

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

FULGENCIO ARIAS, JR.,
PETITIONER,

v.

THE UNITED STATES OF AMERICA,
RESPONDENT.

**On Petition For A Writ Of Certiorari To
the United States Court Of Appeals
For the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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June 4, 2018

Question Presented for Review

Was the defendant's trial fundamentally unfair because the trial court permitted the government to introduce evidence that the defendant (a Hispanic) was a member of the Mexican Mafia, or at least was closely associated with it, when that evidence, which was stale, did not assist in establishing anything the government had to prove to obtain the convictions, and was race-based and extremely inflammatory?

Parties To The Proceedings

The parties to the proceedings in the United States Court of Appeals for the Ninth Circuit were the following:

1. Fulgencio Arias, Jr., the petitioner, was the defendant-appellant below.
2. The United States of America, the respondent, was plaintiff-appellee below.

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**On Petition For A Writ Of Certiorari To
the United States Court Of Appeals
For the Ninth Circuit**

Petitioner Fulgencio Arias, Jr. respectfully petitions for a writ of *certiorari* to review the memorandum decision and order of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The Ninth Circuit's memorandum decision is available at 714 Fed Appx 804 (2018), and is attached here as Appendix A. The district court decision is available at 2016 WL 1532198, and is attached as Appendix B. The district court's judgment is attached as Appendix C.

Basis for Jurisdiction

The District Court had original subject matter jurisdiction pursuant to 18 U.S.C. § 3231.

The United States Court of Appeals for the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The Ninth Circuit issued its memorandum decision and judgment March 13, 2018.

This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is being filed within 90 days of the judgment in the Ninth Circuit.

Constitutional And Statutory Provisions

The Fifth Amendment to the United States Constitution states, “no person shall be ... deprived of life, liberty or property, without due process of law. . . .”

The Federal Rules of Evidence, Rule 404(b) provides in pertinent part:

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice in a Criminal Case*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must: [give pretrial notice].

Statement Of The Case

The government gave pretrial notice that it would use evidence of the defendant’s gang nickname, gang connections with a codefendant, his 2000 drug-related RICO arrest and 2002 conviction, and general information about the Mexican Mafia through an expert. The trial was in May 2016. The defense objected to all the evidence, and most specifically objected to the “Mafia expert” or “gang expert,” and the use of the nickname “Stomper.” All the evidence was allowed by the District Court.

The defendant is Mexican-American, and physically appears to be Hispanic.

The government offered the evidence with the claim that the gang evidence was “inextricably intertwined” with the evidence the government needed to prove its case. However, the gang evidence was very separate from the evidence of the drug conspiracy, it was not “inextricably intertwined.” The gang evidence did not serve to identify the defendant, or serve to establish any of the other exceptions listed in FRE 404(b) (“motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”) The evidence only served to connect the defendant with a violent ethnic gang, and thus to attack his character. This was an improper purpose under the Federal Rules of Evidence (401-404), and under the case law in the Ninth Circuit and in the other Circuits. The government cited no case below, and appellant’s counsel could find no case, in a remotely similar context, where gang evidence was permitted.

The government had a strong case of a drug conspiracy, but that does not make the erroneous admission of this race-based character assassination harmless error. The current political climate, and social science studies, strongly suggest that this particular kind of inflammatory evidence is likely to have affected the verdict. The government cannot show beyond a reasonable doubt that it did not.

The case should be remanded for a new trial, without the factually remote and irrelevant evidence about Hispanic gangs.

Factual background

This defendant was charged, along with four codefendants, with conspiracy to distribute and possess methamphetamine, and to launder money, from January 2008 to December 2011. The four codefendants pled guilty, and two of them testified against the defendant at trial.

One of the codefendants (Fregoso) testified that he had known the defendant for many years, and had spent time with him in federal prison. In June 2011, Fregoso was stopped on the Interstate in Oregon, and about a half a pound of methamphetamine was found in the waistband of his passenger. The same day Fregoso's apartment was searched, and about two-thirds of a pound of methamphetamine, and \$2,555, was seized. Fregoso promptly agreed to cooperate, and identified the defendant as the head of a drug-trafficking operation.

A week later, another codefendant (McGuire) was stopped, driving a vehicle with a sophisticated hidden compartment containing about four pounds of methamphetamine. The stop was based on a tip from Fregoso, who said the vehicle belonged to the defendant.

After that, the government recorded numerous telephone calls between Fregoso and the defendant, and monitored the defendant's bank activity. The calls described the vehicle with the hidden compartment, and banking activity, and

contained exchanges that were, according to Fregoso, in coded language and referred to drug dealing.

Fregoso testified at trial that he received, nearly weekly, shipments of methamphetamine from the defendant, weighing between one and four pounds. After McGuire was arrested in the vehicle with the compartment, the defendant made statements suggestive of threats to him. Fregoso also described the process the defendant used to funnel his funds through an otherwise-mostly-uninvolved businessman in L.A. (codefendant Casas).

Fregoso testified that he was in one gang (18th Street), which is a type of another gang (Sureños), and that the defendant is in yet another gang (Arizona Maravilla).

Fregoso helped set up a controlled buy in L.A. with a confederate of the defendant's, and the undercover officer testified that he was 90% sure he saw the defendant watching the controlled buy.

The jury heard, without objection, police officers testifying about how profitable the drug trade is, and that most of the methamphetamine in West Coast now comes from Mexico.

At trial, the government presented the defendant's 2001 plea petition, which included his admission that he was involved in organized drug activity. That evidence is not at issue in the appellate process. At issue is the government's use

of sparse evidence that the defendant had some remote connection to the Mexican Mafia, the use of a so-called “gang expert,” and the government being permitted to tell the jury that the defendant had a nickname, “Stomper.” Also, almost every police witness told the jury that he was a part of a “gang task force,” or the like. This gang-related evidence was unnecessary to the government’s case, and was, in effect, race-based character assignation.

