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Prosecuting Gang Cases

What Local Prosecutors
Need to Know

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Prosecuting Gang Cases

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TABLE OF CONTENTS

- 1** **Forward**
- 3** **Author’s Acknowledgements**
- 5** **Introduction**
- 7** **Overview of a Gang Case:**
 - Getting Jurors Out of the Courtroom**
 - What Gang Evidence Can Prove: The Tip of the Iceberg*
 - Why Do Gang Members Join Gangs?*
 - Will the Real Defendant Please Stand Up?*
 - Turf, Territory, and Membership*
- 19** **Get Ready For the Fight: Greasing the Skids**
 - Witness Problems in Gang Cases*
 - California’s STEP Act as a Model*
 - Getting the Most Out of the Gang Expert*
- 29** **Closing Remarks**
- 31** **Appendix A: California STEP Act: Penal Code**
 - Section 186.20 – 186.22**
- 39** **Appendix B: Proposed Voir Dire Questions**
 - for a Gang Case**
- 43** **Appendix C: Sample Direct Examination**
 - for a Gang Expert**

FORWARD

Few things evoke fear in a community like the incursion of gang activity. Senseless violence, turf battles and ubiquitous graffiti signal the arrival of gangs. The law enforcement community also dreads the prospect of confronting gang-driven crime. They know that with gangs come drugs, guns, retaliatory killings and recriminations. The investigation and prosecution of these crimes present a host of difficult problems, including recanting witnesses, intimidated bystanders and unsympathetic victims.

Nowhere are these problems more apparent and deep seated than in Los Angeles, California. Gangs, some many generations old, dominate parts of the city. In response, the law enforcement community has adopted specific strategies designed to address the gang problem. Special units within the police department are dedicated to nothing but the investigation and policing of gang activity. The Los Angeles County District Attorney's Office has followed suit, forming the Hardcore Gang Division in 1979. Charged with prosecuting crimes committed by some of the country's most notorious gangs, the unit of 50 prosecutors makes extensive use of the California Street Terrorism Enforcement and Prevention Act. This legislation was borne of California's exasperation with its escalating gang problem. As the preamble states, "the Legislature...finds that the State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods." Armed with this law providing for enhanced punishments for gang-related crimes, prosecutors may now introduce evidence once considered inadmissible. Proof of gang membership is allowable to show motive, intent, and accomplice liability. Experts chronicling gang culture and mores now are called on behalf of the prosecution. Other states have followed California's example and enacted gang legislation. (See footnote 2, *infra*.)

The author of this monograph, Alan Jackson, joined the Los Angeles District Attorney's Office as a deputy district attorney in 1995. Since 1999, he has prosecuted LA's most violent offenders in the Hardcore Gang Division, specializing in the vertical prosecution of violent gang

members. He has also served as a gang prosecution instructor for the Los Angeles District Attorney's Office and the American Prosecutors Research Institute (APRI).

Perhaps the most chilling bit of advice Mr. Jackson gives to prosecutors is to "ready yourself." Gangs are spreading; they are on your doorstep even if you don't realize it. The goal of this monograph is to provide practical trial strategies for prosecutors engaged in combating gang violence and ready prosecutors who will inevitably confront the problem.

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Finally, for her sharp eye and smooth pen stroke, I owe a debt to Melanie Spuches of the American Prosecutors Research Institute, who deftly edited and polished this work.

INTRODUCTION

Trying a gang case is one of the most difficult undertakings a prosecutor can face. Reluctant witnesses, perjurious testimony, and hostile and intimidating courtroom crowds are but a few of the myriad problems a gang prosecutor can expect in trial. And sadly, we're talking about the prosecutor's own case-in-chief. Indeed, the trademark characteristic of a gang case is the difficult witness. Some witnesses are uncooperative and openly hostile—those community members who fear for their lives and, therefore, actively duck service of process, ignore subpoenas and either refuse to testify or lie on the witness stand. Other witnesses, however, may be cooperative, but extremely unsympathetic because they have been granted leniency or immunity in exchange for testimony. The prosecutor may, therefore, be in the unenviable position of arguing in the same case that the “elderly-neighbor-down-the-street-witness” lied on the stand, and that the “co-conspirator-crook-in-handcuffs-witness” should be believed. On top of all this, the prosecutor is faced with the very real concern of simply keeping these witnesses alive.

Moreover, gang cases present unique challenges in terms of explaining motive and complex theories of liability. The gang culture is rife with idiosyncratic mores that define individual gangs and sub-cliques. These customs often define the motive underlying the crime, how the crime is carried out, and the identity of the perpetrator. It becomes incumbent upon the prosecutor to educate the jury about gang culture and habits, and to buttress that explanation with the proper theory of liability, such as conspiracy, aiding and abetting, or vicarious liability.

This monograph seeks to address various pre-trial and trial issues in the context of gang evidence. Hypothetical examples are used for illustrative purposes. Additionally, this presentation includes references to California's Street Terrorism Enforcement and Protection (STEP) Act,¹ which has

¹ Cal. Penal Code § 186.21, *et. seq.* (See Appendix A).

spearheaded the country's state legislatures' answer to the growing national epidemic known as gang crime.²

² Many states have followed California's example and enacted laws specifically designed to address gangs and gang activity. A useful listing of these laws can be found at the Institute for Intergovernmental Research's website located at www.iir.com/nygc/gang-legis/. These laws typically require additional elements of proof, which necessarily expands the definition of what is admissible evidence.

OVERVIEW OF A GANG CASE: GETTING JURORS OUT OF THE COURTROOM

The first question to come to the prosecutor's mind is, "why use gang evidence in the first place?" After all, prosecutors can expect that the defense bar will cry foul at the first mention of gangs. For their part, judges—especially those who have been ill-prepared to address issues concerning gangs—will often have a knee-jerk reaction to side with the defendant in his claims that gang evidence is overly prejudicial. Finally, police officers may be hesitant to testify about gangs because they have never been qualified as an expert. Wouldn't it simply be easier to leave the gang aspect of the trial alone?

Is it easier? Maybe. Is it a better trial technique? Never.

Successful prosecutors do not try their cases in the antiseptic environment of a courtroom. Crimes are not committed within the confines of mahogany walls adorned with the great seal of the state. Rather, they are committed on the streets of the city, in darkened alleyways and abandoned buildings. Good prosecutors seek to transport their juries to those streets, alleys, and buildings. Gang evidence is one of the most powerful tools in the government's arsenal to accomplish that goal.

