

U.S. Department of Justice
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Office of Juvenile Justice and Delinquency Prevention



Gang Prosecution Manual



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Introduction

The National Youth Gang Center estimates that there were approximately 778,000 gang members and 27,000 gangs active in more than 3,550 jurisdictions served by city and county law enforcement agencies in 2007.

Gangs remain a serious problem in the United States, and local prosecutors and district attorneys play an important role in addressing gang-related violence. The vast majority of violent gang-related crimes will be prosecuted at the local level by prosecutors in agencies where budgets are tight and resources for training are often minimal.

Gang-related crimes are, by their very nature, more difficult to prosecute than other sorts of crimes—full of interconnected relationships and complex dynamics between rival gangs. Today’s gang member victim may be tomorrow’s perpetrator. Witnesses and juries may be intimidated by the inherent and implied threat of violence from a gang-involved defendant. The awareness and sophistication of court employees and judges in dealing with gangs vary from place to place. Further, successful prosecution of a gang case may require expert testimony to help the jury understand the complicated cultural issues that are foundational to gang-related crime. Trying gang-related cases takes time, preparation, and knowledge.

For those reasons, this publication has been prepared to bring together information on the basics of gang crime prosecution at the local level. This is a workbook designed to help local prosecutors and investigators visualize and prepare for every step of a gang-related crime prosecution, from the initial crime scene investigation to preparing and presenting the case and, finally, sentencing issues specific to gang cases. This document has been prepared by working prosecutors and investigators from states with very different legal requirements. They have years of experience in dealing with the complexities of violent gang-related crime. The intent of this manual is to assist local prosecutors in holding gang-involved offenders accountable for their actions and, ultimately, guarding the community from gangs.

When a gang member has committed a violent act that has caused loss and pain to the entire community, the goal of effective prosecution should be a finding by a judge that protects the community and demonstrates an understanding of the negative toll taken on the victims by these acts:

“Everything I know about gangs tells me that gangs are dedicated to violence and crime. And, while there may be a certain brotherhood, it is done only to perpetuate whatever joy they get from drug abuse, the crimes they commit, the people they hurt, and the people they bully . . . I really cannot find any reason why I should not protect this community and keep Mr. Cortes off the street. He is one of the links of the chain that goes from the criminality and the violence of gangs, to our schools and to our community. This link, I intend to break . . . Mr. Cortes, this Court hereby sentences you to 25 years in the state prison [for attempted murder]. The court is departing from the guidelines to do so. I believe I have valid legal reasons to do so. I do not think you have a clue. I do not know how else, at this point, to teach you that you have done wrong.”

—The Honorable Maxine Cohen Lando, Circuit Judge, Miami-Dade County, Florida, *State of Florida v. David Cortes*, March 29, 1999.

Section 1: Investigating the Gang Case: Law Enforcement’s Impact on Successful Prosecution

Law enforcement’s preparation for gang-related crimes is the crux of successful prosecution. This section includes information on every aspect of law enforcement/prosecution cooperation, including police documentation of gang affiliation and activity, legal considerations in obtaining gang records, resources that can assist in documenting gang affiliation on the part of defendants, gang databases, search warrants, and the use of informants. It is designed for use by both prosecutors and law enforcement agencies. A sample gang search warrant and affidavit are also provided.

Section 2: Gang Group Crime Theories of Liability and Investigation Considerations: Why the Liability Net Gets Thrown Over So Many

In most instances of gang-related crime, a complex dynamic of connections exists between suspects and victims. The group dynamics of gang-related crimes and conspiracy liability are discussed in this section, along with ways that investigators can respond to crime scenes with multiple participants, gang expert testimony related to group crimes, and dealing with aiders and abettors to gang-related crimes.

Section 3: Filing the Gang Case

In many ways, gang cases are likely to be the most complex cases filed by a prosecutor. This section describes preparation for filing the case, further investigation that may be required, discussion as to whether cases should be filed in juvenile or adult court, decisions about filing against accomplices/accessories using theories of liability, and filing issues specific to murder trials.

Section 4: Presentation of the Case

Once the case actually gets to trial, a host of unforeseen issues can arise. This section deals with anticipating the challenges when presenting gang cases, including witness issues, presentation of gang evidence, litigating the admissibility of gang evidence, dealing with gang expert testimony, and jury selection issues specifically related to gangs.

Section 5: Sentencing Issues in Gang Cases

From the time the case is filed, sentencing issues should be paramount in the mind of the prosecutor. This section addresses sentencing issues during filing, such as misdemeanors versus felonies, alternatives to criminal filings, how filing in juvenile or adult court may affect sentencing, sentencing options for gang offenders, conditions of probation that are appropriate for criminal street gang members, and parole considerations.

Section 1.

Investigating the Gang Case: Law Enforcement's Impact on Successful Prosecution

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INTRODUCTION

Successful gang prosecutions are a result of the combined efforts of the district attorney's office and the local police gang unit investigators and/or robbery/homicide investigators handling the investigation. The strength of a gang case rests almost solely on the strength of the available gang evidence and the credibility of the gang expert. Experienced gang investigators who testify as court-recognized experts base their expertise on their knowledge of area gangs (and their enemy counterparts) and gang methodology, information provided by numerous street contacts, and other gang records that are properly documented and cataloged. Consistent and reliable recordkeeping, therefore, is essential for the successful operation of the gang unit and its future prosecutorial efforts.

GANG MEMBER IDENTIFICATION AND DOCUMENTATION

Without proper documentation of gang contacts, expert opinions lack a basis of fact that defense attorneys may attack, making it difficult for juries to render verdicts. Therefore, gang unit investigators (experts) must have hands-on street knowledge of jurisdictional gangs and must develop and maintain up-to-date gang records in the form of field interview cards, police reports, probation and parole records, court adjudications of prosecutorial efforts, and cataloged photographs of gang members, tattoos, and graffiti.

Gang investigators conduct regular street patrols; provide probation, parole, and search warrant services at gang members' residences; and make arrests for various violations of law. All of these contacts need to be documented and cataloged in an in-house database, and, when available, state or countywide databases, for other departments to utilize.

Patrol officers (first responders) spend a great deal of time on the street; more than many gang, narcotic, or other detective units. These patrol officers need to be tapped for their knowledge and trained in the proper collection and dissemination of gang information. Many patrol officers have regular contacts with gang members in their local areas. Patrol officers, if trained in proper collection of gang documents (field interview cards or crime and incident reports), can be an invaluable source to the gang

unit. The more “eyes and ears” the gang unit has on the street, the more information it will be able to collect, maintain, and store in its gang/intelligence files.

Gang investigators first and foremost must be familiar with the gang dynamics in their cities and surrounding jurisdictions. They need to know the nuances of each gang; i.e., its racial makeup, territory or lack thereof, affiliate gangs, enemy gangs, use of tattoos, graffiti, clothing, and its criminal propensities or methods of operation. Gang investigators need to know the history of the various gangs indigenous to or otherwise active in their jurisdictions. They need to familiarize themselves with the dynamics of the gangs, including but not limited to their membership size, territory, local hangouts, rivalries, and types of crimes committed, as well as the identification and personal and criminal backgrounds of individual members.

Before gang investigators collect, document, and catalog gang information, it is important that they and their agency have policies and procedures in place regarding documentation, collection, storage, and use of such records. Local, state, and federal restrictions or guidelines on maintaining gang and intelligence files must be upheld for the successful operation of the unit and its prosecutorial efforts. Gang unit supervisors and their investigators must be well-versed in these policies and procedures to ensure consistency in records and avoid claims of arbitrary enforcement. Gang units should include the entire department in the efficient and ethical collection of gang (documents) records. Therefore, gang investigators should take the time to conduct regular briefings/trainings for patrol officers, detectives, and others in the department responsible for the collection of gang documents. New officer orientation with gang unit detectives is also a good measure to ensure the proper collection of gang information.

Efficient and up-to-date documentation of gangs and gang members is critical for gang cases and is the key to the successful prosecution of gang-related cases. Documentation lends credence to the allegation of gang membership, status, and street presence and provides motives behind gang-related attacks or other gang behavior. Many patrol officers and even gang investigators sometimes have a strong knowledge of individual gang members with whom they have frequent contact, but because of the frequency of these contacts, these persons are often not field-interviewed or the contacts are not otherwise documented. Because of this lack of documentation, in court a case may lack critical documentary evidence of gang membership. All contacts with gangs or gang members should, therefore, be documented or memorialized in some fashion.



Hispanic Gang Graffiti on a Resident's Van

LEGAL CONSIDERATION IN OBTAINING GANG RECORDS

Good records detailing how gang information was obtained are important. The usefulness of gang records depends on the constitutionally permissible procurement of the information in the records. Information from suspected gang members or pictures taken of them in the field or at the police station may be obtained by consent or may be derived from another legally permissible avenue, such as a probation search, a lawful arrest, or a lawful investigatory detention. It is important to thoroughly document a gang member's consent in cases of consensual encounters. The documentation of consent is useful to survive a future challenge of lack of consent when the records are used in court. Absent consent, there must be a lawful justification for detaining a gang member to obtain gang-related information from the individual.

It is not against the law to be a gang member, nor can a law outlawing gang membership (by itself) withstand a constitutional challenge. Laws outlawing certain gang behavior usually focus on the active participation of an individual in the criminal objectives of a criminal street gang. Police may not stop gang members against their

will to interrogate and/or photograph them merely for belonging to a gang. The United States Supreme Court has stated that the guarantees of the Fourth Amendment do not allow stopping and demanding identification or information, or taking photographs from individuals without any specific basis for believing they are involved in criminal activity, *Terry v. Ohio*, 392 U.S. 1 (1968) and *Brown v. Texas*, 443 U.S. 47 (1979).

To justify an investigative stop or detention, the circumstances known or apparent to the officer must include specific and articulable facts causing the officer to suspect that (1) some activity relating to a crime has taken place or is occurring or about to occur and (2) the person the officer intends to stop or detain is involved in that activity, *Terry v. Ohio*, 392 U.S. 1, 21, *supra*. Further, evidence obtained during an illegal detention or arrest and evidence that is derived from initially illegally obtained evidence may be suppressed, *Wong Sun v. United States*, 371 U.S. 471 (1963). Derivative evidence, such as a photo identification of a suspect obtained from the use of evidence that was illegally obtained by the police explicitly for use in further criminal investigations (e.g., photos for gang books or field interview cards for gang databases), may be suppressed in court.



A Gathering of White-Supremacist Skinhead Gang Members

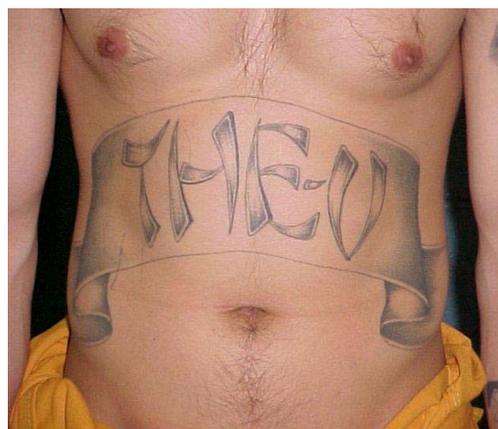
GANG BOOKS, SCHOOL YEARBOOKS, AND OTHER RESOURCES

Gang files or books should be gang-specific and include evidence showing the existence, territory, and dynamics of the gangs in the jurisdiction. They should, therefore, include photos of gang graffiti and its location; examples of various names and symbols used to identify the gang; photos of various tattoos worn by individual members affiliated with the gang; and group photos and/or photos of gang members throwing hand signs, holding firearms or other weapons, or dressed in obvious gang attire or having other indications of gang affiliation, including specific styles and colors of clothes and numbered or lettered jerseys associated with a particular gang (e.g., “AB” or “12” for Asian Boyz or “22” [22nd letter of the alphabet] for V-Boys—both Asian street gangs in Orange County, California).

This documentation should also include examples of personal items, such as letters to and from various members in correctional facilities; other letters with gang reference; schoolwork; and phone books with reference to individual members’ names, monikers, and phone numbers. It is also important to document and catalog any and all examples of disrespect to rival gangs, newspaper articles of gang homicides or other felonious assaults, photos of crossed-out graffiti in public places, and personal items with negative references to rivals with names crossed out. All of these aforementioned items should be properly cataloged by gang name, with the date and time they were discovered, the locations where collected, and the names of the individuals, officers, deputies, or agents who collected the cataloged items.



Asian Boyz (Asian Gang) Hand Sign



The V-Boys (Asian Gang) Tattoo

Gang books serve as a way to collect and maintain gang records and/or photographs of individual members. They should include photographs of all known gang members from a particular gang identified by self-admission or through other reliable sources. The books are used for possible suspect identification when the circumstances of an offense indicate it was committed by a member or members of a particular gang. Gang books tend to change or evolve over time as new members join the gang, gang members are killed off by rivals, or other members leave the jurisdiction or are sentenced to prison for long-term commitments. The gang books need to reflect these changes if they are to be used effectively in identifying, apprehending, and prosecuting gang members. Without continual updating, gang books become less effective for investigative, enforcement, and prosecutorial efforts. It is also critical to keep a record of what a gang book looked like at the time it was shown to a witness or victim (whether there was an identification or not) for use in court. Investigators should photocopy any and all photos shown to witnesses or victims and include them in the case file along with any admonitions given.

Another method used for identification is the arrangement of gang photos (in a gang book) in a multiple “six-pack” organizational scheme. If identification is made from a six-pack, not all photos from the gang book need to be copied and entered into the case file, only those shown in the lineup or series of lineups. This also protects the integrity and confidentiality of the gang book in its entirety.

School yearbooks from elementary schools, middle schools, and high schools in the jurisdiction are also a great tool to utilize in the identification of gang offenders. Given the youthful nature of most gang offenders, the yearbooks are an invaluable aid in the identification process when the perpetrator is known to the victim or witness from school and, particularly, if no other photos exist. Gang investigators should, therefore, regularly obtain up-to-date yearbooks to have at their disposal and should also maintain a close working relationship with school officials or resource officers regarding specific gang activity and/or membership on campus.

Photos showing gang members either alone or posing with other known or suspected gang members that are seized during the service of search warrants or probation and parole searches or that are otherwise lawfully obtained during criminal investigations should also be maintained and cataloged by gang and date.



V-Boys (Asian Gang) Dressed Up for Party Flashing Hand Signs

FIELD INTERVIEW CARDS

Gang records and/or databases should also be gang-member-specific. They should evidence an individual's specific affiliation and allegiance to his gang. These records should include original field interview (FI) cards that were completed by patrol officers, detectives, and gang investigators.

Information from the FI cards should then be entered into a local database to include the member's name, physical description, address, phone numbers (home, work, and cellular), scars, marks or tattoos, vehicles, and associate members with whom the individual has been in contact. Frequently, a fingerprint of a gang member is placed on the back of an FI card to ensure that there is no question later regarding the identity of the individual contacted. The documentation should also include the reason for the contact, such as reasonable suspicion, probable cause, or consensual encounter. A brief recitation of the facts surrounding the contact can be used later to refresh officer recollections and for suppression motions and impeaching inconsistent defendant testimony. Also included on the FI card should be the gang member's status in the

gang and how it is known—not just that the member belongs to a gang but how that fact was established (self-admission, tattoos, clothing, or involvement with other self-admitted members in gang-related activity). Whatever the basis, it needs to be documented. Any self-admission should be in quotes: “I claim West Trece,” or “I was jumped into the Orphans,” or “I kick it with Asian Boyz.”



Female Racist Skinheads

All gang-related FI cards should be sent to the gang unit or other unit responsible for keeping records on gang members or gang crime. Some departments send all FI cards to the records bureau and may eventually forward them to the gang unit. To be most effective, FI cards need to be promptly sent to the gang unit investigators. Therefore, an NCR (ticket format) FI card is an effective method of disseminating the FI cards in a timely manner. A three-part form can be utilized, wherein one copy is disseminated to and maintained by the gang unit, one copy is given to the records bureau for departmentwide recordkeeping, and the last copy is

provided to the regular detective bureau and reviewed by all members of the division. All members of the department (patrol, detectives, gang unit, etc.) should be involved in the process of completing FI cards and ensuring that they are disseminated accordingly to ensure effective law enforcement and investigative efforts.

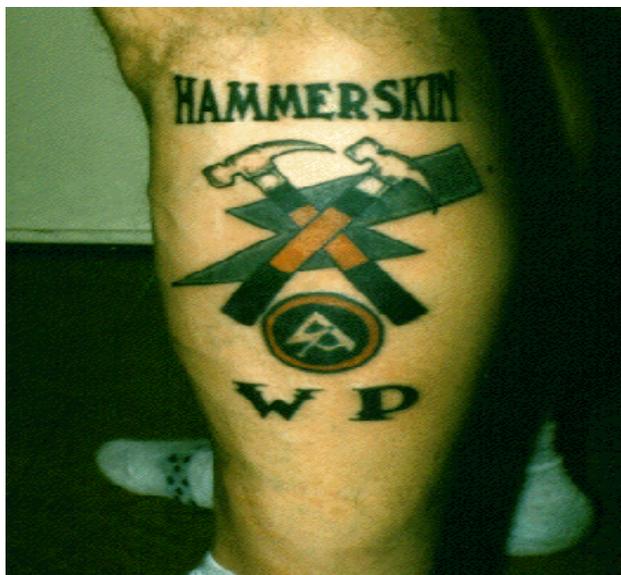
There should also be a policy or procedure in place that outlines the circumstances in which FI cards may or should be completed. Law enforcement-generated gang member photographs frequently accompany FI cards or other official documents of the police department (gang notifications—California STEP Act notices explained below). Information on the back of an FI card or other document should, therefore, include a photo consent signature line. The photo should also include the date and time it was taken and under what circumstances (e.g., during a detention, following an arrest, by consent). Photos taken without legal justification are subject to exclusion from evidence in court, and identifications from illegally obtained photos are subject to suppression. In court, identifications must then be proven by the prosecution to be the independent product of the witness's recollection and not tainted by a suppressed photo used in the out-of-court identification process.

CRIME AND INCIDENT REPORTS

Any report documenting a gang member's criminal activity or in which he or she is identified as the victim of a gang-related crime should be maintained and cataloged by individual member, gang, and date.

In addition to police and incident reports, police and probation and parole officers serve notices on gang members of the penalties for active participation in a criminal street gang under the California Street Terrorism Enforcement and Prevention (STEP) Act. The notice informs a gang member that the police, probation or parole officers, or the courts have determined that the recipient is an active participant in the street gang and that continued participation may result in criminal prosecution, including enhanced penalties (sentences) for gang-related criminal violations. A copy of this notice, or "proof of service," is kept as proof that the gang member received the notice. A juvenile offender's parents are also given a copy of the form and are notified of their child's gang membership or participation. The proof of service usually includes the same information as the FI card, with an emphasis on gang activity, and is often accompanied by a photo of the gang member who was served with the notice. The FI card can include the STEP information on the reverse side. The STEP notice includes

the gang member's name, the name of his gang, and the fact that his gang is a criminal street gang pursuant to Section 186.22 *et al.* of the California Penal Code. This notice also outlines the related 33 criminal offenses that define criminal gang activity. There is a signature line for the gang member to sign and date indicating that he/she has read and understands the nature of the information in the act. These documents should be maintained and cataloged in the same manner as the other gang records previously mentioned.



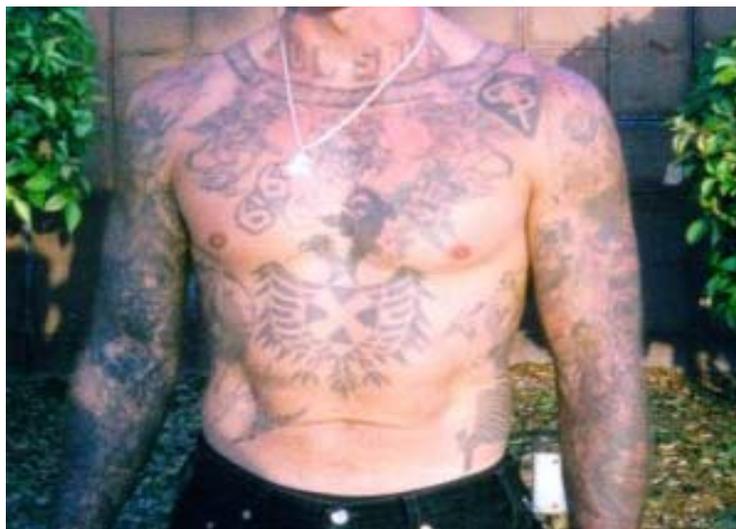
"White Power" Tattoos

GANG DATABASES: STORING AND RETRIEVING GANG RECORDS

The backbone of any successful gang unit is the strength of its intelligence files or gang records. Gang unit investigators should not only contribute their gang intelligence information to regional gang databases, to be shared with other law enforcement agencies, but should also develop and maintain their own in-house records, in case regional databases "crash" or are otherwise unavailable because of updates or repair. Regional databases typically offer thousands of records of gangs and gang members from many jurisdictional areas where authorized users can read and update files, download and retrieve photos, and utilize the system to further their investigations. Many of these databases contain gang members' names, addresses, vehicles, and probation and parole status and have a wide range of search capabilities.

An in-house database should be designed as a system for collecting, analyzing, and storing information that qualifies as criminal intelligence and should allow only limited dissemination and use of the intelligence to enhance public safety. Gang unit investigators need to preserve the integrity of the system by keeping it secure from others who have not been authorized or lack responsibility for maintenance of such files. The constitutional protection of privacy of individuals (whose information is listed in the system) must be followed and a purging system must be adhered to for the credibility and integrity of the files. There should also be a policy and procedure governing access to the system and for determining what information may be entered and maintained. This procedure must follow applicable federal and state laws.

The in-house database should allow the authorized user to enter and retrieve information on the gang's history, individual members, monikers, addresses, phone numbers, vehicle information, tattoos, marks or scars, and specific incident or crime reports. The in-house database is an invaluable tool that can provide instant access to up-to-date information on gang membership, expedite the investigation process, and lead to successful prosecution of gang cases.



White-Supremacist Tattoos

GANG DATABASE LEGAL CONSIDERATIONS

As noted above, the United States Constitution prohibits criminalizing mere membership in an organization (even ones with an apparent criminal nature), *Scales v. United States*, 367 U.S. 203, 223 (1961). However, associating with members of an organization and performing acts that carry out criminal objects of the organization may be criminalized. Most state constitutions have similar associational protections. It is important to note that while states may not allow for less constitutional protection than is guaranteed by the federal constitution, the states may afford individuals more protection. The usual attack on intelligence files is that the databases are targeting groups not engaged in criminal behavior or associating an individual with a group whose members engage in criminal acts.

Citizens have a right to be free from governmental intrusion, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Berger v. New York*, 388 U.S. 41 (1967); and *Katz v. United States*, 389 U.S. 347 (1967). On the other hand, law enforcement has a legitimate interest in monitoring individuals and groups that engage in criminal group behavior. The process of collecting evidence on these individuals and groups, however, creates a tension between the need of society to be protected by law enforcement and the privacy expectations of individuals.

As a result of these competing interests, in 1968, the United States Congress passed the Omnibus Crime Control and Safe Streets Act, which attempted to recognize the need for intelligence databases and the right to privacy. The act resulted in the passage of the Code of Federal Regulations, Title 28, Part 23 (28 CFR Part 23), which outlines the requirements for entering information about an individual or a group into an intelligence system and purging the data from such a system. While the regulation was designed for multiple jurisdictional intelligence databases, it is an excellent guide for individual police departments as well because the regulation balances law enforcement's intelligence needs and individual privacy requirements.

