

Gang Prosecution: The Grand Jury Investigation

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MANY FEDERAL AND STATE PROSECUTORS throughout the nation have attacked the gang problem through the use of grand jury investigations. This article offers prosecutors who have never used the grand jury process for long-term investigations thoughts on the methodology to employ in approaching gang cases. The following offers an approach to prosecuting a gang case for the substantive and conspiratorial crimes committed by its members in furtherance of the gang's objectives. It does not address investigations pursuant to RICO, the Hobbs Act or Continuing Criminal Enterprises.

A grand jury serves several purposes: to investigate criminal activity; to hear testimony regarding that criminal activity; and to return indictments charging the perpetrators of that criminal activity. It is the job of the prosecutor to educate the grand jurors about the existing gang problem in a jurisdiction and to present sufficient evidence to establish probable cause that a crime has been committed such that indictments can be returned against the perpetrators.

INTELLIGENCE

Intelligence is a central component to the success of the grand jury process. Law enforcement is able to obtain intelligence information through stops of individuals and field interviews about gang involvement or membership.

Once an individual has been identified as a gang member, officers often back off and conduct surveillance on that person to catch him or her in a criminal act. That person may then be turned into a cooperator. Prosecutors must work with allied law enforcement on decisions involving the reduction of charges, granting of immunity or other provision of incentives to the cooperator for his or her grand jury testimony.

BROAD STRATEGY—USE OF THE GRAND JURY

Grand jury proceedings are a very important component in the *eventual* prosecution of a case. Law enforcement and prosecutors must work together to develop an investigation strategy and operation plan to address the use of the grand jury. Choosing ineffective investigatory and operational strategies will only undermine the grand jury process. Strategies should be sound and based on good field intelligence. Acute political emergencies, those critical incidents that spurn media attention and community demand for solutions, rarely result in the implementation of efficient or effective strategies.

Prosecutors should begin the grand jury investigation or presentation with an introduction and summary of the matter. A brief general summary of the evidence may be given at the outset of the investigation to introduce the

case or investigation to the grand jury.¹ Traditionally the grand jury's function is to determine if there is probable cause to believe that a person has committed a particular offense.² However, the grand jury has broad powers in performing a role as the government's investigatory vehicle. The grand jury may conduct investigations without the usual evidentiary and exclusionary rules that are required at trial.³ Thus, the grand jury has the power to investigate as well as charge. A strategy to be used at the grand jury is to present witnesses to lock-in and preserve their testimony. The presentation of these witnesses before the grand jury may result in the development of further information which may further the investigation and result in indictments.

TARGETING THE GANG

The initial step in targeting a gang or gangs is to identify its individual members and understand their function and placement within the gang hierarchy. The targets of the investigation should be the individuals upon whom the grand jury should focus. Presumably, they will comprise the hierarchy of the gang, set or clique under investigation. For each target there should be a three-ring binder (and electronic file) containing pictures, police reports, field investigation reports, criminal history backgrounds, known associates, and all written notes, statements (audio and video as well as written), de-brief summaries, My Space pages, and any other documentation regarding that individual. Identifying the core leadership of the set or clique is only the beginning. In addition to a gang's leadership, there are fundamental categories of gang membership and gang activity that need to be identified and understood as well. These include: rank and file membership; criminal activities; geographic territory; time together, and characteristics distinguishing this set or clique from others.

To investigate aspects of gang membership and activity, the prosecutor will have to put cooperators before the grand jury. While investigating officers may be able to convey a great deal of knowledge about a set or clique, only a person on the inside of the set or clique will possess the intimate knowledge of its the day-to-day workings. Nonetheless, using cooperators can present complex issues for a prosecutor. The prosecutor and case officer must be mindful of the loyalties of the cooperator and his/her motivation for cooperation. It is important to know whom they will implicate and whom they will

protect. There must be proper documentation to establish the relationship between the cooperator, the individual about whom they are testifying and the overall relationship between the cooperator and the gang under investigation. In most jurisdictions the grand jury testimony is available to the defense once the grand jury witness testifies at a hearing or trial. If the prosecutor has failed to properly link the cooperator to the individual and/or gang at the grand jury proceeding, the defense will properly attack the cooperator's basis of knowledge at a subsequent hearing, thus creating a doubt in the minds of the trier of fact as to the credibility of the cooperator.

