

The PROSECUTOR

Gang Prosecution: The Need For Qualifying Law Enforcement Officers As Expert Witnesses

BY JEFFREY T. WENNAR

Case scenario: A 15-year-old is fatally stabbed as he walks home from school. The stabbing occurs just off school property. Police announce they are looking into the possibility that the killing was gang related. Friends and family of the victim deny he had any gang affiliation. The high school principal tells reporters that gangs are not a problem at the school. A newspaper editorial calls upon elected officials to do more. Elected officials denied the gang problem. The same officials were then forced by media and public out-cry to make pronouncements addressing actions they would take to address a problem they publicly stated did not exist.

THIS CASE IS NOT UNUSUAL. It is often difficult for jurisdictions to admit they have a gang problem, but the first step in addressing gang activity is to admit that the problem exists. The 2005 National Gang Threat Assessment states that all jurisdictions over the population of 250,000 experience gang problems. The jurisdiction where the above case scenario occurred has in excess of 500,000 residents.

The prosecutor in this case had to first determine whether to prosecute the case pursuant to gang enhancement statutes, given the previous representation that there was no gang problem in the community. Had the prosecutor been unable to show that there was a specific gang problem, the prosecutor would have been prevented by the court from introducing a gang motive. [Although motive is not usually an element of the substantive offense charged, juries are told they may consider the motive or lack of motive as a circumstance in the case. If possible, prosecutors want to establish a motive because it completes the picture for the jury.]

Depending on a jurisdiction's statutes, the prosecutor presenting a gang case can have a tremendous burden. For instance, in Maryland, where this crime occurred, the statute¹ 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.

The prosecutor had to prove that the defendant was a member of a criminal street gang. Challenges to successful prosecution included:

- Proving the existence of the particular street gang.
- Proving that the particular street gang was actively participating in the underlying enumerated offenses.
- Proving that the activity had been ongoing and was not historical. (Maryland does not have a state RICO Act, although approximately 35 states do have a statute similar to 18 USC 1961, et. seq.)
- Proving the elements in of the statute.



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QUALIFYING A GANG EXPERT

Prosecutors should consider using gang experts, who can play a vital role in the establishment of the existence of a particular street gang. A gang expert has specialized knowledge, training, and experience about gangs beyond that possessed by the average person. Although anyone, including a gang member, can be qualified as an expert, this article will only address qualifying law enforcement officers as expert witnesses.

The expert called and qualified by the prosecutor should have specific knowledge regarding the gang associated with the defendant on trial. Establishing the officer's duty assignment, with a component being gang investigation, is a starting point. From there the prosecutor should establish how long the officer has worked gang cases and the duties of a gang investigator. This leads into establishing the officer's familiarity

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with the particular gang, the culture, habits, trends, rules and rivals of the particular gang.

Proving that street gangs actively participate in particular criminal offenses can assist the jury in understanding gang culture. Gang evidence is admissible in order to prove: motive, intent, identity, conspiracy, knowledge, principal, preparation, plan, absence of mistake or accident, bias, and an explanation of the demeanor of a witness. In gang-motivated cases, gang evidence is usually relevant and, therefore, admissible. Rule 702, of the Federal Rules of Evidence, states:

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 the principles and methods reliably to the facts of the case.

The prosecutor will have to convince the court that the probative value out-weighs any potential prejudicial impact.²

The officer's education and training should be addressed, especially training regarding the particular gang. If the officer has presented at trainings 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. The officer can be asked to explain why a member of that gang would speak with the officer, and he could respond that members of that gang are proud to belong and to represent their gang.

ESTABLISHING THE EXISTENCE OF THE SPECIFIC GANG

Once the officer has been offered and accepted by the court, the prosecutor should move on to establishing the existence of the specific gang. The name of the gang and its meaning, the history of where and when the gang was formed, and the organization of the gang are crucial to proving the existence of a gang. The prosecutor must establish the structure of the gang in that particular jurisdiction. Oftentimes, gangs are broken into sets or cliques. The officer'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) should be explained by the expert. Having the officer identify photos of tattoos, persons throwing hand signs, drawings, clothing and graffiti makes the testimony real in the jurors' eyes.

The gang expert should be able to explain the importance

of reputation and respect in relationships between various gangs. This explanation will help jurors 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 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 serve to establish the position of a member rising in the gang's hierarchy.

PROVING THAT THE PARTICULAR STREET GANG ESTABLISHES MOTIVE

As previously discussed, motive may be used by the prosecutor to complete a picture for the jury. Prosecutors may use gang experts to prove that the street gang activity purported in the trial establishes motive, intent, identity, conspiracy, knowledge, principal, preparation, plan, absence of mistake or acci-

dent, and bias, and explains the demeanor of a witness.