Criminal intelligence information is defined in 28 CFR Part 23, Section 23.3(b)(3), as data which has been evaluated to determine that it:

- (i) Is relevant to the identification of and the criminal activity engaged in by an individual who or an organization which is reasonably suspected of involvement in criminal activity.
- (ii) Meets criminal intelligence system submission criteria.

The submission criteria (the basis for entry into an intelligence database) are delineated in 28 CFR Part 23, Section 23.20(a), (b), (c), and (d), and include the following:

- (1) A reasonable suspicion (an abstract term that depends on the facts of particular situations) that an individual or organization is involved in criminal activity.
- (2) Prospective information to be entered is relevant to the criminal activity.
- (3) Information does not include information about political, religious, or social views, associations, or activities except where such information relates directly to the criminal activity that is the basis for focusing on the individual or group.
- (4) Information was not obtained in violation of any federal, state, or local law or ordinance.
- (5) Information establishes sufficient facts to give a trained law enforcement or criminal investigative agency officer, investigator, or employee a basis to believe that an individual or organization is involved in a definable criminal activity or enterprise.

Under the guidelines in 28 CFR Part 23, Section (b)(6), information in an intelligence database must be evaluated for its relevance and importance at least every five years. Information not in compliance with the submission requirements should be purged, even if it is discovered to be noncompliant before five years. No information from the database should be disseminated without a legitimate law enforcement reason, such as a criminal case being filed against a suspect with information in the database.



Juvenile Hispanic Gang Members

GANG SEARCH WARRANTS

Investigations in serious gang offenses frequently include obtaining a search warrant seeking, among other things, evidence of the suspect's gang membership. Gang evidence is invaluable in helping to explain the motivation for the commission of some gang crimes and is helpful in identifying the suspects by establishing, for example, membership in a gang rival to the victim's gang. There is no such thing as too much gang evidence, even in cases of clearly gang-motivated crime.

Gang dynamics frequently allow for search warrants permitting the searching of multiple locations. The most basic element of a gang is that it is a group that perceives itself as a group and acts as a group during the perpetration of delinquent or criminal offenses, hiding the instrumentalities or fruits of such offenses. Given the group dynamics and group criminal liability involved in many gang-related offenses, criminal investigations focus on many suspects in gang cases. The mere existence of multiple suspects normally allows for a search warrant for multiple locations. Gang practices of hiding evidence or instrumentalities of crimes for fellow gang members also afford more possible locations to be searched in gang cases.

An affidavit in a gang search warrant requires all of the care and content of a non-gang search warrant and much more. The affidavit in a gang search warrant includes the following necessary components:

- (1) The affiant's identity and training, education, experience, and expertise relating to the existence and activities of street gangs.
- (2) The affiant's personal observations and information from other persons and sources relevant to establishing probable cause.
- (3) A statement of the facts justifying the affiant's belief that the information included in the affidavit from other sources is accurate and reliable.
- (4) A conclusion with the opinion that based on the affiant's training and experience and the facts in the affidavit, the items sought will be found at the requested locations to be searched.

- (5) Specific opinions to establish that:
 - (a) The warrant affidavit's probable cause to believe the suspect gang exists,
 - (b) The suspects are members of that gang, and
 - (c) The crime was done for a gang-related purpose.
- (6) Facts regarding the suspect's membership in the gang as documented in FI cards, police reports, or any other documents or photographs need to be spelled out in detail in the affidavit.
- (7) An expert opinion explaining gang dynamics—such as passing evidence, instrumentalities, or fruits of a crime among fellow gang members—that allows for the search of multiple locations or is useful in overcoming staleness, if much time has passed since the commission of the crime.

In a typical gang-related search warrant, a gang investigator should seek items of evidence to prove that the underlying crime occurred, as well as instrumentalities or fruits of the committed crime. Additional items would include evidence of street gang membership, such as documents, photos, drawings, writings, objects, graffiti depicting the named suspects in the case or gang or gang member names, initials, logos, monikers, or any newspaper clippings referencing the crime under investigation. (Examples of language for the affidavit in a gang search warrant and the language for the warrant itself are found in the "Gang Search Warrant and Affidavit Language" section of this document.) Of course, the investigator also must request permission to search for any articles of personal property tending to establish dominion and control over the premises and/or automobile(s) to be searched.



Hispanic Gang Tattoos

For a number of reasons, it is important to analyze and catalog the items seized in a “gang warrant” following the service of the warrant. First, it allows the magistrate who approved the warrant to determine that only items authorized in the warrant were seized. Second, although it is a tedious task, all of the seized letters need to be read, seized film developed, and seized tapes listened to, because their value depends on their content. Finally, a detailed inventory itemizing the evidence should be prepared for use in the instant case and for future use. Such an inventory allows for easy retrieval and should also be included in the gang intelligence files.

USE OF INFORMANTS AND THE NEED FOR AN INFORMANT POLICY

“It takes one to know one” is the age-old premise of using CIs (cooperating individuals or confidential informants) in criminal investigations. *Cooperating individuals* is the preferred reference to individuals who cooperate with the police, because the definition is more expansive and recognizes that great care must be taken when one is using the information from a cooperating individual. A *cooperating individual* is any person who knowingly provides information to law enforcement related to another’s criminal activity, whose motivation for doing so is other than that of an uninvolved witness who is a victim or private citizen primarily acting through a sense of civic responsibility, and who, as a general rule but not necessarily, expects some sort of personal benefit or advantage or the same for another individual. A

benefit is usually financial or reduced punishment or some other favorable treatment given in exchange for the information.

Typical CIs in gang cases include mercenaries (paid informants), gang members cooperating to obtain leniency in another case, codefendants, or friends not involved in the present crime. Cooperation covers a range of possibilities, including (among other things) making tape-recorded telephone calls, supplying information regarding the suspects of a crime or their present whereabouts, wearing a recording device while attending a meeting of gang members, recapturing stolen property for the police, and/or testifying.

While the benefits of CI-supplied information can be enormous, CIs should be used with great caution. Juries do not like “snitches.” Police and prosecutors should carefully log all benefits conferred on a CI during an investigation and disclose the benefits before trial to the defense. Such benefits are viewed legally as motivation for a CI to favor law enforcement while testifying. Great care must also be given to disclosing to the defense any exculpatory *Brady* material that might be discovered as a result of the CI’s cooperation, *Brady v. Maryland*, 373 U.S. 83 (1963).

CIs should only be used after a written agreement is signed that fully discloses the agreement between the CI and the police (in conjunction with the prosecution). Police should also maintain a log of all supervision of and direction given to a CI and document the performance of the CI, both good and bad. It is critical to present the CI in the most accurate light possible to avoid the appearance that the police and prosecution are hiding things.

Juveniles should not be used as CIs absent extraordinary (usually life-or-death) circumstances. Use of juveniles is normally highly restricted by law. In California, for example, no juvenile can be used as a CI without authorization from the juvenile court following a hearing on the matter. As a practical matter, juveniles are never used because of the showing necessary for the juvenile court’s authorization. Restrictions also frequently exist regarding the use of probationers and parolees. Acting as a CI and being around criminal behavior and characters are viewed as inconsistent with the reformatory nature of probation or parole.

CONFIDENTIALITY ISSUES

Juvenile Court Records

It is becoming increasingly easier to obtain juvenile court records. Throughout the 1990s, efforts were made to distinguish less serious juvenile offenders from serious and violent recidivist juvenile offenders. More juveniles are now remanded to adult court for trial, which means the court proceedings and records are open to the public. In addition, many states now allow for open juvenile hearings on alleged offenders who are over a certain age or are accused of committing a serious or violent felony offense. Since 2000 in California, juvenile records evidencing adjudication for a serious or violent felony offense may never be sealed and are open to public inspection.

Typically, juvenile records are available to the prosecution in new cases against a specific juvenile offender. Juvenile records, however, are also useful in cases besides the specific offender's case in jurisdictions that require the prosecution to establish that a gang has committed a certain number of predicate offenses. Given the young age of many gang member offenders, juvenile records are frequently helpful in showing the required predicate offenses committed by juvenile members of the gang. At times, there are no adult convictions available, necessitating the use of juvenile adjudication records. Occasionally, a court order is necessary to inspect or copy records of a juvenile gang member for a case other than his own.

GANG SEARCH WARRANT AND AFFIDAVIT LANGUAGE

Gang Paraphernalia Language

Search Warrant Description

Any evidence of street gang membership or affiliation with any street gang, said paraphernalia to include, but not limited to, any reference to XXXXX; said items to include any (color used by specific gang) bandanas, drawings or miscellaneous writings, or objects, or graffiti depicting gang members' names, initials, logos, monikers, slogans, or containing mention of street gang membership affiliation,

activity, or identity; any paintings, drawings, photographs or photograph albums depicting persons, vehicles, weapons, or locations which may appear upon observation to be relevant on the question of gang membership or association, or which may depict items sought and/or believed to be evidence in the case being investigated with this warrant, or which may depict evidence of any criminal activity; any newspaper clippings tending to relate details or reference to any crime or crimes of violence; and any address books, lists of, or single references to, addresses or telephone numbers of persons who may later be determined to belong to or be affiliated with any street gangs.

Affidavit Language to Justify Seizure of Gang Paraphernalia

I request permission to seize any evidence of street gang membership or affiliation with any street gang, said paraphernalia to include, but not limited to, any reference to XXXXX; said items to include any drawings or miscellaneous writings, or objects, or graffiti depicting gang members' names, initials, logos, monikers, slogans, or containing mention of street gang membership affiliation, activity, or identity, as it is my experience that most street gang members are known by street names or monikers to their fellow gang members, and that they frequently write their names or monikers of their associates on walls, furniture, miscellaneous items, or papers, both within and on their residences, and within and on their vehicles; any paintings, drawings, photographs or photograph albums depicting persons, vehicles, weapons, or locations which may appear upon observation to be relevant on the question of gang membership or association, or which may depict items sought and/or believed to be evidence in the case being investigated with this warrant, or which may depict evidence of any criminal activity, as it is my experience that most gang members keep photographs and photograph albums, in which are depicted (1) fellow gang members who are posing and giving hand gang signs that indicate gang identity or affiliation, (2) gang members or associates posing with weapons, particularly firearms that are often used for criminal activities, (3) gang members or associates posing beside vehicles that are occasionally used during the commission of crimes, and (4) gang members or associates posing at locations that are known to be specific gang hangouts; any newspaper clippings tending to relate details or reference to any crime or crimes of violence, as it is my experience that gang members occasionally maintain scrapbooks or newspaper articles that describe crimes committed by or against their gang; and any address books, lists of, or single reference to, address or telephone numbers of persons who may later be determined to belong to or be affiliated with any street gangs, since it is my experience that gang members

frequently maintain the current phone numbers or addresses of fellow gang members whom they associate with.

It is my opinion that evidence of gang membership or affiliation with any street gang is important, as it may suggest motive for the commission of the crimes, in the instant case, and it may provide evidence which tends to identify other persons who may have knowledge of or be involved in the commission of the crimes in the instant case, or it may tend to corroborate information given by other witnesses.

I believe that these are not the types of items normally disposed of after the commission of a crime and that they will, therefore, likely still be found in the locations or on the persons to be searched.

Dominion and Control Language

Search Warrant Description

Any articles or personal property tending to establish the identity of persons who have dominion and control over the premises, automobiles, or items to be seized, consisting of rent receipts, utility company receipts, miscellaneous addressed mail, personal letters, personal identification, keys, photographs, vehicle titles, and vehicle registration slips.

Affidavit Language to Justify

Seizure of Dominion and Control Evidence

I request permission to seize any articles of personal property tending to establish the identity of persons who have dominion and control over the premises, automobiles, or items to be seized, consisting of rent receipts, utility company receipts, miscellaneous addressed mail, personal letters, personal identification, keys, photographs, vehicle titles, and vehicle registration slips.

I believe that all of these items will tend to connect the premises, persons, locations, and vehicles to be searched with the items to be seized and the case being investigated. It is my experience that these types of items are usually present at the types of locations sought to be searched in this warrant, and I

believe that these items are not the type normally disposed of and can, therefore, be found at the locations to be searched.

Affidavit Language to Establish Relevance of Gang Evidence

(Overcoming staleness with the dynamic of guns and evidence being passed among fellow gang members)

Based upon all of the above, the attached exhibits, and my expertise on gangs, I have the following opinions regarding this case:

- (1) *That there is a longstanding and ongoing war between members of the XXXXX and the XXXXX and that this war has involved many acts of violence on both sides.*
- (2) *That I personally know that the XXXXX are a close-knit group and that it is not uncommon for many of the members to be involved in related acts of violence.*
- (3) *That when an ongoing war situation involving many separate members of the same gang exists, it is not uncommon for the violent members at the central core of the gang to associate with each other, and to plan together aggressive acts and/or acts of violent retaliation to be perpetrated by a few members of this violent central cadre.*
- (4) *That the pattern of violent acts between the XXXXX and the XXXXX and the large number of separate people involved in these acts makes it more likely than not that there is a general common plan existing among the XXXXX to commit acts of violence with the XXXXX.*
- (5) *That in a longstanding, gang-shooting war, members of the victim gang in one shooting frequently know or suspect that they know who the perpetrators are because of the “word on the street,” which is information passed from person to person, often based on sources within the perpetrators’ gang, on eyewitnesses reluctant to cooperate with the police, or on gang graffiti that is composed of writings on buildings or walls and*

is a means used by some gang members to take credit for a violent incident.

- (6) That because of the above, a person involved as a shooter in a gang-related war incident will generally assume his identity is known on the streets and that, while he must temporarily dispose of the weapon used in the underlying offense, he must at the same time have accessible to himself a weapon which can be used for self-defense upon short notice.*
- (7) That gang members who are involved in an ongoing war of shooting incidents frequently do not permanently dispose of their weapons, preferring to retain access to them for protection from retaliation or for further use in acts of aggression while the war is continuing.*
- (8) That gang members who use a firearm in gang war situations frequently borrow the weapon used from a fellow gang member, and after the commission of a violent act with the weapon, they return it to the gang member they borrowed it from, to prevent it from being seized by law enforcement officers pursuant to a search conducted shortly after the commission of the crime.*
- (9) That gang members who do use their own firearms in gang war situations frequently pass the weapons used to fellow gang members for safe keeping, in order to prevent the weapons from being seized by law enforcement officers pursuant to a search of their residences, vehicles, or persons.*
- (10) That when a gang member in the above situation believes that he is no longer liable to be searched as a suspect in the shooting incident, he will frequently retrieve the weapon used and store it where it would be readily accessible for defense or offense, such as in his residence, on his person, or in a vehicle to which he has access.*

Section 2.

Gang Group Crime Theories of Liability and Investigation Considerations: **Why the Liability Net Gets Thrown Over So Many**

By

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INTRODUCTION

Gangs represent perhaps the greatest violent crime threat facing society. Successful gang crime investigations and prosecutions usually require an intimate familiarity with typical gang dynamics and the legal theories associated with group criminal behavior. Before a gang can be anything else, it must first be a group and almost always a group that involves itself, as a group, in serious and violent criminal conduct.

Unfortunately, one of the few consistent findings in gang research is that gang members commit a disproportionately high number of delinquent and criminal acts compared with other non-gang-involved youth. Frequently, gang members commit crime as a group, and such group criminal behavior poses unique dangers to society far more serious than the risk typically related to individual criminal behavior. Understanding the legal theories of group criminal liability assists in the investigation of most gang-related crimes—especially in crime scene considerations, victim and witness interviews, and the interrogation of suspects.

Consider the following hypothetical yet typical gang activity scenario:

Three documented members of the Crazy Punkz (CP) street gang notice that someone from the Not So Smart Boyz (NSSB) has come into CP territory and “plaqueed up” (spray-painted) a wall in the CP territory with NSSB graffiti. The plaqueed-up wall is the main wall used by CP to spray-paint CP graffiti and is in the heart of CP territory. The NSSB culprit also crossed out the CP graffiti. Naturally, the three CP members feel disrespected and agree to collectively retaliate against NSSB by likewise spray-painting walls in the NSSB turf.

The CP members decide that because they are going into NSSB territory, they should bring along a firearm in case they are confronted while spray-painting and that two of the three will paint while the third watches for rivals and the police. The three agree that the gun will ONLY be used, if at all, to scare a rival, assuming the group is confronted while in NSSB territory.

The three enter the NSSB neighborhood and leave their CP graffiti everywhere they can. Sure enough, several NSSB gangsters see the CP members and confront them. The CP member keeping lookout (and possessing the handgun) immediately takes out the handgun and fires several shots at the NSSB members while screaming, “Die, you cheese-eating rats!” Two NSSB gangsters are killed and two others severely wounded.

Who is liable for what crimes? Hint: consider group crime dynamics, conspiracy and aiding and abetting laws, and extended or derivative liability principles. Sequentially, the CP members conspired to commit a misdemeanor (vandalism), which makes the target crime a felony in many states; they jointly possessed the handgun (one actually, the others constructively); they are each liable for the acts of vandalism (two as direct perpetrators, the other as an aider and abettor); and the shooter CP gang member directly perpetrated the murder of the two dead NSSB members and the attempted murder of the other two who survived. The remaining two CP members are also liable for the murders and the attempted murders as the natural and probable consequences of conspiring to vandalize the NSSB territory while possessing a firearm. To fully appreciate the application of these concepts, it is necessary to review group crime dynamics, the basic principles of aiding and abetting and conspiracy laws, and extended derivative liability.

GROUP CRIME DANGERS

The old adage “two heads are better than one” exemplifies the dynamics and dangers associated with group participation in criminal acts. Often, group actions synergistically affect the outcome of an intended goal. While group work and synergy are normally considered positive attributes, these principles work dangerous consequences when applied to criminal enterprises. Criminal law has historically responded with severe sanctions against participants in group crime. Specialized legal theories and crimes and criminal punishments have been developed in response to the dangers of group criminality.

“Unquestionably, the purpose of the law in making it an offense to [agree to commit a crime as a group] is to reach everyone who has participated in forming the evil plan irrespective of who or how many carry out the design, and well may this be a protection to society, for a group of evil minds planning and giving support to the commission of crime is more likely to be a menace to society than where one individual alone sets out to violate the law.”

People v. Luparello, 187 Cal. App. 3d 410, 437 (1986)

The above is true because group behavior in crime represents a unique danger to society. The potential for harm to society increases when multiple participants are involved in the planning and execution of criminal schemes. As one court has said,

“The punishment of conspiracy as a felony . . . is explained on the theory that concerted criminal activities are a much more serious danger than individual criminal acts, and therefore justify drastic sanctions against the criminal agreement itself.”

Williams v. Superior Court, 30 Cal. App. 3d 8, 11 (1973)

The United States Supreme Court has stated the following concerning the dangerous dynamics associated with group criminal behavior:

“Collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal objective will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of

ends more complex than those which one criminal could accomplish. Nor is the danger of a [criminal] group limited to the particular end toward which it embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which [group criminal behavior] generates is not confined to the substantive offense that is the immediate aim of the enterprise.”

Callanan v. United States, 364 U.S. 587, 595 (1961)

Group crime represents not only the danger of a crime being committed but also a uniquely elevated danger potential. As stated by the California Court of Appeal:

“The basic [group crime prohibition] principle has some place in modern law, because to unite, back of a criminal purpose, the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer. Collaboration magnifies the risk to society both by increasing the likelihood that a given quantum of harm will be successfully produced and by increasing the amount of harm that can be inflicted.”

People v. Williams, 101 Cal. App. 3d 711, 721 (1980)

The specific dangers of group crime include an increased chance of the planned crime actually occurring, a greater possibility of criminal success, a higher risk of violence, and an increased likelihood of escape or not being detected. Group behavior increases courage and lowers inhibitions among group members.

Group criminal participation historically has received severe sanctions because of the unique dangers associated with group criminal dynamics. When a group is set upon committing a crime, there are accompanying dangers. For example, the chance of the crime actually occurring increases because the group dynamics result in increased courage, perceived strength from numbers, lowered inhibition among the group members, higher degrees of negative peer influence, and a reluctance for group participants to back out of the criminal design because the others are relying on them. Simply stated, people do things in a group environment that they would not do alone. Many hands make light work, and many minds can formulate better plans and more thoroughly prepare for contingencies. Compared with a single individual, a group increases the chances of a crime being better planned. Groups also possess more physical strength (helpful in carrying away stolen property, subduing victims, passing or concealing weapons, breaking down doors, etc.) than individuals and can expedite the commission of an offense by dividing the tasks necessary for the completion of the

crime. Finally, the enhanced physical and mental attributes of a group criminal enterprise better allow a group to escape following a crime. This is accomplished by quicker execution of the crime, given the enhanced physical and mental attributes of a group.

TEENAGE GROUP CRIME DANGERS

The group crime dangers described above are exacerbated when the group is composed of teenagers and young adults and even more so with gang members. Teenagers and young adults, on a percentage basis, are more frequently involved in criminal acts than adults. Youthful offenders have limited or immature levels of judgment and social development. Peer influence is at its highest among younger people, and this age cohort frequently involves itself in group activities (criminal and noncriminal). A startling reality is that more than 90 percent of delinquent acts are committed in groups of two or more (Bursik, 1993, p. 142).

GANG GROUP CRIME DANGERS

Gang group criminal involvement represents the zenith of group crime dangers. While there is no universal definition of a gang, every available definition recognizes a gang as a group (Klein, 1995, p. 94). In fact, a gang draws its identity, strength, and reputation from its strength as a group and the crimes it commits, usually as a group. Research has consistently shown that gang members have extraordinarily high levels of delinquency and criminal involvement (Esbensen, 1993, p. 110). Gangs not only commit crime as a group but also do so more frequently than other youthful offenders who, in turn, commit a greater percentage of crime than older-age cohorts. Compounding the problem is that gang members possess an antisocial, oppositional mind-set; reject middle-class values; more frequently drop out of school (which increases free time, leading to more criminal opportunity); have high levels of substance abuse; and identify more closely with negative peers. The bottom line is that gangs represent one of society's greatest group criminal threats.

BASIC CONCEPTS OF GROUP CRIMINAL LIABILITY

Direct Criminal Liability

Most states consider persons who directly and actively commit or attempt to commit acts constituting a crime as principals in the commission or attempted commission of the crime. All such perpetrators are equally guilty of the crime, no matter if the involvement of all is not equal. So long as each is a perpetrator of the offense, each is legally culpable and, therefore, legally blameworthy.

Aiding and Abetting

Principals in a crime also include those who aid and abet the commission of the offense. Aiders and abettors are liable for the same crime as the direct perpetrator(s) and are punished the same. A person aids and abets the commission of a crime when he or she (1) aids, promotes, encourages, or instigates another person or persons in the commission of a crime; (2) has knowledge of the unlawful purpose of the perpetrator(s); and (3) has the specific intent or purpose of committing or encouraging or facilitating the commission of the crime.*

(*Many states require only willful assistance of another in the commission of a crime with knowledge of the perpetrator's intent. There is no requirement of intent in the mind of the aider and abettor for the crime to actually occur.)

