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Ganging Up on Gangs: The Steps Necessary for Effectively Prosecuting Gang Violence

BY JEFFREY T. WENNAR

The 2009 National Gang Threat Assessment report states, “[gangs] pose a serious threat to public safety in many communities throughout the United States”¹ In his 2008 report to Congress, Attorney General Michael B. Mukasey writes,

[Gangs] threaten our society, from city streets to suburban neighborhoods and beyond. They bring a culture of violence and drugs to our doorsteps, creating an atmosphere of fear, diminishing the quality of life, and endangering the safety, well-being, and future of our children. In partnership with state and local authorities as well as community leaders, we must be vigilant in keeping our communities safe from the curse of gang-related crime and violence.²

Legislatures have passed statutes intended to address gang related issues within their states. Those states enacting gang legislation have, with certain exceptions, done so recently.³

To understand and identify the threat posed by a criminal street gang, the term must be defined. At present, the federal definition reads as follows:

“Criminal street gang” means an ongoing group, club, organization, or association of 5 or more persons (A) that has as 1 of its primary purposes the commission of 1 or more of the criminal offenses described in subsection (C); (B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (C); and (C) the activities of which affect interstate or foreign commerce.⁴

California Senator Dianne Feinstein’s Gang Abatement Act of 2009 proposes the following federal definition for a criminal street gang:

(1) Criminal Street Gang. The term ‘criminal street gang’ means a formal or informal group, organization, or association of 5 or more individuals—

(A) each of whom has committed at least 1 gang crime; and

(B) who collectively commit 3 or more gang crimes (not less than 1 of which is a serious violent felony),

in separate criminal episodes (not less than 1 of which occurs after the date of enactment of the Gang Abatement and Prevention Act of 2009), and the last of which occurs not later than 5 years after the commission of a prior gang crime (excluding any time of imprisonment for that individual).⁵

There is no one uniform definition among the states as to what constitutes a criminal street gang. State statutes are fairly consistent in identifying a criminal street gang as constituting three or more persons who have a common name or identifying sign, symbol, tattoo or other physical marking, style of dress or use of a hand sign, and whose mem-

bers individually or collectively engage in a pattern of criminal activity.⁶

For centuries individuals have joined together for a common interest or purpose. Merchants and craftsmen formed guilds in Europe for continuity of business.⁷ Fraternal and benevolent organizations have grown to be part of mankind’s everyday existence.⁸ As Bursik and Gransmick have noted, the first part of most states’ definition of a criminal gang is easily met by a number of social groups, including Greek fraternities and sororities, the Girl and Boy Scouts, and most youth sports teams.⁹ Thus, from the different state definitions and the proposed federal definition, there is considerable disagreement as to what constitutes a gang and who is a gang member.¹⁰

Following, then, on the definition of a Criminal Street Gang is the definition of what is “gang participation.” Current Federal law states:



- (d) Circumstances.—The circumstances described in this section are that the offense described in subsection (c) was committed by a person who
- (1) participates in a criminal street gang with knowledge that its members engage in or have engaged in a continuing series of offenses described in subsection (c);
 - (2) intends to promote or further the felonious activities of the criminal street gang or maintain or increase his or her position in the gang; and
 - (3) has been convicted within the past 5 years for¹¹

Senator Feinstein's proposed legislation makes it

unlawful for any person to knowingly commit, or conspire, threaten, or attempt to commit, a gang crime for the purpose of furthering the activities of a criminal street gang, or gaining entrance to or maintaining or increasing position in a criminal street gang, if the activities of that criminal street gang occur in or affect interstate or foreign commerce.¹²

As with the definition of a criminal street gang, the states are not united in their definition of "gang participation."¹³ Using Maryland as an example, the law makes it a crime to "participate in a criminal gang knowing that the members of the gang engage in an ongoing pattern of criminal activity," and "knowingly and willfully direct or participate in the commission of an underlying crime . . . committed for the benefit of, at the direction of, or in association with a criminal gang."¹⁴

Considering the elements enumerated in the Maryland statute, prosecutors in that jurisdiction have to prove: (1) that the defendant is a member of a criminal street gang; (2) the existence of that particular street gang; and (3) the street gang is actively participating in the underlying enumerated offenses.¹⁵ From the reading of the statute, this activity is ongoing and not historical. The prosecutor then has to prove the defendant at bar

participate[d] in a criminal gang *knowing* that the members of the gang engage in an ongoing pattern of criminal activity; and *knowingly and willfully* direct or participate in the commission of an underlying crime . . . committed for the *benefit* of, at the *direction* of, or in *association with* a criminal gang.¹⁶

In order to meet this burden of proof, the prosecutor will likely have to call and qualify an expert witness.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion

or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied principles and methods reliably to the facts of the case.¹⁷