The case may involve a gang's rival. The alliances and rivals of the gang need to be established through the officer. 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 officer must talk about the expectation by the gang when a member encounters a rival, the effect this expectation has on reputation and respect, and the consequences for failure to act in this situation.

Gang experts should be asked their opinion of the defendant's participation in the criminal behavior in benefit of, at the direction of, or in association with criminal street gang activity. Finally, the expert should be asked for an opinion as to whether the defendant is a member of the gang. And, depending on the prosecutor's theory of motive (discipline of a gang member, the encountering of a rival, or earning reputation and/or respect), the expert should be asked what effect the defendant's membership in the gang had on his action, particularly if the defendant was in the company of other members of the gang.³

NOTIFYING THE DEFENSE

Most discovery rules require the prosecutor to notify the defense regarding expert witnesses. The prosecutor should file a Motion in Limine for the Admission of Expert Witness Testimony and other Evidence Relating to Gangs and Memorandum in Support of Motion. The motion and memorandum should delineate the general topics for which the evidence should be admitted, state the factual background of the case emphasizing the gang component, make a legal analysis of the admissibility of gang evidence generally, and address that admissibility as it relates to inchoate crimes, the substantive crimes, motive, intent, and identity. The expert's curriculum vita, written opinion and basis of the opinion are often required to be provided to the defense.

EXPERT RESOURCES

Like the jurisdiction where this crime occurred, some jurisdictions may not have an officer who is able to be qualified based on training, experience and knowledge of gangs in that jurisdiction. In that instance, prosecutors may wish to look outside of their specific geographic area.

One expert resource is the National Alliance of Gang Investigators Associations (NAGIA), which was formed in 1998. It is a cooperative organization composed of representatives from 16 regional gang investigator associations representing over 15,000 gang investigators across the country, including federal agencies and other organizations involved in gang-related matters. NAGIA is a unique alliance of criminal justice professionals dedicated to the promotion and coordination of national anti-gang strategies. NAGIA also advocates the stan-

standardization of anti-gang training and the establishment of uniform gang definitions, provides assistance for communities with emerging gang problems, and provides input to policymakers and program administrators. NAGIA is not meant to replace or duplicate the services provided by any other entity. Rather, it facilitates and supports regional gang investigator associations, Regional Information Sharing Systems (RISS), as well as federal, state, and local anti-gang initiatives.

NAGIA maintains an online library of articles written by gang specialists from around the U.S. on a variety of gang-related topics. This selection of articles is one of the most comprehensive libraries on the Internet with information applicable to different regions of the U.S. NAGIA has a complete listing of links to all the regional gang investigators associations and includes Internet links to sites featuring regional gang-specific information, as well as gang prevention and intervention strategies. If a prosecutor's state or region has a gang investigators' association, the prosecutor should contact that association to ascertain and obtain an expert witness for a specific gang.

The Institute for Intergovernmental Research (IIR) has developed two courses: Basic Gang Investigator and Advanced Gang Investigator. These courses are offered throughout the year and across the United States. Officers who have completed these courses are also a good resource as expert witnesses.

The National Gang Targeting, Enforcement and Coordination Center, which includes the National Gang Intelligence Center, is another resource that maintains a database of expert witnesses.

The National District Attorneys Association provides technical assistance with trial questions, investigations, and technical case presentation, and can recommend gang experts to testify on behalf of a prosecutor's office.

ASSISTING THE EXPERT

In order to assist the expert witness, detectives and street officers will need to become proficient in compiling evidence. Field interviews where there are photographs of individuals stopped together will become crucial in establishing associations. The recovery of gang documents, photographs and other indicia in search warrants need to be catalogued for use in future prosecutions. A central repository of gang photos, documents, and information will greatly benefit the prosecution of a gang case.

If a prosecutor is unsure as to the extent of the gang problem in their jurisdiction, the National District Attorneys Association through its research and technical assistance division, the American Prosecutors Research Institute, may be able to send a team to assist a jurisdiction with the development and implementation of comprehensive strategies to address the gang activity in their community. They have also published two monographs entitled, *Prosecutor's Comprehensive Gang Response Model* and *Prosecuting Gang Cases: What Local Prosecutors Need to Know*, (see page 32 of this issue of *The Prosecutor* magazine for the second monograph).

A gang case may present challenges but should not dissuade the prosecutor. The community perception that gangs do not exist is a challenge as are the challenges of establishing that a gang exists and that the crime was committed in furtherance of the gang's criminal enterprise. These challenges, however, can be met and countered by finding and qualifying an expert witness.

¹ Annotated Code of Maryland, Criminal Law Article, Section 9-801, and et. seq.

² See Federal Rule 703.

³ *Ayala v. State*, 174 Md. App. 647, 923 A.2d. 952 (2007)