Simply stated, an aider and abettor is a person who helps someone in the commission of a crime while having at least knowledge of the direct perpetrator's criminal or unlawful purpose. The aider and abettor either has to act knowing that the act will help facilitate a crime or, in a minority of the states, must share with the direct perpetrator the specific intent for the crime to actually occur. The aider and abettor by act or advice (words) aids, promotes, encourages, facilitates, or instigates the commission of the direct perpetrator's crime.

There is no requirement that an aider and abettor be present at the scene of a crime, merely that he or she knowingly helped the perpetrator commit the offense. Drawing a diagram of the interior of a robbery location, giving the alarm codes, or loaning the instrumentalities of a crime (getaway car, guns, rope, or duct tape) are good examples of assisting the commission of a crime while not being present for its execution. On the other hand, merely being present during the commission of an

offense is not a crime. Likewise, knowing that a crime is about to occur and failing to report or prevent it is not a crime.

Conspiracy Liability

Collective gang criminal action frequently also constitutes a conspiracy. A conspiracy is two or more persons agreeing to commit a crime. Many states also require that one of the conspiring parties commit some act, known as an overt act, toward the completion of the agreed-upon crime before criminal liability attaches against all of the conspirators. There is no requirement that the overt act be a crime, just that it be done to further the criminal goal of the conspiracy.

Regarding the required mind-set of the conspirators, each must have the specific intent to agree and to commit a crime. There is no requirement that the planned offense actually occur or that all of the conspirators be present if the crime is attempted or completed. Because of the recognized dangers of group criminal activity, the law usually punishes a conspiracy the same as if the target crime actually occurred. Finally, if the target crime is attempted or actually occurs, there is separate criminal liability for attempted or completed crime.

INVESTIGATION CONSIDERATIONS

Frequently, in a gang context, a group rather than an individual commits crime. Anytime multiple participants commit a crime, it is important to investigate the crime with group criminal liability concepts in mind. When there are multiple possible criminal perpetrators, it is important to focus on the actions of each suspect, not just the obvious ones.

Crime Scene

Evidence found at a crime scene may indicate the involvement of multiple suspects. Physical evidence is powerful corroboration of victim, witness, and/or suspect statements. Every reasonable effort should be made to collect and analyze all available crime scene evidence. Issues to consider include:

- (1) Were multiple weapons used?
 - Were different caliber expended bullet casings or projectiles found at a shooting?
 - Were different types of weapons left at the crime scene?
 - Do the victim's wounds indicate more than one weapon was used?
- (2) Is the available fingerprint, blood, or DNA evidence indicative of several perpetrators?
- (3) Were any other instrumentalities of the crime left behind demonstrating group criminal behavior?
 - Items of clothing, notes, multiple vehicles, etc.
- (4) Is there any security video available from the scene or nearby locations where the suspects may have been just before or after the crime?
- (5) Is there any other physical evidence that has a tendency to show there was a group of perpetrators involved in the crime who were assisting each other in the commission of the offense or facilitating or encouraging the commission of the offense?
- (6) Was there any fresh graffiti sprayed in the area immediately before or after the crime that could be a gang's claim of responsibility for the crime?
- (7) Were the victims or intended victims documented gang members based on police records?

Witness Statements

Obviously, witnesses are a valuable source of information in multiple-perpetrator crimes. Sometimes, however, witnesses are allowed to give conclusionary statements (e.g., "They all attacked the victim!" or "The skinny guy was acting as a lookout.") instead of detailed accounts of each suspect's involvement. It is important for witnesses to fully describe the actions of each perpetrator, whenever possible. Witnesses should also be separated from each other as soon as possible and interviewed individually. Finally, whenever possible, witnesses should be tape-recorded to ensure

that the witnesses' stories are unquestionably memorialized should the witnesses become uncooperative during court testimony.

Witnesses to a crime can provide important information in the following areas:

- (1) Number of suspects.
- (2) Specific actions of each suspect.
- (3) Whether the suspects arrived and/or left together.
- (4) How the suspects talked and interacted with each other. (Did they speak to one another as if they were associated, and were they directing each other during the commission of the crime?)
- (5) Were there multiple direct perpetrators of the crime (e.g., shooters, stabbers, spray-painters, or beer grabbers in a beer run)?
- (6) Were the suspects dressed similarly or in the same color of clothes?
- (7) Was a gang name announced or were hand signs used before, during, or immediately after the commission of the crime?
- (8) Were the suspects known to the victim(s) and witness(es) and known as gang members?
- (9) Was someone acting as a lookout (have the witness be specific in describing the suspect's actions) or as a distraction while others were stealing property or running out of the convenience store with alcohol or other stolen property?
- (10) Any other suspect actions that indicate prior planning and agreement.

It is important to remember that a conspiracy is a completed crime either at the time of the agreement to commit a crime or, in those states requiring it, at the time of an overt act by one of the conspirators in furtherance of the agreement to commit a crime. There may be no traditional crime scene with a conspiracy because the would-be perpetrators did not complete the agreed-upon crime before something caused the cessation of the movement toward the crime's completion. Likewise, in an aiding-and-

abetting situation, if the crime is attempted but not completed, then the direct perpetrators and the aiders and abettors are still liable for the attempt.

Consider the following scenario to demonstrate when criminal liability attaches despite the perpetrator(s) not completing the intended crime.

While driving in a car, a group of four gang members are stopped by a patrol officer for a routine vehicle code violation. The car turns out to be stolen. A search of the car reveals four ski masks, two handguns, a roll of duct tape, a stun gun, and a map to the home of a jewelry merchant, who is neither related to any of the gang members nor knows any of them. To the experienced gang investigator or prosecutor, these facts are powerful evidence of a conspiracy to commit a residential robbery.

Gang Expert Testimony

A gang expert's testimony is critical in gang aiding-and-abetting situations. A gang expert is someone who, through training, experience, and/or education, is thoroughly conversant with gang dynamics. The expert can help explain typical gang behaviors that are pathetically predictable but beyond the common experience of most jurors. Following is a listing (although in no way an exhaustive list) of several common gang dynamic concepts and gang behavior examples of aiding-and-abetting and/or conspiracy situations:

- (1) **Backing up.** Gang members are expected to stand by while a fellow gang member confronts or is confronted by a rival or commits a crime in case the fellow gang member needs help. The fellow gang members are not merely present but rather standing ready and willing to step in with assistance should the fellow perpetrating gang member need help. The gang members backing up the perpetrating gang member lend confidence to the perpetrator(s) and help encourage the commission of the offense.
- (2) **Driving the car.** The driver in a number of crimes is a necessary facilitator in the commission of the offenses. Drive-by shootings and commercial robberies are good examples of crimes frequently involving drivers who are not the direct perpetrators of the offenses.
- (3) **Yelling the gang name.** Fellow gang members often claim (speak or yell) their gang's name while one of their gang members commits a

crime. This affords notoriety to the gang for the criminal activity of a member. It also lends encouragement for the direct perpetrator to complete the offense.

- (4) **Throwing hand signs.** Gang members enjoy their notoriety. Frequently, immediately preceding a crime or during the commission of a crime, gang members who are not direct perpetrators of the offense throw their gang hand signs as encouragement to their fellow, direct perpetrator gang members or as a sign to the victims of the perpetrators' status as gang members.
- (5) **Preventing others from interfering.** Gang members occasionally prevent others from interfering in a fight between a fellow gang member and another person or in the commission of some other sort of crime. This conduct promotes and assists in the completion of a crime by ensuring unfettered access to the victim.
- (6) **Keeping lookout or watching for the police.** Gang members often keep guard while fellow gang members commit criminal offenses. The knowledge that others are watching out for you encourages the continued commission of a crime. It also allows the perpetrator to focus solely on the crime instead of looking around to see whether he or she has been detected. A lookout is commonly utilized in street narcotics transactions or spray-painting expeditions.
- (7) **Calling the "homies" when rivals are seen.** This behavior alerts fellow gang members to the presence of rivals, which, in turn, allows for assaultive conduct against the rivals.
- (8) **Stealing a car (G-ride) for some other crime—usually a drive-by shooting or robbery.** When a gang member knowingly steals a car for use in some other crime, the gang member is facilitating the commission of the other offense. The gang member is therefore equally liable for the commission of the crime done in the car after it was stolen.

- (9) **Getting or holding a weapon—the “gang gun.”** Gang experts usually opine that when a gang member has a gun, anyone in the gang can use the gun. Further, following a crime, it is common for a noninvolved gang member to hold the gun until the heat dies down. Either situation helps the gang obtain, use, and conceal its collective cache of firearms.

In order for an expert to render such opinions, however, it is critical to have plentiful evidence of a suspect’s gang affiliation. All prior field interview cards; crime reports; pictures; correspondence; documented admissions of gang membership to teachers, probation or parole officers, or to jailers; interview statements; and any other piece of gang membership evidence should be gathered for use by the expert in court.

Suspect Interview—Statements

Some of the most damaging evidence in a criminal case is admissions made by a suspect. In a gang crime situation, gang dynamics are important areas of inquiry for an investigating officer during a suspect interview. It is helpful in a group crime scenario to keep the dynamics of group crime in mind; e.g., allegiance to the group, a sense of invincibility while in the group, reliance of the group on those who have committed to the planned behavior, the division of tasks possible with multiple crime partners, and alcohol or narcotic use.

Often, gang members discuss their gang membership with the police even when reluctant to admit participation in a crime. Under such circumstances, valuable information is obtainable from gang member suspects. Interview topics should mirror the eventual testimony of the gang expert. It is useful to have the gang suspect lay out the gang group dynamics that are explained above.

Interview topics with a gang member suspect should include:

- (1) Attachment to and identification with the gang.
- (2) The gang being the primary focus and most important aspect of a gang member’s life.
- (3) Allegiance to the gang and to fellow gang members.

- (4) Putting in work for the gang when called upon and knowing when joining a gang that someday the gang member will be expected to commit crime on behalf of the gang.
- (5) “Representing” or being “down” for the gang by never backing away from a challenge and always backing up a fellow gang member.
- (6) The code of never cooperating with the police and the importance of never being labeled a “snitch” or a “rat.”
- (7) History of the suspect’s gang, the number of members, the gang’s territory (if territorial), and the types of crimes the gang is known for (even if the suspect denies any involvement in those crimes).
- (8) Initiation rituals of walking in, jumping in, “criming in,” or being “sexed in.”
- (9) Rivalries—especially if the crime under investigation is one of violence against a rival of the suspect gang.
- (10) Expected behavior of gang members when confronting rivals and the territories of the rivals of the suspect’s gang.
- (11) Antisocial, oppositional attitudes of gang members toward the criminal justice system, education, employment, and legitimate society.
- (12) The role of drugs and alcohol for gang members—getting buzzed is not passing out. Drugs and alcohol increase courage yet do not result in the loss of self-control. Gang members usually are experienced drinkers and recreational drug users. This line of questioning is important and helps to offset any later claim of an alcohol- or drug-induced reduced mental capacity.

If a gang member is willing to talk about his involvement in the crime under investigation, discuss that last. Get as much detail about the suspect’s involvement as possible. Also, have the gang member explain in detail the involvement of the other suspects. Frequently, gang members will acknowledge behavior they believe makes them less culpable than the direct perpetrator(s), such as watching out for the police, keeping others from intervening during the commission of a crime, driving the car in a

drive-by shooting, supplying the gun(s) used in an offense, or being present to back up fellow gang members during a crime should the need arise. Legally, the above admissions are sufficient to establish liability as an aider and abettor, a conspirator, or both.

EXTENDED LIABILITY FROM GROUP CRIME PARTICIPATION

Aiders and abettors and conspirators may be liable for crimes committed or attempted by their crime partners, other than those crimes that were aided and abetted or the target offense of a conspiracy. Each member of a conspiracy, for example, is liable for each act of every other member of the conspiracy that was done in furtherance of the object of the conspiracy. A conspirator is liable for all acts of his coconspirators—intended, unintended, or even actually forbidden—provided only that such acts be in furtherance of the common purpose of the conspiracy.

Another proviso of aiding and abetting and conspiracy law is the concept of extended liability for crimes committed besides those originally contemplated. Aiders and abettors and conspirators are not only guilty of the crime(s) aided and abetted or the object crime(s) of a conspiracy but are also liable for all other crimes committed by a fellow principal that are a “natural and probable consequence” of the crime(s) originally aided and abetted. A natural and probable consequence is a result that is reasonably foreseeable to the aiders and abettors to a crime or the members of a conspiracy.

Whether a consequence is natural and probable is an objective test based on what a person of reasonable and ordinary prudence would have expected.

The following crimes committed during group crime situations have been found to be the natural and probable consequences of the original crime aided and abetted or the object crime of a conspiracy:

- (1) A collective act of vandalism in rival gang territory led to an assault with a deadly weapon against a rival gang member by one of the vandalizing gang members. All of the other gang members involved in the vandalism were held liable for the assault.

- (2) Several gang members involved in a robbery were liable for an assault with a deadly weapon committed during the robbery by one of their fellow perpetrators.
- (3) An agreement to shoot from a vehicle led to group liability for an attempted murder.
- (4) Gang members agreeing to fight in public were all held liable for the attempted murder committed by one of their members against a rival during the fight.
- (5) A group of robbers were held jointly liable for the murder of the victim by one of the perpetrators.
- (6) A murder was a natural and probable consequence of a group plan to commit an assault with a deadly weapon.
- (7) Gang members who agreed to fight in public (a low-grade misdemeanor offense) were each found culpable for the murder of a combatant on the other side of the fight committed by one of their fellow gang members.

Interview suspects along the lines of foreseeability and expected outcomes. For example, ask:

Question: Why did you bring a gun to the fistfight?

Predictable response: I took the gun along because I might have needed it.

Under these circumstances, it is hard to deny the gun's use was foreseeable.

Other examples:

Question: Why did you go to back up your fellow gang members in the fight?

Predictable response: Because there might be violence, and my fellow gang members might have needed help.

Question: Why did you bring a gun when spray-painting graffiti in rival gang territory?

Predictable response: Because if I had been seen by rival gang members while spray-painting, there might have been violence.

In each of these situations, violence was a planned, foreseeable outcome, rather than a spontaneous coincidence.

CONCLUSION

The above is meant only as an introduction to the interplay of group crime theories and how they relate to the investigation and prosecution of group gang crime. Familiarity with the theories enhances the odds of solving crime and successfully prosecuting gang criminal conduct. Work with these concepts, and remember that there is no substitute for experience in this area.

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Section 3.

Filing the Gang Case

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INTRODUCTION

In many ways, gang cases may be the most complex cases filed by a prosecutor. Since a gang is a group of people, multiple defendants and complex litigation about using their statements against one another should be expected. Because gangs are constantly recruiting, initiating, and training, expect juveniles to be involved. Witnesses are often hostile to law enforcement and will recant at trial. A gang prosecution generally involves extended or vicarious liability for aiders and abettors, conspirators, or others involved in the criminal enterprise. If the crime is murder, individuals may be found guilty within the felony murder rule, provocative act murder, or other theories.

Filing a gang case may be extremely difficult. Compounding your filing decisions are many other factors. Supervisors will want to be briefed about the case. Clerical and court staff need paperwork as soon as possible. The jail, probation department, and juvenile hall will also be awaiting your decisions. The media will want you to answer the questions the investigating agencies will not touch. If charges are filed, will the vertical prosecutions gang unit retain the case or will mainline or another unit, such as homicide, prosecute?

The real issues, however, are simply what crimes were committed and who is liable for them. How you answer these questions and what charges you file with the court will set the tone for this case from the beginning. These charges, for example, will greatly affect whether the defendant will remain in custody or be eligible for bail and how much the bail will be. These charges can affect the amount of resources that will

be spent on further investigation of the case. The charges may also determine the resources available to the defense. The charges will affect later plea bargains and indicated sentence judgments from the court, as well as the defendant's eligibility for probation and the terms of that probation, including registration requirements.

To decide which charges to file and against whom to file them, you must have an unsurpassed understanding of the case. You must also understand theories that extend criminal liability to the participants. Additionally, the prosecutor must be prepared to decide whether juveniles should be tried as adults or remain in juvenile court.

One fundamental principle cannot be stressed enough. As a prosecutor, you are ethically bound to file charges only when there is a reasonable possibility of proving the charges. A typical filing standard reads, "The admissible evidence should be of such convincing force that it warrant conviction of the crime charged by a reasonable and objective factfinder after hearing all of the evidence . . . and after hearing the most plausible, reasonably foreseeable defense that could be raised under the evidence presented to the prosecutor."¹ Under no circumstances is this rule to be violated. There is not a different or lower filing standard for gang cases. When tactical decisions are discussed in this chapter, it will always be assumed that probable cause supports the filings. If probable cause does not exist to file charges, your decision is easy: you do not file charges. On the other hand, once probable cause exists, aggressively prosecute everyone who is responsible in the interests of justice.

PREPARING TO FILE THE GANG CASE

As a prosecutor, you must know more about your case than anyone else, including the defense attorney or the judge. You cannot be surprised or embarrassed about problems with the evidence in your case. By acknowledging and overcoming these problems, you can confidently ask the jury to return a verdict of guilty at the end of your trial. Knowing everything there is to know about your case begins at intake.

While rushing to comply with constitutional and statutory scheduling, you must obtain a great amount of information in a short period of time. Reports generally will not be completed, so you may have to rely on the statements and integrity of your investigators. Learning about the case includes learning not only the strengths but the

¹ Uniform Crime Charging Standards, CDAA, p. II-1.

weaknesses of the case. The author has often been told the magic words, “the suspect confessed,” only to later learn that what was really said was, “I shot back after the victim shot at me.” This is a long way from a confession.

To file the case, review whatever reports are available. Quite often, detectives will not have finished their reports but will have prepared affidavits for search-and-arrest warrants that you should read.

When you speak with the investigators, ask multiple questions. Obtain as much information as you can about the defendant, the victim, the gangs involved, the area where the crime happened, and the motive or reason the crime happened. Become familiar with witnesses and their biases or shortcomings. Find out what other contacts these people have with law enforcement or the criminal justice system. Also determine who has been untruthful during the investigation and why.

When establishing evidence, ask the following questions:

- ✓ What is the physical evidence?
- ✓ To what extent does the crime scene, injuries, or other evidence support or contradict the victim, witnesses, or defendant?
- ✓ Does physical evidence exist that proves or disproves a victim, witness, or defendant? What are the opinions of the forensic pathologist?
- ✓ Has a criminalist been contacted, and if so, for what?
- ✓ What will this expert be able to testify to?

Ask questions about the investigation:

- ✓ Are there legal issues that you need to be aware of regarding the investigation, searches, or interrogations?
- ✓ What scientific testing is available to further the investigation?
- ✓ What other witnesses need to be contacted?
- ✓ Are there witnesses who need to participate in photographic or physical lineups before the defendant appears in court or before his picture appears in the newspaper or on television? If so, make sure that this is done so that outside sources will not later discredit the identification as being suggestive.

In states where you have an option, you must decide whether to initiate the court proceeding by grand jury or preliminary examination. Generally, a preliminary

examination will be the best route, especially if your jurisdiction allows hearsay evidence. However, in certain instances, a grand jury indictment may be the better route. Because the grand jury proceedings are closed, witnesses may testify and have their identities protected. The author used a grand jury to protect a store owner in a gang neighborhood who overheard the defendant confess to murder. Using the grand jury allowed him to have the witness's name redacted from the transcript, protect the witness from retaliation, and make arrangements to move the witness safely. Grand juries can also prevent long cross-examinations that can tie up courts for days when many defendants are involved. A grand jury indictment is also a successful way to arrest several members of a conspiracy at the same time.²

By having a thorough understanding of the strengths and weaknesses of the case, the prosecutor can file the most appropriate charges to initiate the court proceedings.

DIRECTING FURTHER INVESTIGATIONS

An unfortunate assumption is that once the case is filed, the job of the investigating agency is done. Nothing is farther from the truth in gang cases. Successful resolutions require teamwork from all members of the prosecution team. The greatest prosecutor cannot win a poorly investigated case. Witnesses will have a rapport with the detectives who initially took their statements—not with district attorney investigators who are strangers to them. Many witnesses are more cooperative at trial if the detectives stay in contact with them and make arrangements for their safety. Small things, such as extra presence of patrol officers in the neighborhood, create goodwill that pays off greatly at trial time.

Unfortunately, the axiom for prosecutors generally is that cases get worse after filing. Get commitments from the investigators so that the efforts they made in developing a case warranting a criminal filing will continue through the pendency of the litigation. If necessary, set up a schedule for completing further investigations. Arrange deadlines with investigators for receiving their reports and providing discovery to the defense.

² This practice is used frequently in San Joaquin and San Diego Counties to arrest many members of a gang after making several controlled drug buys on videotape. The "buy-bust" operation is a successful way to incarcerate many members of a gang in a single day.

Investigate the defendant's activities at the jail. At a minimum, the defendant will answer a classification questionnaire. Such questionnaires usually determine which gang the defendant associates with and who his enemies are. Even the most sophisticated defendant answers these questions truthfully for fear of being housed with his enemies. Records at the jail will show who visits the defendant, who is putting money on the defendant's books, and who picks up his property. Knowing who the defendant trusts can be very important; it may be a preview of your defense witness list. Some jails tape record jail visits. Obtain copies of the nonattorney visits or phone calls, especially the initial ones. While defendants may try to minimize their involvement to loved ones, they often make damaging admissions. Have the defendant's mail screened and cell searched for gang indicia to prove his membership.

Make arrangements for case detectives to attend the arraignment and, if possible, introduce you to the victim or his family. Try to arrange a brief meeting afterwards to explain your job and the court process. This is a good time to prepare the victim for the long haul. Reinforce, however, that you will always be available to answer whatever questions the victim has. Direct the victim's family to those in your office who can provide reimbursement for medical, counseling, and funeral expenses. Take time to answer their questions and return phone calls.

Make proper security arrangements with the courts. The first court appearance for a defendant is very emotional and often well attended by the friends and families of both the defendant and the victim. If the victim and defendant were rival gang members, this is a recipe for disaster inside the courtroom, in the hallways, outside the courthouse, and in parking lots. Properly anticipating such a gathering may prevent violence and create an opportunity to develop important intelligence regarding the victim's or defendant's gang involvement.

About the same time as the first arraignment in a murder case, the family will be planning a funeral. Have your detectives monitor this ceremony and the related gatherings. If the victim was a gang member, it is not unusual for him to be dressed in gang attire. Floral arrangements may have gang insignias or symbols. People attending the funeral or participating in the ceremony, such as pallbearers, may identify themselves as gang members by wearing gang attire or displaying hand signs. Additionally, members of the defendant's gang may attend the funeral. Violence can break out between the rival gangs. In one instance, gang members forced their way into the ceremony, snatched the victim from the casket, and stomped on his body outside the funeral home!

By having a strong understanding of the facts and developing a plan to continue the gathering of evidence, the prosecutor will be better prepared to successfully prosecute the criminal street gang member.

JUVENILE OR ADULT PROSECUTION

Depending on the jurisdiction, if the suspect is 17 years old or younger he may be eligible for prosecution as an adult. Several factors influence whether a minor can be prosecuted in adult court, such as the crimes committed and the criminal history of the minor. If the minor is prosecuted in adult court, there will be a longer prison sentence. However, the minor is entitled to a jury trial. If he remains in juvenile court, he will receive a much shorter sentence but will serve the time in facilities better equipped for a minor's education and rehabilitation. Minors in juvenile court are not entitled to jury trials.