The gang expert's testimony is pivotal in establishing the existence of a particular street gang, proving the street gang actively participates in particular criminal offenses, and assisting the jury in understanding the gang culture. In the appropriate case, evidence of gang membership may be admitted to show: (1) "motive, a reason for participation, joint ownership of firearms, or a relationship between witnesses;" (2) "for purposes of impeachment and showing bias;" (3) "to explain parties' actions, to help the jury understand the dynamics at work in a given case;" and (4) "to support conspiracy or joint venture theories."¹⁸ Prosecutors must use gang experts to assist in proving the street gang activity purported in the trial establishes motive, intent, identity, conspiracy, knowledge, principal, preparation, plan, absence of mistake or accident, bias, and an explanation of the demeanor of a witness.¹⁹

The gang expert should be able to testify as to the role reputation and respect has in relationships between various gangs. The importance of reputation and respect and the role of fear in obtaining such status will help a juror to understand what motivates a member to act at the direction of or in association with the gang. How that reputation and respect is earned, lost or increased confirms to a jury the importance of the respect and reputation. The rise of a member within the gang may be relevant.²⁰ This may include oaths of loyalty,²¹ the hierarchy of the gang, the organization of the gang and disciple administered to gang members.²² The expert witness "should be familiar with the hierarchy of the gang and how reputation and respect serve to establish the position of a member rising in the gang's hierarchy."²³ If known, the expert witness should testify about the rules of the gang and the consequences and disciple for violation of those rules.²⁴

What motivated the crime is something the jury wants to know. Motive is admissible,²⁵ if it is more probative than prejudicial.²⁶ The case may involve a gang's rival. The alliances and rivals of the gang at issue should be established through the expert witness.²⁷ The history of the rivalry needs to be made known to the jury, and the expert needs to be able to address what occurs when these two rival gangs encounter each other. The expert witness must be able to explain the gang's expectation of the gang member when that member encounters a rival, the effect this expectation has on reputation and respect, and the consequences for a failure to act in this situation.²⁸ The bias of a witness who is a member of the defendant's gang may also be explained through an expert.²⁹

Gangs, by definition, must consist of more than one person.³⁰ Therefore, in order to show the crime was committed by a gang, evidence is admissible to establish a conspiracy or joint venture.³¹

Evidence of gang membership is admissible if relevant.³² Evidence of defendant's gang affiliation, rank in the gang, and brags about other alleged gang crimes were relevant in a murder prosecution for shooting a rival gang member.³³ Evidence of gang colors, hand-signs, shout-outs, apparel, gang history, gang structure, leadership, and tattoos may also be admissible as relevant.³⁴ Gang membership may also be admissible to prove common purpose or design, or to prove a motive for an otherwise inexplicable act.³⁵ However, where the state failed to demonstrate facts or circumstances showing that the motive was

gang related and that the defendant knew that the shooting was gang related or intended to be gang related, even to a slight degree, the gang evidence was inadmissible.³⁶ Such facts or circumstances that might fail to demonstrate that the motive was gang related could include: no gang slogans being shouted, no gang signs being flashed, no gang member claiming credit for a shooting, and no report

of a previous precipitating gang related encounter.³⁷ Where the state produced evidence of the street gang and defendant's gang membership, the evidence was held to be relevant to show motive for the killing of the victim as the result of a territorial feud between the defendant's gang and the victim's gang.³⁸ Defendant's gang membership was also relevant to show motive where the murder victim's sister was shown to date a rival gang member who previously had a run-in with the defendant.³⁹ Nothing bars evidence of gang affiliation that is directly relevant to material issues; testimony that links the defendant and his opponent with rival gangs was admissible to explain the reason for the fight.⁴⁰ The fact that defendant and victim are in rival gangs has been held to be admissible.⁴¹ Identification is also an issue that will permit the admission of gang evidence.⁴² Punishment and retaliation are issues that will generate the admissibility of evidence regarding gang membership.⁴³

By statute, Alaska permits expert testimony "to show, in regard to a specific criminal street gang or criminal street gangs whose conduct is relevant to the case" the indicia that would support the expert's opinion.⁴⁴ Indiana and Nevada permit expert testimony in gang cases for the purposes of sentencing enhancement.⁴⁵

David Dawson was convicted of murder and sentenced to death in Delaware.⁴⁶ Dawson committed this murder while he was an escapee from the Delaware Correctional Center.⁴⁷ At sen-

tencing the jury was presented with the aggravating factor that Dawson had the words "Aryan Brotherhood"⁴⁸ tattooed on his hand. Dawson's conviction was affirmed by the Supreme Court of Delaware⁴⁹ and the United States Supreme Court granted certiorari to determine if Dawson's First Amendment rights were violated.⁵⁰ Chief Justice Rehnquist began his opinion by stating, "[we] have held that the First Amendment protects an individual's right to join groups and associate with others holding similar beliefs."⁵¹ The Court went on to analyze the stipulation to membership in the Aryan Brotherhood, concluding that "[e]ven if the Delaware group to which Dawson allegedly belongs is racist, those beliefs, so far as we can determine, had no relevance to the sentencing proceeding in this case."⁵² This holding is narrow in scope. Had the crime been committed in furtherance of, for

the benefit of or at the direction of the gang, it is conceivable the evidence of gang membership would have been relevant. "'Relevant evidence' means evidence having any tendency to make existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁵³ As a general rule, all relevant evidence is admissible.⁵⁴