Reason For Granting The Petition

The government had a strong case without the gang evidence, and the sparse evidence of the defendant’s remote relationship to the Mexican Mafia did nothing to advance the government’s case. In its rebuttal closing argument the government acknowledged, “This isn’t a case about whether the defendant was in the Mexican Mafia. It’s not a case about whether he was a made member or an affiliate member. This is a drug case.” However, the strength of the government’s case does not mean that the government’s use of the gang evidence was harmless error: even when the government has a strong case, it must present it fairly.

The government’s proffered rationale for its admission of evidence about Hispanic gangs was that the evidence was “inextricably intertwined” with the facts the government needed to prove its case. It was not. The evidence the government needed to convict the defendant was distinct from the gang evidence. Nevertheless, the government decided to pile on, with “gang experts,” and other

abstract evidence, such as a police officer, who knew nothing about this case, testifying about the race-based violent gang.

The most obvious illustration of the unfairness of the government's case is its use of a nickname of the defendant, "Stomper." This is a common gang name (as a review of reported federal cases in the last decade will reveal), and it suggests that the defendant stomps on people. The district court allowed the government to use it to identify the defendant. However, the only time the name was spoken to the jury was when the government asked the cooperating witness, Casas (the L.A. businessman), if the defendant had a nickname, and Casas testified that he knew the defendant to be called "Stomper."

The evidence of the defendant's connection with the Mexican Mafia was over a decade before this trial. In a 2002 RICO plea petition, the defendant agreed he acted "as security for the Mexican Mafia meetings and activities relating to Mexican Mafia business." There was no evidence of more recent contacts.

Yet, in 2016, the government was permitted to present an "expert" (who never investigated the defendant) who told the jury that the Mexican Mafia is a prison gang, and is responsible for narcotics trafficking inside jails and prisons. He also testified that the Mexican Mafia is gang that controls other gangs. It has a strong influence outside the prison, its members have ordered contract murders, and its members have directed drug sales, home invasion robberies, and the like. The

Mexican Mafia controls by fear and intimidation. The Surenos are also Hispanic gang members. They are not members of the Mexican Mafia, but they are a critical part of it: they are essentially the army for the Mexican Mafia. There is a structure that the expert described. The Surenos “do criminal activity for the Mexican Mafia.” Surenos are people the Mexican Mafia trusts, “they have the same ideals.” They are the “black hand of death that reaches out and touches you.” Narcotics are the staple of the Mexican Mafia. They smuggle drugs into the prisons by keistering them, inserting it into the body. They also sell drugs outside the prison, using fear and intimidation. They have influence across the country, and internationally. They work with the Mexican cartels. They manipulate people in the prison system. If a person refuses to continue working for the Mexican Mafia, the consequences are “assault, a fine, or death.” A person becomes a member by “doing work,” which means assaulting or killing people. Some members have a “black hand of death” tattoo on their left side, which is opposite the right side, which is the side God is on.

It is noteworthy that it was the *informant* who claimed to be in the Surenos, not the defendant.

The error was not harmless.

Gang evidence will almost always be particularly prejudicial, and its improper admission will generally constitute reversible error. *See e.g., Kennedy v.*

Lockyer, 379 F.3d 1041, 1055 (9th Cir. 2004). “Indeed, this court has recognized time and time again that gang evidence has the potential to be particularly prejudicial.” The nature of the evidence makes it impossible for the jury to compartmentalize it. *See Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 602 (9th Cir. 2016). In *Diaz*, it was reversible error in a wrongful death case to allow impeachment of plaintiff/decedent’s mother that the decedent had the gang nickname “Stomper,” and was in a gang.

The May 2016 trial in this case was a particularly unfortunate time for a jury to hear irrelevant evidence about the Mexican Mafia. The trial was 11 months after the ultimately-successful candidate for President of the United States made his campaign announcement, with his well-known characterizations of Mexicans:

The U.S. has become a dumping ground for everybody else's problems. Thank you. It's true, and these are the best and the finest. When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people.

But I speak to border guards and they tell us what we're getting. And it only makes common sense. It only makes common sense. They're sending us not the right people.

Statement of Donald Trump, June 16, 2015. Time, 6/16/15, Transcript available at: <http://time.com/3923128/donald-trump-announcement-speech> (last visited 5/12/18).

Social science studies strongly suggest that once a jury hears about gangs, the jury will tend to convict, even if the prosecution's case is very weak. Evidence about gangs appears to swamp the jurors' minds, and cause "reverse jury nullification." Eisen, Dotson, Dohi, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?* 62 UCLA L. Rev Disc 2 (2014) at App-20; Eisen, Gomes, Wandry, Drachman, Clemente, Groskopf, *Examining the Prejudicial Effects of Gang Evidence on Jurors*, Journal of Forensic Psychology Practice Vol. 13 , Iss. 1, 2013 (available at: <http://dx.doi.org/10.1080/15228932.2012.713831> (last visited 5/13/18).)

The error at issue was a constitutional one: the government offered irrelevant, inflammatory, and race-based character assassination. The defendant did not have a trial that was fundamentally fair, as guaranteed in the Constitution, Amendment V.

For constitutional error, the court must reverse unless it can say, beyond a reasonable doubt, that the error did not affect the verdict. The reviewing court must consider not just the other evidence in the case, but must consider the effect of this inflammatory evidence on the jury. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In this case, the error was not harmless.