In some instances, prosecution in juvenile court may be more beneficial than in adult court if the evidence is weak against the minor. Also, if the juvenile is a small player in the crime, juvenile court may be more appropriate. Juvenile court may be a better choice when the minor will be used to prosecute the adults in the crime by testifying. Finally, juvenile court rules frequently do not require independent corroboration of a cosuspect's statement regarding a juvenile's involvement in a case, whereas adult criminal procedure rules on accomplice statements usually do.

The decision to prosecute a minor in adult or juvenile court should never be taken lightly, and all factors should be considered.

CRIMINAL LIABILITY

If your defendant is *the* shooter, stabber, robber, etc., liability is direct and generally easy, but what if your defendant is not directly liable? What if the defendant was the driver or provided the guns? What if he participated in the planning stages but is not present at the crime? What if the defendant agreed to participate and then did little during the commission of the crime; e.g., an unarmed backseat passenger along as backup? What if the crime committed was not the intended crime but a crime greater than the one intended, yet it is a logical and direct consequence of the originally

planned crime? What if an unintended victim is injured or killed? Or what if one defendant is not present when the crime occurs but had earlier agreed to participate?

The answers to many of these questions are contained in accomplice liability laws, such as aiding and abetting or conspiracy. Also, if the crime is murder, additional theories of vicarious liability exist, such as the felony murder rule, provocative act murder, and concurrent causation murder.

If the witness is an accomplice, his testimony alone may be legally insufficient to convict a defendant. An accomplice is someone who can be charged with the same crimes as the defendant. In California, an accomplice's testimony requires some corroboration connecting the defendant to the crime before the defendant can be convicted. If your case is based solely upon an accomplice's testimony, you will not be able to convict without additional evidence, such as a confession, eyewitness identification, or physical evidence.

By understanding each of these concepts, their similarities, and differences, the gang prosecutor may prosecute every defendant who is criminally liable to the fullest extent of the law.

AIDING AND ABETTING

Principals are individuals who are criminally liable for the crime and include not only those who directly commit the crime (e.g., a shooter) but also those who aid and abet the crime. If a defendant is an aider and abettor, he is as liable for the crime as if he had committed the crime himself.

Mere presence at a crime does not make someone an aider and abettor. An aider and abettor must have an intent to promote the illegal conduct. For example, if a defendant's girlfriend drives him to the liquor store and does not know he is going to rob it, she is not an aider and abettor.

State statutes on aiding and abetting differ on the required mental state of an accomplice. Some states require that the accomplice share the criminal intent of the direct perpetrator, *State v. Kendrick*, 9 N.C. App. 688 (1970). As one court put it:

"Complicity is not a theory of strict liability. It is not sufficient that the defendant intentionally engaged in acts which ultimately assisted or

encouraged the principal. Rather, the complicitor must intend that his conduct have the effect of assisting or encouraging the principal in committing or planning the crime committed by the principal.”

Bogdanov v. State, 941 P.2d 247 (Colo. 1997)

Other states require a lesser mental state for aiding and abetting. The accomplice must only have knowledge or reason to know of the actor’s mental state, *State v. Lewis*, 514 N.W. 2d 63 (1994 Iowa Sup).

“The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price.”

Backun v. United States, 112 F.2d 635 (4th Cir. 1940)

An aider and abettor need not be present to be liable. If a gang member provides guns for a drive-by shooting on rivals, he is an aider and abettor, even if he stayed at home during the shooting.

An aider and abettor is liable for the crimes committed unless there is a legally sufficient withdrawal. Generally, to withdraw from aiding and abetting liability, the defendant cannot merely walk away from the crime; the defendant must announce his withdrawal and do all in his power to prevent the commission of the crime.

Aiders and abettors are common in gang crimes. They generally are the drivers in drive-by shootings. They also include individuals who furnish the stolen cars or guns to commit the crimes or who serve as lookouts during the commission of a crime. In each of these examples, even though the defendants did not directly commit the crime (i.e., shoot and kill the victim), they are aiders and abettors (or accomplices) and are as guilty as if they had committed the crime.

Aiders and abettors, however, are not accessories. While aiders and abettors aid in the commission of the crime, accessories aid the principals only after the crime has been committed. For example, a girlfriend of a gang member who hides him or the weapon after the crime is not an aider and abettor but an accessory. Because her participation begins only after the commission of the crime, her criminal liability is limited to being an accessory. A gang member who intimidates a witness after the crime to prevent his testimony is also an accessory. However, if one of the defendant’s

fellow gang members tells a friend of the victim to stay out of a gang fight or blocks intervention while the fight is taking place, the fellow gang member is an aider and abettor.

A difficult prosecution for aiding and abetting is a situation in which the defendant is an unarmed passenger during a drive-by shooting. The defendant does not act during the crime and may not be criminally culpable. However, an argument is made through gang-expert testimony that this individual is an aider and abettor. By the act of entering the car and choosing to be present at the shooting, he can be a lookout to identify the victims or to warn the perpetrator of police activity. Also, this passenger can act as backup to the shooter, having the ability to continue shooting if the initial gunman is wounded or killed. Investigators should be trained to establish such information when interviewing a nonshooting backseat passenger. This is a tough sort of case that may better be handled as a conspiracy.

Gangs have used juveniles as shooters because of lesser penalties they traditionally receive in juvenile court. Females can be aiders and abettors too. Gangs may use females to carry weapons and drugs because they generally do not attract the same level of police attention as males. Female gang members can be lookouts and even drivers in shootings for the same reasons. When investigated, these females may not be interrogated or searched as thoroughly as male gang members. Do not jump to conclusions about an individual's guilt based solely on age or gender.

CONSPIRACY

A conspiracy is an agreement between two or more persons for an unlawful purpose. In some jurisdictions, the crime of conspiracy is complete when the agreement for an unlawful purpose has been reached, *State v. Condrey*, 349 S.C. 184, 562 S.E.2d 320 (2002). Other jurisdictions require an "overt act" in furtherance of the conspiracy, *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001). An overt act need not be criminal; just an action taken toward the completion of the object of the agreement to commit an illegal act. In those jurisdictions requiring an overt act of conspiracy, liability is established once the act is completed.

Not every member of the conspiracy needs to commit an overt act; one member committing one is sufficient, *United States v. Leonard*, 61 F.3d 1181 (5th Cir. 1995). Further, not every member needs to know who the other members are in the conspiracy and that an overt act has occurred, *Blumenthal v. United States*, 332 U.S. 539, 68 S.Ct.248,

92 L.Ed. 154 (1947). Examples of overt acts include obtaining weapons, stealing vehicles, driving, or shooting or stabbing. Juries usually need not unanimously agree which overt acts happened, but in some jurisdictions the overt acts must be pleaded in the charging documents. In other jurisdictions, however, “it is not necessary for an indictment to charge that an overt act was done pursuant to the conspiracy,” Am Jur 2d Conspiracy.

The agreement in a conspiracy is the primary requisite act. The United States Supreme Court stated, “The prohibition against criminal conspiracy, however, does not punish mere thoughts; the criminal agreement itself is the *actus reus*,” *United States v. Shabani*, 513 U.S. 10 (1994). There is great uniformity among American jurisdictions regarding what constitutes a sufficient agreement for conspiracy purposes and how such an agreement is proven. The following excerpt is a typical discussion on these issues:

“To obtain a conspiracy conviction, the government must prove that there was an agreement between two or more participants to achieve a particular illegal end. ‘The agreement need not be shown to have been explicit. It can instead be inferred from the facts and circumstances of the case. A tacit understanding will suffice to show agreement for purposes of a conspiracy conviction. There need not be any written statement or even a speaking of words which expressly communicates agreement. Furthermore, the participants in a conspiracy need not be fully aware of the details of the venture so long as they agree on the ‘essential nature of the plan.’ Finally, evidence sufficient to link a particular defendant to a conspiracy ‘need not be overwhelming,’ and may be demonstrated by circumstantial evidence,”

United States v. Amiel, 95 F.3d 135, 144 (1996).

The agreement need not be proven by direct evidence only; it may be proven by circumstantial evidence.

Some jurisdictions limit conspiracy liability to a misdemeanor. See, for example, *State v. Carbone*, 10 N.J. 329 (1952). Some allow it to be charged as a felony, *Gaines v. Malone*, 244 Ala. 490 (1943). Some even allow an agreement to commit a misdemeanor with an overt act to be charged as a felony, *State v. Pooler*, 141 Me. 274 (1945). Check your jurisdiction’s decisions.

Like aiding and abetting, a conspirator need not be present when the acts are committed; and mere presence does not make one a conspirator. To withdraw from a

conspiracy, a defendant must announce his withdrawal to the other known conspirators and do all in his power to prevent the commission of the crime. A conspirator is liable for the crimes of the conspiracy unless there is a legally sufficient withdrawal. Also, a withdrawal must precede the overt act in those jurisdictions requiring one, *State v. Kaiser*, 260 Kan. 235 (1996). Finally, a withdrawal does not constitute a defense in jurisdictions where an overt act is not required. The crime is considered complete after the involved parties agree to commit a crime, *People v. Juarez*, 158 Mich. App. 66 (1987).

Conspiracy is useful as a prosecution theory when the defendant who agreed to engage in criminal activity has no further involvement. If the defendant had aided by action or words, he would be an aider and abettor. However, if the defendant agrees to participate in a drive-by shooting on enemy gang members on rival turf but, instead of driving or shooting, remains as a backseat passenger, this defendant may not be an aider and abettor. But just by agreeing to the crime, he is liable as a conspirator. Conspiracy does not require that a defendant do anything beyond agreeing to commit a crime to become criminally liable in some jurisdictions. In most jurisdictions, as long as another member of the conspiracy commits an overt act, even those conspirators who do nothing other than agreeing are liable. This liability continues, absent a legally effective withdrawal.

An additional benefit of conspiracy may be the opportunity to admit the coconspirator's statements. A statement of coconspirators is a well-established exception to the hearsay rule, *Lutwak v. United States*, 344 U.S. 604 (1953). A conspiracy need not be charged for the hearsay exception to apply. If, however, you have charged a conspiracy, you may be in a better strategic position for a court to allow the hearsay exception.

Conspiracies are punished for the agreed-upon crimes; i.e., the target crimes. So if a gang member agrees to drive to rival territory and shoot his enemies but misses, he is liable for conspiracy to commit murder. He is not liable for conspiracy to commit attempted murder. Also, the conspiracy to commit murder is punished as first-degree murder, not second-degree murder. In this way, conspirators receive the punishment for murder, even when no one was injured!

Conspiracy is a useful tool in prosecuting criminal street gangs. Not only are drive-by shootings conspiracies, but conspiracies also include drug trafficking and the activities of prison gangs.

NATURAL AND PROBABLE CONSEQUENCES LIABILITY

The natural and probable consequences doctrine applies to both aiding and abetting and conspiracy laws. The doctrine applies when something other than what was planned or intended happens.

A common example is an agreement to aid and abet in a gang fight against rival gang members by attending and fighting. In addition to a fight occurring, someone is killed. Another example is a defendant who claims he only agreed to go scare rival gang members, and instead, someone is shot and/or killed. When the natural and probable consequences doctrine is applied in either of these examples, the defendant is liable of murder, not the lesser crimes of assault or battery. Since, in both examples, the death was reasonably foreseeable, the defendants are not only criminally liable for the crimes they agree to commit but for the murders as well.

The natural and probable consequences doctrine makes aiders and abettors and conspirators liable not only for those crimes they aid and abet or conspire to commit, but also for those crimes that are the natural and probable consequences of their original criminal design. A natural and probable consequence means reasonably foreseeable. If the crimes actually committed are reasonably foreseeable to the crimes aided and abetted or agreed to, the defendant is liable for the greater crime, *United States v. Masotto*, 73 F.3d 1233 (3d Cir. 1996).

The inquiry is defined in this way. First, determine the crime that is aided and abetted or agreed to. Call this the “target” crime. Next, determine what crime was actually committed either instead of or in addition to the target offense. This is the “charged” crime. The natural and probable consequences doctrine applies, creating extended liability if the charged crime is reasonably foreseeable to the target crime. When the charged crime is reasonably foreseeable to the target crime, the aiders’ and abettors’ or conspirators’ liability extends to all other crimes that are the natural and probable consequences of the original target offense, and they are placed (in a legal sense) in the shoes of the direct perpetrator of the charged crime.

Going back to the above examples, is it reasonably foreseeable that someone will die during a gang fight? Is it reasonably foreseeable that someone will die when gang members invade rival territory shooting guns? Because both of these questions can be answered “yes,” the defendants are liable for murder.

Whether the committed crime is reasonably foreseeable is a question for the jury, not the defendants. Therefore, it is no defense when a gang member claims he never intended for anyone to die. If the jury finds it reasonably foreseeable that someone would die from the agreed crime, the defendant is guilty of murder. If the crimes are reasonably foreseeable to a reasonable person, the doctrine applies. Also, liability extends, even when the criminal parties contemplate and agree not to do the committed crime, if the crime is reasonably foreseeable. For example, if all the gang member agree there will be no killing, but someone still dies, they are guilty if the death was foreseeable.

A perfect example is the case of *People v. Luparello*, 187 Cal. App. 3d 410 (1986); see also [*Commonwealth v. La*], 433 Pa. Super 432 (1994). Dr. Luparello was a chiropractor who hired gang members to obtain information from Martin about the whereabouts of Gadzinski, who had recently ended their romantic relationship. During a meeting at Luparello's home (during which the gang members were openly armed with deadly weapons), one of the gang members stated that he was going to "thump" the person from whom they wanted information. Luparello replied he would like the information "at any cost." The next evening, the gang members, while again armed with deadly weapons, met with Luparello. They then proceeded to Martin's house and killed him. The next day, Luparello told someone that he hired some Mexicans who were going to take care of Martin. The court concluded, "That a homicide resulted from a planned interrogation undertaken 'at any cost' by armed men confronting an unwilling source is unquestionably the natural and probable consequence of that plan. The evidence thus supports Luparello's liability for the conspiratorial acts."

In *People v. Montano*, 96 Cal. App. 3d 221 (1979), Montano and his fellow gang members pretended to be in a different gang to lure and assault a rival gang member. Once the victim joined them, they drove him to their turf. Montano left, and then his fellow gang members murdered the rival. Because the murder was foreseeable to the agreed conduct, Montano's conviction for murder was upheld.

Through the natural and probable consequences doctrine, aiders and abettors and coconspirators are liable not only for the agreed-upon crimes but for those crimes that are foreseeable if the plans change and more serious crimes happen.

THEORIES SPECIFIC TO MURDER

In many ways, murder cases are different. They require increased investigation, usually by a specially trained unit of the police department. Generally, murders are vertically prosecuted by the district attorney's office by those with special training who handle only murder cases. Murders have special sentencing laws and may expose defendants to the death penalty. Murder cases have theories of extended liability that are not available in other cases, in addition to aiding and abetting and conspiracy.

The previous theories discussed—such as aiding and abetting, conspiracy, and the natural and probable consequences doctrine—are available in murder cases and should be utilized. However, theories such as the felony murder rule, provocative act murder, and concurrent/proximate causation murder can be used only to extend criminal liability for homicides.

Many gang-related murders fall into long-established categories of aggravated liability. The typical drive-by shooting is usually a premeditated (planned beforehand) and deliberated (reasons for and against were considered before the action was taken) murder when a victim is killed. Additionally, drive-by murders are good examples of lying-in-wait homicides. It is common for gang members to slowly approach a group of rivals in a car with the radio turned down and sometimes even the lights turned off. By the time the victims realize that a car has pulled up to the place where they are congregating and that it contains rivals, it is too late. They have been ambushed, which falls into a lying-in-wait classification in most jurisdictions. As explained below, there are many other theories that seem tailor-made for gang cases.

THE FELONY MURDER RULE

When a victim is killed during the commission or attempted commission of a felony, all persons aiding and abetting the felony are guilty of murder. The qualifying felony must either be specified by statute or be an inherently dangerous felony. This applies irrespective of whether the killing was *intentional*, *unintentional*, or *accidental*. To be liable, the defendant must aid and abet before the killing and not join in afterwards. Certain felonies committed in conjunction with the murder may increase the degree of the murder to first degree. In addition, the commission of certain felonies may be a special circumstance and make the defendant eligible for the death penalty. Unlike the

natural and probable consequences doctrine, the killing need not be foreseeable. Once the killing occurs during a specified felony, all defendants are liable for murder.

The felony murder rule can be used in the case of an armed robbery with a getaway driver. Even if the robber and getaway driver agree that there will be no killing, both are liable for murder if the store clerk is killed. The robber and getaway driver are guilty of murder, even if the killing was unintentional or accidental. If the defendants were burglarizing a home and their gun went off, accidentally killing the homeowner, both defendants are guilty of murder, no matter whose gun it was and that the gun went off accidentally. However, the merger doctrine prevents the felony murder rule from applying for the felonies of assault with a deadly weapon or attempted murder.

PROVOCATIVE ACT MURDER

What if defendants were engaged in a gun battle with the police? During the shootout, a police officer misses the defendants and hits a bystander or the store owner. For what crimes are the defendants guilty? Are they only guilty of attempting to murder the police, or can they be found guilty of the third party's death?

The above scenario is an example of provocative act murder. The defendants are not only guilty of attempted murder of the police officers, they are also guilty of murder because their actions provoked another, the police officer, to kill the third party. When someone other than a defendant kills, after the defendant commits an act provoking the killing, the defendant is guilty of provocative act murder. Provocative act murder differs from felony murder because a defendant or codefendant is not the killer. However, the victim may be a bystander or a defendant.

For instance, during an armed robbery, a store clerk shoots at the defendant, killing a customer or a codefendant. Because the defendant provoked the killing by another individual—the store clerk—the defendant is guilty of murder. The defendant's acts provoking the killing must be intentional and deliberate. The provocative acts must be those in which the natural consequences are dangerous to human life, such as brandishing or shooting a gun.

The provocative act must be close in time and directly related to the killing. In *People v. Cervantes*, 26 Cal. 4th 860 (2001), the defendant shot but did not kill a rival gang member at a party. Minutes after the first shooting, a member of the rival's gang shot

and killed a member of the defendant's gang in retaliation. The defendant was not liable for murder for the second shooting because it was an independent and intervening act and Cervantes was not guilty of murder. The provocative act murder is limited to murder of the second degree.

CONCURRENT CAUSATION

Recently, a new theory of extended liability, called concurrent causation, was created to answer a situation common to gang disputes.

More and more frequently, gang members hold shootouts in public places. These gun battles on residential streets, in parks, or at businesses create a great danger to the public and often result in the death of an innocent bystander. If the killer can be identified, he is guilty of murder. Because the killer shot with the intent to kill, the transferred intent doctrine finds him guilty of killing the unintended victim.

What about the other shooter? Is he guilty only of attempted murder, with the victim being the rival target who is now charged with murder? What if the killer cannot be determined by the forensic or police investigations?

In these gun-battle situations, courts have found that all the shooters are guilty of murder, irrespective of whether they were the killers. Because both shooters directly caused the bystander's death by shooting at each other, both are guilty of murder. The concurrent causation theory reasons that since the shooters aided each other in killing the bystander by shooting at each other without concern of harm to the public, they are equally guilty of murder. This theory is relatively new and may not be available in all jurisdictions.

CONCLUSION

The filing of criminal charges initiates the prosecution in the courtroom. However, this is not when the criminal investigation ends, and prosecution should make arrangements to continue developing the case.

Several decisions must be made by the prosecutor, such as whether the defendant is directly liable or liable as an aider and abettor or coconspirator. Through these vicarious liability theories, the defendant is liable not only for the intended crimes but also those that are reasonably foreseeable. If the defendant is a minor, the prosecutor must decide between adult or juvenile court.

Additional theories extend liability to nonkillers for murder cases. Vicarious liability theories in murder cases also include felony murder, provocative act murder, and concurrent causation murder.

Prosecutors must use all theories available to them to properly hold gang members accountable for promoting violence in the community. The pursuit of justice is best accomplished when the prosecutor commands a thorough understanding of the theories that make gang members guilty for all the crimes they commit. With this knowledge, the prosecution team can aggressively arrest and prosecute everyone responsible for the crimes.

Section 4.

Presentation of the Case

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INTRODUCTION

The trial of a gang case is not unlike other cases except that witnesses tend not to cooperate, lie at all times, surprise the prosecutor with theretofore unknown evidence, refuse to talk at all, disappear, require expert testimony the judge never heard of, etc. In short, the trial can be a mess.¹

Gang cases are among the most difficult to try. Gang member witnesses, no matter how many versions of a story they have previously given, may, while on the stand, give yet another version. Civilian witnesses may shut down completely. A gang expert, who is supposed to make sense of everything, may be met with an objection by the defense and a perplexed look by the judge. Reacting to situations such as these requires litigation expertise, a very good understanding of the rules of evidence and the law, and an intimate knowledge of the jurisprudence of gang prosecution.

Many aspects of criminal law and procedure are not significantly different in gang cases as opposed to other criminal cases. Other aspects are unique under the rules of each state. Certain aspects of gang cases, however, are of such overriding importance that an effective discussion of gang prosecution cannot take place without their being addressed.

¹ Keith Burt, Chief Deputy District Attorney, Office of the District Attorney, San Diego, California, “*Prosecution of Street Gangs.*”

Gang membership is not a crime but a dynamic that will affect the evidence, the manner in which it is presented, the witnesses, and the jury. Until one begins to approach these cases as “gang prosecutions,” rather than merely as cases involving gangs, it is practically impossible to take them to trial. This section includes anecdotal discussion from gang prosecutions as well as case law and questions that must be asked to get certain evidence legally introduced at trial.

WITNESSES

Any prosecutor who has handled a gang case knows that gang violence prosecution means dealing with difficult witnesses. Witnesses in a gang case generally fall into one of three categories: (1) members of the victim’s gang who often prefer retaliation over prosecution, (2) members of the defendant’s gang who will not testify against their fellow gang member, or (3) members of the community who live in fear of the gangs and refuse to get involved. Each of these types of witnesses must be dealt with differently and resourcefully.

[V]iolent street gangs, which often engaged in drug trafficking, required a more specialized approach. For example, police stressed that street gang cases often involve witnesses or victims who do not possess great jury appeal. Furthermore, these witnesses and victims may be reluctant or even unwilling to cooperate with law enforcement due to intimidation and fear or out of loyalty to the gang. General prosecutors often lacked the special expertise required to solidify an investigation containing problem witnesses or victims and bring it to trial. Opportunities to target high-profile gang members were lost and prosecutors not specifically charged with making an impact on the street-gang problem had little time for proactive involvement at the investigative stage. As a result, criminal cases involving street gangs tended to receive inadequate attention.²

Members of the Victim’s Gang as Witnesses

In *State of Florida v. Herbert Wilson*, the state charged that on June 3, 2000, the defendant, Herb Wilson, shot Steven Rudolph. Rudolph had been walking down the street when Wilson jumped from a truck and opened fire. Wilson shot several times at Rudolph, who tried running for cover while returning fire with his own gun. Rudolph

² *Urban Street Gang Enforcement*, Bureau of Justice Assistance, 1997.

was struck one time in his back but survived. Wilson was arrested and charged with attempted first-degree murder with a firearm—a life sentence felony in Florida.

The state's theory was that Wilson shot at Rudolph on June 3 in retaliation for the murders of Kevin Trought and Trevor Clayton on May 25 and that the murders of Trought and Clayton on May 25 were in retaliation for the murder of Anthony Leggett on May 23. Related to those events, the state theorized, were the shootings of Quinton Toombs and Antoine Harris on May 21. The Toombs and Harris shootings, the state further theorized, were related to the nonfatal shooting of Trevor Clayton on May 14.