*Punishment and retaliation
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The prosecutor seeking to introduce evidence of gang membership will be well served by following the recommendation in *Dawson*: "Delaware might have avoided this problem if it had presented evidence showing more than mere abstract beliefs on Dawson's part"⁵⁵ The Court will always have the option to preclude evidence, even though it is relevant if its probative value is outweighed by unfair prejudice.⁵⁶

In *Stewart v. McCoy*,⁵⁷ the Supreme Court of the United States declined the opportunity to decide a gang related case with First Amendment overtones.⁵⁸ Jerry McCoy was convicted in Arizona of giving advice to gang members.⁵⁹ The State of Arizona alleged McCoy had been a member of a California street gang, and on at least two separate occasions advised an Arizona street gang on how to conduct its affairs.⁶⁰ "McCoy was charged, tried and convicted based solely on his speech to, and association with, the Bratz."⁶¹ The Ninth Circuit Court of Appeals was presented with a speech issue regulated by state statute.⁶² Arizona contended that McCoy advised the Bratz how to conduct their criminal enterprise.⁶³ McCoy asserted that, at worst, his words were "abstract advocacy" not intended for any specific criminal undertaking.⁶⁴ McCoy argued his speech was protected under the holding in *Brandenburg v. Ohio*.⁶⁵ In *Brandenburg*, the Court held that the "mere abstract teaching," in that case of force and violence, was constitutionally protected under the First Amendment.⁶⁶ *Brandenburg* makes the timing of

the speech essential to the commission of the criminal act.⁶⁷ In McCoy, the Arizona prosecutor failed to produce evidence that members of the Bratz, upon hearing the words of McCoy, went forth and acted upon those words.⁶⁸ The prosecutor attempting to avoid a Brandenburg issue of abstract advocacy must be able to prove that the actions taken were the direct result of the advice or counseling provided by the accused.⁶⁹

Marion Ayala was charged with first degree murder.⁷⁰ The prosecutor placed the defendant on notice of their intent to call an expert witness regarding the defendant's gang affiliation.⁷¹ The defense moved *in limine* to preclude any evidence of the defendant's affiliation with MS-13.⁷² The prosecutor's expert witness was permitted to testify.⁷³ Ayala was convicted.⁷⁴ At trial, the State presented a detective who testified to the history and customs of MS-13, the cliques or subgroups of MS-13, the method of becoming a member of the cliques, the rivals of MS-13, the types of weapons used by members of MS-13, the colors and apparel worn by MS-13, and the types of tattoos they may display.⁷⁵ After being shown pictures of Ayala's tattoos and of him throwing gang signs the detective was asked to render an opinion regarding Ayala's membership in MS-13.⁷⁶ The detective opined that Ayala was a member of MS-13.⁷⁷ The detective was then asked:

"Do you have an opinion to a reasonable degree of professional certainty as to what effect his membership in MS-13 would have on his interaction with a person whom he believed to be a member of the 18th Street gang, particularly if the Defendant was in the company of two other persons who were members of MS-13?"⁷⁸

The detective responded:

"As a member of MS-13 against an 18th Street member, he could not just sit by and do nothing. For him not to become involved in itself would be a violation where he didn't backup his homeboys, where he didn't step up and represent MS-13. And he would have been disciplined for it in what MS-13 refers to as court. He would have been disciplined, beaten"⁷⁹

In a case of first impression, regarding gangs, the Maryland Court of Appeals stated,

[w]hile we establish no bright-line rule as to the admissibility of gang evidence in Maryland, we conclude that the trial court in this case properly exercised its discretion when it admitted the evidence in question. As the trial court determined, the evidence was highly probative in establishing motive and was not unduly prejudicial under the circumstances.⁸⁰

United States v. Abel,⁸¹ a case decided prior to *Dawson*, addressed the relevancy and admissibility of a defense witness's

gang membership. John Abel and two co-defendants were indicted for robbing a bank.⁸² The co-defendants entered guilty pleas; Abel elected to go to trial.⁸³ Ehle, a co-defendant, agreed to testify against Abel.⁸⁴ Abel's counsel put the government on notice that he would counter Ehle's testimony by way of another witness Mills.⁸⁵

The prosecutor in turn disclosed that he intended to discredit Mills' testimony by calling Ehle back to the stand and eliciting from Ehle the fact that Abel, Mills, and Ehle were all members of the 'Aryan Brotherhood,' a secret prison gang that required its members always to deny the existence of the organization and to commit perjury, theft, and murder on each member's behalf.⁸⁶

The Court examined and relied on Rules 401, 402, and 403 of the Federal Rules of Evidence to conclude that evidence of the witness's gang membership was probative of his potential bias.⁸⁷ The Court also considered Rule 608, which allows for cross-examination of a witness concerning his character for truthfulness or untruthfulness if it is probative of those characteristics.⁸⁸