Conclusion

For the foregoing reasons, the Court should grant this petition for writ of *certiorari* and take this opportunity to interpret FRE 404(b).

Respectfully submitted,

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714 Fed.Appx. 804

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3. United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Fulgencio ARIAS, Jr., AKA Stomper, Defendant-Appellant.

No. 17-30021

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Argued and Submitted March 6, 2018 Portland, Oregon

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Filed March 13, 2018

Appeal from the United States District Court for the District of Oregon, Marco A. Hernandez, District Judge, Presiding, D.C. No. 3:11-cr-00494-HZ-1

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Before: FISHER, N.R. SMITH and HURWITZ, Circuit Judges.

MEMORANDUM^{*}

^{*} This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Fulgencio Arias appeals his convictions for conspiracy to distribute methamphetamine, distribution of methamphetamine, attempted distribution of methamphetamine and conspiracy to commit money laundering. *See* 18 U.S.C. §§ 2, 1956(a)(1)(A)(i); 21 U.S.C. §§ 841(a)(1), (b)(1)(A), 846. He raises a single issue on appeal, contending the district court abused its discretion by admitting evidence regarding his association with two criminal organizations, including the Mexican Mafia. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Under the Federal Rules of Evidence, “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of ... unfair prejudice.” Fed. R. Evid. 403. The evidence challenged here was relevant. The evidence of Arias’ gang associations was relevant to explain the development of the relationship between Arias and his co-conspirator, Francisco Fregoso, and to establish Arias’ motive or opportunity to engage in drug trafficking. *See* Fed. R. Evid. 401, 404(b). The evidence of Arias’ nickname was relevant to establish the close relationship between Arias and a second co-conspirator, Art Casas. The expert testimony was relevant to explain the relationship between the Mexican Mafia and the Sureño gangs and to explain the difference *805 between a member and affiliate of the Mexican Mafia.

Arias validly points out that the relevance of much of this evidence was limited. The government, for example, could have explained the development of Arias and Fregoso’s relationship without mentioning Arias’ gang affiliations. Similarly, although the evidence showed Arias had a historical connection to the Mexican Mafia, there was no evidence actually linking the Mexican Mafia to the charged conspiracy. Arias’ ties to the Mexican Mafia therefore provided only a tenuous theory of motive and opportunity. Evidence of Arias’ nickname was only minimally probative, given Arias’ identity was not at issue.

On the other side of the equation, gang affiliation evidence carries a significant risk of unfair prejudice. *See Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 602 (9th Cir. 2016); *Kennedy v. Lockyer*, 379 F.3d 1041, 1055-56 (9th Cir. 2004). Given the limited probative value of the evidence and the risk of unfair prejudice, the district court might reasonably have excluded the challenged evidence under Rule 403. The standard of review, however, is highly deferential. “A district court’s Rule 403 determination is subject to great deference, because ‘the considerations arising under Rule 403 are susceptible only to case-by-case determinations, requiring examination of the surrounding facts, circumstances, and issues.’” *United States v. Hinkson*, 585 F.3d 1247, 1267 (9th Cir. 2009) (en banc) (quoting *R.B. Matthews, Inc. v. Transamerica Transp. Serv., Inc.*, 945 F.2d 269, 272 (9th Cir. 1991)). We cannot say the district court abused its broad discretion here.

In any event, even if the evidence should have been excluded, we will not reverse where, as here, “it is more probable than not that the error did not materially affect the verdict.” *United States v. Vera*, 770 F.3d 1232, 1240 (9th Cir. 2014) (quoting *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1099 (9th Cir. 2005)). The government’s case against Arias was built not only on the testimony of Arias’ two principal co-conspirators, Fregoso and Casas, but also on recorded phone conversations in which Arias described his methamphetamine and money laundering crimes in his own words. The district court also took steps to limit the possibility of prejudice. Any error, therefore, was harmless. Arias’ contention that we should apply

the harmless error standard applicable to constitutional error is not supported by relevant authority and is therefore rejected.

2. We review Arias' challenge to the gang task force evidence for plain error. *See United States v. Lloyd*, 807 F.3d 1128, 1152 (9th Cir. 2015). Because the error, if any, was not obvious, Arias' argument fails.

AFFIRMED.

All Citations

714 Fed.Appx. 804

2016 WL 1532198

Only the Westlaw citation is currently available.

United States District Court,
D. Oregon.

United States of America, Plaintiff,

v.

Fulgencio Arias, Jr., Defendant.

No. 3:11-cr-00494-HZ-1

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Signed 04/15/2016

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OPINION & ORDER

HERNÁNDEZ, District Judge:

***1** Defendant is charged with conspiracy to distribute and possess with intent to distribute methamphetamine, conspiracy to commit money laundering, attempted distribution of methamphetamine, and distribution of methamphetamine. On March 30, 2016, this Court held a motion hearing in which both the Government and the Defendant presented argument on several motions filed in anticipation of the upcoming trial in this case. The Court ruled on most of the parties' motions, as stated on the record. However, the Court indicated that it would provide a written Opinion & Order on two issues: (1) the admissibility of evidence regarding Defendant's alleged gang membership, as discussed in Defendant's motion in limine [ECF 329] and the Government's 404(b) notice [ECF 349]; and (2) Defendant's motion to change venue [ECF 327].

I. Admissibility of evidence regarding Defendant's alleged gang membership

The Government seeks to admit as substantive evidence Defendant's alleged association with the Arizona Maravilla gang and the Mexican Mafia criminal organization. The Government contends that such evidence is direct evidence of the charged crimes in this case, as it is inextricably intertwined evidence that explains Defendant's conduct and his relationship with his conspirators during the course of the conspiracy. Alternatively, the Government seeks to admit this evidence pursuant to Federal Rule of Evidence ("Rule") 404(b). In addition, the Government seeks to admit evidence of Defendant's prior racketeering conviction to corroborate his participation and involvement with the Mexican Mafia, pursuant to Rule 404(b).