From the time the first police officers arrived on the scene, Rudolph identified Wilson as the person who had tried to kill him. On July 31, 2000, Rudolph attended a prefile conference at the State Attorney's Office, during which an affidavit was prepared for Rudolph detailing his recitation of the facts surrounding his being shot on June 3, 2000. On January 30, 2001, Rudolph was deposed by defense counsel for Wilson. During that deposition, Rudolph testified that Wilson shot him on June 3, 2000.

Ten months later, on or about May 25, 2001, Rudolph contacted Wilson's attorney directly and advised that he wished to drop the charges against Wilson. Wilson's attorney scheduled a second deposition for the following Friday, June 1, 2001, at which time Rudolph recanted his previous identifications of Wilson. This time, Rudolph testified that he "was going through a lot at the time of the shooting and was stressed out." He later added that the police coerced him to identify Wilson as the shooter. Meanwhile, prosecutors learned from a confidential informant that Rudolph planned to take care of Wilson on his own and that he was going to lie to secure Wilson's release so that he could shoot him.

It is probably difficult for traditional prosecutors to believe what transpired in the Herb Wilson case, yet those events demonstrate how difficult it can be to get a victimized gang member witness to testify against a rival gang member.

Even when a victim is not trying to derail a prosecution to retaliate against the defendant, the victim's testimony or that of witnesses from the victim's gang may be difficult to secure. Gang member witnesses are particularly difficult to bring in for trial. The code of silence among gang members and the fact that cooperating with police or prosecutors will be viewed by other gang members as a sign of weakness are factors that will negatively affect cooperation from gang member witnesses. Gang prosecutors should be familiar with the intricacies of their respective jurisdictions' procedures regarding rules to show cause, contempt proceedings, and material-witness bonds.

Judges can be reluctant to issue material-witness bonds, so a prosecutor making application needs to be prepared to educate the judge and ensure that the judge will be free of any wrongdoing.

Finally, once the prosecutor gets the gang member victim or member of the victim's gang on the stand, there will be yet another problem—bias. Whether that bias is real or imagined, prosecutors have to know that just getting the victim or member of the victim's gang on the stand is not the end of the battle. It is preferable to stick to facts that can be verified through other witnesses or evidence, such as what happened or what the relationship is between the two gangs.

Members of the Defendant's Gang as Witnesses

In *State of Florida v. David Cortes*, 761 So. 2d 1115, Fla. Dist. App. 3rd Dist., 2000 (unpublished opinion), several members of the Miami gang known as Take No Shit (TNS) jumped a group of individuals they recognized as members of the rival gang International Posse (IN/P). By all accounts, this was to be a “beat down,” using fists and feet to beat their rivals, whom they had fortuitously encountered one Saturday night on a busy, nightclub-lined street on Miami's South Beach. David Cortes, however, fancied himself an up-and-comer in TNS. In an effort to “catch rank,” Cortes pulled a knife from his pocket and, in the melee of the assault, stabbed an IN/P member, puncturing his lung.

Following the assault, the TNS gang members ran to the car in which they had driven to South Beach. As they made their getaway from South Beach back to Miami's mainland, an excited David Cortes held up a bloody knife and proclaimed, “I stuck that IN/P!”

The victim survived, but although he and his fellow IN/P gang members knew they had been attacked by several TNS gang members, they could not identify all of their attackers. More important, no one could identify the actual stabber. Gang detectives began interviewing TNS members. During the interviews, they learned which TNS members had been involved, and they learned that Cortes had been the stabber. Moreover, detectives learned that it was not until after the attack that anyone even knew that Cortes had possessed a knife. This was, by all accounts, to have been only a beat down. Detectives then approached Cortes, who denied everything.

Although one might argue that a stabbing is a natural and foreseeable outcome of a gang assault, based on the specific facts of this case, prosecutors elected to file

battery and aggravated battery charges against Cortes' fellow attackers and charged only Cortes with attempted second-degree murder with a deadly weapon.

Cortes' codefendants all pleaded guilty; however, none entered into a cooperation agreement with the state. Cortes went to trial, and the prosecutor was faced with a situation in which the only way to prove identification—in other words, that Cortes was the person who had stabbed the victim—would be to call Cortes' former codefendant and fellow TNS gang member, Edgar Gonzalez, as a witness.

The night before Gonzalez was to testify, the prosecutor and two gang detectives met with Gonzalez to review his testimony. The next morning, at the prosecutor's request, the gang detectives picked up Gonzalez from his house, drove him to court, and babysat him all day, lest he walk out of the courthouse and never be seen again. Finally, Gonzalez was called to the stand. During direct examination, he identified Cortes as the stabber, recounting for the jury that when Cortes returned to the car, he displayed the bloody knife and bragged about what he had done. During cross-examination, though, Gonzalez stated that he made up the story about Cortes and the knife and the bragging. He also stated that the only reason he had come to court and testified was that the prosecutor had threatened to have his probation violated if he did not identify Cortes. The jury, the judge, and the defense attorney were all surprised. The defense attorney terminated her cross-examination, confident that she had just destroyed the state's case and that her client was on his way to an acquittal.

Perhaps the only person in the room not particularly surprised was the prosecutor. Midtrial surprises like this one are not uncommon in gang cases. During a brief redirect examination, the prosecutor then locked Gonzalez into what he had just stated on cross-examination, thereby opening the door to Gonzalez' prior consistent statements. The prosecutor next called the lead detective, through whom the state introduced Gonzalez' previously inadmissible hearsay statements to police about Cortes, the knife, and the bragging. For added measure, the prosecutor also called the gang detectives who had been present the night before, to assure the jury that no one had threatened Gonzalez in order to get him to testify.

Cortes was convicted and sentenced to 25 years in prison, based on the testimony of his own fellow gang member.

Members of the Community as Witnesses

Members of the community become both intended and unintended victims in gang cases. Victims may be the target of a robbery or burglary or some random act of violence, but they may also be accidentally injured during the commission of a gang-on-gang assault, such as in cases involving victims struck by stray bullets.

While a few innocent civilians victimized by gang violence may be too afraid to pursue prosecution, most are usually willing to come forward as witnesses. The mere presentation to a jury of an innocent victim in a gang case instantly communicates to the jury all the evils of gangs, without the prosecutor ever saying anything reversible. Prosecutors must be wary, however, of a gang member defendant's fellow gang members intimidating a witness, either while the witness is on the stand or before the witness testifies, such as in the hallways of the courthouse. A prudent measure is to have gang detectives ensure safe access to the courtroom for witnesses.

Innocent-bystander witnesses are much more reluctant to come forward than innocent victims, for obvious reasons. Unlike their victim counterparts, these witnesses have very little incentive to testify. For most, the idea of doing their civic duty or contributing to a better community is far outweighed by the fear of retaliation from gang members. A prosecutor can try to persuade these witnesses to cooperate, but in truth, it is difficult to argue with their logic in not wanting to participate. The possibility of a material-witness bond exists, but a prosecutor should seriously consider whether to lock up an innocent civilian just because that person is afraid to testify against gang members.

One important way to objectively protect witnesses and to subjectively gain their continued cooperation is by keeping a defendant detained pretrial. Thus, a defendant's first appearance is an important proceeding and should be attended by both the gang prosecutor and the lead detective. There, the prosecutor should give the magistrate an applicable treatment of the bond statute, arguing for an increased bond or, when applicable, no bond.

Another important way to ensure cooperation is by dealing with the problem of witness reluctance ahead of time. The gang prosecutor already knows the geographic areas from which gang cases are most likely to come. By being proactive and having a presence in the community, the prosecutor will not be viewed as a stranger but as someone whom victims and witnesses can trust.

Cooperating Defendants

One last type of witness for which the gang prosecutor should be prepared is the witness who was a participant in the crime. Cooperating defendants are often necessary in gang cases to give the jury a complete understanding of what happened or who did it. The process of presenting flip witnesses, however, is something that begins long before the witness takes the stand. (A flip witness is a defendant who has been offered limited-use immunity in exchange for cooperating testimony.)

The first thing a prosecutor has to consider is who to flip. Obviously, prosecutors should want to strike a balance between those defendants least culpable and those able to provide the evidence needed to prove the case. Shooters, stabbers, and rapists are not the defendants prosecutors want to flip. Rather, prosecutors should be seeking people such as the driver or a passenger actively looking for victims in a drive-by shooting, someone who was involved in an assault but did not present a weapon, or someone who was present at the scene and may have aided and abetted the crime by cheering everyone on but who did not actually touch or strike the victim.

Part of selecting the right cooperator involves interviewing defendants under the conditions set out in an immunity letter. Such an immunity letter might be referred to as a Kastigar letter or a queen for a day letter³; however, regardless of its name, its purpose is the same. In the letter, written to the defendant's attorney, the prosecutor should state that it is his understanding that the defendant is interested in speaking with law enforcement in hopes of resolving his current charges. The conditions of such an interview should be set out in the letter and will ordinarily confer limited-use immunity for a defendant's testimony. The letter should not, however, provide derivative-use immunity. Sample language is as follows:

³ In *Kastigar v. United States*, it was found that the United States can compel testimony from an unwilling witness who invokes the Fifth Amendment privilege against compulsory self-incrimination by conferring immunity, as provided by 18 U.S.C. 6002, from use of the compelled testimony and evidence derived therefrom in subsequent criminal proceedings, as such immunity from use and derivative use is coextensive with the scope of the privilege and is sufficient to compel testimony over a claim of the privilege. Transactional immunity would afford broader protection than the Fifth Amendment privilege and is not constitutionally required. In a subsequent criminal prosecution, the prosecution has the burden of proving affirmatively that evidence proposed to be used is derived from a legitimate source wholly independent of the compelled testimony.

Proffer or "queen for a day" letters are written agreements between federal prosecutors and individuals under criminal investigation that permit these individuals to tell the government about their knowledge of crimes, with the supposed assurance that their words will not be used against them in any later proceedings. (The individuals can either be witnesses, subjects, or targets of a federal investigation, although it is subjects and targets who provide most proffers.)

Pursuant to our conversations, I understand that your client is interested in speaking with the State Attorney's Office regarding his involvement in the conspiracy to traffic in cocaine, for which he is presently charged. I further understand that your client is interested in entering into these discussions in hopes of eventually being able to resolve his current charges.

If your client is willing to cooperate with the State Attorney's Office and law enforcement, I will grant him limited-use immunity for his testimony. No statements provided by him in this matter pursuant to this agreement will be offered into evidence against him, other than a prosecution for perjury in the event that he did not provide truthful information. The obligation of truthful disclosure includes an obligation to provide the attorneys and law enforcement officers with any documents, records, or other tangible evidence within his custody or control relating to the matters about which he is questioned.

The state of Florida and the United States government remain free to use information derived from the debriefing, directly or indirectly, for the purpose of obtaining leads to other evidence that may be used against your client. Your client expressly waives any right to claim that such evidence should not be introduced because it was obtained as a result of the debriefing. This is to obviate the need for a Kastigar hearing. Furthermore, the state and/or the United States government may use statements made in the debriefing and all evidence derived directly or indirectly therefrom for the purpose of cross-examination, if your client testifies at any trial contrary to information he has provided. This limited-use immunity agreement does not apply to any crime of homicide. No additional promises, agreements, or conditions have been entered into other than those set forth in this letter. I hope this letter clarifies the conditions under which I would be willing to speak to your client.

If the defendant and his attorney agree to the conditions, an interview is arranged and attended by the defendant, the defense counsel, the prosecutor, and investigators. It should be anticipated, notwithstanding the letter notwithstanding, that it is highly unlikely a defendant is being 100 percent truthful from the outset. Over the course of the interview or even follow-up interviews, the prosecutor should be able to assess the value of this individual as a witness by answering the following questions:

Does he have the necessary evidence?

- In other words, does he know what happened or who did it?
- Will his testimony prove a crime and/or identification?

Is the evidence admissible?

- In other words, how does he know it?
- Did he witness it firsthand?
- Did he acquire the information through coconspirator statements or is it just "word on the street" hearsay?

Will the witness stand up to cross-examination?

Has he previously been convicted of a felony or a crime involving dishonesty?

- If so, how many times?

How great is his motive to cooperate?

- Obviously, he is going to want to resolve the instant case, but what other issues, such as probation or parole violations, must also be factored into the equation?

Having made the decision to flip a codefendant, the prosecutor should reduce the agreement to writing. Plea agreements should set forth all the conditions of the agreement, and prosecutors should anticipate that the agreement will be used during cross-examination and introduced into evidence.

One thing to consider is that plea agreements often contain a polygraph provision, even though *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), prohibits polygraph results from being admitted. *Frye* should not, however, motivate a prosecutor to forego polygraph examination of a cooperating defendant if the agreement calls for it, lest the argument be made that the prosecutor's reason for not polygraphing the witness was that the prosecutor himself did not believe the witness. Polygraph results are not admissible. But the conscious decision by a prosecutor not to polygraph a defendant who has signed a plea contract agreeing to a polygraph may be admissible. If a contract calls for a polygraph, a polygraph should be given. If no polygraph is going to be given, the contract should not provide for it.

Preparing a jury to accept the testimony of a flip codefendant is a topic discussed in the section on jury selection, but the theme is essentially this: Nobody likes a tattletale, but everybody wants to know what happened. Who better to tell us what happened than somebody who was there and participated?

In presenting the codefendant, prosecutors should not attempt to hide anything. If he is in jail, he should be wearing his jail clothes. If he has been brought to court from prison, he should, ideally, be wearing his prison clothes. Some state prison systems do not allow inmates to travel in their prison uniforms, instead sending them from prison to jail in their civilian clothes, where they are then given jail uniforms. The idea is that prisons are able to account for all uniforms by ensuring that the uniforms never leave

the facility. A phone call from a prosecutor to the prison, however, can sometimes get prison officers to send an inmate to court with his prison uniform. This is a small detail but one that the prosecutor may want to consider if, when presenting the cooperator, the idea of letting the flip codefendant mitigate his sentence by cooperating is balanced by the flip codefendant's accepting responsibility for his actions, pleading guilty, and getting on with his sentence. Incidentally, cooperators should be pleading GUILTY, not *nolo contendere* or no contest.

GANG EVIDENCE

When compared with individual criminal behavior, gang crime is unique. Rather than occurring as snapshots, gang crimes occur as part of a filmstrip. To understand the instant crime, it is often necessary to understand a preceding crime, the history between the defendant and victim, or the history between the gangs to which each belongs. In other instances, the relationship between perpetrators of a crime—common gang membership—may be relevant to proving they acted in concert.

Violent crimes, such as assaults and murders, can be motivated by nothing more than rivalry between two groups. Violent crimes (such as robbery) and property crimes (such as burglary and theft), regardless of whether the gang members committing the crime ever share the proceeds with the entire gang, are often facilitated by the relationship among the people committing the crimes—common gang membership. The testimony of gang member witnesses is often skewed in favor of or biased toward or against a defendant or victim.

Gang prosecution as an area of law is relatively new. However, by considering gang crime at its core—group criminal behavior—appellate courts, particularly in California and Illinois, have carved out an area of law without which gang prosecution would cease to exist. As a general rule, where gang evidence is relevant, it is admissible.

The touchstone consideration herein is whether the evidence concerning the defendant's gang affiliation was relevant to the charges filed. Where the information is relevant, it is admissible, despite any prejudice toward the accused from its disclosure. The probative value of the evidence outweighs the prejudicial impact. An accused may not insulate the trier of fact from his gang membership where it is relevant to a determination of the case, simply because prejudice attaches to that revelation, *People v.*

Rivera, 495 N.E. 2d 1088 (Ill. App. 1 Dist. 1986), citing *People v. Hairston*, 263 N.E. 2d 840 (Ill. App. 1970); *People v. Calderon*, 424 N.E. 2d 671 (Ill. App. 1981); and *People v. Deacon*, 473 N.E. 2d 1354 (Ill. App. 1985).

Proof of gang membership is relevant and admissible where there is sufficient proof of a relationship between such affiliation and the crime charged (e.g., to show a motive or common purpose), and where its relevance is so established, such evidence need not be excluded merely because of its tendency to prejudice the defendant, *People v. Anderson*, 505 N.E. 2d 1303 (Ill. App. 1 Dist. 1987), citing *People v. Hairston*, 263 N.E. 2d 840 (Ill. App. 1970); *People v. Jackson*, 424 N.E. 2d 1207 (Ill. App. 1 Dist. 1986); and *People v. Calderon*, 424 N.E. 2d 671 (Ill. App. 1981).

It is proper to introduce evidence of membership in a gang or any type of group that relates to a question, such as motive. Thus, it has repeatedly been held that it is proper to introduce evidence that is unpleasant or negative pertaining to an organization where it is relevant to motive or to the subject matter at trial. In *In re Darrell T.*, 90 Cal. App. 3d 325 (1979), the court discussed evidence concerning the history of various juvenile gangs as it pertained to the proof of the existence of a motive relative to the crime of murder. In the case within, gang membership was quite relevant. The victim and some of his companions were admitted members of a gang that was inside the territory or turf of another gang. Additionally, appellant Bazurto admitted having been a past member of the gang that claimed the scene of the crime as its territory, *People v. Frausto*, 135 Cal. App. 3d 142 (1982), citing *People v. Dominguez*, Cal. App. 3d 481 (1981) and *People v. Perez*, 114 Cal. App. 3d 470 (1981).

Gang evidence is admissible to prove motive, intent, identity, conspiracy, knowledge, principal, preparation, plan, absence of mistake or accident, and bias, as well as to explain the demeanor of a witness.

Evidence of this type is usually considered in the context of Fed. Rule of Evid. 404(b) or its equivalent in state evidence codes. Under these rules, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial, Fed. Rule of Evid. 404(b).

Most gang evidence, however, is not collateral but is inextricably intertwined, thus taking it outside the purview of 404(b) analysis. In other words, it would be impossible for the jury to understand the case being tried without understanding the gang dynamics of the case. The United States Court of Appeals Eleventh Circuit, in *United States v. Williford*, 764 F. 2d 1493 (1985), stated, “Evidence of an uncharged offense arising from the same series of transactions as that charged is not an extrinsic offense within Rule 404(b).” For example, understanding the rivalry that existed between two gangs and that members of the victim’s gang had earlier in the day assaulted a member of the defendant’s gang will help a jury understand the motive and intent of the defendants; in other words, why they drove to the turf of the victim’s gang—each person in the car armed with a firearm—and all but the driver were shooting at the victim, who was innocently walking down the street.

The decision to admit evidence that falls under Rule 404(b) or is shown to be intertwined in the crime depends on Fed. Rule of Evid. 403. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence, Fed. Rule Evid. 403.⁴ The United States Supreme Court, in *Old Chief v. United States*, 519 U.S. 172 (1997), stated, “The term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.”

THE JURISPRUDENCE OF GANG PROSECUTION

The following section provides examples of courts allowing the introduction of gang evidence for various relevant purposes. Gang evidence has been used in court for several decades in jurisdictions throughout the United States. There has emerged a substantial body of law regarding the circumstances when gang evidence has been admitted and excluded. A good example of the extent to which gang evidence has been considered in several states is found in a Virginia Court of Appeals case, *Utz v. Commonwealth*, 28 Va. App. 411, 422, footnote 2 (1998):

⁴ See California Evidence Code, Section 352 for an equivalent state statute.

Siler v. State, 705 So. 2d 552, 556-59 (Ala. Crim. App. 1997) (admission of past gang-related activity and rivalry was directly relevant to show motive and state of mind; due to its direct relevance, it was not overly prejudicial); *State v. Romero*, 178 Ariz. 45, 870 P.2d 1141, 1147-48 (Ariz. Ct. App. 1993) (evidence of defendant's gang affiliation established a link between the crime and gang rivalry and was relevant to establish motive; trial court properly balanced probative value with prejudice); *People v. Williams*, 16 Cal. 4th 153, 940 P.2d 710, 738 (Cal. 1997) (in gang-related case, gang evidence is admissible if relevant to motive or identity, so long as probative value not outweighed by prejudicial effect); *State v. Taylor*, 239 Conn. 481, 687 A.2d 489, 500 (Conn. 1996) (finding evidence of gang affiliation relevant and not overly prejudicial to establish motive for murder); *People v. Knox*, 241 Ill. App. 3d 205, 608 N.E. 2d 659, 663, 181 Ill. Dec. 586 (Ill. Ct. App. 1993) (explaining that gang-related evidence 'is only admissible where there is sufficient proof that gang membership or activity is related to the crime charged,' holding that gang-related evidence was sufficiently linked to offense and was, therefore, admissible to provide motive for otherwise inexplicable murder); *State v. Toney*, 253 Kan. 651 862 P.2d 350, 352-53 (Kan. 1993) (evidence of defendant's gang membership and expert testimony about gang conduct was relevant and admissible in government's case-in-chief to show motive for murder); *Hoops v. State*, 681 So. 2d 521, 529-31 (Miss. 1996) (upholding admission of evidence of defendant's involvement in gang that had rivalry with victim's gang to show motive for otherwise unexplained assault; finding that probative value outweighed danger of unfair prejudice); *Tinch v. State*, 113 Nev. 1170, 946 P.2d 1061, 1064-65 (Nev. 1997) (upholding admissibility of evidence of gang affiliation where it was relevant to charged offense and probative value was not substantially outweighed by danger of unfair prejudice; 'concluding that the [gang-related] evidence was relevant to the gang enhancement charge and could show motive'); *People v. Connally*, 105 A.D. 2d 797, 481 N.Y.S. 2d 432, 433 (N.Y. App. Div. 1984) (limited evidence of gang affiliation was relevant and admissible to prove motive and intent); *State v. Campbell*, 78 Wash. App. 813, 901 P.2d 1050 (Wash. Ct. App. 1995) (holding that evidence of defendant's gang affiliation was sufficiently linked with crime and was probative to show motive and premeditation, supporting state's theory of case; trial judge carefully limited evidence so as to avoid undue prejudice)."

Motive

It is proper to introduce evidence of membership in a gang or any type of group that relates to a question in issue, such as motive, *People v. Frausto*, 185 Cal. Rptr. 314 (App. 1982). For example, gang expert testimony on the role of respect in gang culture was relevant to provide a motive for an otherwise inexplicable act by assisting the jury in understanding why the defendant would attack a person seeking to avoid a fight, *State v. Jackson*, 714 N.W. 2d 681 (Minn. 2006). In a drive-by shooting case, an Illinois appellate court found that gang testimony regarding a gang war was relevant since the defendant admitted he knew that his armed passengers were going to shoot at rival gang members. The court said, “Gang evidence is relevant when it corroborates a defendant’s confession . . . [and] is admissible despite the prejudice that attaches if it is relevant and particularly if it is crucial in establishing motive,” *State v. Davis*, 335 Ill. App. 3d 1 (2002).

Motive and Identity

The defendant’s membership in the Diamond Gang was relevant to his identity as a participant in the group action and relevant to his credibility as a witness. The defendant’s membership in the Diamond Gang was also relevant to his motive for participation in the charged offenses, *People v. Contreras*, 192 Cal. Rptr. 810 (App. 1983).