The New York Court of Appeals decided a Fifth Amendment matter in *People v. Slavin*.⁸⁹ Christopher Slavin and an accomplice brutally attacked two victims because of their ethnic background.⁹⁰ Slavin had white supremacist tattoos on his body.⁹¹ Pictures of the tattoos were taken and introduced at trial.⁹² Slavin raised a Fifth Amendment argument on appeal asserting the State introduced the photographs to establish his motive for committing the crime against these specific victims.⁹³ Slavin asserted that the introduction of the photographs was analogous to compelling him to provide testimony against his Fifth Amendment rights.⁹⁴ The court held that the State did not place the tattoos on Slavin; Slavin had the tattoos placed upon him.⁹⁵ In creating this evidence himself, Slavin was not compelled by the State to be a witness against himself.⁹⁶

Again, using Maryland as an example, the gang statute may allow for an enhanced penalty upon conviction.⁹⁷ The prosecutor must decide if the enhanced penalty is worth the effort to produce the evidence necessary to prove the crime was gang related. A first degree murder in Maryland carries the possibility of death, life without possibility of parole, or a life sentence.⁹⁸ In Maryland, for the commission of an underlying crime resulting in the death of the victim, the court has the ability to sentence the defendant to twenty years.⁹⁹ This sentence may be either consecutive or concurrent to the sentence imposed for the underlying first degree murder, at the judge's discretion.¹⁰⁰

Applying a combination of statutes, case law from both the prosecuting jurisdiction and neighboring jurisdictions that have addressed the issues expected to be presented in the case at bar, and rules of evidence and procedure, the prosecutor should at-

tempt to prosecute using the gang statute where applicable. The violence perpetrated upon communities by gang violence must effectively, efficiently, fairly, and swiftly be addressed through suppression.

CLB

¹ NATIONAL GANG INTELLIGENCE CENTER, NATIONAL GANG THREAT ASSESSMENT 2009 (2009).

² ATTORNEY GENERAL'S REPORT TO CONGRESS ON THE GROWTH OF VIOLENT STREET GANGS IN SUBURBAN AREA (2008).

³ Alabama, 1998; Alaska, 2003; Arizona, 2008; Arkansas, 1987; California, 1988; Colorado, 2002; Connecticut, 1994; Delaware, 2003; District of Columbia, 2007; Florida, 2008; Georgia, 2006; Idaho, 2006; Indiana, 2004; Illinois, 2003; Iowa, 2010; Kansas, 2009; Louisiana, 1990; Maryland, 2007; Massachusetts, 1996; Minnesota, 1991; Mississippi, 1996; Missouri, 1993; Montana, 1997; Nevada, 2007; New Jersey, 2008; North Carolina, 2008; North Dakota, 1995; Oklahoma, 1992; South Carolina, 2007; South Dakota, 2006; Tennessee, 1997; Texas, 1994; Utah, 2008; Virginia, 2004; Washington, 1990; Wisconsin, 2005. *See also* National Gang Center, *Highlights of Gang Related Legislation Spring 2008*, <http://www.nationalgangcenter.gov/Legislation/Highlights> (last visited May 17, 2010) (explaining that 46 states and DC have enacted gang related legislation, with 36 states and DC defining the term "gang").

⁴ 18 U.S.C.A. § 521 (West 2002).

⁵ S. 132, 111th Cong. § 521 (2009).

⁶ *See* ALA. CODE § 13A-6-26 (1998); ALASKA STAT. § 12.45.037 (1996); ARIZ. REV. STAT. ANN. § 13-105 (1977) (indicating that two of seven criteria demonstrate criminal street gang membership); ARK. CODE ANN. §§ 5-74-103-04 (1993) (defining "engaging in a continuing criminal gang" as three or more individuals who commit a continuing series of two or more predicate criminal offenses which are undertaken in concert with each other); CAL. PENAL CODE § 182.5 (WEST 2000); COLO. REV. STAT. ANN. § 18-23-101 (WEST 2001); CONN. GEN. STAT. ANN. § 29-7N (WEST 1993); DEL. CODE ANN. TIT. 11, § 616 (2003); D.C. CODE § 22-951 (2007); FLA. STAT. ANN. § 874.03 (WEST 1990) (defining a "criminal gang" as consisting of three or more members); GA. CODE ANN. § 16-15-3 (WEST 1992); IDAHO CODE ANN. § 18-8502 (2006); 740 ILL. COMP. STAT. ANN. 147/10 (WEST 1993); IND. CODE ANN. § 35-45-9-1 (WEST 1991) (defining a "criminal gang" as a group of at least three members that assist in or require as a condition of membership the commission of a felony); IOWA CODE ANN. § 723A.1 (WEST 1990); KAN. STAT. ANN. § 21-4226 (2009); LA. REV. STAT. ANN. § 15:1404 (1990); MD. CODE ANN. CRIM. LAW § 9-801 (WEST 2005); MASS. GEN. LAWS ANN. CH. 265, § 44 (WEST 1996); MINN. STAT. ANN. § 609.229 (WEST 1991); MISS. CODE ANN. § 97-44-3 (WEST 1996); MO. ANN. STAT. § 578.421 (WEST 1993); MONT. CODE ANN. § 45-8-402 (2009); NEV. REV. STAT. ANN. § 193.168 (WEST 1991); N.J. STAT. ANN. § 2C: 33-29(A) (2008) ("CRIMINAL STREET GANG" MEANS THREE OR MORE PERSONS ASSOCIATED IN FACT.); N.C. GEN. STAT. ANN. § 14-50.16 (WEST 2008); N.D. CENT. CODE § 12.1-06.2-01 (1995); OKLA. STAT. TIT. 21, § 856 (1999) (identifying a gang as five or more people); S.C. CODE ANN. § 16-8-230 (2007) (defining "pattern of criminal gang activity" as "four or more enumerated offenses within a 2 year period"); S.D. CODIFIED LAWS § 22-10A-1 (1992); TENN. CODE ANN. § 40-35-121 (WEST 1989); TEX. PENAL CODE ANN. § 71.01 (VERNON 1977); UTAH CODE ANN. 1953 § 76-9-905 (WEST 2009); VA. CODE ANN. § 18.2-46.1 (WEST 1975); WASH. REV. CODE ANN. § 9.94A.030 (WEST 2009); WIS. STAT. ANN. § 939.22 (WEST 2005).

