

GANG PROSECUTION: IS THE END NEAR?



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TRADITIONAL CONCERNS WITH GANG PROSECUTION:

- Everyone (Except Your Officer) Lies: The Defendants Lie, Your Victim Lies, The Witnesses Lie.
- You hear the word **Respect or Disrespect** about a million times.
- You need a “Gangster Lingo” interpreter to understand what the witnesses are talking about.
- You have to work with a Gang Expert to get in evidence.

NEW ISSUES

- 1. CUSTODIAL INTERROGATIONS AS BASIS FOR ACTIVE PARTICIPATION
- 2. THE DEMISE OF CAL GANG (FORE-RUNNER OF DEMISE OF OTHER GANG DATABASES?)
- 3. HOW TO ESTABLISH YOUR GANG?
- 4. *SANCHEZ* AND A GANG EXPERT'S FOUNDATION

- **CUSTODIAL INTERROGATIONS AS
BASIS FOR ACTIVE
PARTICIPATION/VALIDATION**



Custodial Classification Interviews

Defendant going into jail asked a series of questions by the custodial “classification” officer.

These questions usually include affiliation with any gangs, to avoid problems in the jail.

Defendants answer these questions truthfully because of their own safety concerns.

Questions are not asked to incriminate or provide proof for a gang prosecution, they are asked as part of safe administration the jail.

People v. Elizalde

(2015) 61 C. 4th 523

- Jail “Classification” questions related to gang affiliation, require *Miranda* waiver to be admissible.
- The court invalidated the argument that custodial officer classification questions were not asked to elicit an incriminating response, but for safety in the jail.

People v. Elizalde (2015) 61 C. 4th 523

Many jurisdictions use classification responses as criteria to determine whether a defendant is an active participant in a criminal street gang or a validated gang member or associate.
(Why would you lie about where you want to be housed?)

CUSTODIAL INTERROGATIONS AS BASIS FOR ACTIVE PARTICIPATION/VALIDATION

- *People v. Leon* (2016) 244 C.A. 4th 359 (5th Dist.)-
Not all jail classification statements will be deemed testimonial and requiring *Miranda* waiver to be admissible in 186.22 prosecution.
(Statements made about other defendants)

THE DEMISE OF CAL GANG (FORERUNNER OF DEMISE OF OTHER GANG DATABASES?)

- In California, and other Western States, gang cops look to the CalGang database to provide information on the status of suspected gang members.



THE DEMISE OF CALGANG

- 2013: Penal Code section 186.34
 - requires that when entering information on a **minor** into the Cal Gang database (or any other “shared gang database”), law enforcement must notify, in writing, the juvenile and his parents or guardian of the designation and the basis for the designation within the database. These persons then may contest the designation with the submitting agency. The submitting agency then reviews the designation and makes a determination if the designation is removed or remains.

THE DEMISE OF CALGANG

- 2017: Penal Code section 186.34 is amended to add **adults** to the written notice requirements before designating them within the gang database. It also reduces the response time of law enforcement, from 60 days to 30 days, to make a decision on the contesting of the designation. Alleged gang member initially had no additional recourse. HOWEVER,

THE DEMISE OF CALGANG

- 2017: Penal Code section 186.35 which lays out a statutory appeals procedure with the superior court of the agency's decision on the contesting of designation by law enforcement of the person within the gang database.
- Finally, the bill requires that, after January 15, 2018, any local law enforcement agency using a shared gang database will have to annually submit to the state Department of Justice specified data on what has been included or removed from the database. This information will be posted on the Department of Justice website.

THE DEMISE OF CALGANG

- The practical result is that Cal Gang will not be used, and if it is not used, then it is not accurate.
- Agencies in California have already withdrawn from CalGang.
- California Gang Node Advisory Committee (CGNAC) members have expressed dismay at the constructive dismantling of CalGang by the California Attorney General & Legislature.
- **Is your gang database next?**

HOW TO ESTABLISH YOUR GANG?

- Most jurisdictions require evidence of 3 (or more) gang members;
 - A common sign or symbol
 - Evidence of the gang's illegal activities.
-
- Do you use the specific “subset” gang to establish this or a larger “umbrella” gang?

HOW TO ESTABLISH YOUR GANG?