Intent

The court implicitly found the requisite specific intent by finding that the drive-by shooting here was “a crime of shooting at somebody with a shotgun” and that Sergio and Leonardo “both had knowledge of what was going to happen” (i.e., someone would be killed), *In re Sergio R.*, 279 Cal. Rptr. 149 (Cal. Rptr. 2 Dist. 1991). In a case out of Hawaii, evidence of a prior gang-related shooting was relevant to prove the intent to enter a conspiracy, *State v. Renon*, 73 Haw. 23 (1992).

Knowledge and Principal

Evidence established that the juvenile was not merely present at the scene of the robbery but acted with requisite knowledge of criminal purpose so as to be the aider and abettor in facilitating the robbery of an automobile, *Matter of Jose T.*, 282 Cal. Rptr. 75 (Cal. App. 2 Dist. 1991).

Principal

A defendant was found to be a principal in a case in which the evidence was not contradicted that the defendant was one of those present at the discussions held by the Crips immediately before their venture was undertaken and that, along with the others, he departed the murder scene as soon as the shooting had occurred, *People v. McDaniels*, App., 166 Cal. Rptr. 12 (1980).

Aiding and Abetting

Gang evidence is critical at times to prove aiding and abetting liability. The Ohio Supreme Court addressed the relevancy of gang evidence in light of aiding and abetting in a case where the defendant actively encouraged a member of his gang to shoot his gun at someone as retaliation for an earlier gang-related incident.

“This court has held that the state need not establish the identity of the principal in order to convict an offender of complicity. To support a conviction for complicity by aiding and abetting...the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such criminal intent can be inferred from the presence, companionship, and conduct of the defendant before and after the offense is committed.”; *State v. Johnson*, 93 Ohio St. 3d 240 (2001) (in a gang motivated shooting gang evidence was allowed to show defendant aided and abetted in the murder of a three year old bystander).

In re T.K., 109 Ohio St. 3d 512, 514 (2006).

Conspiracy

Gang evidence is often admissible to establish the existence of a conspiracy, *State v. Torres*, 47 Conn. App. 149 (1997) [Gang membership and leadership position in the gang were found to be relevant to the criminal charge of conspiracy to commit murder because it helped establish that the defendant’s actions of being at a café and communicating by walkie-talkie were carried out to advance a plan to harm a rival gang member.]; *United States v. Hartsfield*, 976 F.2d 1349 (1992) [gang membership relevant to prove a conspiracy charge in order to show defendant and coconspirator were both members of a particular gang whose main purpose was to distribute drugs].

While mere association with perpetrators of crime does not establish participation in a conspiracy, it does provide a starting point. Here, the evidence shows much more than the “mere association” of appellant with the conspirators. The members of the “family” (a gang) and their supporters quite clearly formed a plan to hunt down and assault B-Wingers to retaliate for the stabbing of a “family” member, *In re Nathaniel C.*, 279 Cal. Rptr. 236 (Cal. App. 1 Dist. 1991). In a Pennsylvania case, evidence of the victim’s and defendant’s gang affiliations and rivalries and a specific past incident where a member of the defendant’s gang was stabbed by a member of the victim’s gang were properly admitted to help establish a conspiracy. The court declared, “Evidence of relations, conduct of circumstance of the parties is relevant circumstantial evidence to establish a conspiracy. [Thus,] evidence of the gang activity involved in the present case is highly probative of whether a conspiracy existed,” *Commonwealth v. Gwaltney*, 497 Pa. 505 (1982).

In another case, the defendant was present at one or more discussions concerning Reggie T.’s fight with Daryl W. and the plan to get even. The defendant traveled to a rival gang’s (The Fives) area in a caravan of three cars with nine or ten other youths. Before the shooting occurred, the defendant (along with Michael P. and Nicardo P., members of the same Crips faction as the defendant) was identified by McCormick as one of the boys standing with McDaniels when the victim was killed. Michael P., Nicardo P., and the defendant ran back to the car together. After the car failed to start, the defendant and Nicardo P. ran from the scene on foot. The evidence, although circumstantial, is clearly sufficient to support a conspiracy finding, *In re Darrell T.*, 979 App., 153 Cal. Rptr. 261.

Bias

Membership of the defendant and a defense witness in a prison gang whose tenets required its members to lie, cheat, steal, and kill was admissible to show bias of the witness, *United States v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed. 2d 450 (1984). Gang membership was also found admissible in a Florida case to show two defense witnesses had a motive for lying because the defendant and they were all members of the same gang, which created an “unusual loyalty,” *Martin v. State*, 797 So. 2d 6 (Fla. Ct. App. 2001). In the Kansas case of *State v. Knighten*, 260 Kan. 47 (1996), the defendant was charged with the first-degree murder of a correctional officer. The defendant’s supporting witnesses attesting to his alibi were all members of the same gang. Gang membership was admissible to the issues of witness bias and credibility. The court held that “proof of bias is almost always relevant because the jury, as finder of fact and

weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony."

LITIGATING THE ADMISSIBILITY OF GANG EVIDENCE

Particularly in emerging jurisdictions, where gang prosecution is a relatively new concept, litigating the admissibility of gang evidence can be tricky. Even in established jurisdictions, gang evidence might need to be litigated on a case-by-case basis. The admissibility of gang evidence should be litigated pretrial. The pleading on which a prosecutor should rely is a "Memorandum of Law: Points and Authorities on the Admissibility of Gang Evidence." Typically, such a pleading will summarize the facts of the case and then give an offer of proof and argument, essentially laying out all the reasons why the gang evidence is relevant. Next, the pleading should include a discussion of cases where gang evidence was similarly relevant and admitted. Obviously, in an emerging jurisdiction, the majority of cases cited will be from other states.

In *State v. Tran*, 847 P. 2d 680 (Kan. 1993), the Kansas Supreme Court found itself having to look to other jurisdictions, such as California and Illinois, for guidance in a gang case.

Two groups had gone to a skating center one night: one group was made up of two brothers, Toan and Toan Q., and their girlfriends—the other group consisted of several members of the Local Boys, a street gang, of which the defendant, Hieu Tran, was a member. Inside the skating rink, a fight occurred between one of the brothers and Jimmy Nguyen, a Local Boy. The fight was broken up by a security officer, who arrested Jimmy Nguyen for assault and battery.

The two brothers and their girlfriends, leaving the skating rink, headed towards the parking lot. Kevin Nguyen followed and stated, "You fought my friend. Why don't you fight me?" The four were confronted by "a whole bunch of guys," and Kevin Nguyen then said, "Why'd you mess with my brother? You mess with him, you mess with me."

Eight to ten people attacked the two brothers. Hieu Tran, the defendant, was seen pulling a gun from his pocket and pointing it toward Toan's head. A shot rang out, and everybody scattered. Toan died from a head wound.

At trial, Officer Brad Carey, a gang intelligence officer for the Wichita Police Special Community Action Team (SCAT), identified Hieu as a member of the Local Boys gang. Officer Carey's identification was based on observations of Hieu associating with other gang members on two occasions and on information provided by a reliable informant.

On appeal, the defendant claimed that he was denied a fair trial by the admission of gang characteristics and purported gang associations. The defendant reasoned that a gang is not simply a group of kids who hang out together. According to the defendant, "The term 'gang' in its current usage connotes opprobrious implications. The use of the word 'gang' takes on a sinister meaning when it is associated with activities." The Kansas Supreme Court disagreed, stating:

Evidence of gang association or characteristics may only be admitted if relevant. Relevance is present in the case at bar. (Tran, at 686.)

The *Tran* court agreed with the state that the evidence of gang membership was relevant to establish Hieu's motive for the crime. Following the fight inside the skating rink, Corby Turner heard a group of three to five Vietnamese males talking about the incident. Turner heard the people say they were going to get even, and they knew how they were going to do it. According to the state, that conversation established a link between the fight in the skating rink and the fight in the parking lot that led to Toan's death. The motivation or desire to get even with the brothers who were involved in the arrest of Jimmy Nguyen, a member of the Local Boys, led to the confrontation in the parking lot. Hieu was a participant in the fight in the parking lot. Hieu made sure the gang retaliated against the brothers when he shot Toan in the back of the head.

Absent evidence of gang affiliation, the jury would wonder why Hieu felt the need to get even with the brothers. Again, evidence of gang affiliation established an alliance among Jimmy, who started the initial fight inside the skating rink; Kevin, who started the fight in the parking lot; and Hieu, who fired the shot that killed Toan. Without evidence of gang affiliation, the state's attempt to establish a motive for the crime would have been impeded. (Tran, at 688.)

The *Tran* court went on to analogize the motive concept in that case to the concept adopted by the United States Supreme Court in *United States v. Abel*,

469 U.S. 45, 105 S.Ct. 465, 83 L.Ed. 2d. 450 (1984), that gang evidence may be admitted to prove bias.

Additionally, the Kansas Supreme Court found that several facts in *Tran* supported the admission of gang testimony as *res gestae* and acknowledged that they had recently approved the admission of gang evidence on a *res gestae* basis in *State v. Walker*, 843 P. 2d 203 (1992) and *State v. Hooks*, 840 P. 2d 483 (1992).

ADMISSIBILITY OF GANG EXPERT TESTIMONY

In *People v. Langford*, 602 N.E. 2d 9 (Ill. App. 1 Dist. 1992), a properly qualified gang expert was allowed to testify that the defendant was a member of one of the two gangs involved in that case. He recounted the history of the gangs and described the continuing dispute between them over the right to sell drugs in the area where the murders at issue in that case occurred. The expert witness testified that it was the dispute that motivated the defendant to shoot the victims, who were members of the rival gang.

In *People v. Buchanan*, 570 N.E. 2d 344 (Ill. App. 1 Dist), a gang specialist was allowed to testify, among other things, that the Insane Unknowns and the Imperial Gangsters were rival gangs that belonged to different “umbrella” organizations (*Buchanan*, at 348).

In *People v. Gamez*, 286 Cal. Rptr. 894 (Cal. App. 4 Dist. 1991), “[T]hree Santa Ana police officers testified as experts regarding their knowledge of gangs in general and the Southside and Highland Street gangs in particular. One of the officers opined that the shooting was a ‘payback’ for a prior shooting by Highland Street against Southside. Another opined the defendant was a member of Southside. Photographs, taken in October 1987, showing the defendant with other known Southside members throwing the gang’s hand signs were introduced to corroborate the officers’ opinions. Based on his own personal knowledge, crime and victim reports, conversations with other officers, and statements by gang members, one officer gave his opinion that Southside was a criminal street gang engaged in a pattern of criminal street gang activity.” Relying on *In re Darrell T.*, 90 Cal. App. 3d 325 (1979) and *People v. McDaniels*, 107 Cal. App. 3d 898 (1980), the *Gamez* court found the use of gang expert testimony admissible.

QUALIFYING THE GANG EXPERT

Below are sample predicate questions for qualifying a detective to testify as a gang expert and to offer opinion testimony.

Background

- Please state your name.
- How are you employed?
- How long have you been employed as a police officer?
- To what unit are you presently assigned?
- Prior to being assigned to the gang unit, to what units were you assigned?
- While in the uniform patrol division and the street narcotics unit, did you have occasion to come into contact with gang members?
- Are you presently a member of any task force?
- What is the mission of the Violent Gang Task Force?
- As a member, what specifically do you do?
- How often does the task force conduct such an operation?
- The intelligence meetings to which you referred—how often are they held?
- Are you a member of any professional associations?
- What is the mission of the _____ Gang Investigators Association?

Training and Expertise

- Have you received any specialized training in the areas of gang enforcement, investigation, or prosecution?
- Have you ever taught any courses?
- To whom are the gang awareness courses taught?
- Do you keep current on literature, articles, or studies in the areas of gang enforcement, investigation, or prosecution?
- What are some of the materials you have read?
- By whom were they written?
- Have you ever written any materials on those subjects?

Experience

- As a gang detective, do you have occasion to personally come into contact with gang members?
- How often?
- Is that always in a custodial context?
- Describe a typical casual contact with a gang member.
- In your five years as a gang investigator, your two years as a detective in the narcotics unit, and your two years in the uniform patrol division, approximately how many gang members have you spoken with?
- Is it your experience that gang members have a unique culture, with its own habits, trends, customs, language, values, and morals?
- Is it part of your job as a gang detective to keep current on gang culture—the habits, trends, customs, and language?
- How do you do that?

Information Sharing

- As a member of the gang unit, do you share what you learn with other gang detectives?
- Do other gang detectives share information with you?
- Do you share what you learn with police officers in other units?
- How do you do that?
- Do you also share information with other police agencies?
- How do you do that?
- As a gang detective, do you have the responsibility to help maintain an ongoing gang file by collecting information and intelligence and forwarding it to the gang crime analyst?
- Is it part of your job to be familiar with gang rivalries?
- Is it part of your job to be familiar with gang alliances?

Courtroom Experience

- Have you ever testified before in court in a gang case?
- How many times?
- Have you ever been recognized by a court as an expert witness in the field of gangs?

- How many times?
- Were you allowed to testify regarding gangs, gang membership, gang culture, gang rivalries, and gang alliances?

Gangs in Question

- Are you familiar with the term “Chicago-style” as it relates to gangs?
- Please explain.
- Do “Chicago-style” gangs align themselves by nation?
- Please explain what these nations are and how they relate to one another.
- Are there different levels of participation within gangs?
- Do “Chicago-style” gangs have a hierarchy?
- Describe the typical hierarchy of a “Chicago-style” gang.
- How does one progress or move through the ranks?
- Are you familiar with a gang called TNS?
- For what do the initials TNS stand?
- When did you first come into contact with members of TNS?
- Is TNS a “Chicago-style” gang?
- To what nation does TNS belong?
- Does TNS have colors?
- What are their colors?
- How do they display the colors blue and red?
- Does TNS have any signs or symbols?
- What are their signs or symbols?
- Where do they put these signs or symbols?
- Are you familiar with a gang called IN/P?
- For what do the initials IN/P stand?
- When did you first come into contact with members of IN/P?
- Is IN/P a “Chicago-style” gang?
- To what nation does IN/P belong?
- Does IN/P have colors?
- What are their colors?
- How do they display the colors blue and red?
- Does IN/P have any signs or symbols?
- What are their signs or symbols?
- Where do they put these signs and symbols?
- What is the relationship between TNS and IN/P?

Defendant's Membership

- Are you familiar with the defendant Mauricio Solarzano?
- Do you know him by any other names?
- What is the street name by which you say you know him?
- When did you first come into contact with "Desca"?
- Where was that contact?
- With whom was the defendant hanging out?
- Did you memorialize that contact in any way?
- Is this the field interview (FI) card you prepared?
- Did you ever come into contact with the defendant on other occasions?
- Did you also prepare FI cards on those occasions?
- Are these those cards?
- Do you have an opinion as to whether the defendant, Desca, is a gang member?
- What is that opinion?
- On what do you base that opinion?
- To what gang do you believe Mauricio Solarzano, also known as Desca, belongs?

JURY SELECTION

Because of the seriousness of gang crime and the serious threat to public safety posed by gang member defendants, gang prosecution is ultimately about making the most problematic cases prosecutable and winnable. From dealing with problem witnesses, to litigating the admissibility of gang evidence, to introducing that evidence through a gang expert, gang prosecutors should be able to explain evidence to jurors in common-sense terms.

Jurisdictions vary over how involved attorneys for the parties will be in jury selection. Certain jurisdictions are so restrictive that jury selection is essentially conducted from the bench, although attorneys for each side might submit certain questions. In other jurisdictions, the attorneys are able to *voir dire* prospective jurors for a reasonable period of time. "Reasonableness" is determined on a case-by-case basis.

Jurors' reactions to gangs vary. Some jurors want to convict all gang members based on gang membership alone, regardless of whether there exists any evidence that the defendants actually committed the crimes charged. At the other end of the spectrum are jurors who are so afraid of retaliation that they will never be able to convict, regardless of how overwhelming the evidence. A gang prosecution requires jurors who are somewhere in between.

Below are sample predicate questions for discussing gangs during jury selection, designed to seat a fair and impartial jury whose members will listen to the evidence and render a true and correct verdict.

Juror's Basic Attitude Toward Gangs

- What do you think of when you hear the word "gang"?

Personal Knowledge About Gangs

- In what area do you live?
- Are there gang problems in your neighborhood?
- Have you ever seen graffiti in your neighborhood?
- Does any of it appear to be gang graffiti?
- Have you ever tried to interpret it?
- Are you aware of any gang rivalries in your neighborhood?

Gangs Involved

- Have you ever heard of a gang called TNS or Take No Shit?
- Where?
- What effect will it have?
- Have you ever heard of a gang called IN/P or International Posse?
- Where?
- What effect will it have?
- Have you ever heard of:
 - Folk Nation?
 - People Nation?
 - Outlaws (not the motorcycle gang)?
- Have you ever had personal contact with gang members?
- Has anyone here ever been a gang member?

- Is anyone here currently a gang member?
- Does anyone have any family members who are gang members or who they think are gang members?
- Does anyone have friends or know anyone who is a gang member?
- Have you ever seen anyone whom you believed to be a gang member? Why did you believe that person to be a gang member?
- Are your children confronted at school by gang members?
- Are your children confronted at school by gang problems/issues?
- Have you ever been the victim of a gang-related crime?
- Do you know anyone who has been a victim of a gang-related crime?
- Have you ever witnessed a gang-related crime?

Juror's Knowledge of Gang Culture

Discuss with the jurors the following in regards to gang culture:

- Dress
- Understanding that dress is not the “be all” and “end all” of gang membership
- Nowadays, everyone looks like a gang member
- Tattoos
- Graffiti
- Hand signs
- Slang
- Monikers
- Territories (hoods or turf)
- Source of knowledge—personal or from the media
- Television shows or movies watched or books read on gangs or about gangs

Gang Problem

- Do you think there is a gang problem in (city/county)?
- What are your feelings about that problem?
- Do you think it is blown out of proportion, or is it increasing in seriousness?
- Do you understand that this trial is not supposed to be your opportunity to get back at every gang member in the county?

- Gang evidence will be introduced to help you understand the crimes charged. No one is charged with being a gang member. The judge will instruct you that it is not against the law to belong to a gang, but it is against the law to commit the crimes charged.

Gang Membership and Motive to Commit Crimes

- Rival gangs
- Increased status in gang catching rank/respect

Reluctant Witnesses

- Witness intimidation and/or fear of retaliation is a motive to lie.

Juror's Fear of Retaliation as an Obstacle to Deliberation in a Gang Case

- I expect the victim to testify in this case, and I expect it to come out that he is a gang member. I should also point out that this is an open courtroom and some of the victim's friends may attend part of this trial. Likewise, some of the defendant's friends may attend part of this trial. I also want you to understand that your personal information, such as your address at which you received your jury summons, is not made available to the defendant, the victim, or any of the witnesses.
- Would the fact that the victim is a gang member affect your ability to render a guilty verdict? In other words, do you think that as a gang member he deserves what he gets, even if that means being the victim of a crime?
- Similarly, if the charges are not proven beyond a reasonable doubt, would you have any problem finding the defendant not guilty? In other words, would you be able to acquit the defendant and not be afraid of what the victim or the victim's gang might think?
- Likewise, if the charges are proven beyond a reasonable doubt, would you have any concerns about convicting the defendant? In other words, would you be able to convict the defendant and not be afraid of what the defendant or the defendant's gang might think?

General Factors to Consider

- Offensive language.
- Circumstantial evidence.
- How do we know what someone's intent is?
- Actions speak louder than words.
- Sympathy factor—defendant is young.
- Not to consider punishment or consequences of verdict. That is the judge's job. We all have separate jobs.
- What would you do if during deliberations, a juror told you he was not convinced the defendant committed the crime but wanted to convict the defendant anyway because he believes all people who are arrested are guilty?
- What would you do if during deliberations, a juror told you he was convinced the charges had been proven beyond a reasonable doubt but did not want to convict the defendant because he felt bad about what might happen to the defendant at sentencing?
- Report juror misconduct to court . . . it does not make you a tattletale. We are just relying on everyone.

Legal Theories That Extend Criminal Liability

- Principal theory/instruction
- Three Musketeers—“all for one” and “one for all”

CONCLUSION

Gang cases are not easy. They are time-intensive and labor-intensive. Because of the nature of street gangs, specialized prosecutors can expect multiple codefendants and serious charges. Management of such cases can be overwhelming and requires that the prosecutor have experience and expertise in dealing with complex litigation issues—such as 404(b) evidence, *Bruton* issues⁵ multiple juries, declarations against

⁵ *Bruton v. United States*, 391 U.S. 123 (1968), granted a new trial, finding error in the admission in a joint trial of a nontestifying codefendant's confession which directly implicated the defendant, 391 U.S. at 125–26, 137. The court held this violated the Confrontation Clause of the Sixth Amendment to the Constitution, even though the jury had been instructed not to consider the codefendant's statement on the issue of the defendant's own guilt.

interest, prior testimony, and self-defense—as well as experience and expertise dealing with gang issues, such as what gang evidence is, where it comes from, for what it can be used, and how it is introduced. Gang prosecutors often handle serious crimes involving serious defendants. Meticulous care must be taken at each stage. There is no substitute for preparation.

Section 5.

Sentencing Issues in Gang Cases

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INTRODUCTION

Sentencing issues in a gang case are important from the time of initial consideration of the case for filing. An appropriate disposition of a case (or a potential case) is often a function of the charges filed, a decision to delay the filing of a case, or deferring the entry of judgment following a guilty plea. The less serious an offense committed by a gang member, the more options exist to fashion a disposition that punishes the offender but still allows an opportunity for rehabilitation. The more serious and violent felony gang offenses usually are met with the most severe charges and the harshest possible punishments.

The fact that the majority of street gang members are most criminally active between the ages of 14 and 24 creates additional difficult sentencing issues. Gang prosecutions require that prosecutors be thoroughly familiar with juvenile and adult court procedures and know when a juvenile may be prosecuted under the adult law. It is not uncommon for juvenile and adult street gang members to be suspects in the same case. This dynamic dictates split juvenile and adult court prosecutions at least until the juvenile suspects are remanded to adult court.

Sentencing in gang cases is a complicated process, depending on the type of crime, the range of possible punishments for the crime, on what charges the defendant

is convicted, how the defendant was convicted (by plea or trial), and whether the defendant was initially placed on probation following a conviction.

TYPES OF CRIMES

Most states classify crimes based on the seriousness of the offense as measured by the level of violence or the amount of loss. Different classes of crimes carry different levels of punishment. Some public disturbance offenses, such as making unreasonable noise or disturbing the peace, often are considered noncriminal infractions punishable by fines or community service hours but no jail time. The first level of criminal offense is a misdemeanor, which is punishable by fines and typically up to one year of local jail time. Common gang-related misdemeanors include vandalism, challenging another to fight in public, simple assault, and possession of alcohol by a minor.

Felonies are serious or violent crimes punishable by confinement in state prison, sometimes for life, or even by death in many states for special-circumstance murders. Often, states have sentencing schemes that allow for more custody time based on how the crime was committed (use of a weapon or firearm, for example), the nature of the victim (for instance, an elderly person or a government official), the motivation for the crime (for example, hate crimes based on race or sexual orientation), or the amount of loss. Common gang-related felonies include rape, robbery, attempted murder, and murder.

In between felonies and misdemeanors is sometimes a crossover category of crimes that can be charged as either felonies or misdemeanors. The initial filing decision rests with the prosecutor, but during the pendency of a case, a charge filed by the prosecutor as a felony can be reduced to a misdemeanor. A court's decision to reduce such an offense from a felony to a misdemeanor usually cannot be overturned absent a clear abuse of discretion by the court. Common gang-related offenses falling into this category of crime include assault with a deadly weapon, joyriding, and grand theft.