Gang evidence is highly probative in explaining what takes place on the streets because it gives deep insight into the conduct of both defendants and witnesses. While courts have determined that gang evidence is admissible only for specific purposes, they have recently been broadening the scope of those purposes. Today, a prosecutor can successfully argue the admissibility of gang evidence for a range of purposes, including proving intent, motive, and identity, establishing a theory of liability, explaining witnesses' demeanor, and explaining gang culture. Gang evidence can set the tone for the trial and, at the same time, educate the jury. Gang experts can explain the inexplicable, define the indefinable, and can add rich color to an otherwise pale fact pattern. In other words, if the crime includes gang evidence, use it.

Faced with the prospect of defending a case involving gang evidence, defense attorneys cower. Understanding the power of such evidence, the defense bar will try almost anything to prevent a prosecutor from admitting gang evidence against their client. The first and most clamorous cry is always the same: “Objection! Gang evidence is prejudicial.” The prosecutor’s response should be equally strident: “Of course it is! That’s the point!”

No court in the land disallows evidence against the defendant solely because it is prejudicial. Indeed, every word a prosecutor speaks in a courtroom and every item of evidence submitted is, or should be, prejudicial to the defendant. The question is not whether the evidence is prejudicial, but whether it is substantially more prejudicial than probative.³ Given the extraordinary probative value of most gang evidence, prosecutors should rarely give in on this point. In arguing for its admissibility, it is incumbent upon the prosecutor to steer the court toward the proper use of gang evidence.

What Gang Evidence Can Prove: The Tip of the Iceberg

Every day, courts are sanctioning broader uses for gang evidence. Nothing requires that prosecutors allege a gang enhancement or charge a gang crime in order to properly use gang evidence to prove their case. Indeed, the vast majority of cases in which gang evidence is applicable include no specific gang allegation. In those cases, the prosecutor must focus the court’s attention on the reason for its admission. It is important to remember, however, that the proper use of gang evidence is expanding. The following illustrations merely scratch the surface.

To Prove Intent

As any prosecutor can attest, one of the most difficult elements to prove in a criminal trial is intent. Prosecutors rely largely on circumstantial evidence to prove the defendant’s purpose in committing the crime at hand; gang evidence provides that circumstantial evidence.

³ See, e.g. Cal. Evid. Code § 352 (2004), stating that, “The court . . . may exclude evidence if its probative value is *substantially outweighed* by the probability . . . of undue prejudice.” (emphasis supplied).

Look at a hypothetical set of facts as told in two different ways, one without the use of the underlying gang evidence, and the second enriched with gang facts. The same question will be posed for each set of facts.

In the first set of facts, we find the following: the victim is attending a late-night party at a residence. During the night, the defendant drives up in a car, stops and opens the car door. The defendant then points and fires a gun at the victim, who is standing in the front yard. The victim is struck, but lives. The question is, was the crime an assault with a firearm or an attempted murder?

Now assume the same facts, but include the following gang evidence: the victim's late-night party is in Compton Varrio Grape Street gang's claimed neighborhood. The defendant is a known Florencia-13 gang member. Grape Street and Florencia have been at war for several years over their respective territory and drug trade. Three weeks before the shooting at the party, a known Florencia-13 gangster was shot and killed by a known Grape Street gangster. The gang expert testifies during the trial that in the gang culture, when a gang is victimized, the expected reaction is to strike back with equal or more violence. That is, if a gang member is murdered, the usual reaction is retaliatory murder. Again, the question is, was the crime an assault with a firearm or an attempted murder? With the admission of the highly probative gang evidence, the answer becomes clear. Gang evidence of rivalry and violence is admissible to establish that the intent harbored by the defendant was the intent to kill.

To Prove Motive

Seldom, if ever, is a prosecutor legally required to prove motive in a criminal trial. Motive is not normally an element of a charged offense. Nevertheless, prosecutors should *always* attempt to prove motive in trial. Jurors will ask the "why" question, if not of the prosecutor, at the very least of each other. If it is not answered to their satisfaction, the jury will see it as the prosecutor's failing. For that reason, motive evidence is always relevant.

Gang evidence is properly admitted to prove motive. The motives for a gang crime can include payback and rivalries, as outlined in the example above. Additionally, motivations can be derived from more arcane sources. Drug sales, weapons transactions and extortion can all be at the root of violent gang crimes, all of which are permissible subject matter for a gang expert. Moreover, gang evidence that explains the history of rivalries and violence between and among hostile gangs is admissible. Therefore, gang experts can testify to violent acts committed by the defendant's fellow gang members. A useful technique for arguing the admissibility of such evidence is to accede to a limiting instruction by the court.

Of course, nothing will befuddle a jury—and oftentimes a prosecutor—more than the proverbial “random act of violence.” Rarely, however, is a gang crime truly random. Gang experts can shed a bright light on the murky corners of gang life. What appears to be, at first blush, an amorphous act with little in the way of rhyme or reason will take shape when the gang expert explains the concept of *respect* in the gang culture. Consider the following:

A 40-year-old man stands at a gas station filling the tank of his car. A young gangster rides up on a bicycle and fires a bullet into the man's head, killing him. There is no connection between the two. Jurors yearn for an explanation; the gang expert provides one. The expert will explain that in the most violent gangs, recruits must show loyalty to their brethren by committing murder. Only then will they be considered a true member. With few exceptions, the victim is a stranger to the killer. When the act is complete, the new member is said to have earned the “respect” of his fellow gang members.

While prosecutors often bear no legal burden to prove motive, its power when properly presented to a jury should never be overlooked or underestimated.

To Prove Identity

Unlike classic criminals of old who sought secrecy above all else, modern gang members publicize their identities for all to see. The explanation is simple: terrorism.

Terrorism is alive and well in our streets. Instead of the bomb, the gangsters' weapon of choice is the drive-by shooting. Instead of camouflage, their uniform includes baggy pants and knee-high socks. Instead of flying a flag to show their allegiance, they carry bandanas and throw hand signs. While they don't call themselves terrorists, the effect is just the same—every day, innocent people are killed in the streets, often in broad daylight.

Just like terrorists, gang members thrive on fear. The more fear they can instill in the communities and their enemies, the greater the freedom they enjoy while dealing in their dirty business of guns, drugs, and extortion. That fear is implanted by taking credit for the violence they perpetrate.

Gang members, therefore, often sign their crime, either figuratively or literally. Witnesses to a gang crime recite incredible tales of suspects walking up to enemy gang members in broad daylight and stating, "This is Midget from Tortilla Flats [street gang]," just before shooting the rival. While juries may be dumbfounded by such brashness, gang experts can explain that such conduct is commonplace among gangs. First, committing the crime with such audacity sends a message to rivals that they are not safe, day or night. Second, when Midget exclaims his name before the crime, he shows individual fearlessness, and, therefore, enhances his reputation among his own peers. That reputation may further be bolstered by graffiti that claims responsibility for the crime, and gives credit to Midget for his accomplishment.