In addition, prosecutors should be aware that bargaining away or reducing charges, or providing any other consideration in exchange for testimony, has potential disadvantages. The terms of the cooperation and benefits conferred upon any witness must be disclosed to the defense at some point after an indictment has been returned against the target gang member(s). Such consideration is fair game for the defense to use during cross-examination should the cooperator take the stand at trial. Further, the defense will likely argue in closing that the cooperator's credibility has been compromised because his or her testimony was part of a deal.

It may be necessary to place several cooperators before the grand jury. Every effort should be made to keep the cooperators separated from each other, and to keep their cooperation and testimony confidential. Investigative security is as important as operational security. The cooperators and/or witnesses should not be interviewed in, or exposed to, the "war room." Operational security should be limited to prosecutors and officers immediately associated with the investigation.

Through the information provided by these witnesses, a picture should develop regarding the structure of the set or clique, how it is organized, the identity of the shot-caller, lieutenants, enforcers, street criminals, etc. Developing information regarding membership recruitment, initiation procedures, "work" or mission assignments, meetings, dues and punishment is also important. Further, testimony regarding the gang philosophy and gang unity must be presented in order for the grand jurors to understand why certain events took place.

BACKGROUND ANALYSIS

Prior to putting the first witness in front of the grand jury, all documents should be assembled and analyzed.

This analysis should show the relationship of individuals to other individuals and of individuals to the gang. It may also show the relationship of the target set or clique to other sets or cliques or of the gang to other gangs. Exhaustive historical research of incident reports, field interviews, officer's notes and intelligence databases should be completed as soon as possible after a decision has been made to proceed with a grand jury investigation but prior to the first witness being called before the grand jury.

Historical documentation will aid the prosecutor in developing the questions that will be asked of the witnesses being presented to the grand jury. No witness should be placed before the grand jury without first being debriefed by the prosecutor and a case officer. That debrief, and any subsequent debrief, should be thorough. The prosecutor does not want to encounter any surprises at the grand jury or later at a trial.

OUTCOMES

Throughout the grand jury investigation, the prosecutor and case officer should be considering additional charges pursuant to any statutory provision for criminal gang offenses. For a successful prosecution involving gang statutes, the prosecutor will have to present evidence: that the specific gang exists; there may also exist a sub-part of the gang known as a set or clique; that the defendant is a member of that set or clique; and, finally, the prosecutor will have to qualify a gang expert.

If the grand jury had only been used for investigation, if appropriate, the prosecutor will eventually present cases for indictment. Targets will be charged, if appropriate, with both substantive and conspiracy counts.

GANG EXPERT

Because the grand jury's role is to determine if probable cause exists to charge a person with a crime, the testimony and evidence that would be presented before the grand jury does not rise to the same burden that would be required at a trial. A prosecutor presenting a case at the grand jury would most likely *not* put on expert testimony at that stage of the case. However, prior to indicting a case pursuant to a gang statute or with the intent to show motive, the prosecutor should still have identified and secured a suitable expert witness to testify at trial.

In selecting a gang expert, a prosecutor should be

aware that such a witness must have specialized knowledge, training, and experience about gangs beyond that possessed by the average person. Therefore, in addition to a law enforcement officer, a gang member can be qualified as an expert witness. Consideration should therefore be given to using a cooperator later in the prosecution as a gang expert. In addition, the prosecutor may consider calling a local officer, if one is available, to establish the existence of the gang of which the defendant is a member. Consideration should also be given to calling a second law enforcement expert to establish the gang's existence on a national or international scale, if appropriate.

Any expert called and qualified by the prosecutor should have specific knowledge regarding the gang associated with the defendant on trial. Establishing the officer's knowledge of the specific gang is paramount to qualify the officer. As a part of qualifying the officer expert the prosecutor should illicit testimony about the officer's duty assignment and specialty in gang investigation, establishing how long the officer has worked gang cases and the duties of a gang investigator. This leads into establishing the officer's familiarity with the particular gang, the culture, habits, trends, rules and rivals of the particular gang. The prosecutor should take time establishing all of this with the officer in order to give the jury an insight to the particular operational methods of the gang.