More than 70 percent of states have enacted some form of antigang crime legislation. A number of states have laws that focus on so-called criminal street gang activity. Criminal street gang statutes create crime and sentence enhancements (additional custody time) for crimes committed for the benefit of, in association with, or at the direction of a criminal street gang. The statutes have elaborate definitions of

what constitutes a criminal street gang and what activity is included in criminal street gang activity. Precision in the definitions helps avoid the constitutional infirmity of vagueness in the laws but also creates difficulty in proving the charges.

ALTERNATIVES TO CRIMINAL FILINGS AND DIVERSION PROGRAMS

The initial question when a case is presented by the police to the prosecutor for a filing decision is whether the case warrants a filing. Just because a case *can* be filed does not always mean it *should* be filed. Prefiling alternatives can be explored, especially in juvenile cases involving minor offenses committed by first-time gang offenders (e.g., possessing spray paint).

Police often counsel juveniles and their parents in nonviolent and nonserious first-time offenses. The idea behind such a strategy is informing the parents of the juvenile's activities and enlisting the parents' help in keeping the juvenile offender on the straight and narrow. Sometimes police departments have the juvenile and parents come to the station for a more formalized counseling session.

If a case is referred to the juvenile authorities (usually the probation department) for presentation to the prosecutor's office for a filing decision, the authorities sometimes have the discretion to place the juvenile offender on informal probation. In such cases, the charges are never presented to the prosecutor if the juvenile offender completes the requirements of the informal probation. These programs are typically limited in application to first-time petty offenders.

If a case is filed in either juvenile or adult court, there are a number of alternatives to a judgment of guilty. Diversion programs allow many types of offenders to participate in structured counseling programs. Narcotics violations (usually only possession offenses, not possession for sale, sale, or manufacturing cases) are the most common crimes eligible for diversion programs. In California, narcotics offenders are allowed to participate in three different drug diversion programs. Each allows offenders a chance to complete narcotics offender diversionary programs in exchange for a dismissal of their cases. Gang members are notorious substance abusers and therefore prime candidates for narcotics diversion programs. Other types of diversion programs cover petty theft and domestic violence cases.

FILING DECISION

The decision to file a criminal case is the first step in which sentencing is considered. Gang case filing decisions are subject to the same ethical standards as any other case. A prosecutor should not file a case unless, after a careful consideration of all of the available admissible evidence and taking into consideration any possible defense apparent in the available evidence, the prosecutor is satisfied there is a reasonable probability of proving the truth of the charges beyond a reasonable doubt to an objective fact finder (a jury or a judge in a court trial). Prejudice toward a gang member suspect (or gangs in general) or public pressure never justifies a case filing if there are insufficient facts to support the filing.

Sentencing implications related to the charging decision include that some charges make a defendant ineligible for probation upon conviction or require mandatory minimum sentences upon conviction. It is critical at the time of filing to obtain and thoroughly review all of a defendant's prior conviction records to ensure that all applicable crimes and enhancements (i.e., strikes, prior felony convictions, and prior prison terms) are alleged. Finally, while sentencing considerations start at the filing of a case, getting the sentence requires a successful prosecution in the trial court and no loss of the conviction on appeal. Thus, a prosecutor must remain completely within ethical boundaries from the filing of a case through its conclusion. It is senseless to secure a conviction that will be reversed on a new trial motion before sentencing or on appeal.

Adult or Juvenile Court

Given the youthful age of many gang offenders, often a decision must be made when charges are filed whether to seek to try a juvenile as an adult or keep the offender in juvenile court. Most states allow for minors as young as 16, 14, or even 12 years old to be tried as adults if a juvenile offender is found unfit for juvenile court proceedings. This process requires filing charges in juvenile court and setting the case for a fitness hearing. With serious and violent felonies, the threshold of unfitness is lower than for misdemeanor or nonserious/violent offenses. Factors considered in a fitness hearing include the gravity of the current offense, the level of sophistication of the minor offender in the commission of the offense, the minor's previous record, and the prior attempts by the juvenile court to rehabilitate the offender.

Some states allow for the direct filing of certain criminal charges against a juvenile in adult court without the need of a fitness hearing. In California, for example, crimes committed in association with, for the benefit of, or at the direction of a criminal street gang are chargeable at the prosecution's discretion in adult court without judicial acquiescence. Further, some states *require* the filing of adult court charges against juveniles in murder cases (at least where the minor was the direct perpetrator of the murder) or serious sex offenses. (See California Welfare and Institutions Code, Section 707.)

A minor offender faces much less severe consequences staying in juvenile court than being remanded to adult court. There are usually age limits on how long a juvenile offender can be incarcerated (i.e., until 18, 21, or 25 years old). In adult court, the juvenile offender may face as much as life in prison without possibility of parole. The only true prohibition on the sentences imposed on juvenile offenders tried as adults is that juveniles cannot face the death penalty.

The decision of where to try a juvenile gang member is obviously an important one. It is a decision that requires careful consideration of the offense and the offender. If there is a good chance the gang member may rehabilitate while incarcerated in juvenile facilities, it is sometimes best to keep the minor in juvenile court by not direct filing or requesting a fitness hearing. On the other hand, if the offense is sophisticated, with much violence, and/or the gang member offender is a recidivist, it is probably best to seek an adult conviction to better protect society by the longer periods of incarceration available in adult court. Even when a juvenile is prosecuted in adult court, there are opportunities for the minor to be returned to juvenile court on the motion of the prosecutor or sometimes at the discretion of the court at sentencing.

Types of Charges

In adult court, the charges filed affect possible sentences. Conduct may often be charged in different ways and sometimes for strategic reasons. A gang-related attempted murder, for example, can also be charged as an assault with a deadly weapon as a backup charge to the attempted murder. The sentence for an attempted murder (especially one committed with premeditation and deliberation) is much greater than the sentence for an assault with a deadly weapon. Charging both crimes allows the jury to find a defendant guilty of both charges or just the lesser assault charge. Sometimes a prosecutor does not want to give the jury that option and charges only an attempted murder. That charging decision forces the jury to convict or not on the greater charge of attempted murder.

In states with anti-street gang laws, the decision to seek conviction on those charges can significantly alter a possible sentence. In California, for example, felonies committed for the benefit of, in association with, or at the direction of a criminal street gang have several sentencing consequences. First, the crimes receive an additional punishment of two, three, or four years for regular felonies; five years for serious felonies; and ten years for violent felonies. Second, crimes punishable with straight life sentences (which are normally eligible for parole consideration after 7 years) require a defendant to serve 15 actual years before becoming eligible for parole consideration. Third, all felonies committed for the benefit of, in association with, or at the direction of a criminal street gang are “strikes” for future sentencing under the three-strikes law. Fourth, certain violent felonies are punishable by life in prison, if committed for the benefit of, in association with, or at the direction of a criminal street gang. Finally, misdemeanor offenses committed for the benefit of, in association with, or at the direction of a criminal street gang (e.g., vandalism, fighting in public, and simple assault and battery) are chargeable as felonies. (See generally, California Penal Code, Section 186.20 *et seq.*)

Often the crimes committed by gang members carry significant sentences even without the additional time imposed under anti-street gang laws. For example, it is not uncommon for an attempted murder or a kidnapping for specific purposes (such as carjacking, rape, or robbery) to carry a life sentence. Carjacking, robbery, and assault with a deadly weapon also carry significant prison terms, especially if weapons were used or the victim was injured. Nearly all gang crime convictions (and frequently juvenile convictions called adjudications) are strikes for future sentences. It is not uncommon for gang members to reach their 18th or 19th birthdays with multiple strike convictions. As such, it is critical to carefully examine gang member defendants’ criminal histories for prior strike convictions whenever filing a gang case. Obviously, strikes affect any sentence imposed on the new case and may subject a youthful gang offender to a sentence of life in prison.

Gang members also commonly perpetrate street violence using firearms. Many states significantly increase the punishment for crimes committed with a firearm. California, for example, imposes an additional mandatory term of three, four, or ten years in prison for the use of a firearm in nonviolent felonies. (See California Penal Code, Section 12022.5.) The penalty for using a firearm in violent felonies is significantly higher. In violent felonies, the use of a gun (showing it or pointing it) carries a mandatory 10-year extra prison term, discharging the firearm carries a mandatory 20-year additional prison term, and discharging a firearm causing death or great bodily injury requires an additional prison term of 25 years to life. Most firearm use enhancements require the personal use of a firearm. In California, firearm use

enhancement applicability is specifically expanded for gang member accomplices committing a crime. For gang members jointly perpetrating a crime, all are punished equally for firearm use by one of the gang members if the underlying crime was being committed for the benefit of, in association with, or at the direction of a criminal street gang. (See California Penal Code, Section 12022.53.) Other states allow for such expanded firearm use enhancements for all accomplices involved in a felony crime (or a specific category of crime, e.g., violent felony).

METHOD OF CONVICTION

The method of conviction has great impact on the sentencing consequences of the finding of guilt. Guilty pleas come in a few different forms. The most common is a plea negotiated between the defense and the prosecution. In exchange for pleading guilty, a defendant is commonly given a reduction in the number of crimes that must be admitted or a lighter sentence. Negotiated dispositions require a court's concurrence in the soundness of the deal and the determination that the disposition is not against the public interest as being too light. A plea bargain should always require a defendant to give up the right to appeal. The terms of the plea can also include restrictive probation terms that allow police officers to search the defendant without probable cause to believe a new crime is being committed while the defendant is on probation.

The second most common plea is that of a defendant pleading guilty to an indicated sentence by the presiding judge. Under either scenario, the defendant admits guilt before trial and receives a lighter sentence in exchange for an early admission of guilt. Guilty pleas to the court often allow a defendant to avoid a harsher punishment desired by the prosecution. In another type of plea, a court indicates a lid or a maximum sentence that the court will impose at a later sentencing date. At the sentencing hearing, both sides present evidence or argument on what the sentence should be. A major shortcoming of pleas to the court is that a defendant must plead guilty to all of the charges. A court typically cannot dismiss charges on its own motion.

Guilty pleas require a knowing and voluntary waiver of rights from a defendant. Specifically, defendants must give up the right to remain silent, confront, and cross-examine witnesses and the right to a jury trial. They must further be advised of all direct consequences of their guilty pleas (length of incarceration or deportation, for example). Finally, defendants must offer a factual basis for their guilty pleas, describing

their actions that constituted the crimes. (See the attached examples of typical felony guilty plea form, Exhibit 1, and misdemeanor guilty plea form, Exhibit 2.)

In gang cases, it is imperative to obtain a detailed factual basis describing the gang nature of the crime. This leaves no room for defendants to later contest the gang-related nature of the admitted crimes. The required elements of criminal street gang laws are numerous, detailed, and difficult to quickly reduce to writing at the time of a plea. A good practice is drafting the factual basis for a criminal street gang crime far enough in advance of a guilty plea to include all required elements of the crime. Some jurisdictions with such crimes use prefabricated forms for guilty pleas. (See the attached Exhibit 3.)

Defendants not pleading guilty face a trial either by jury or a judge (also known as a court or bench trial). A jury may convict on some or all of the charges or end in a stalemate (a “hung” jury), in which they are unable to reach a verdict in all or some of the charges. If a jury is unable to reach a unanimous decision, which is required in most states for a conviction, a mistrial is declared on the case or the unresolved counts if the jury is able to decide some of the charges. The prosecution then must decide whether it wishes to seek a retrial on the case or the hung counts. If the prosecution requests a retrial, then the trial court must decide whether there is a reasonable probability of a future jury reaching a decision on the hung counts in a retrial. Sometimes prosecutors move for dismissal of the hung charges in exchange for a greater sentence on the guilty charges. This process helps a court avoid a costly retrial and defendants to limit their sentence exposure.

A court trial is another option in which the judge alone hears the evidence and determines the guilt or innocence of a defendant. Usually the law requires both the defendant and the prosecution to waive a jury trial for a court trial to occur. Unlike a jury trial, a court trial cannot end in a hung verdict because it involves only one fact finder—the judge. Sometimes a court trial is used as a way for a defendant to avoid pleading guilty. Instead, the court finds the defendant guilty on the basis of the preliminary hearing transcripts or the available police reports, as long as both sides agree to the process. This process is known as a slow plea. It allows a defendant to effectively plead guilty yet reserve the right to appeal.

No matter how the conviction arrives (by plea, slow plea, court trial, or jury trial), the crimes on which the defendant stands convicted in large part determine the sentence. For example, if the defendant is convicted of crimes that carry a mandatory jail or prison sentence, the court must follow the law. It is an abuse of discretion for a court to dismiss a count supported by the evidence just to avoid the imposition of a

sentence that the court considers excessive. Some charges afford a sentencing option whereby a judge may strike an otherwise mandatory sentence if the judge puts sufficient justification on the record for imposing less than the otherwise required sentence. Still, other crimes allow a court to fashion a sentence that the judge considers appropriate for the offense without having to justify the sentence on the record.

Sentence Options

A court usually has three options at the time of sentencing a street gang offender. First, a court can suspend the imposition of a sentence and place the defendant on probation with a number of conditions. Jail time is often a condition of probation. Probation is a grant of judicial leniency allowing defendants a chance to reform their conduct and avoid an immediate harsher sentence. If a defendant fails to comply with the conditions of probation, a judge can then sentence the defendant to the full jail or prison value of the crime or reinstate probation with or without additional jail time.

The second sentencing option is to sentence a defendant but then suspend the execution of the sentence. Frequently, suspended sentences are used as a last resort, giving a recidivist defendant one last chance. Unlike when the *imposition* of a sentence is suspended, in a *suspended sentence* situation, defendants know exactly what faces them should they fail on probation. The sentence is typically higher than it would have been had sentence been immediately imposed. In essence, defendants agree to a higher term in exchange for that one last chance to be successful on probation.

Imposing a sentence is the final option. Misdemeanors allow courts to sentence up to one year in jail, depending on the offense. Felonies result in state prison terms—sometimes for life or even capital punishment for some forms of murder, in states that have capital punishment as a sentencing option. Currently, 38 states and the federal government have the death penalty as a sentencing option. When a sentence is imposed—whatever it is—the punishment should fit the crime.

Gang members disproportionately commit serious and violent crimes in comparison to other youthful offenders. Nowhere is this dynamic more pronounced than in homicide cases. Typical forms of special-circumstance homicide include intentional murder during a drive-by shooting; murder occurring during the commission of serious or violent felonies (the felony murder rule); murder committed while lying in wait; and in some states, murder committed for the benefit of, in association with, or at the direction of a criminal street gang. In states allowing the death penalty, it is the ultimate penalty in criminal law and requires the ultimate level

of preparation by the prosecution. No prosecutor should try a capital case without significant trial experience and training on the laws of homicide and the ponderous procedural requirements of death penalty cases, such as a specialized jury selection process, the requirement that all proceedings be on the record, and bifurcated trials for the guilt phase and the penalty phase.

The jury must first decide whether the death penalty should be imposed. Without the jury's recommendation, the death penalty cannot be imposed. In most states, a judge can overrule a jury's recommendation of death, but in no state may a judge impose the death penalty if the jury recommended against it. In evaluating whether a defendant deserves death, a jury typically considers factors in mitigation and aggravation regarding the defendant and the murder, including:

- Circumstances of the crime and the impact of the loss of the victim to the next of kin.
- Other crimes of violence and felonies committed by the defendant.
- Whether the murder was committed while the defendant was mentally or emotionally disturbed.
- Whether the victim participated in/consented to the acts that resulted in his murder.
- Whether the defendant had a reasonable belief that his conduct was justified.
- Whether the defendant had mental problems or was intoxicated at the time of the crime.
- The age of the defendant at the time of the crime.
- Whether the defendant had a minor role in the murder.
- Any other extenuating circumstances or evidence of the defendant's good character.

Alternative Sentencing Choices

There are many alternatives to county jail time as a condition of probation for gang offenders. These options are sometimes imposed in lieu of or in addition to jail time. Common alternative sentencing options include community service, highway litter removal, graffiti removal, home confinement, live-in treatment/rehabilitation programs, and drug or alcohol treatment sessions. Community service requires a defendant to work a specified number of hours at a program approved by the court or the probation department. For physically fit defendants, litter removal alongside highways or at parks can likewise be an option. However, people convicted of violent crimes are often excluded from participating in such programs.

Graffiti removal seems like a fitting punishment for many minor gang crimes, especially vandalism. Safety, however, is a primary concern because the types of graffiti being removed are frequently gang-related. Care must be taken to keep gang defendants out of rival gang territory.

Many defendants would like to avoid county jail time because of overcrowding or the volatile mix of offenders, from misdemeanants to murderers, in jail awaiting disposition of their cases. Home confinement programs allow defendants to remain confined at home on the condition of checking in with a probation officer periodically or wearing an electronic monitoring device that alerts home confinement program supervisors if a defendant wanders too far from a transmitting device. Home confinement programs are usually expensive, given the rigorous supervision or equipment needs. Another county jail alternative is a “pay to stay” program at a local city jail. In these programs, defendants pay the cost of jailing to avoid doing time in the county jail. Violent offenders are typically ineligible for pay to stay programs.

Cooperating witnesses in gang cases are many times codefendants to the others charged in an offense. Given the severity of gang crimes, however, cooperating defendants are not normally released upon their agreement to cooperate. A reduced sentence may be in order, but usually not a complete dismissal. As such, it is imperative to protect cooperating witnesses in custody from their fellow gang members. In a large county, the jail system probably has branch jails throughout the county. This allows a sheriff’s department to keep cooperating witnesses housed apart from the other defendants. It is sometimes better for the prosecuting authorities to house cooperating witnesses at a city jail if the witness cannot be adequately protected in the county jail. At the conclusion of a case in which a cooperating witness is sentenced to prison, albeit for a shorter period than the other defendants, it is imperative to ensure the witness’s safety while the witness is in prison.

Common Gang Case Probation Terms

Probation is often given to gang defendants convicted of their first felony (e.g., robbery without a firearm or injury) or misdemeanor offense. Probation lasts from one to five years, with three years typical in felonies. While on probation, defendants face imposition of their sentences that could result in several years of state prison should they fail to comply with the requirements of their grants of probation.

Usual terms and conditions of probation, besides jail time and/or fines, require defendants to violate no law; comply with all lawful orders of the court, jail, and

probation department; maintain employment and associates as approved by the probation officer; pay restitution; submit their persons, places, and things to any search required by a probation officer; and obey any other condition a court finds justified under the circumstances of the case. (See the attached Terms and Conditions of Felony Probation, Exhibit 1, page 5.)

Many jurisdictions have specialized probation terms for criminal street gang members convicted of a gang-related crime called gang terms of probation. In addition to the normal conditions of probation, gang terms have a number of stringent restrictions designed to curtail further gang activity. Following are some of the restrictions included in gang terms of probation:

- No presence in a known gang gathering area.
- No possession of spray paint, any etching device, a “slim-jim,” a dent puller, a cell phone, or a beeper.
- No clothing associated with or signifying membership in a street gang.
- No appearances at any court proceeding unless a party in the action, a defendant, or subpoenaed as a witness. (See the attached Gang Terms and Conditions of Probation, Exhibit 4.)

Sentencing Hearing

Both the defense and the prosecution have a right to ask for a sentencing hearing following the conviction of a defendant by jury or when a court has allowed a defendant to plead guilty with a promise of a lid or a maximum sentence. Usually, in felony cases a sentencing report is prepared by the probation department outlining the defendant’s family and social, employment, and criminal history. At the sentencing hearing, the prosecution highlights the aggravated facts in the probation report and presents additional evidence, if necessary, regarding the serious nature of the offense, the offender, or both.

Often, a defendant’s gang affiliation may be relevant to an appropriate sentence. This is true even if gang evidence was excluded at trial because the court decided the probative value of gang evidence was substantially outweighed by its prejudicial impact. The nature of the offender, including his gang affiliation, is a relevant factor to consider at sentencing. A prosecutor should also check for any violations of jail rules by the defendant during the pendency of the case. Such rule violations bode poorly for the defendant’s prospects to comply with the rules and regulations of the probation department. The violations are also common incidents of gang rivalry, which help present the defendant as being thoroughly gang-involved. It is difficult for a gang

member defendant in court to claim reformation while participating in gang fights at the jail.

It is common to prepare sentencing briefs for the court delineating the crimes and their accompanying possible punishments. Most states allow victims to make impact statements about how a crime affected their lives before the court imposes sentence. Finally, a court determines the amount of any restitution owed and orders the defendant to pay it. Prosecutors should always obtain a restitution order even when a defendant is sent to prison for life. In most states, a percentage of prison wages is devoted to the payment of restitution, if the sentencing judge orders it.

PROBATION HEARINGS

Gang members on probation, especially those with gang terms, are frequent violators of their probation conditions. The clearest example of a probation violation is a defendant's commission of a new crime. Absent the commission of a new offense, common gang member probation violations include failing to report to the probation officer, wearing gang clothing, associating with fellow gang members, or other gang term disobedience.

The prosecution must prove the defendant has committed a violation if the defendant refuses to admit to the violation. The normal burden of proof in a probation violation hearing is a mere preponderance of the evidence (more likely than not). Probation violations are sometimes referred to as "state prison on the installment plan." Moreover, depending on the severity and frequency of probation violations, many gang member defendants eventually end up in prison. Defendants in violation of probation may have their probation reinstated with additional jail time imposed, may be sentenced if the imposition of their sentences was suspended, or may have their sentences imposed if the execution of the sentences was suspended.

PAROLE CONSIDERATIONS

It is important for a prosecutor to ensure that the true picture of a gang defendant and a gang crime is preserved for future use by a parole board should the defendant become eligible for parole consideration. The time to gather the necessary

components of the record for future use at a parole hearing is at the time of sentencing. A good parole package should include a sentencing transcript of the judge's comments about the defendant's behavior, a probation or sentencing report, autopsy photos and reports (in murder cases), tapes or transcripts of the defendant's statements, any crime scene photos, and documentation of any rules violations while in jail during pendency of the case. Any written statements or transcripts of oral statements made by the victims or the next of kin during the sentencing hearing should likewise be preserved. Finally, phone numbers, addresses, and other information that will ensure notification of the victims or next of kin of any parole consideration hearings should be collected.

CONCLUSION

Gang cases range from vandalism to multiple murder, and gang offenders can be inexperienced youths in their early teens to hard-core, violent adult gang member recidivists. Appropriate sentencing in gang cases requires factoring the aggravating and mitigating circumstances of the offense and the offender. The lesser-involved young gang associate committing a relatively minor offense may be the perfect candidate for counseling and minimum court involvement.

On the other hand, the hard-core, violent gang member recidivist committing a new violent offense is a good candidate for the maximum incapacitation through incarceration. It is the gang members in between, committing perhaps serious but not violent crimes, who require the most careful attention regarding appropriate dispositions of their criminal cases. A thorough knowledge of gang dynamics, theories of criminal liability, and specialized antigang laws lends insight into what an appropriate sentence might be in any given case.

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EXHIBIT 1

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
ADVISEMENT AND WAIVER OF RIGHTS FOR A FELONY GUILTY PLEA**

Case No. _____ People v. _____

1. ___ My true full name is _____

I am represented by _____ who is my attorney.