Such evidence is ripe for gang experts to explain. Although members of the community may be reluctant to identify the perpetrator of the shooting for fear of retaliation, the expert can circumstantially support identity using statements made at the crime scene ("This is Midget"), the subsequent graffiti ("T-Flats" & "Midget" spray painted on the walls), and the defendant's prior identification as Midget in gang files. Such evidence can robustly corroborate a single identification witness, which many gang prosecutors would be lucky to find.



To Prove Criminal Liability

Successful field marshals approach their battles with a clearly defined plan. So should prosecutors approach their trials. Defining a cogent theory of liability enables the prosecutor to choreograph the presentation of evidence in a simple, logical and persuasive manner. Gang evidence can aid in defining tightly reasoned theories on which to build a solid case.

Gang members are, by nature, social creatures. Seldom will a gang member commit an assault, a drive-by shooting or a drug transaction by himself. The gang prosecutor will, therefore, often be faced with deciding whether one gangster, two or twenty are legally liable for the crime. Take, for instance, the back seat passenger in a drive-by shooting. Following the filing of murder charges, his lawyer will surely inform the prosecutor that his client cannot be liable for murder, as he fired no weapon and possessed no gun.

However, through properly admitted gang evidence, the prosecutor can establish that merely throwing a hand sign or calling out a gang name from the back seat of the car shows complicity in the crime. The gang

expert can testify that a drive-by shooting takes on a special significance when accompanied by the signature of the offending gang. That is, the gang's reputation in the community for violence is secured when witnesses hear, "This is Farm Town Crips" through the gunfire of a violent attack. Thus, the back seat passenger who throws a sign or yells a gang name may be prosecuted as an aider and abettor, and therefore is liable to the same extent as the driver and the shooter.

Additionally, the prosecutor may wish to take another approach. Drive-by shootings are rarely the product of a spur-of-the-moment decision. More often, drive-bys can be traced to plans that were hatched hours or even days before, when the car was stolen or the guns were secured. The players in the conspiracy may range from the O.G. (original gangster) who supplied the weapons or ammunition, to the graffiti tagger who warned the victim gang of the impending violence. A close look at the facts of the case, along with in-depth consultation with the expert, can, in some instances, form the basis for a conspiracy charge.

To Explain Witnesses' Conduct

There are only two sorts of gang prosecutors: those who have had witnesses recant their statements during testimony, and those who *will* have witnesses do so. As mentioned in the introduction, one defining characteristic of a gang case is the recalcitrant, uncooperative witness. It is hard enough to persuade 12 strangers to agree on anything in a trial courtroom. The difficulties mount exponentially when the prosecutor introduces eyewitnesses who deny their previous statements to the police. These difficulties are even further compounded when the recanting witnesses are law-abiding citizens who appear to have no axe to grind.

While the gang prosecutor's task is daunting, providing the jury with a reasonable explanation for why citizen witnesses lie on the stand is within reach. Evidence that the defendant's gang is a violent, dangerous organization whose *modus operandi* is to retaliate against cooperative witnesses and their families is admissible to explain witnesses' conduct. A gang expert can elaborate on the type of street intimidation the defendant's gang employs. Photographs of graffiti in the neighborhood, evidence of known gang hang-outs in that territory, and specific incidents

PROSECUTING GANG CASES: WHAT LOCAL PROSECUTORS NEED TO KNOW

of gang retaliation against witnesses in the past are but a few of the seeds the prosecutor should sow in the minds of the jurors.



The prosecutor’s job is to ensure that the jury understands that at the end of the day, the witness must go home to the very neighborhood claimed by the defendant and his gang. He or she will be forced to walk the streets past members of the very gang against which the witness was asked to testify. Long after the case is over for the litigants, the judge and the jury, the witnesses will still live in the middle of the lion’s den. The gang members know that. The witnesses know that. Using gang evidence, prosecutors must let the jury know that.

Gang evidence is admissible to explain witnesses’ conduct on the other side of the table as well. Seldom do prosecutors receive a full witness list from the defense before trial. More commonly, the prosecutors are standing at counsel table to “rest their case” when the defense attorney hands them a list of new witnesses who will be testifying for the defendant. In a gang case, those witnesses are often fellow gang members who are called to provide an alibi for the defendant. However, courts have provid-

ed prosecutors with the tools to rebut this eleventh-hour evidence. Gang evidence is admissible to explain this type of witness's motivation to testify for the defendant. An expert is permitted to explain that in the gang culture, loyalty is preeminent. Indeed, when a gang member is accused of a crime, the gang culture dictates that fellow members will come forward to assist him, even if it means providing perjurious testimony. A word of caution is appropriate, however: gang evidence should not be used for this purpose alone if the witness whom the prosecutor is trying to impeach has an independent relationship with the defendant other than that of common gang membership. The use of evidence for this purpose has been held reversible error.

To Explain Gang Life

Once the prosecutor decides that gang evidence will play a seminal role in his or her trial, the door is opened to a plethora of useful information about gang life.

Why Do Gang Members Join Gangs?

Proper inquiries for the gang expert run the gamut. Why do people join gangs in the first place? What are the perceived benefits of joining a gang? Are there consequences for refusing to join? The latter is a favorite fallback position for the defense. That is, the defendant had no choice but to join the gang. While most gang experts will agree that aggressive recruiting into gangs is common, individual gang members must make the choice to join. Indeed, most gangs require a specific demonstration of loyalty to the gang, like committing a violent crime, or being “jumped in”—fighting a group of active members. If these acts are not accomplished, the applicant will be denied entry into the gang. Gang membership is a choice, plain and simple.

Will the Real Defendant Please Stand Up?

Perhaps the most crucial element of a successful prosecution is introducing the jury to the *real* defendant. Invariably, by the time the jury sees the defendant at trial, his hair has grown out to a normal length, his clothes are nicely tailored, and he will have taken on the aura of an altar boy. But

the real defendant is a criminal wearing a do-rag and throwing a gang sign. Gang evidence can take a prosecutor a long way toward introducing the jury to that person. Through photographs, letters, notes, and even music lyrics, prosecutors can invade and exploit the defendant's true personality. Gang investigators should focus on these items of evidence during search warrants and arrests.