⁷ *See generally* Thomas D. Drescher, *The Transformation and Evolution of Trademarks—From Signals to Symbols to Myth*, 82 TRADEMARK REP. 301, 311 (1992) (TRACING FORMATION OF GUILDS TO THE 12TH CENTURY).

⁸ *See generally* Scott Patrick McBride, *Freedom of Association in the Public University Setting: How Broad is the Right to Freely Participate in Greek Life?*, 23 U. DAYTON L. REV. 133, 142 (1997) (describing the origin of collegiate fraternal societies).

⁹ R.J. BURSİK & H.G. GRASMICK, NEIGHBORHOODS AND CRIME: THE DIMENSIONS OF EFFECTIVE COMMUNITY CONTROL (LEXINGTON BOOKS 1993).

¹⁰ *See generally* Richard Ball, & G. David Curry, *The Logic of Definition in Criminology: Purposes and Methods for Defining Gangs*, 33 CRIMINOLOGY 225, 225-26 (1995) (explaining that the definition of "gang" has changed over time and that there is current disagreement on the meaning of the term and whether it can ever be given a standardized definition); SCOTT DECKER & KIMBERLY KEMPF-LEONARD, CONSTRUCTING GANGS: SOCIAL DEFINITIONS AND YOUTH ACTIVITIES, 4 CRIM. JUST. POL'Y REV. 272 (1991); FINN-AAGE ESBENSEN, ET AL., YOUTH GANGS DEFINITIONAL ISSUE: WHEN IS A GANG A GANG AND WHY DOES IT MATTER?, 47 CRIM. & DELINQ. 105 (2001) (examining several different definitions of a "gang" and the implications of such definitions).

¹¹ 18 U.S.C.A. § 521 (West 2002).

¹² S. 132, 111th Cong. § 522 (2009).

¹³ ARIZ. REV. STAT. ANN. § 13-2308 (1977); ARIZ. REV. STAT. ANN. § 13-2321 (2007); CAL. PENAL CODE § 186.22 (WEST 1989); CAL. PENAL CODE § 182.5 (WEST 2000); DEL. CODE ANN. TIT. 11, § 616 (2003); D.C. CODE § 22-951 (2007); GA. CODE ANN. § 16-15-4 (WEST 1992); 720 ILL. COMP. STAT. ANN. 5/25-1 (WEST 1961); IND. CODE ANN. § 35-45-9-3 (WEST 1991); IOWA CODE ANN. § 723A.1 (WEST 1990); LA. REV. STAT. ANN. § 15:1403 (1990); MD. CODE ANN., CRIM. LAW § 9-804 (WEST 2007); MINN. STAT. ANN. § 609.229 (WEST 1991); MO. ANN. STAT. § 578.423 (WEST 1993); OHIO REV. CODE ANN. § 2923.42 (2006); TEX. PENAL CODE ANN. § 71.02 (VERNON 1977); VA. CODE ANN. § 18.2-46.2 (WEST 2010).

¹⁴ MD. CODE ANN., CRIM. LAW § 9-804 (WEST 2007).

¹⁵ *See id.*

¹⁶ *Id.* (emphasis added).

¹⁷ FED. R. EVID. 702.

¹⁸ United States v. Acosta, 110 F. Supp. 2d 918, 931 (E.D. Wis. 2000).

¹⁹ *See* Ayala v. State, 923 A.2d 952, 958 (Md. Ct. Spec. App. 2005) (discussing the use of gang activity evidence to establish motive).

²⁰ *See* State v. Nieto, 12 P.3d 442, 449-50 (N.M. 2000) (explaining that the defendant's desire to rise through the ranks of a gang could be used to establish intent to murder).