Defendant moves to limit any evidence regarding gang membership or affiliation because Defendant contends that there is no evidence that Defendant's alleged criminal activities were gang-related. Defendant argues that, therefore, any evidence about gangs is irrelevant, inadmissible prior bad act evidence, hearsay without an exception, and prejudicial without probative value related to this case. Def.'s Mot. Limine 1, ECF 329.

a. Testimony of CI#1

The Government seeks to present evidence of Defendant's gang membership through the testimony of Confidential Informant (CI) #1. CI#1 met Defendant in prison in 2003 or 2004. Govt. Notice 2, ECF 349. CI#1 and Defendant became acquainted through their mutual gang affiliations and association, and became close as CI#1 helped Defendant "run the yard" in prison. Id. Through this relationship, CI#1 knows Defendant to be an Arizona Maravilla gang member and affiliated with the Mexican Mafia. Id. at 2-3. Through his own gang affiliations, CI#1 is familiar with the organization and activities of the Mexican Mafia. Id. at 3. Shortly after CI#1 left prison in 2008, CI#1 contacted Defendant in January 2009. Id. CI#1 began distributing methamphetamine for Defendant as part of a drug trafficking organization aligned with the Vario Nuevo Estrada Street Gang. Id.

Under Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). However, evidence is not considered to relate to "other crimes, wrongs or acts" if it is "inextricably intertwined" with, and "part of the same transaction" as, the crime for which the defendant was charged. United States v. Mundi, 892 F.2d 817, 820 (9th Cir. 1989). One category of cases in which this occurs is when it is necessary "to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime." United States v. Vizcarra-Martinez, 66 F.3d 1006, 1012-13 (9th Cir. 1995). "It is obviously necessary in certain cases for the government to explain either the circumstances under which particular evidence was obtained or the events surrounding the commission of the crime." Id. The Ninth Circuit has explained:

*2 This exception to Rule 404(b) is most often invoked in cases in which the defendant is charged with being a felon in possession of a firearm. For example, in United States v. Daly, 974 F.2d 1215, 1216 (9th Cir. 1992), evidence regarding a shoot-out was considered to be “inextricably intertwined” with the charge that the defendant was a felon in possession of a firearm. We based our holding upon the fact that “evidence regarding the shoot-out was necessary to put [the defendant's] illegal conduct into context and to rebut his claims of self defense.” Id. Recognizing the difficulty that the prosecution would encounter in proving that the defendant possessed a gun and in rebutting his proffered defense without relating the facts surrounding the commission of the crime, we observed that “the prosecution is not restricted to proving in a vacuum the offense of possession of a firearm by a felon.... ‘[The jury] cannot be expected to make its decision in a void—without knowledge of the time, place, and circumstances of the acts which form the basis of the charge.’ ” Id. (quoting United States v. Moore, 735 F.2d 289, 292 (8th Cir. 1984)).

Id. at 1013.

In United States v. Santiago, 46 F.3d 885, 889 (9th Cir. 1995), the Ninth Circuit upheld the district court's decision to admit evidence relating to the role of the Mexican Mafia in the murder for which Santiago was convicted. The record contained no evidence of any specific, wrongful acts by either the Mexican Mafia or Santiago that were unrelated to the murder. Id. To the contrary, “[e]vidence of gang links to the procurement of the murder weapon and to the planning of the crime relate[d] directly to the crime for which Santiago was indicted.” Id. Therefore, the evidence relating to the Mexican Mafia did not constitute “other crimes” evidence subject to Rule 404(b). Id. See also United States v. Easter, 66 F.3d 1018, 1022 (9th Cir. 1995) (admitting evidence of the defendants' gang ties to prove the identity of the perpetrators of the crimes where the evidence did not show any specific or wrongful acts unrelated to the crime charged); United States v. Dota, 33 F.3d 1179, 1185 (9th Cir. 1994) (holding that evidence of defendant's mafia connections is probative to establish context).

Here, similarly to Santiago and Easter, the testimony of CI#1 provides evidence of gang links to the ability, means, and reasons for Defendant to engage in the crime for which he was indicted, and does not contain evidence of other unrelated crimes, wrongs, or acts. The evidence will help explain who was involved in the planning of the crime as well as its execution. The evidence of Defendant's gang affiliation explains the relationship between him, CI#1, and other involved parties. In addition, the evidence gives context for the execution of the crime and for Defendant's role within the conspiracy. Therefore, the testimony of CI#1 regarding Defendant's gang affiliation is admissible.

Alternatively, such evidence is admissible under Rule 404(b). Evidence of other crimes, wrongs, or acts may be admitted pursuant to Rule 404(b) if “(1) the evidence tends to prove

a material point; (2) the other act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other act; and (4) (in certain cases) the act is similar to the offense charged.” United States v. Cherer, 513 F.3d 1150, 1157 (9th Cir. 2008). If evidence satisfies Rule 404(b), “the court must then decide whether the probative value is substantially outweighed by the prejudicial impact under Rule 403.” Id.

Evidence of Defendant's gang affiliation, as presented through the testimony of CI#1, is admissible “as proof of motive, opportunity, intent, preparation, [or] plan.” Fed. R. Evid. 404(b). See also Santiago, 46 F.3d at 889 (admitting evidence relating to gangs and other organizations as relevant to the issue of motive). The fact that Defendant and CI#1 met in prison through their gang affiliation and that, shortly after CI#1's release, they reconnected to distribute methamphetamine as part of a gang-affiliated drug trafficking organization is evidence of Defendant's motive, opportunity, intent, preparation, and plan. Accordingly, Defendant's gang affiliation “tends to prove a material point.” Cherer, 513 F.3d at 1157.