Tattoos are another rich source of insight into the personality of the defendant. The accused will appear in court wearing a high-collared, long-sleeved shirt. There is a reason for that: to hide tattoos that profile his gang affiliation and prove his loyalty. It is well within the purview of the prosecutor in a gang case, however, to investigate those tattoos and reveal them to the trier of fact. Without question, one of the most dramatic and powerful

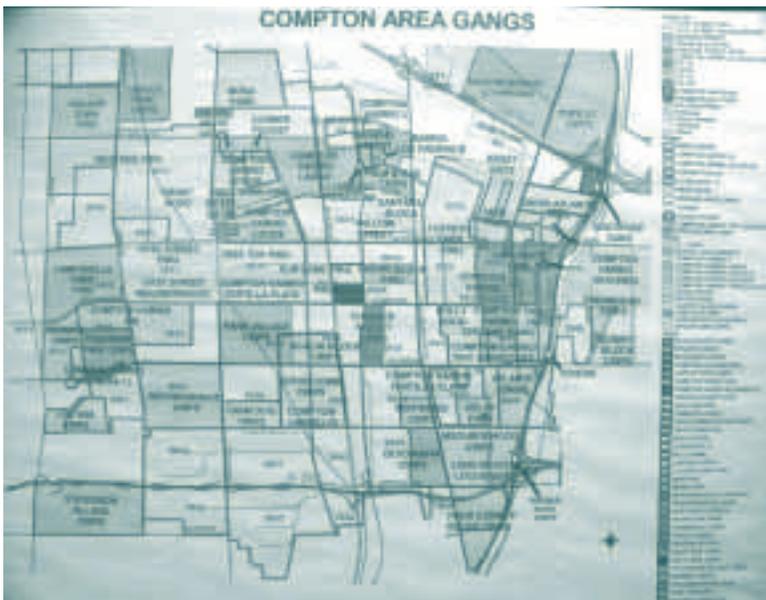
moments in trial occurs when the prosecutor asks the judge to instruct the defendant to stand and remove his shirt, exposing a large, gothic script tattoo across his stomach, reading, "BLOOD KILLER."



Turf, Territory, and Membership

Another proper subject matter for the gang expert is an explanation of the territory claimed by the gang, often referred to as “turf.” The gang expert can provide valuable insight into the importance of territoriality to a gang and explain the relationship among drugs, money, guns and turf. That is, gangs claim territory to create a safe haven for drug sales. The more territory they claim, the safer they feel, and the more street corners they can utilize for drug sales. The more drugs they sell, the more money they generate. The more money they generate, the greater their buying power for guns. The more guns they acquire, the better their chance of expanding their territory, and so on. Most gang experts agree that territory is the keystone that holds gangs together. Not unlike the geopolitics among warring nations, gangs will fight and kill for territory they perceive to be their own.

Since there are no official maps delineating gang borders, prosecutors must rely on evidence of points of conflict: graffiti—termed “the newspaper of the street”—and gang members’ statements in order to



define a gang's territory. Gang investigators are the best source of such information.

Intertwined with information concerning territory is information concerning gang membership. Most gangs consist of cliques and sub-cliques which define the loyalties and conflicts that exist on the street. All too often, a gang will split into separate factions that begin to war with one another. Resulting struggles over territory, power and prestige will take over the neighborhood. When the tensions turn violent, innocent victims are caught in the crossfire. Therefore, the gang culture surrounding membership, loyalties and broken alliances may become an important factor in a gang prosecution.

GET READY FOR THE FIGHT: GREASING THE SKIDS

Gang violence on the streets is pervasive; the same cannot be said for gang evidence in the courtroom. While many courts are getting used to gang evidence as a relevant and proper subject for criminal trials, others still balk at the idea. Before diving headlong into a trial in which they intend to use gang evidence, prosecutors should take steps to prepare the court.

First and foremost, inform the defense through the discovery process of the prosecution's intent to introduce gang evidence. The defendant will, thereafter, be prevented from arguing that he was ill-prepared to defend against such evidence. Moreover, it is prudent to present the court with a brief outlining the prosecution's plan to present gang evidence and the reasons for it. This tactic will educate the court on the law surrounding the issues, and give the court ample opportunity to get comfortable with the idea that the admission of such evidence will not result in reversible error. It is also helpful to include in the brief proposed jury *voir dire* questions on gangs and gang membership. Jury selection is a frequently underestimated tool that can be used to educate the jury before the prosecutor presents the first piece of evidence.⁴

Witness Problems in Gang Cases

Several categories of witnesses can create serious problems in a gang case. The "normal citizen" witness is a person who is unaffiliated with any gang, but happens to be in the wrong place at the wrong time. Such a witness is generally extremely fearful of gang retaliation because he or she often lives on claimed gang turf. This witness's fear is legitimate, and the prosecutor will have a difficult time assuaging that fear. Factors like property ownership, community ties and employment make relocation extremely difficult or impossible. It is important never to make promises or guarantees to this witness concerning safety that cannot be backed up. The prosecutor's relationship with the normal citizen witness will span

⁴ See Appendix B for sample *voir dire* questions.

the duration of the case; if the witness believes that the prosecutor is not completely honest about the possibilities of retaliation or intimidation, the prosecutor will lose credibility. Explain to this witness that while safety cannot be absolutely guaranteed, steps can be taken to reduce the possibility of retaliatory violence. Work with the witness, and above all else, be empathetic to his or her position.

Another type of witness the prosecutor may face is a victim who belongs to the defendant's rival gang. This witness will likely be uncooperative because of the gang code that regulates members. Even if this witness identified the defendant as the perpetrator at the time of the crime, do not expect his cooperation at the trial. This witness will lie on the witness stand, because if he cooperates he will be labeled a snitch. In many gangs, snitching—even against a rival gang member—is a zero tolerance offense.

Additionally, a prosecutor may be forced to rely on a member of the defendant's own gang. This witness will be problematic from the start. He will seek to protect the defendant at every stage and actively sabotage the prosecution's case. More often than not, this witness will be announced at the last minute by the defense as an alibi witness. It is a good idea at the start of the case to interview as many of the defendant's close associates as possible, to forestall any last-minute contrived alibi testimony.

Finally, the gang prosecutor's best witness may be sitting at the other end of the table. The facts of the case may dictate that the prosecutor utilize a co-defendant as a government witness. Securing this witness's testimony will likely require an offer of leniency or immunity. In that case, the terms of the agreement should be in writing. Additionally, if the witness is in custody, the prosecutor will be responsible for the witness's safety behind bars. That responsibility will include protective custody, special transport, and similar measures to separate the defendant from the witness. Be aware that jurors will view this witness with distrust. The prosecutor's case should be shored up accordingly.

Because these witnesses are frequently unavailable at trial, it is advisable to memorialize the witness's testimony before trial. This can be accom-

plished via the preliminary hearing, through a conditional examination, or by a recorded statement under oath.⁵ In the event the witness becomes unavailable, the prosecutor can rely on the previous testimony.

California's STEP Act as a Model

The easiest way to get gang evidence admitted in trial is by filing a substantive gang crime or gang enhancement allegation. Many jurisdictions, recognizing the growing problem, have codified laws directed at gang membership.⁶ Many others, however, have not. The following examines California's answer to the gang epidemic, and hopefully provides a model for those jurisdictions that have yet to address the issue.