²¹ *See* United States v. Takahashi, 205 F.3d 1161, 1165 (9th Cir. 2000) (indicating that evidence of oaths may be relevant to indicate bias).

²² *See* State v. Torres, 874 A. 2d 1084, 1099 (N.J. 2005) (cautioning against the use of gang expert testimony as a means of circumventing hearsay rule).

²³ Jeffrey T. Wennar, *Gang Prosecution: The Need for Qualifying Law Enforcement Officers as Expert Witnesses*, 42 JUN PROSECUTOR 30, 46 (2008); *see also* Jeffrey T. Wennar, *Gang Prosecution: The Grand Jury Investigation*, 43 DEC PROSECUTOR 27, 34 (2009).

²⁴ *See* Torres, 874 A.2d at 578 (indicating that expert testimony concerning gang discipline was sufficiently reliable).

²⁵ *See, e.g.,* Duong v. McGrath, 128 F. App'x 32 (9th Cir. 2005); Nguyen v. Runnels, 127 F. App'x 926 (9th Cir. 2005); United States v. Rodriguez, 925 F.2d 1049, 1053 (7th Cir. 1991) (explaining that evidence of gang membership would be helpful in establishing motive for robbery); People v. Gonzalez, 25 Cal. Rptr. 3d 124, 132 (Cal. Ct. App. 2005) (noting that motive is generally more probative than prejudicial); People v. Breyea, 113 Cal. Rptr. 254, 265 (Cal. Ct. App. 1974) ("Motive is material as evidence tending to refute or support the presumption of innocence."); People v. Atkins, 844 P.2d 1196, 1202 (Col. 1992) (admitting videotape where defendant discussed his gang activities into evidence); State v. Ruffin, 710 A.2d 1381, 1384 (Conn. App. C. 1998) (discussing the scope of motive); People v. Lucas, 603 N.E.2d 460, 474 (Ill. 1992), cert. denied,

508 U.S. 916 (1993) (concerning use of motive evidence as basis for impeachment); *People v. Miller*, 428 N.E. 2d 1038, 1043 (Ill. App. Ct. 1981); *State v. Garcia*, 664 P.2d 969 (N.M. 1983), *cert. denied*, 462 U.S. 1112 (1983); *Pleasant v. State*, 701 So. 2d 799, 804 (Miss. 1997); *Cunningham v. State*, 982 S.W. 2d 513, 523 (Tex. App. 1998) (concluding that counsel was not constitutionally ineffective in failing to object to evidence concerning defendants' gang affiliation).

²⁶ See *United States v. Montgomery*, 390 F. 3d 1013, 1019 (7th Cir. 2004) (explaining that judge's limiting instruction muted the prejudicial effect of motive evidence); *People v. Almendarez*, 639 N.E. 2d 619, 623 (Ill. 1994) (contending that the prejudicial impact of gang identity evidence was lessened because defendant was never actually accused of being a gang member); *People v. Patterson*, 610 N.E. 2d 16, 37 (Ill. 1992) (explaining that the probative value of gang activity evidence was enhanced by defendant's admissions); *People v. Wilson*, 788 N.Y.S. 2d 383, 383–85 (N.Y. App. Div. 2005); *People v. Correa*, 696 N.Y.S. 2d 198, 198 (N.Y. App. Div. 1999).

²⁷ See e.g., *State v. Lopez-Rios*, 669 N.W.2d 603, 611 (Minn. 2003) (recounting an expert's description of alliance between the Latin Kings and the Sure os).

²⁸ See, e.g., *State v. Torrez*, 146 P.3d 331, 232 (N.M. 2009) (explaining the means by which a gang member's reputation could be damaged).

²⁹ See, e.g., *United States v. Hartsfield*, 976 F.2d 1349, 1352 (10th Cir. 1992) (weighing probative value versus prejudicial impact); *In re Wing Y*, 136 Cal. Rptr. 390, 395 (Cal. Ct. App. 1977) (holding that detective witness could not testify about defendant's gang affiliation because he was not an expert and did not have personal knowledge).

³⁰ See *supra* note 6 and accompanying text.

³¹ *United States v. Westbrook*, 125 F.3d 996 (7th Cir. 1997), *cert. denied*, 522 U.S. 1036 (1997); *Willoughby v. State*, 626 S.E. 2d 112 (Ga. 2006); *Billups v. State*, 523 S.E. 2d 873 (Ga. 1999); *State v. Hightower*, 609 S.E. 2d 235 (N.C. Ct. App. 2005); *Commonwealth v. Mason*, 518 A. 2d 282 (Pa. Super. Ct. 1986); *United States v. Brown*, 200 F.3d 700 (10th Cir. 1999), *cert. denied*, 528 U.S. 1178 (2000); *Johnson v. State*, 627 S.E. 2d 116 (Ga. Ct. App. 2006).