***3** Defendant's gang affiliation is not “too remote in time,” as he was affiliated with the Arizona Maravilla and the Mexican Mafia during the course of the charged conspiracies. Furthermore, the content of CI#1's testimony is sufficient to support a finding that Defendant was affiliated with gangs.

Finally, Defendant's gang affiliation was part of the furtherance of the conspiracy to distribute methamphetamines and launder money, and accordingly, it makes the existence of his knowledge more probable than it would be without the evidence. See United States v. Arambula-Ruiz, 987 F.2d 599, 603 (9th Cir. 1993) (explaining that similarity is not always a prerequisite for admissibility under Rule 404(b) and that when the prior act is offered to prove knowledge, it is admissible as long as it “make[s] the existence of the defendant's knowledge more probable than it would be without the evidence”).

Finally, the Court must determine whether the probative value of the evidence concerning Defendant's gang membership is substantially outweighed by its prejudicial value. “The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403.” Fed. R. Evid. 404(b) advisory committee's note.

The Court concludes that the probative value is not substantially outweighed by any potential prejudice. While there are valid concerns that referring to Defendant as a gang member can cause prejudice, see, e.g., Easter, 66 F.3d at 1021, the probative value of providing context for Defendant's actions, as well as his motive, opportunity, intent, knowledge, preparation, or plan, outweighs any such prejudice. Furthermore, Defendant may request that the Court

minimize possible prejudice by probing potential jurors, during voir dire, on the issue of bias due to gang affiliation; and issuing cautionary instructions during trial. Id.

b. Evidence of Defendant's racketeering conviction

The Government also seeks to admit the indictment, plea agreement, and judgment from Defendant's 2002 racketeering conviction for his participation and association with the Mexican Mafia criminal organization. The Government contends that the evidence is admissible pursuant to Rule 404(b).

The Court finds that the indictment is inadmissible because its probative value is substantially outweighed by the prejudicial impact under Rule 403. The indictment largely comprises six pages of narrative about how the Mexican Mafia operated as of September of 2000, when the indictment was issued. Govt. Notice Ex. A. The indictment provides substantial detail about how the Mexican Mafia enforced its rules and promoted discipline among its members through violence, including murder. Id. at 2. The descriptions of Mexican Mafia internal operations eleven years before the events at issue in this case have little probative value, yet are highly inflammatory and prejudicial.

On the other hand, the judgment is admissible. Defendant's conviction for racketeering in 2002 demonstrates his motive, knowledge, intent, preparation, plan, and absence of mistake in his affiliation with a gang to conspire and attempt to distribute narcotics, conspire to launder money, and possess narcotics with the intent to distribute them. The conviction is not too remote in time, given that Defendant re-engaged in criminal behavior within three to four years of being released after his racketeering sentence. The evidence is sufficient to support a finding that the racketeering occurred and that it was based upon Defendant's affiliation with the Mexican Mafia. See, e.g., United States v. Ramirez-Robles, 386 F.3d 1234, 1243 (9th Cir. 2004) (finding that because the defendant "was convicted of these prior crimes, there is sufficient evidence to support the finding that he committed them"). In addition, Defendant's racketeering conviction is similar to the charged conduct.

***4** As to balancing the judgment against the danger of unfair prejudice, the Court again may provide a limiting instruction to reduce any risk of undue prejudice. However, given that Defendant's prior conviction makes the existence of his motive, knowledge, intent, preparation, plan, and absence of mistake to engage in the charged acts in this case more likely, the judgment of conviction is properly admitted.

Finally, Defendant's plea agreement is admissible in part. For the same reasons discussed in relation to the indictment, any references to murder, assault, and acts of violence should be redacted. The probative value of such references is substantially outweighed by their

prejudicial impact. The remainder of the plea agreement is admissible for the same reasons as the judgment.

c. Defendant's objections

Defendant submits objections to the testimony of CI#1 and the evidence of Defendant's racketeering conviction, contending that the Government cannot lay a foundation to show Defendant's alleged gang association, the evidence is unduly prejudicial, CI#1 lacks personal knowledge, and the evidence is inadmissible hearsay not subject to any exception. The Court rejects each of these objections, both for the reasons already explained and the reasons that follow.

CI#1's testimony establishes that he has personal knowledge of Defendant's gang affiliation, based both on what Defendant told him and their collaboration in the conspiracy. CI#1's testimony as to what Defendant told him is not inadmissible hearsay because statements by party-opponents are not hearsay and are admissible provided the statement is offered against the party and is the party's own statement. Fed. R. Evid. 801(d)(2)(A). In sum, Defendant's objections are overruled.

II. Defendant's Motion to Change Venue

The Court denies Defendant's motion to determine and change venue because: 1) Oregon is a proper venue for Defendant's trial; and 2) the newspaper article printed about Defendant and the threat made towards Assistant United States Attorney (AUSA) Scott Kerin does not qualify as the type of pretrial publicity that merits a change of venue.

The Federal Rules of Criminal Procedure mandate the scope of venue: “[u]nless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.” Fed. R. Crim. P. 18. The place or places where the offense happened is the basic rule for determining proper venue.

a. Oregon is a Proper Venue

Defendant contends that Oregon is not the proper trial venue. He and his co-defendants were indicted on conspiracy drug charges, conspiracy to launder money, and a number of related drug charges. Indictment, ECF No. 2.