In 1988 the California legislature enacted emergency legislation known as the Street Terrorism Enforcement and Prevention (STEP) Act. The STEP Act was made permanent in 1997. In 2000, the Act was amended to substantially increase punishments for gang crimes and enhancements. The STEP Act contains two main parts. Section (a) created a substantive crime of knowing participation and willful furtherance of felonious conduct by members of a criminal street gang.⁷ Section (b) is an enhancement that applies to any felony or misdemeanor committed for the benefit of a criminal street gang.⁸ Because of its much broader use in California, this discussion will focus on the (b) enhancement, rather than the (a) substantive crime.

Because the STEP Act's (b) enhancement applies to *any* felony and *any* misdemeanor, it wields extraordinary power. The prosecutor need only prove that the crime—whatever it was—was committed for the benefit of, in association with, *or* at the direction of a criminal street gang. Indeed, the prosecutor does not even have to prove that the defendant is a member of the gang, as long as his conduct promotes or benefits the gang.⁹

⁵ Cal. Evid. Code § 1231 (2004).

⁶ A listing of state gang laws can be found at the Institute for Intergovernmental Research's Web site located at www.iir.com/nygc/gang-legis/.

⁷ Cal. Penal Code § 186.22(a) (2004).

⁸ Cal. Penal Code § 186.22(b) (2004).

⁹ See CALJIC Criminal 17.24.2, 7th Ed. (2004).

To prove the STEP Act enhancement, the prosecutor must prove that the group the defendant has benefited is, in fact, a criminal street gang. A “criminal street gang” is defined by the code as

an ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of [Penal Code § 186.22] subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.¹⁰

Although the definition appears convoluted, when broken down elementally it is relatively simple: 1) any ongoing organization of three or more people, 2) with a common sign or symbol, 3) with one of its primary activities being the commission of one of 25 specified crimes, and 4) which engages in a pattern of criminal gang activity. With very simple questions, the prosecutor can elicit from a gang expert testimony that will prove each of these elements.¹¹

The primary element of proof involves a determination of which 25 felonies qualify as predicate acts under the STEP Act. The legislature included the most serious crimes one can think of: murder, manslaughter, rape, arson, assault with a deadly weapon, burglary, robbery, kidnapping, torture, mayhem, carjacking, and the like. Additionally, most drug offenses, excluding straight possession, are included. Thus, as long as the prosecutor can establish through prior convictions¹² that members of the defendant’s gang have committed two or more of these crimes within three years of the defendant’s crime, the element is proved.

The prosecutor must then define a “pattern of criminal gang activity.” Again, the legislature provided a definition:

¹⁰ *Id.*

¹¹ *People v. Valdez*, 58 Cal.App.4th 494, 506 (1997).

¹² Although a conviction is not necessary to establish this element, it is the easiest way to prove it.

the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more [listed] offenses [same 25 to choose from], provided at least one of these offenses occurred after the effective date of this chapter [September 23, 1988] and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons...¹³

In other words, the prosecutor must prove that members from the defendant's gang committed two or more predicate offenses on separate occasions *or* two or more gangsters committed two separate crimes at the same time.¹⁴ The only stipulation is that the crimes must be within three years of one another.

Although the gang enhancement takes a few extra steps to prove, the result at sentencing makes it all worthwhile. Under the STEP Act, a garden-variety felony, which normally carries a sentence range of 16 months to three years (depending on aggravating or mitigating evidence), is enhanced to carry an *additional* two to four years. If the felony is "serious" (as defined by the California Penal Code), five years are added to the sentence. If the felony is "violent" (as defined by the California Penal Code), 10 years are added. Certain crimes such as car-jacking, home invasion robbery, and shooting from a vehicle causing injury carry life terms with the inclusion of the enhancement. Indeed, because of its prevalent use by gang members, witness intimidation carries a life sentence under the STEP Act enhancement.

An examination of California's gun use law provides a final example of the power of the STEP Act. By way of illustration, assume the defendant is the driver of a car involved in a drive-by shooting wherein the victim is severely injured. Ordinarily, the driver of the car would be prosecuted as an aider and abettor in the drive-by. If the driver were convicted of attempted murder, he would face a maximum punishment of 10 years in state prison (nine years for attempted murder, plus one year for a princi-

¹³ *Id.*

¹⁴ *People v. Louen* (1997) 17 Cal.4th 1, 10-11.

pal armed allegation). The shooter, on the other hand, would face a life sentence with a minimum eligibility for parole after 25 years because of his personal use of the gun (*see* Cal. Penal Code § 12022.53(d)).

Conversely, if the prosecutor pleads and proves the STEP Act gang enhancement, the “personal gun use” enhancement attaches to *all principals* in the crime, including aiders and abettors. That means the driver, shooter, even the gangster who threw a gang sign from the window of the car, are *all* facing 25 years to life.

Such sentencing schemes have a chilling effect on gang members. It does not take long for word to reach the streets that gang members who never even touched the gun, let alone fired it, are facing life sentences. As more jurisdictions use gang laws to their benefit, the vise will close on gangs and street terrorism. With consistent prosecutions and sentences, gang members will begin to decide the price is simply too high for their chosen lifestyle.

Getting the Most Out of the Gang Expert

Among the most important decisions a gang prosecutor can make during trial preparation is who to call as the expert. Most essential, the expert chosen *must* have an intimate and working personal knowledge of the defendant’s gang. Insubstantial and passing knowledge of a gang gleaned from sources other than personal contact with its members will not impress the jury. After all, the expert will be asked to talk about the storied history of the gang, as well as subjective matters such as the gang’s primary activities, code of conduct, and territory. For these reasons, it is imperative that the expert be able to show that his opinions are based on a personal history with the gang.

It is less important that the gang expert know the defendant personally. The defendant’s affiliation with the gang is often borne out by objective evidence such as tattoos, field identification cards revealing associations, and self-admissions to other officers. It is helpful, however, if the expert knows not only the gang in general, but the defendant himself. If the prosecutor sees fit, there is no prohibition against using multiple experts—one who is intimately familiar with the gang, and another who

knows the defendant personally. While some may argue that multiple experts can lead to inconsistent testimony, a tandem of experts can be very effective if both are well prepared and knowledgeable.

As soon as the expert takes the witness stand, the jury will begin to make personal judgments, examining the expert's demeanor, appearance and articulation to begin forming an opinion and assigning credibility. If the expert appears tentative and unsure, the jury will notice. If the expert is brash and presumptuous, that will show as well. It is important for the expert to strike a balance between confidence and modesty to enhance his or her credibility and persuasion with the jury.