³² See *State v. Ross*, 127 P.3d 249 (Kan. 2006); *People v. McMurray*, 93 S. Ct. 1554 (1972); *Commonwealth v. Gwaltney*, 442 A.2d 236 (Pa. 1982); *United States v. McKay*, 431 F.3d 1085 (8th Cir. 2005); *People v. Noel*, 28 Cal. Rptr. 3d 369 (Cal. Ct. App. 2005); *People v. Olguin*, 37 Cal. Rptr. 2d 596 (Cal. Ct. App. 1995); *Hartry v. State*, 512 S.E.2d 251 (Ga. 1999); *People v. Iniguez*, 838 N.E.2d 65 (Ill. App. Ct. 2005).

³³ See *People v. Ellis*, 735 N.E.2d 736 (Ill. App. Ct. 2000) (explaining relevant elements in determining a defendant's gang affiliation).

³⁴ See *United States v. Gibbs*, 182 F.3d 408 (6th Cir. 1999); *United States v. Ortiz*, 125 F.3d 630 (8th Cir. 1997); *People v. Mendoza*, 6 P. 3d 150 (Cal. 2000); *People v. Carroll*, 628 N.E.2d 1036 (Ill. App. Ct. 1993); *People v. Bryant*, 609 N.E.2d 910 (Ill. App. Ct. 1993); *People v. Nichols*, 601 N.E.2d 1217 (Ill. App. Ct. 1992); *State v. Ferguson*, 581 N.W.2d 824 (Minn. 1998); *Tinch v. State*, 946 P.2d 1061 (Nev. 1997); *Medellin v. State*, 960 S.W.2d 904 (Tex. App. 1997); *People v. Cruzado*, 700 N.E.2d 707 (Ill. App. Ct. 1998); *People v. Cain*, 792 N.Y.S.2d 60, 61 (N.Y. App. Div. 2005); *State v. Robb*, 723 N.E.2d 1019, 1035 (Ohio 2000); *State v. Skatzes*, 819 N.E.2d 215, 232 (Ohio 2004).

³⁵ See *People v. Terry*, 728 N.E.2d 669 (Ill. 2000); *People v. Olivier*, 279 N.E.2d 363 (Ill. App. Ct. 1972); *People v. Calderon*, 424 N.E.2d 671 (Ill. App. Ct. 1981); *State v. Torres*, 702 A.2d 142 (Conn. App. Ct. 1997); *People v. Smith*, 565 N.E.2d 900 (Ill. 1990); *People v. Matthews*, 702 N.E.2d 291 (Ill. App. Ct. 1999); *State v. Valdez*, 977 P.2d 242 (Kan. 1999); *Butler v. State*, 102 P.3d 71 (Nev. 2004).

³⁶ See *People v. Colon*, 618 N.E.2d 1067 (Ill. App. Ct. 1993) (highlighting instances where gang evidence is inadmissible).

³⁷ *Id.* at 1071.

³⁸ See *People v. Fort*, 618 N.E.2d 445 (Ill. App. Ct. 1993); see also *People v. Williams*, 940 P.2d 710 (Cal. 1997); *People v. Foster*, 697 N.E.2d 357 (Ill. App. Ct. 1998); *People v. Kirkman*, 609 N.E.2d 827 (Ill. App. Ct. 1993).

³⁹ See *Siler v. State*, 705 So.2d 552 (Ala. 1997) (showing an instance where gang membership can be used to establish motive in a homicide case).

⁴⁰ See *People v. Tuilaepa*, 842 P.2d 1142 (Cal. 1994) (describing situations where evidence of gang affiliation is relevant in trial proceedings).

⁴¹ See, e.g., *People v. Sandoval*, 841 P.2d 862 (Cal. 1992); *People v. Hairston*, 294 N.E.2d 748 (Ill. App. Ct. 1973); *Siler v. State*, 705 So.2d 552 (Ala. 1997); *People v. Williams*, 940 P.2d 710 (Cal. 1997); *People v. Wright*, 691 N.E.2d 94 (Ill. App. Ct. 1998); *People v. Buchanan*, N.E.2d 344 (Ill. App. Ct. 1991); *People v. Washington*, 812 N.Y.S.2d 525 (N.Y. App. Ct. 2006); *People v. Connally*, 481 N.Y.S.2d 432 (N.Y. App. Ct. 1984); *Medina v. State*, 7 S.W.3d 875 (Tex. 2005).

⁴² See, e.g., *People v. Contreras*, 192 Cal. Rptr. 810 (Cal. Ct. App. 1983); *State v. Ruof*, 252 S.E.2d 720 (N.C. 1979); *State v. Holmes*, 978 S.W.2d 440 (Mo. Ct. App. 1998); *State v. Jamison*, 7 P.3d 1204 (Kan. 2000); *People v. Gonzalez*, 568 N.E.2d 864 (Ill. 1991); *United States v. Easter*, 66 F.3d 1918 (9th Cir. 1995); *United States v. Brown*, 200 F.3d 700 (10th Cir. 1999); *Flores v. State*, 5 P.3d 1066 (Nev. 2000).