In U.S. v. Corona, the Ninth Circuit held that the proper venue for conspiracy drug charges was “any district where an overt act committed in the course of the conspiracy occurred.” 34

F.3d 876, 879 (9th Cir. 1994) (citing U.S. v. Meyers, 847, F.2d 1408, 1411 (9th Cir. 1988)). The Meyers court indicated that it was not necessary for the particular defendant to have committed an overt act within the district, as long as one of his co-conspirators did. Id. In addition, the Ninth Circuit has held that the proper venue for money laundering charges can be both where the money was deposited and where money was obtained. U.S. v. Angotti, 105 F.3d 539, 544–545 (9th Cir. 1997).

*5 Elements of the crimes alleged against Defendant took place in Oregon and California. Specifically, the Government alleges that through the full timeframe of the charged conspiracy, CI#1 sent money to Defendant through a courier. The courier took money from Oregon to Defendant in California, and used banks in Oregon to deposit money into accounts designated by Defendant. Accordingly, as alleged in the indictment, either Defendant or his co-conspirators committed overt acts in Oregon related to the conspiracy charges. Thus, contrary to Defendant's assertion, Oregon is a proper venue for Defendant's trial.

b. Pretrial Publicity

Defendant also argues that pretrial publicity will prejudice him if the trial takes place in Oregon. A federal court must grant a defendant's motion to change venue when “so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.” Fed. R. Crim. P. 21(a).

In March of 2015, the Oregonian published an article indicating that AUSA Kerin, the attorney who was prosecuting Defendant's case, was the subject of a death threat. While the article names Defendant, it does not state that Defendant was responsible for the death threat. The article does mention Defendant's gang affiliations, and that Mr. Kerin recused himself from the case.¹ Defendant is not the primary subject of the article, nor is he mentioned in the title.

¹ Bryan Denson, Unwanted Texts and Attention by U.S. Attorney Amanda Marshall Prompted Complaint from Subordinate, Sources Say, The Oregonian, Mar. 19, 2015, <http://www.oregonlive.com/portland/index.ssf/2015/03/unwanted-texts-and-attention-b.html>, accessed Mar. 8, 2016.

The Ninth Circuit measures the “prejudicial effect of pervasive publicity” under the actual prejudice or presumed prejudice standards. Harris v. Pulley, 885 F.2d 1354, 1361 (9th Cir. 1988). Actual prejudice exists where jurors have “such fixed opinions that they [cannot] judge impartially the guilt of the defendant.” Id. at 1364. The actual prejudice analysis is not applicable in this case, as *voir dire* has not taken place, and it cannot yet be determined whether individual jurors have actual prejudice against Defendant. Presumed prejudice exists where the community is “saturated with prejudicial and inflammatory media publicity about the crime.” Id. Juror exposure to news reports of a crime—even “pervasive, adverse

publicity”—is not enough alone to trigger a presumption of prejudice to the defendant's due process rights. Murray v. Schriro, 746 F.3d 418, 442 (9th Cir. 2014) (citing Skilling v. United States, 561 U.S. 358, 383-84 (2010), in which the Supreme Court described the “vivid, unforgettable” and “blatantly prejudicial” information at issue in the handful of cases in which the Supreme Court has presumed prejudice as a result of pretrial publicity). A presumption of prejudice “attends only the extreme case.” Skilling, 561 U.S. at 381.

In Harris, the Ninth Circuit held that three newspaper articles and local television coverage spanning a two and one-half week period did not satisfy the presumed prejudice standard. 885 F.2d 1361. In this case, Defendant was mentioned in one newspaper article, as discussed above.² It was published nearly a year ago. The article does not assert that Defendant is guilty of any crime; rather, it simply states that he is being prosecuted. There is nothing to suggest that the community is saturated with coverage or has been presented with inflammatory or prejudicial representations of Defendant.

² At the March 30, 2016 hearing, Defendant's attorney claimed that another article had been published in the Oregonian regarding Mr. Arias. Defendant did not provide the Court with a copy of that article. Even if there were two articles regarding Mr. Arias and the threat to Mr. Kerin, that would not alter the Court's decision to deny Defendant's motion to change venue.

CONCLUSION

***6** Evidence regarding Defendant's alleged gang membership, as discussed in Defendant's motion in limine [329] and the Government's 404(b) notice [349] is admissible as stated above. Defendant's motion to change venue [327] is denied.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2016 WL 1532198

Date of Original Judgment: February 03, 2017**(Or Date of Last Amended Judgment)****Reason for Amendment:**

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☒ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36) To correct the Schedule of Payments page.
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant to
- ☐ 28 U.S.C. § 2255 or
- ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON**

UNITED STATES OF AMERICA

Plaintiff,

v.

FULGENCIO ARIAS, JR.

Defendant.

AMENDED JUDGMENT IN A CRIMINAL CASE**Case No.: 3:11-CR-00494-1-HZ****USM Number: 16377-112**Ernest Warren,
Defendant's AttorneyClayton H. O'Connor, Michael N. Lang
Assistant U.S. Attorney**THE DEFENDANT:**☒ was found guilty on count(s) ONE, TWO, FOUR and SIX of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of the following offense(s):

<u>Title, Section & Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number</u>
Conspiracy to Distribute and Possess with Intent to Distribute Methamphetamine: 21 U.S.C. §§ 41(a)(1), 841(b)(1)(A), 846	Beginning on or about 1/2008 and continuing until 12/15/2011	1
Conspiracy to Commit Money Laundering: 18 U.S.C. §§ 2, 1956(a)(1)(A)(i),	Beginning on or about 1/2008 and continuing until 12/15/2011	2
Attempted Distribution of Methamphetamine: 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A),	6/10/2011	4
Distribution of Methamphetamine: 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A),	5/2011	6

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) and is discharged as to such count(s).☐ Count(s) are dismissed on the motion of the United States.☒ The defendant shall pay a total special assessment in the amount of \$400.00 for Count(s) ONE, TWO, FOUR and SIX payable immediately to the Clerk of the U.S. District Court. (See also the Criminal Monetary Penalties Sheet.)