Keep in mind that the jury will be asked to believe the opinion of the expert, a person they have never heard of and have never met. Most of their impression will be based on the expert's qualifications, as drawn out by the prosecutor. Those qualifications will be the foundation upon which the rest of the expert's testimony will be based. If they are slight, vague or otherwise unimpressive, the jury will disregard the expert's opinion. If, on the other hand, the qualifications are notable and well articulated, the jury will follow the expert's lead. Accordingly, the prosecutor should work with the expert in advance to formulate a concise series of questions to most effectively highlight the expert's qualifications. Moreover, the prosecutor should brainstorm with the expert in an effort to uncover qualifications that may have been overlooked. Contacts with gang members in jail facilities and on the streets, gang investigations, executions of search warrants on gang members' homes and cars, intelligence gathering with other officers, and sharing of gang information with other agencies are some of the points the expert should focus on when explaining his or her qualifications. Moreover, the number of years the expert has worked in the area and the number of times he or she has qualified as an expert in the past are both factors that will impress a jury.

Once the witness is qualified as a gang expert, the question becomes, "What is the proper subject matter for the expert?" The simple answer is, "All the juicy stuff." The expert is the witness who will identify the defendant as a gang member. From the witness stand, the expert can establish the defendant's gang affiliation in several ways, including the

defendant's admission of membership to the expert, the defendant's tattoos, and his consistent association with other gang members. The expert can also relate the defendant's gang's rivalries in the community, as well as the gang's history and structure. The meaning of tattoos as more than identifiers of gang membership is proper subject matter for a gang expert, as well as the interpretation of graffiti, gang slang and gang monikers. The expert may also explain the gang's criminal tactics, culture, and habits. Remember, the expert is giving opinions. There are no "wrong" answers.

The crux of the gang expert's testimony, however, will come in the form of answers to the hypothetical question. The hypothetical as seen through the eyes of the expert will be the culmination of the prosecutor's gang evidence. If there is a gang allegation included in the charges, the expert will render an opinion, based on the facts presented by the prosecutor, as to whether the crime committed benefited or promoted a criminal street gang. If no specific gang allegation is charged, but rather the prosecutor has introduced gang evidence to prove intent, motive or identity, for instance, the hypothetical should be tailored to that point, and the expert can then direct the jury to the facts that prove it.

The hypothetical question is a powerful tool that prosecutors can and should use to their advantage. It should be viewed as a free bite at the apple—an opportunity to set out the facts of the case the way the prosecutor wants the jury to see them. Therefore, because the prosecutor will recite the facts most productive to his or her case, the hypothetical question should be viewed as a mini closing argument. Because of the persuasive power of the hypothetical question, the gang expert should be called to the stand as close to the end of the prosecutor's case as possible. The more often the jury hears the evidence couched in the prosecutor's terms, the more persuasive it will be. Coupling the hypothetical with the closing arguments means that the jury will hear the prosecutor's version of the facts three times, versus the defense attorney's single argument.

Once again, however, it bears mentioning that a proper evidentiary foundation is everything. The expert's opinion of the prosecutor's hypothetical question is only as good as the foundation upon which it is based. It is

incumbent on the expert to explain in detail the bases of his or her opinion. And, as with any expert, the bases can be almost anything. Otherwise inadmissible evidence—hearsay, for instance—can be the proper basis for an expert’s opinion. For example, experts can base their opinions on the defendant’s statements, other gangsters’ statements, the review of graffiti or photographs of graffiti, conversations with other police officers, the review of prior police reports, and centralized computer database records. However, anything upon which the gang expert relies is subject to discovery. Gang intelligence files, therefore, may become discoverable if the expert does not track the original source of the information contained in the case file or database. If internal intelligence files are turned over to the defense, ongoing investigations could very well be compromised. Advise the expert to follow up on information uncovered in gang intelligence files to independently corroborate the facts so that only the original source information is discoverable.¹⁵

¹⁵ See Appendix C for proposed expert questions.

CLOSING REMARKS

Every day in jurisdictions across the country, gang problems persist. Where gang members were once viewed as nuisances with spray cans, they are now roving bands of criminals with AK-47 assault rifles. Where gang violence was once seen as sporadic and occasional, it has now graduated to a full-blown epidemic. In 2000, in Los Angeles County, a staggering 44.8 percent of all homicides reported were gang-related. Other jurisdictions are beginning to see similar numbers. With the gang wars raging, there is a dire need to address the problem in the courtrooms. Only with the severest of penalties and the swiftest of punishments will gang members on the streets begin to feel the force of the law. Only with the dedication of prosecutors and investigators will those penalties and punishments be enforced. The burden rests squarely on the government's shoulders. Marshalling gang evidence at trial should be on every prosecutor's mind. The legislatures and the courts have provided the tools; it is now up to the men and women who represent the People to use them.

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APPENDIX A

California STEP Act: Penal Code Section 186.20 – 186.22

186.20. This chapter shall be known and may be cited as the “California Street Terrorism Enforcement and Prevention Act.”

186.21. The Legislature hereby finds and declares that it is the right of every person, regardless of race, color, creed, religion, national origin, gender, age, sexual orientation, or handicap, to be secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals. It is not the intent of this chapter to interfere with the exercise of the constitutionally protected rights of freedom of expression and association. The Legislature hereby recognizes the constitutional right of every citizen to harbor and express beliefs on any lawful subject whatsoever, to lawfully associate with others who share similar beliefs, to petition lawfully constituted authority for a redress of perceived grievances, and to participate in the electoral process. The Legislature, however, further finds that the State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected. The Legislature finds that there are nearly 600 criminal street gangs operating in California, and that the number of gang-related murders is increasing. The Legislature also finds that in Los Angeles County alone there were 328 gang-related murders in 1986, and that gang homicides in 1987 have increased 80 percent over 1986. It is the intent of the Legislature in enacting this chapter to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs. The Legislature further finds that an effective means of punishing and deterring the criminal activities of street gangs is through forfeiture of the profits, proceeds, and instrumentalities acquired, accumulated, or used by street gangs.

186.22. (a) Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.

(b) (1) Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows:

(A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion.

(B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years.

(C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years.

(2) If the underlying felony described in paragraph (1) is committed on the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school, during hours in which the facility is open for classes or school-related programs or when minors are using the facility that fact shall be a circumstance in aggravation of the crime in imposing a term under paragraph (1).

(3) The court shall order the imposition of the middle term of the sentence enhancement, unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its choice of sentencing enhancements on the record at the time of the sentencing.

(4) Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, fur-

ther, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

(A) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 3046, if the felony is any of the offenses enumerated in subparagraphs (B) or (C) of this paragraph.

(B) Imprisonment in the state prison for 15 years, if the felony is a home invasion robbery, in violation of subparagraph (A) of paragraph (1) of subdivision (a) of Section 213; carjacking, as defined in Section 215; a felony violation of Section 246; or a violation of Section 12022.55.

(C) Imprisonment in the state prison for seven years, if the felony is extortion, as defined in Section 519; or threats to victims and witnesses, as defined in Section 136.1.

(5) Except as provided in paragraph (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served.