The officer's education and training should be addressed, especially training regarding the particular gang. If the officer has presented training or written articles regarding the gang, that should be brought out in qualifying the officer. The field experience the officer has had with the gang, including personal experience with the gang, conversations with members, surveillance of gang members, and information exchange with other officers needs to be presented.⁴

The expert should also be capable of helping to establish the existence of the specific gang. The name and its meaning, the history of where and when the gang formed and the organization of the gang are crucial to proving that there is a gang. The expert's knowledge of the particular set or clique associated with the prosecution is essential. The process involved in joining the gang, as well as how the members identify themselves (tattoos, clothing, graffiti, nicknames, hand signs, drawings), will likely be areas of testimony by the expert. Later, at trial,

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noticeable difference.

Make sure you leave yourself enough time to do the conversion. Although conversions are much faster than real time video copying it can still take a lot of time depending on the length of the original video. It's not something you want to be doing right before going to court, because you will be at the mercy of your computer. In addition, after successfully converting the files on the DVD you can easily insert the video files into your trial presentation software. In the next installment (Part Three) we will take a look at making short clips from the video files on CDs and DVDs. We will also take a look at muting audio during video when redactions are

required. As always, feel free to e-mail me: Sean.Smith@nypti.org if you have a question or if your trial cannot wait until the next installment. Good luck and happy DVDing.

¹ AVS did not respond to my request for a prosecutor discount. But here is a work around—simply search the Internet for “AVS Discount Code,” or “AVS coupon.” With minimal effort you’ll find a code that gives you 15 percent or more off the retail price. As an aside, this method of finding discount codes works for almost any purchase on the Web. AVS recently added some pretty powerful image tools making it pretty much an all-in-one solution for audio, images, and video files.

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eliciting testimony explaining photos of tattoos, hand signs, drawings, clothing and graffiti makes the evidence real in the jurors’ eyes.

The gang expert should be able to testify as to the role that reputation and respect have 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 respect and reputation. The officer should also testify about the rules of the gang and the consequences and discipline for violation of those rules. The officer should be familiar with the hierarchy of the gang and how reputation and respect affect the rise of a member in the gang’s hierarchy.

Given all that may be required of the gang expert, it is critical to do the preparatory work of identifying and securing such a witness who possesses sufficient knowledge and background, well in advance of trial. Waiting until after the investigation and indictment may present numerous problems, including not being able to find an expert to testify about the specific gang and/or the defendant’s affiliation with the gang; gang territory; gang rivals; gang activities; the structure of the particular gang; or, habits, culture, trends and rules of the gang. The early identification and relationship with the gang expert will

allow the prosecutor to learn as much as possible about the gang. Together, the prosecutor and gang expert will develop the questions necessary to illicit crucial testimony and evidence before the grand jury, and likewise, necessary evidence and testimony before the petit jury to obtain a conviction.

CONCLUSION

Once the foregoing pretrial strategies are underway, the prosecutor and law enforcement should make periodic assessments to determine if appropriate progress is being achieved. The prosecutor’s ultimate objective in presenting evidence to the grand jury is to thoroughly investigate a gang and its members to determine the nature of their criminal activity and obtain proper charges for their wrongdoing.

Each jurisdiction has its own unique gang issues. There is no one strategy that fits all circumstances in investigating and suppressing gang activity. The above outline is a starting point that must be refined by each prosecutor seeking to use the grand jury for a gang investigation.

¹ Grand Jury Manual, Office of the Attorney General of Maryland, January 2003.

² *Branzburg v. Hayes*, 408 U.S. 665, 686-687 (1972).

³ *Costello v. United States*, 350 U.S. 359 (1956).

⁴ Taken from *The Prosecutor*, Vol. 42, No. 2, “Gang Prosecution: The need for Qualifying Law Enforcement Officers as Expert Witnesses,” Wennar, J.T.