- Page 2

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

January 30, 2017

Date of Imposition of Sentence

Signature of Judicial Officer

Marco A. Hernandez, U.S. District Judge

Name and Title of Judicial Officer

February 15, 2017

Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of **300 months, as to Counts 1, 4 and 6, to be served concurrently with each other; and 240 months as to Count 2 to be served concurrently to the sentence imposed in Counts 1, 4, and 6.**

☒ The court makes the following recommendations to the Bureau of Prisons:

1. That the defendant remain at the NORCOR facility for up to 90 days in order to complete current medical treatment.
2. That the defendant be incarcerated at FCI Victorville or other California institution

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the custody of the United States Marshal for this district:

- ☐ at _____ on _____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before _____ on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

The Bureau of Prisons will determine the amount of prior custody that may be credited towards the service of sentence as authorized by Title 18 USC §3585(b) and the policies of the Bureau of Prisons.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **10 years** as to Counts 1, 4, and 6; and 3 years as to Count 2.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. You must observe Reentry Court as directed by the Court and/or probation officer.
2. You must not communicate, or otherwise interact, with any known gang member without first obtaining the permission of the probation officer.
3. You must not communicate, or otherwise interact, with Anthony Ian Hernandez, Jon Eric McGuire, Francisco Salcido Fregoso, Art Casas , either directly or through someone else, without first obtaining the permission of the probation officer.
4. You must participate in a substance abuse treatment or alcohol abuse treatment program, which may include inpatient treatment, and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). The program may include urinalysis testing to determine if you have used drugs or alcohol. You must not attempt to obstruct or tamper with the testing methods.
5. You must not go to, or remain at any place where you know controlled substances are illegally sold, used, distributed, or administered without first obtaining the permission of the probation officer. Except as authorized by court order, you must not possess, use or sell marijuana or any marijuana derivative (including THC) in any form (including edibles) or for any purpose (including medical purposes). Without the prior permission of the probation officer, you must not enter any location where marijuana or marijuana derivatives are dispensed, sold, packaged, or manufactured.
6. You must not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances (e.g., synthetic marijuana, bath salts, etc.) that impair a person's physical or mental functioning, whether or not intended for human consumption, except with the prior approval of the probation officer.
7. You must submit to substance abuse testing to determine if you have used a prohibited substance. Such testing may include up to twelve (12) urinalysis tests per month. You must not attempt to obstruct or tamper with the testing methods.
8. You must submit your person, property, house, residence, vehicle, papers, or office to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments set forth in this judgment.

	<u>Assessment</u> <u>(as noted on Sheet 1)</u>	<u>Fine</u>	<u>Restitution</u>	<u>TOTAL</u>
<u>TOTALS</u>	\$400.00			\$ 400.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid in full prior to the United States receiving payment.

☐ If applicable, restitution amount order pursuant to plea agreement: \$_____.

☐ The defendant must pay interest on any fine or restitution of more than \$2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that

☐ The interest is waived for the ☐ fine and/or ☐ restitution.

☐ The interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

Any payment shall be divided proportionately among the payees named unless otherwise specified.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment¹ of the total criminal monetary penalties shall be as follows:

- A. ☒ Lump sum payment of \$ 400.00 due immediately in full.
☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, or ☐ E below; or
- B. ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ E below); or
- C. ☐ If there is any unpaid balance at the time of defendant's release from custody, it shall be paid in monthly installments of not less than \$ _____, or not less than 10% of the defendant's monthly gross earnings, whichever is greater, until paid in full to commence immediately upon release from imprisonment.
- D. ☐ Any balance at the imposition of this sentence shall be paid in monthly installments of not less than \$, or not less than 10% of the defendant's monthly gross earnings, whichever is greater, until paid in full to commence immediately.
- E. ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the Court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties, including restitution, shall be due during the period of imprisonment as follows: (1) 50% of wages earned if the defendant is participating in a prison industries program; (2) \$25 per quarter if the defendant is not working in a prison industries program.

It is ordered that resources received from any source, including inheritance, settlement, or any other judgment, shall be applied to any restitution or fine still owed, pursuant to 18 USC § 3664(n).

All criminal monetary penalties, including restitution, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of Court at the address below, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

**Clerk of Court
U.S. District Court - Oregon
1000 S.W. 3rd Ave., Ste. 740
Portland, OR 97204**

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ **Joint and Several**

Case Number

Defendant and Co-Defendant

Names

(including Defendant number)

Total Amount

Joint and Several Amount

**Corresponding Payee, if
appropriate**

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court costs:

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

¹ Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?

Mitchell Eisen
Brenna Dotson
Gregory Dohi



ABSTRACT

This study was designed to examine the potential biasing effect of gang evidence on jury verdicts. Two hundred four participants viewed one of two versions of a simulated trial that included opening statements and closing arguments by the prosecution and defense, and direct and cross-examination of the eyewitness and investigating officer. Half of the participants saw a version of the trial that included no mention of gang involvement, while the other half saw a version in which the prosecutor argued at opening and closing that the crime was committed for the benefit of a criminal street gang. In the gang version, participants also heard testimony from a gang expert who described the primary criminal activities of the gang. Jurors were read standard California jury instructions and deliberated in small groups. The prosecution's case was very weak by design. Results revealed that when mock jurors were polled before deliberations, only 13 percent who saw the trial without gang evidence voted guilty compared to 36 percent in the gang condition. After deliberation, none of the jurors found the defendant guilty in the no-gang condition. However, when gang evidence was introduced, 10 percent of the jurors continued to vote guilty. When faced with potent gang testimony in the absence of persuasive evidence, some jurors appeared to disregard reasonable doubt and vote to convict the defendant who was depicted as a dangerous gangster. This behavior appears to be driven by a form of jury nullification in the reverse direction, in which the defendant is judged to be deserving of punishment despite a lack of evidence related to the charge at hand. Implications of these data in the courtroom are discussed.