- *People v. Prunty* (2015) 62 C. 4th 59. “Umbrella Gang” info not sufficient, must be from specific subset gang.
- **HOWEVER:**
- *People v. Ewing* (2016) 244 C. A. 4th 359 (3rd Dist.)-Evidence of benefitting larger Norteno (NR) gang combined with evidence of local Norteno gang sufficient to get around “Umbrella Gang” argument.

HOW TO ESTABLISH YOUR GANG?



- Examples of an “Umbrella Gang”
- “Nortenos” vs. “Yuba City Varrio 14”
- “Folk Nation” vs. “Gangster Disciples” vs. “Springfield Loco GD”
- “Surenos” vs. “Varrios Playboy 13 Receda”
- “United Blood Nation” vs. “Nine Trey Gangstas”
- “Pagans” vs. “Pagans Morgantown Chapter”

SANCHEZ AND A GANG EXPERT'S FOUNDATION

- In California, as in many other states, courts have allowed expert witnesses to testify concerning gangs, gang members, and gang activities.
- This testimony is allowed, even though prejudicial, and is a valuable tool for Prosecutors.

SANCHEZ

(2016) 63 C. 4th 665

- Under California's Street Terrorism Enforcement Prevention Act (STEP), officers have for years testified as expert witnesses to establish the elements of Penal Code sections 186.22(a), 186.22(b), and 186.22(d). The foundation for this expert testimony has been based, in part, upon police reports, reported field interviews (FIs), notices given to validated gang members called STEP notices, conversations with other law enforcement officers, hearsay statements from civilians and gang members, and records of convictions.

SANCHEZ

- In June of 2016, the California Supreme Court issued a ruling in *People v Sanchez*, that changed the way this foundational evidence must be presented in court to provide a foundation for the gang expert's testimony.

SANCHEZ

- In *Sanchez*, Defendant was charged with active participation in a criminal street gang per P.C. § 186.22(a), and with gang enhancements for committing a felony for the benefit of the gang, per P.C. § 186.22(b). A detective, with 17 years of experience as a gang suppression officer and over 500 gang-related investigations under his belt, testified for the prosecution as a gang expert at defendant's trial. His expertise was not contested.

SANCHEZ

- The expert had never met the defendant, but he was allowed to testify that in his opinion, defendant was a member of, and that his conduct benefited, the criminal street gang. The expert's opinion was based, in part, upon information he had obtained by reviewing a "STEP notice", and four "F.I." cards prepared by other officers, backed up by other police reports, which contained admissions by defendant concerning his association with the gang.

SANCHEZ

- The Court held that while experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, studies of learned treatises, etc., an expert is not allowed to testify to “*case-specific*” facts relayed to him by other people, there being a legal “distinction between generally accepted background information and the supplying of case-specific facts.”

SANCHEZ

- “***Case-specific facts***” are those relating to the particular events and participants alleged to have been involved in the case being tried. The “case-specific” facts in *Sanchez* were defendant’s statements to other officers, memorialized in the STEP notice, F.I. cards, and other reports, concerning his gang-affiliation and activity.

SANCHEZ

- These facts were not from the detective's own personal knowledge. To be admissible, the officers who actually collected this information should have been called to testify as to what defendant told them.

SANCHEZ

- The court further held that Defendant was not provided with the opportunity to confront and cross-examine the officers who had submitted the STEP notice, F.I. cards, and other reports, and therefore his Sixth Amendment right to confrontation had been violated.

SANCHEZ

- Under *Crawford v. Washington*, admission of testimonial hearsay against a defendant violates the confrontation clause unless (1) the declarant is unavailable to testify *and* (2) the defendant had a previous opportunity to cross-examine the witness or forfeited the right by his own wrongdoing. In *Sanchez*, officers who wrote out defendant's admissions as contained in the STEP notice, F.I. cards, and other reports, were not shown to be unavailable to testify, and defendant did not have an opportunity to cross-examine.

SANCHEZ

- Officers will need to assist prosecutors in knowing and having available to testify those witnesses that have firsthand knowledge of the background gang information;
- Gang officers can continue to base their opinion on all of that information, but be prepared and understand that they cannot disclose during their direct testimony “case-specific hearsay.”

CONCLUSION

- IS GANG PROSECUTION DESTINED FOR EXTINCTION?
- IS IT WORTH THE RESOURCES & EFFORT?
- WILL WHAT IS HAPPENING IN CALIFORNIA HAPPEN IN YOUR STATE?