(c) If the court grants probation or suspends the execution of sentence imposed upon the defendant for a violation of subdivision (a), or in cases involving a true finding of the enhancement enumerated in subdivision (b), the court shall require that the defendant serve a minimum of 180 days in a county jail as a condition thereof.

(d) Any person who is convicted of a public offense punishable as a felony or a misdemeanor, which is committed for the benefit of, at the direction of or in association with, any criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison for one, two, or three years, provided that any person sentenced to imprisonment in the county jail shall be imprisoned for a period not to exceed one year, but not less than 180 days, and shall not be eligible for release upon completion of sentence, parole, or any other basis, until he or she has served 180 days. If the court grants probation or suspends the execution of sentence imposed upon the defendant, it shall require as a condition thereof that

the defendant serve 180 days in a county jail.

(e) As used in this chapter, “pattern of criminal gang activity” means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons:

(1) Assault with a deadly weapon or by means of force likely to produce great bodily injury, as defined in Section 245.

(2) Robbery, as defined in Chapter 4 (commencing with Section 211) of Title 8 of Part 1.

(3) Unlawful homicide or manslaughter, as defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1.

(4) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances as defined in Sections 11054, 11055, 11056, 11057, and 11058 of the Health and Safety Code.

(5) Shooting at an inhabited dwelling or occupied motor vehicle, as defined in Section 246.

(6) Discharging or permitting the discharge of a firearm from a motor vehicle, as defined in subdivisions (a) and (b) of Section 12034.

(7) Arson, as defined in Chapter 1 (commencing with Section 450) of Title 13.

(8) The intimidation of witnesses and victims, as defined in Section 136.1.

(9) Grand theft, as defined in subdivision (a) or (c) of Section 487.

(10) Grand theft of any firearm, vehicle, trailer, or vessel.

(11) Burglary, as defined in Section 459.

(12) Rape, as defined in Section 261.

(13) Looting, as defined in Section 463.

(14) Money laundering, as defined in Section 186.10.

(15) Kidnapping, as defined in Section 207.

(16) Mayhem, as defined in Section 203.

(17) Aggravated mayhem, as defined in Section 205.

(18) Torture, as defined in Section 206.

(19) Felony extortion, as defined in Sections 518 and 520.

(20) Felony vandalism, as defined in paragraph (1) of subdivision (b) of

Section 594.

(21) Carjacking, as defined in Section 215.

(22) The sale, delivery, or transfer of a firearm, as defined in Section 12072.

(23) Possession of a pistol, revolver, or other firearm capable of being concealed upon the person in violation of paragraph (1) of subdivision (a) of Section 12101.

(24) Threats to commit crimes resulting in death or great bodily injury, as defined in Section 422.

(25) Theft and unlawful taking or driving of a vehicle, as defined in Section 10851 of the Vehicle Code.

(f) As used in this chapter, “criminal street gang” means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

(g) Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition.

(h) Notwithstanding any other provision of law, for each person committed to the Youth Authority for a conviction pursuant to subdivision (a) or (b) of this section, the offense shall be deemed one for which the state shall pay the rate of 100 percent of the per capita institutional cost of the Department of Youth Authority, pursuant to Section 912.5 of the Welfare and Institutions Code.

(i) In order to secure a conviction, or sustain a juvenile petition, pursuant to subdivision (a), it is not necessary for the prosecution to prove that the person devotes all, or a substantial part of his or her time or efforts to the criminal street gang, nor is it necessary to prove that the person is a member of the criminal street gang. Active participation in the criminal street gang is all that is required.

186.22a. (a) Every building or place used by members of a criminal street gang for the purpose of the commission of the offenses listed in subdivision (e) of Section 186.22 or any offense involving dangerous or deadly weapons, burglary, or rape, and every building or place wherein or upon which that criminal conduct by gang members takes place, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

(b) Any action for injunction or abatement filed pursuant to subdivision (a), including an action filed by the Attorney General, shall proceed according to the provisions of Article 3 (commencing with Section 11570) of Chapter 10 of Division 10 of the Health and Safety Code, except that all of the following shall apply:

(1) The court shall not assess a civil penalty against any person unless that person knew or should have known of the unlawful acts.

(2) No order of eviction or closure may be entered.

(3) All injunctions issued shall be limited to those necessary to protect the health and safety of the residents or the public or those necessary to prevent further criminal activity.

(4) Suit may not be filed until 30-day notice of the unlawful use or criminal conduct has been provided to the owner by mail, return receipt requested, postage prepaid, to the last known address.

(c) Whenever an injunction is issued pursuant to subdivision (a), or Section 3479 of the Civil Code, to abate gang activity constituting a nuisance, the Attorney General may maintain an action for money damages on behalf of the community or neighborhood injured by that nuisance. Any money damages awarded shall be paid by or collected from assets of the criminal street gang or its members that were derived from the criminal activity being abated or enjoined. Only persons who knew or should have known of the unlawful acts shall be personally liable for the payment of the damages awarded. In a civil action for damages brought pursuant to this subdivision, the Attorney General may use, but is not limited to the use of, the testimony of experts to establish damages suffered by the community or neighborhood injured by the nuisance. The damages recovered pursuant to this subdivision shall be deposited into a separate segregated fund for payment to the governing body of the city or county in whose political subdivision the community or neighborhood is located, and that governing body shall use those assets solely for the ben-

efit of the community or neighborhood that has been injured by the nuisance.

(d) No nonprofit or charitable organization which is conducting its affairs with ordinary care or skill, and no governmental entity, shall be abated pursuant to subdivisions (a) and (b).

(e) Nothing in this chapter shall preclude any aggrieved person from seeking any other remedy provided by law.

(f) (1) Any firearm, ammunition which may be used with the firearm, or any deadly or dangerous weapon which is owned or possessed by a member of a criminal street gang for the purpose of the commission of any of the offenses listed in subdivision (e) of Section 186.22, or the commission of any burglary or rape, may be confiscated by any law enforcement agency or peace officer.

(2) In those cases where a law enforcement agency believes that the return of the firearm, ammunition, or deadly weapon confiscated pursuant to this subdivision, is or will be used in criminal street gang activity or that the return of the item would be likely to result in endangering the safety of others, the law enforcement agency shall initiate a petition in the superior court to determine if the item confiscated should be returned or declared a nuisance.

(3) No firearm, ammunition, or deadly weapon shall be sold or destroyed unless reasonable notice is given to its lawful owner if his or her identity and address can be reasonably ascertained. The law enforcement agency shall inform the lawful owner, at that person's last known address by registered mail, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing and that the failure to respond shall result in a default order forfeiting the confiscated firearm, ammunition, or deadly weapon as a nuisance.

(4) If the person requests a hearing, the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing.