⁴³ See *Perez v. Dretke*, 393 F.Supp.2d 443 (N.D. Tex. 2005); *Clark v. State*, 515 S.E.2d 155 (Ga. 1999); *People v. Deacon*, 473 N.E.2d 1354 (Ill. App. Ct. 1985); *State v. Tran*, 847 P.2d 680 (Kan. 1993); *Commonwealth v. Maldonado*, 709 N.E.2d 809 (Mass. 1999).

⁴⁴ ALASKA STAT. § 12.45.037 (1996).

⁴⁵ See IND. CODE ANN. § 35-50-2-15 (2006); NEV. REV. STAT. ANN. § 193.168 (1991).

⁴⁶ *Dawson v. State*, 581 A.2d 1078, 1081 (Del. 1990).

⁴⁷ *Id.* at 1082.

⁴⁸ See *id.* at 1096 (showing the parties agreed to stipulate that “[t]he Aryan Brotherhood refers to a white racist prison gang that began in the 1960’s in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware”).

⁴⁹ *Id.* at 1109.

⁵⁰ See *Dawson v. Delaware*, 503 U.S. 159, 163 (1992).

⁵¹ *Id.*

⁵² *Id.* at 166.

⁵³ FED. R. EVID. 401.

⁵⁴ FED. R. EVID. 402.

⁵⁵ *Dawson*, 503 U.S. at 167.

⁵⁶ FED. R. EVID. 403.

⁵⁷ 537 U.S. 993 (2002).

⁵⁸ *Id.*

⁵⁹ *State v. McCoy*, 928 P.2d 647, 648 (Ariz. App. 1996) [hereinafter *McCoy I*]; see also ARIZ. REV. STAT. ANN. § 13-2308(A)(3) (1978) (defining an element of criminal syndication as “[f]urnishing advice or direction in the conduct, financing or management of a criminal syndicate’s affairs with the intent to promote or further the criminal objectives of a criminal syndicate”).

⁶⁰ *McCoy I*, 928 P.2d at 648.

⁶¹ *McCoy v. Stewart*, 282 F.3d 626, 629 (9th Cir. 2002) [hereinafter *McCoy II*].

⁶² *Id.* at 628.

⁶³ *Id.*

⁶⁴ *Id.* at 630.

⁶⁵ *Id.*

⁶⁶ *Id.* at 631 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969)).

⁶⁷ *Id.*

68 *Id.* at 629.
 69 *Id.* at 632.
 70 *See Ayala v. State*, 174 Md. App. 647 (2007).
 71 MD. CODE ANN., CRIM. PROC. § 4-263 (1986).
 72 *Ayala*, 174 Md. App. at 652.
 73 *Id.* at 661.
 74 *Id.* at 651.
 75 *Id.* at 654.
 76 *Id.* at 656.
 77 *Id.*
 78 *Id.*
 79 *Id.*
 80 *Id.* at 664.
 81 469 U.S. 45 (1984).
 82 *Id.* at 47.
 83 *Id.*
 84 *Id.*
 85 *Id.*
 86 *Id.*
 87 *Id.* at 56.
 88 *Id.* at 55.
 89 807 N.E.2d 259 (N.Y. 2004).
 90 *Id.* at 261.
 91 *Id.*
 92 *Id.* at 262.
 93 *Id.* at 263.
 94 *Id.*
 95 *Id.* at 265.
 96 *Id.*
 97 MD. CODE ANN., CRIM. LAW § 9-804 (2010).
 98 MD. CODE ANN., CRIM. LAW § 2-201(B).
 99 MD. CODE ANN., CRIM. LAW § 9-804 (c)(2).
 100 MD. CODE ANN., CRIM. LAW § 9-804 (B)(2).

ABOUT THE AUTHOR

Jeffrey T. Wennar has been practicing law since 1979. He began his legal career as an Assistant State's Attorney in Prince George's County, Maryland. In 1993 Governor Schaefer appointed Mr. Wennar to the Governor's Executive Advisory Council requesting him to study gangs in Maryland, culminating with the Governor being presented with "A Report on Gang Violence in Maryland," written by Mr. Wennar and other members of the study group. In 1995 he was recognized by Federal Bureau of Investigation Director, Louis Freeh, for his successful prosecution of the Hester drug gang. In August 2001 he joined the Montgomery County State's Attorney's Office as the Gang Prosecutor. In 2003 and 2004 Mr. Wennar received the prestigious Frederic Milton Thrasher Award, from the National Gang Crime Research Center, for superior community service. In 2005, the Maryland General Assembly, House of Delegates recognized Mr. Wennar's contribution to Montgomery County and the State of Maryland by passing a Resolution congratulating him on his services to the County and State. Mr. Wennar has participated in writing the national legal considerations curriculum on behalf of the Bureau of Justice Assistance for both Basic and Advanced Training for Street Gang Investigators.

Mr. Wennar is currently an Adjunct Professor at American University. While at American University Mr. Wennar developed and taught the course *Gangs and Gang Violence in America*. Mr. Wennar is also an Adjunct Professor at Washington College of Law where he developed and teaches an advanced trial advocacy class focusing on prosecuting the gang homicide.