a crime, but this bill would use the highly prejudicial word "gang" to stack the deck against defendants before they are even tried.