2. ___ I understand that I am pleading guilty, and admitting the following offenses, special punishment allegations, and prior convictions, carrying the possible penalties as follows:

Ct.	Charge	Sentence Range	Enhancements	Yrs.	Term for Priors	Yrs.	Total Penalty Years
Maximum Total Punishment							

3. ___ In addition to time in custody, I understand the court may also order me to pay a fine as follows: up to \$10,000 for most felonies [P.C. 672]; up to \$20,000 for selected drug offenses [H&S 11372]; up to \$50,000 for selected drug offenses [H&S 11352.5]; or other: _____.
4. ___ I understand it is absolutely necessary that all plea agreements, promises of a particular sentence, and sentence recommendations be completely disclosed to the court on this form.
5. ___ **Right to an attorney:** I understand I have the right to be represented by an attorney at all stages of the proceedings until my case is completed. If I cannot afford an attorney, one will be appointed for me free of charge. However, I understand that at the conclusion of my case, the court may order me to reimburse the County of Orange for the cost of my attorney, according to my ability to pay.
6. ___ **Right to a preliminary hearing:** I understand I have the right to a preliminary hearing at which a judicial officer will determine if there is sufficient evidence to justify setting my case for trial. At this hearing, I have the right to be represented by an attorney as described in paragraph 5 above, the right to confront and cross-examine witnesses against me, the right to present evidence on my behalf, and the right to remain silent and not testify; but I may testify if I want to. I waive and give up my right to a preliminary hearing.
7. ___ **Jury trial rights:** I understand I have the right to a speedy and public trial by a jury. I waive and give up these rights.
8. ___ **Rights to confront and cross-examine witnesses:** I understand I have the right to confront the witnesses against me and to cross-examine them myself or have my attorney cross-examine them. I waive and give up these rights.
9. ___ **Right to testify or remain silent:** I understand I have the right to testify on my behalf. I also understand I have the right to remain silent, and I cannot be compelled to testify against my will. I waive and give up these rights.
10. ___ **Right to present evidence:** I understand I have the right to present evidence and to call witnesses to testify on my behalf. I further understand I have the right to invoke the compulsory process of the court to subpoena evidence and witnesses at no cost to me. I waive and give up these rights.
11. ___ **Immigration consequences:** I understand if I am not a citizen of the United States, my conviction for the offense charged will have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

Case No. _____ People v. _____

12. **Fourth Amendment waiver:** I understand under the Fourth and Fourteenth Amendments to the United States Constitution, I have a right to be free from unreasonable searches and seizures. I waive and give up this right, and further agree that for the period during which I am on probation I will submit my person and property, including any residence, premises, container or vehicle under my control to search and seizure at any time of the day or night by any law enforcement officer or probation officer, with or without a warrant, probable cause, or reasonable suspicion.
13. **Sentencing waiver:** I understand I have the right to a jury or court trial as to certain factors that may be used to increase my sentence on any count, sentencing enhancement, or allegation, to the upper or maximum term provided by law. I waive and give up the right to a jury or court trial on all of these factors. I agree the judge will determine the existence of any of these factors, within the judge's discretion, as allowed by law. I agree this waiver shall apply to any future sentence imposed following a probation revocation.
14. **Appeal waiver:** I understand I have the right to appeal from decisions and orders of the Superior Court. I waive and give up my right to appeal from any and all decisions and orders made in my case, including motions to suppress evidence brought pursuant to Penal Code section 1538.5. I waive and give up my right to appeal from my guilty plea. I waive and give up my right to appeal from any legally authorized sentence the court imposes which is within the terms and limits of this plea agreement.
15. **Parole after prison:** I understand if I am sentenced to state prison, upon my release I will be on parole for a period of time ranging from 3 years to life. I further understand I could be sent back to state prison for a period of up to one year for each violation of any term or condition of my parole.
16. **Mandatory state prison:** I understand I am not eligible for probation, and I will be sentenced to state prison in this case.
17. **Proposed disposition:** I understand the court will: (Circle and initial all that apply)
- (a) Sentence me to state prison for a period of _____ years and _____ months, credit for time served of _____ days actual custody and _____ days of good time/work time for a total credit of _____ days. I waive and give up my right to make application for probation and request immediate sentence.
- (b) Consider my application for probation before pronouncing sentence. I understand the court may deny my application for probation and sentence me to state prison for a maximum period of _____ years and _____ months.
- (c) Grant me probation under the terms and conditions set forth on the attached page 5 that I have initialed and signed. I understand I have the right to reject probation and have the court impose a final sentence. However, I agree to accept probation on the terms and conditions set forth on the attached page 5. I further understand that if I am found in violation of any of the terms or conditions of probation, the court may sentence me to state prison on this case for a maximum period of _____ years and _____ months.
- (d) Order me to pay restitution on counts _____, even if any of these counts have been dismissed as part of the plea agreement, in the amount of _____, or in an amount to be determined by the Probation Department. If I disagree with the amount of restitution determined by the Probation Department, I may request a court hearing to determine the amount of restitution.
- (e) Order me to pay the mandatory state restitution fine between \$200 and \$10,000 [P.C. 1202.4]. A second restitution fine in the same amount will also be ordered if I receive a sentence that includes probation, a conditional sentence, or parole. This second fine will be suspended and I will only have to pay it if the court later finds that I have violated the terms of my probation, conditional sentence, or parole [P.C. 1202.44 & 1202.45]. A twenty dollar court security fee must also be paid [1465.8].
- (f) Order me to provide samples of my saliva, blood, and prints pursuant to P.C. 296 and P.C. 296.1.
- (g) Order me to register pursuant to the following: (Circle and initial all that apply)
- (1) P.C. 290 - Conviction of sex offense. (3) P.C. 186.30 - Conviction of gang related offense.
- (2) H&S 11590 - Conviction of narcotics offense. (4) P.C. 457.1 - Conviction of arson offense.

Case No. _____ People v. _____

___ (h) Order that my driver's license or driving privilege be suspended or revoked for a period of _____.

___ (i) Other:

18. ___ I acknowledge all other cases pending against me in Orange County and the proposed disposition:

19. ___ I understand a plea of guilty in this case may constitute an admission I violated a previous grant of probation or parole in other cases and may result in additional penalties being imposed in those cases.

20. ___ I offer my plea of guilty freely and voluntarily, and with full understanding of all matters set forth in the accusatory pleading and this advisement and waiver of rights form. No one has made any threats or used any force against me, my family, or anyone else I know, in order to convince me to plead guilty in this case. Further, all promises that have been made to me to convince me to plead guilty are on this advisement and waiver of rights form.

21. ___ I offer the following facts as the basis for my guilty plea:

In Orange County, California, on _____

Case No. _____ People v. _____

22. _____ I understand each and every one of the rights set forth above in this advisement and waiver of rights form. I waive and give up each of those rights in order to enter my guilty plea. I am entering a guilty plea because I am in fact guilty and for no other reason. I declare under penalty of perjury I have read, understood, and personally initialed each numbered item above, and I have discussed them with my attorney. I declare under penalty of perjury everything on this form is true and correct. I understand the signing and filing of this form is conclusive evidence I have pled guilty to the charges listed on this advisement and waiver of rights form.

Executed in Orange County, California.

Dated: _____ Signed: _____
Defendant

23. **DEFENSE ATTORNEY'S STATEMENT:** I am the attorney of record for defendant. I have explained to defendant each of the rights set forth on this form. I have discussed the charges and the facts with defendant. I have studied the possible defenses to the charges and discussed those possible defenses with defendant. I have discussed the possible sentence ranges and immigration consequences with defendant. I also have discussed the contents of this form with defendant. I concur with defendant's decision to waive the rights set forth on this form and to plead guilty. No promises of a particular sentence or sentence recommendation have been made to defendant by me, or to my knowledge by the prosecuting attorney or the court, which have not been fully disclosed on this form. I agree that this form may be received by the court as evidence of defendant's advisement and voluntary, intelligent, knowing, and express waiver of the rights set forth on this form.

Dated: _____ Signed: _____
Attorney

24. **INTERPRETER'S STATEMENT:**

I, _____, having been duly sworn as a court certified interpreter, state that I am fluent in the _____ language. I translated the contents of this form to defendant in that language. The defendant told me he/she understood the contents of this form and initialed and signed it in my presence.

Dated: _____ Signed: _____
Interpreter

25. **FOR THE PEOPLE:**

Dated: _____ Signed: _____
Deputy District Attorney

Plea to the Court _____

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
TERMS AND CONDITIONS OF FELONY PROBATION**

Case No. _____ People v. _____

1. _____ Sentenced to State Prison for _____ years and _____ months. Execution of sentence suspended. Placed on probation for _____ years.
2. _____ Imposition of sentence suspended. Placed on probation for _____ years.
3. _____ Supervised Probation OR _____ Probation Department relieved of supervision. (Initial one)
4. _____ Serve _____ in County Jail. Credit for _____ days actual time served and _____ days good time/work time. Stay granted until _____.
5. _____ Pay fine of _____ plus penalty assessment.
6. _____ Pay mandatory court security fee in the amount of \$20.00 [P.C. 1465.8].
7. _____ Pay mandatory laboratory analysis fee of \$50.00 for each specified drug offense plus penalty assessment [H&S 11372.5 & P.C. 1464].
8. _____ Pay mandatory state restitution fine of _____ [Min: \$200; Max: \$10,000 - P.C. 1202.4]. If your sentence includes probation, a conditional sentence, or parole, the court will order you to pay a second restitution fine in the same amount, but it will be suspended and you will only have to pay the second fine if you are later found in violation of your probation, conditional sentence, or parole [P.C. 1202.44 & .45].
9. _____ Pay restitution on counts _____, even if any of these counts have been dismissed as part of a plea agreement, in the amount of _____ or in an amount to be determined by the Court and as directed by the Probation Department. You are also ordered to make all financial disclosures required by law in order to fulfill your responsibility to pay full restitution [P.C. 1202.4].
10. _____ Register pursuant to: (Initial all those that apply)

(a) _____ PC 290 [sexual assault offense]	(c) _____ H&S 11590 [narcotics offense]
(b) _____ PC 186.22 [gang related offense]	(d) _____ PC 457.1 [arson offense]
11. _____ Provide samples of your saliva, blood, and prints pursuant to P.C. 296 and P.C. 296.1.
12. _____ Do not be in the presence of children under the age of 18, unless accompanied by a responsible adult 21 years of age or older and approved in advance by your probation officer.
13. _____ Use no unauthorized drugs, narcotics, or controlled substances, and submit to drug or narcotic testing as directed by your probation officer or any peace officer.
14. _____ Submit your person and property, including any residence, premises, container or vehicle under your control, to search and seizure at any time of the day or night by any law enforcement officer or probation officer, with or without a warrant, probable cause or reasonable suspicion.
15. _____ Cooperate with your probation officer in any plan for psychological, psychiatric, alcohol, and/or drug treatment. Seek training, schooling, or employment, and maintain residence and associates as approved by your probation officer.
16. _____ Do not possess any blank checks, write any portion of any checks, have any checking account, nor use or possess any credit cards or open credit accounts, unless approved in advance by your probation officer. Use only your true name. Do not possess any other persons' personal identifying information or personal financial information unless approved in advance by your probation officer.
17. _____ Do not own, use, or possess any type of dangerous or deadly weapon, including any firearm or ammunition.
18. _____ Obey all orders, rules, regulations, and directives of the Court, Probation Department, and jail.
19. _____ Violate no law.
20. _____ Driver's license or driving privilege is suspended or revoked for a period of _____.
21. _____ All of the below apply unless lined out:
 - a. Do not drive a motor vehicle with a measurable amount of alcohol in your blood.
 - b. Submit to a chemical test of your blood on demand of any peace officer or probation officer.
 - c. Do not be present in any establishment where the primary items for sale are alcoholic beverages.
 - d. Do not consume any alcoholic beverages.
 - e. Do not drive a motor vehicle without a valid California Driver's License on your person.
22. _____ Do not, in any manner, directly or indirectly, initiate contact with, nor have any communication with: _____
23. _____ CVC 23593 Advisement: You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If you continue to drive while under the influence of alcohol or drugs, or both, and, as a result of that driving, someone is killed, you can be charged with murder.
24. _____ Disclose your probation status and terms upon the request of any peace officer.
25. _____ Other conditions: _____
26. _____ Pay cost of probation, according to ability to pay, as directed by your probation officer.
27. _____ I understand that the Court ultimately determines the conditions of probation, and I have the right to request the Court to modify or eliminate any condition imposed by the Probation Department that I believe is unreasonable.

I have read and agree to all the terms and conditions of probation I have initialed above.

Dated: _____ Defendant's Signature: _____
Defendant

EXHIBIT 2

DEFENDANT'S WAIVER OF CONSTITUTIONAL RIGHTS FOR GUILTY PLEA TO MISDEMEANOR

DEFENDANT'S NAME _____ COURT CASE NO. _____

DEFENDANT: **READ** the following. If you understand and agree to each provision, **INITIAL** each box, and **DATE** and **SIGN** at the end.

1. I understand that I am charged with the offense of _____, to which I intend to plead guilty/nolo contendere. [A nolo contendere plea has the same legal consequences as a guilty plea in a criminal case. P.C. §1016] 1
2. I understand I have violated this section by (factual basis) _____

_____ 2
3. I understand that the maximum penalty for this offense is confinement in the county jail for a period up to _____ and/or a fine of _____. 3
4. I understand each of the following rights, and hereby voluntarily, intentionally and with full knowledge give up each and all of them, as indicated:
 - a. **To be represented by an attorney** of my own choice at all stages of the proceedings, or if I cannot afford an attorney, to have the Court appoint one to represent me, free of charge subject to the Court's requirement that I pay the cost thereof at the conclusion of these proceedings based upon my financial ability. a
 - b. **To a speedy trial**, that is: Within 30 days of my arraignment if I am in custody, or within 45 days thereof if I am not in custody and to a dismissal of the charges against me if I am not so tried. b
 - c. **To a public trial** by jury. c
 - d. **To subpoena witnesses** for my defense without expense to me. d
 - e. **To confront the witnesses** against me in trial and to cross examine them myself or through my attorney. e
 - f. **To testify** in my own defense, or to **remain silent** if I so desire and to thereby refuse to give evidence that may be used against me. f
 - g. **To be sentenced in not less than 6 hours** or more than 5 days from the time of my plea of guilty/nolo contendere. g
 - h. **To appeal the denial of my Penal Code Section 1538.5 motion** (suppression motion) even after pleading guilty. h
5. I understand the nature of the charges against me, the elements thereof and the available pleas and defenses thereto. 5
6. I understand that if I receive probation and violate any of the terms thereof, I may be returned to court and sentenced on this charge as set forth in paragraph 3 above. Also, if I am presently on probation for any previous convictions, I understand that my plea of guilty/nolo contendere may cause me to be in violation of probation, and result in additional penalties and/or punishments. 6
7. I understand that if I am not a citizen of the United States the conviction for the offense charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization or amnesty pursuant to the laws of the United States. 7
8. I understand that I will be required to register as a sex offender pursuant to Section 290 of the Penal Code. 8
9. I understand that I will be required to register as a narcotic offender pursuant to Section 11590 of the Health and Safety Code. 9
10. I understand that under the Fourth and Fourteenth Amendments to the United States Constitution, I have a right to be free from unreasonable searches and seizures. I hereby waive and give up this right, and further agree for the period during which I am on probation or parole, to submit my person and property, including any residence, premises, container or vehicle under my control to search and seizure at any time of the day or night by any law enforcement, parole, or probation officer with or without a warrant, and with or without reasonable cause or reasonable suspicion. 10

11. I understand the following sentence will be recommended and if it is not so imposed, that I may withdraw my plea.
- a. I.S.S., 3 years of informal/formal (circle) **probation**, violate no laws.
 - b. Pay a **fine** of \$ _____ plus penalty assessment.
 - c. Make **restitution** (Mandatory if probation – 1203.04 P.C.).
 - (1) If **victim** involved: Pay as determined by the court through the Victim Witness Office; or pay \$ _____)
 - (2) If **no victim** involved: Pay \$ _____ to State Restitution Fund.
 - d. Serve _____ days in Orange County Jail. Credit _____ days actual time.
 - e. Pay \$50 **laboratory analysis fee**** (11372.5 H&S)
 - f. Pay **Drug Program Fee**** of \$ _____ (\$100 maximum – 11372.7 H&S)
 - g. Use no unauthorized drugs, narcotics or controlled substances and submit to drug or narcotic testing program as directed by probation or police officer.
 - h. Submit your person and property, including any residence, premises, container or vehicle under your control to search and seizure at any time of the day or night by any law enforcement or probation officer with or without a warrant, and with or without reasonable cause, or reasonable suspicion.
 - i. Other: _____
- _____
- _____
- _____

*Required upon conviction of H&S 11355, 11357a & c, 11363, 11364, 11368, 11375(b), 11377, 11382 & 11550.
**Required upon conviction of H&S 11355, 11357a & c, 11363, 11364, 11368, 11375(b), 11377, & 11382.

12. My plea of guilty/nolo contendere is entered freely and voluntarily, and without any threats or promises made to me except as to the recommended sentence, if any.

DEFENDANT: I have personally initialed each of the above boxes and understand each and every one of the rights outlined above and I hereby waive and give up each of them and plead guilty/nolo contendere to the above charge.

DATED _____ SIGNED _____, DEFENDANT

DEFENDANTS REPRESENTING THEMSELVES IN PRO PER:

DEFENDANT: I understand that there are a number of dangers and disadvantages in representing myself in this case and that an attorney could possibly help me. Nevertheless, I choose to represent myself and voluntarily enter a plea of guilty/nolo contendere to the above charge.

DATED _____ SIGNED _____, DEFENDANT

DEFENDANT'S ATTORNEY: I am attorney of record and I have explained each of the above rights to the defendant, and having explored the facts with him and studied his possible defenses to the charge(s), I concur in his decision to waive the above rights and to enter a plea of guilty/nolo contendere. I further stipulate that this document may be received by the Court as evidence of defendant's intelligent waiver of these rights and that it shall be filed by the Clerk as a permanent record to that waiver. I have witnessed the reading of this form by the defendant and his initialings and signature upon it.

DATED _____ SIGNED _____, ATTORNEY OF RECORD

FOR THE PEOPLE:

DATED _____ SIGNED _____, DEPUTY DIST. ATTY.

AFTER READING, INITIALING AND SIGNING, GIVE TO THE COURTROOM CLERK.

EXHIBIT 3

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ATTACHMENT No. 1

FACTUAL BASIS FOR PLEA OF GUILTY

CASE NUMBER: _____:

DEFENDANT: _____ D.O.B.: _____

COUNT(s) _____:

1. On _____, in Orange County, I knowingly, willfully and unlawfully did the following: _____

Count: **PENAL CODE SECTION 186.22(a) AND 186.22(b)(1) ENHANCEMENT**

2. On _____, in Orange County, I knowingly and actively participated in a criminal street gang called

_____, which is an informal gang with more than three members, that has, in the last three years, engaged in a pattern of criminal gang activity and which commits, as some of its primary activities, crimes such as _____

I willfully promoted, aided and abetted and furthered the interest of that gang and its members by committing the felonious conduct previously described in paragraph #1 above. I committed these offense(s) for the benefit of, at the direction of, or in association with the _____ criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by _____ gang members.

3. The above factual statements are true and correct and are the basis for my plea of guilty. By signing this document, I acknowledge that I read and write the English language and I understand **everything** written and typed in this document.

I declare under penalty of perjury the above is true and correct.

DATED: _____ SIGNED: _____

EXHIBIT 4

**ADULT
ORANGE COUNTY PROBATION DEPARTMENT
GANG TERMS AND CONDITIONS OF PROBATION**

COURT # _____

**Defendant's
Initials:**

- _____ 1. You are to report to your probation officer in person as directed. Transportation problems or poor weather conditions are not acceptable reasons for not reporting.
- _____ 2. You are to comply with all directions of your probation officer.
- _____ 3. You are to obey all laws, including traffic rules and regulations. You are not to operate a motor vehicle on any street or highway until properly licensed and insured. YOU ARE TO REPORT TO YOUR PROBATION OFFICER ANY ARRESTS, LAW VIOLATIONS OR POLICE CONTACTS IMMEDIATELY.
- _____ 4. Obey curfew as directed by your probation officer.
- _____ 5. You are not to leave the State of California or change your residence without prior permission from your probation officer. Prior to change of residence, you are to notify your probation officer of the new address. You are not to live with anyone unless they are approved by your probation officer.
- _____ 6. Attend school or maintain employment as directed by your probation officer.
- _____ 7. You are not to be on any school campus where not enrolled without the permission of the school administration.
- _____ 8. You are not to be present in any known gang gathering area of the _____ gang as directed by your probation officer; specifically the following locations:

_____.
- _____ 9. Your associates are to be approved by your probation officer. You are not to associate with anyone whom you have met while in any of the County Institutions. You are not to associate with any member of the _____ gang or any other gang as directed by your probation officer.
- _____ 10. You are not to possess weapons of any description including but not limited to firearms, knives of any description, nunchucks and martial arts weaponry. You are not to possess ammunition or weapon replicas. You are not to involve yourself in activities in which weapons are used including but not limited to hunting and target shooting. You are not to remain in any vehicle wherein anyone possesses a weapon, ammunition or weapon replica.
- _____ 11. You are to submit to search and seizure of your person, property, automobile, residence, or any container under your control at anytime with or without reasonable or probable cause by any peace or probation officer with or without benefit of a search warrant.
- _____ 12. You are to submit to a chemical test of blood, breath, or urine as directed by the probation officer or any other peace officer.
- _____ 13. Do not remain in any vehicle either as a passenger or driver which you know or suspect to be stolen.
- _____ 14. Do not possess nor remain in the presence of one you know possesses any master key, lock picks, dentpuller, "slim jim", slide hammer, or other device you know to be an auto theft or burglary tool.



- _____ 15. Do not appear at any Court proceeding unless you are a party, defendant in a criminal action or subpoenaed as a witness.
- _____ 16. Do not possess a beeper, pager, cellular phone or any other cordless or otherwise wireless communication device.
- _____ 17. Do not possess graffiti of any form. Do not have in your possession or maintain paints, aerosol spray cans, pens, etching devices, or other instruments useable in applying graffiti. Do not assist others in application of graffiti.
- _____ 18. Carry valid picture identification at all times.
- _____ 19. Do not wear, display, use or possess any insignia, emblem, button, badge, cap, hat, scarf, bandana or any article of clothing which is evidence of affiliation with or membership in the _____ street gang.
- _____ 20. You are not to use or possess any intoxicants, narcotics, other controlled substances, related paraphernalia, poisons, or illegal drugs; including marijuana. You are not to be with anyone who is using or possessing any illegal intoxicants, narcotics or drugs. Do not inhale or attempt to inhale or consume any substance of any type or nature, such as paint, glue, plant material, or any aerosol product. You are not to inject anything into your body unless directed to do so by a medical doctor.
- _____ 21. Do not obtain tattoos except as permitted by your probation officer.
- _____ 22. Have no contact with _____
- _____ 23. You are hereby ordered to obey the following addition term(s) of your probation:
 - (a) _____
 - (b) _____

I have personally read, initialed, and understood Terms and Conditions of Probation that apply in my particular case as explained to me by the probation officer/Defense Attorney. I understand that my failure to comply with the items could result in my arrest and/or return to court.

Date: _____ Signed: _____

INSTRUCTIONS:

- 1. Original to Court - White
- 2. Copy to Probationer - Canary
- 3. Copy to Probation File - Pink
- 4. Copy to District Attorney - Gold

Attorney

Deputy Probation Officer