(5) At the hearing, the burden of proof is upon the law enforcement agency or peace officer to show by a preponderance of the evidence that the seized item is or will be used in criminal street gang activity or that return of the item would be likely to result in endangering the safety of

others. All returns of firearms shall be subject to subdivision (d) of Section 12072.

(6) If the person does not request a hearing within 30 days of the notice or the lawful owner cannot be ascertained, the law enforcement agency may file a petition that the confiscated firearm, ammunition, or deadly weapon be declared a nuisance. If the items are declared to be a nuisance, the law enforcement agency shall dispose of the items as provided in Section 12028.

APPENDIX B

Proposed Voir Dire Questions for a Gang Case

The purpose of questioning prospective jurors is to determine whether those jurors harbor any biases, prejudices or opinions such that they could not well and truly try the cause pending before the court. To that end, it is the prosecutor's responsibility to uncover those biases, prejudices or opinions. Without question, the issue of street gangs is a hot-button point for many members of the community. The gang prosecutor, therefore, seeks during *voir dire* to explain some of the terms and concepts that the jury is expected to encounter during the upcoming trial in order to reveal potential juror bias. The tangential effect, of course, is to educate the jury on the law upon which they will be instructed.

The gang prosecutor is saddled with another task, however. Many jurors will honestly state that they do not like gang members. Defense attorneys will, therefore, move to excuse those jurors, citing "cause." If, however, every juror who dislikes or disapproves of gang members were excused from the panel, the only jurors left would be other gang members. It is vitally important for the gang prosecutor to assertively rehabilitate jurors who offer strong opinions on gangs and gang members. Only then will the *voir dire* process truly result in a fair pool of jurors, representative of the community.

The following proposed questions are merely examples of approaches a gang prosecutor may take to expose certain jurors' biases and rehabilitate others.

Direct the juror's attention toward the legal definition of a criminal street gang:

If you were asked to define the term 'gang,' how would you do it?

(This is a good opportunity to correct the jurors' misimpression of the actual definition.)

If the court gave you an instruction that defined ‘criminal street gang,’ would you promise to apply that definition in this case?

Would any of you ignore the court’s definition in favor of your own?

Face the issue head on (then rehabilitate):

Does anyone think that it’s okay to be a gang member?

(A “yes” answer here should immediately bar that juror from the prosecutor’s case. No amount of rehabilitation or explanation will suffice. That juror should be gone. Period.)

Does anyone (juror # ____, do you) have negative thoughts toward gangs or gang members?

(Most will answer in the affirmative. That’s okay. See the next questions.)

Does everyone agree that it is okay (acceptable) to dislike gangs and gang members?

(Here, the jurors must be reminded that it is acceptable to dislike gang members, just as it is acceptable to dislike murderers. The jurors’ inherent dislike of gang members is not grounds for their disqualification. Get them used to the idea that gang membership is a bad thing, and it is okay to say so. Jurors are perfectly qualified to sit on a gang case as long as they agree that they will not convict the defendant of the crime *solely* because of his gang affiliation. The juror should be reminded to listen to the facts of the case with an open mind, and then apply the law to those facts. The following questions address these points.)

That you do not like gang members does not mean that you will automatically find the defendant guilty of _____ crime, does it?

APPENDIX B

If you are not convinced beyond a reasonable doubt that the defendant committed the crime of _____, you would not convict him of that crime just because he is a gang member, would you?

(“No” answers to these questions serve to rehabilitate the juror who doesn’t like gangsters, yet explain that jurors do not have to hide from the fact that gang members offend them.)

APPENDIX C

Sample Direct Examination for a Gang Expert

Qualifications

What do you do for a living?

How long have you been a police officer?

How long have you been in your current assignment?

Is [Unit Title] a specialized gang unit?

What are your duties as a gang [officer] [detective]?

What education, training and background qualify you to perform those duties?

Have you ever lectured or taught classes regarding gangs?
To whom?

Have you ever qualified as a gang expert in the past?

How many times?

In what jurisdiction? In L.A. County, other counties, other states?

Is it part of your job to stay current on gang trends, including rivalries, alliances, customs, habits?

How do you do this?

Did you ever work the streets, i.e. patrol? Did you talk to gang members in that setting?

Did you ever work county jail? (If Sheriff) Did you talk to gang members in that setting?

How many times have you come in contact with gang members?

Have all your contacts been adversarial in nature?

Describe a typical casual contact you might have with a gang member.

Have you found that gang members have been forthcoming with you concerning gang info (i.e. current rivalries, alliances, membership, etc.)?

Do you typically share information and intelligence with other police agencies?

Have you been involved with serving search warrants on gang members' houses?

Is there valuable gang intelligence that can be derived from the service of such warrants? Describe.

Gang Culture

What constitutes a "Criminal Street Gang?"

What motivates a person to join a gang?

Once in, do gang members typically just quit?

What does "blood in / blood out" mean?

Does the concept of "respect" have a special significance in the gang culture?

How does a gang member gain respect or prestige in the gang?

What does it mean to “put in work” for the gang?

Does turf or territory have special significance in the gang culture?

Does the term “payback” have special significance in the gang culture?

How do gangs identify themselves?

Names?

Hand signs?

Graffiti?

Colors?

Monikers?

Your Case

The Defendant’s Gang

Are you familiar with [Gang Name]?

How do you know that gang?

Have you had contacts with that gang and its members?

Describe those contacts in general.

How many members are in [Gang Name]?

Does [Gang Name] have a turf or territory that it claims?

What are those boundaries?

Does [Gang Name] have a hand sign or graffiti symbol that signifies the gang?

Describe those.

What, in your expert opinion, are among the primary activities of [Gang Name]? (One of the “dirty 25;” P.C. 186.22(e)).

Is the defendant a member of [Gang Name]?

How do you know?

Have you had personal contact with the defendant?

Has the defendant admitted his membership to you? To others?

Does the defendant have any tattoos that indicate his affiliation with that gang?

Is the defendant still active? How long has he been active?

The Victim’s Gang (if applicable)

Do you know the victim?

Does he belong to any gang?

Does that gang have a turf or territory?

Does the victim’s gang have any rivals? (If the defendant’s gang is a rival).

Describe the relationship between these two gangs.

Is there a history of violence between these gangs?

The Pattern

Do you know [Defendant Name]?

Is he a member of [Defendant's Gang]?

Was he convicted of a felony? What felony?

When was the offense for which he was convicted? (After 9/26/88, within 3 years of the instant crime).

Was he a member of [Defendant's Gang] at the time he committed that crime? (Not necessary, but nice if you have it...)

(Introduce the certified predicate prior conviction.)

The Hypothetical

(Ask the hypothetical question based on your facts—not generic.)

Was this crime committed to promote or benefit [Gang Name] criminal street gang?

On what do you base your opinion?



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