AUTHORS

Mitchell Eisen Ph.D., Brenna Dodson M.S., California State University, Los Angeles. Gregory Dohi, J.D., Los Angeles County Superior Court Judge, Adjunct Associate Professor, Southwestern Law School. Acknowledgements: We would like to thank Millan Djanbazian, Madhavi Guiot, Amani Hamed, Oriana McGee, Marilyn Orozco, Diamond Orso, Maisam Othman, Christine Schemezle, Giovanna Tavera, and Carli Yoneda for their work in collecting and entering the data, and Judge Darrell Mavis of the Los Angeles Superior Court for allowing us to combine our mock trial with his trial advocacy class at Southwestern Law School. All correspondence related to this article should be directed to Mitchell Eisen Ph.D., Department of Psychology, California State University, Los Angeles, Los Angeles, CA 90032. Email: meisen@calstatela.edu.

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INTRODUCTION

The words “gang-related” give rise to strong emotions in jurors. Many of us fear and hate criminal street gangs. “It is fair to say that when the word ‘gang’ is used in Los Angeles County, one does not have visions of the characters from the ‘Our Little Gang’ series. The word gang . . . connotes opprobrious implications.”¹

The California legislature captured the prevailing antigang sentiment in its preamble to the Street Terrorism Enforcement and Protection (STEP) Act:

The Legislature . . . 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 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.²

In a criminal trial, gang evidence can arise in a host of different contexts. “Evidence of the defendant’s gang affiliation—including evidence of the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime.”³

One way in which the prosecution can almost guarantee that the jury will hear gang evidence is to charge the STEP Act gang enhancement.⁴ If the jury finds that the defendant committed the crime for the sake of a gang, the gang enhancement can increase the sentence anywhere from two years to life, depending on the underlying crime.⁵ In order to prove the gang enhancement, the prosecution must present evidence of the gang’s size, its primary purposes, and its signs or symbols. The gang enhancement requires proof that the gang has previously committed certain crimes off a list that features many of the most

1. People v. Perez, 114 Cal. App. 3d 470, 479 (1981).
2. CAL. PENAL CODE § 186.21.
3. People v. Hernandez, 94 P.3d 1080, 1086 (Cal. 2004).
4. CAL. PENAL CODE § 186.22(b).
5. CAL. PENAL CODE § 186.22(b)(1)–(5).

heinous offenses.⁶ The gang enhancement can thus serve as a conduit for gang evidence: “In general, where a gang enhancement is alleged, expert testimony concerning the culture, habits, and psychology of gangs is permissible because these subjects are ‘sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.’”⁷

This study seeks to answer the question: Does the introduction of gang evidence cause jurors to convict defendants whom they might otherwise acquit? Are jurors more likely to convict just because the defendant has a connection to a criminal street gang? While the answers may seem obvious, there has been a dearth of scientific research as to the effect of gang evidence on jury decisionmaking.

I. GANG STATUS AS A RELEVANT EXTRALEGAL FACTOR

Jurors are often influenced by extralegal factors in determining guilt or innocence,⁸ and the effects of these extralegal factors tend to be most potent when the evidence is equivocal.⁹ In other words, the weaker the case, the stronger the effect of extralegal factors. There is good reason to believe that the label “gang member” invokes an extremely potent stereotype that can have a biasing effect on jurors, particularly when the evidence linking the defendant to the crime is weak. Once a negative stereotype like gang member is activated, people often seek information that further supports the instilled perspective. Frey referred to this as “confirmation bias.”¹⁰ Once this bias is instilled, the jurors may tend to filter the evidence presented through the negative stereotype that has been activated.

Recently, Eisen et al. directly examined the effect of gang evidence on mock juror decisionmaking.¹¹ These researchers created three versions of a simulated trial, all of which included opening statements and closing arguments by the defense and prosecution, together with direct and cross-examination of the investigating officer and the victim/eyewitness. The three versions differed only with regard to the prosecutor’s reference to the defendant’s gang associa-

6. CAL. PENAL CODE § 186.22(a), (e).

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

8. Barbara F. Reskin & Christy A. Visher, *The Impacts of Evidence and Extralegal Factors in Jurors’ Decisions*, 20 LAW & SOC’Y REV. 423, 435–37 (1986).

9. Jeffrey E. Pfeifer & James R. P. Ogloff, *Ambiguity and Guilt Determinations: A Modern Racism Perspective*, 21 J. APPLIED SOC. PSYCHOL. 1713, 1713–25 (1991).

10. Dieter Frey, *Recent Research on Selective Exposure to Information*, in ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 19, 41–80 (L. Berkowitz ed., 1986).

11. See Mitchell L. Eisen et al., *Examining the Prejudicial Effects of Gang Evidence on Jurors*, 13 J. FORENSIC PSYCHOL. PRAC. 1, 1–13 (2013).

tion in opening statements and closing arguments. Gang association was manipulated by describing the defendant as either having been seen hanging out with gang members on the night of the incident (the “gang affiliate” condition), or as being a documented gang member with a gang tattoo (the “hardcore gang member” condition). In the control condition, no mention of gangs was made at trial (the “no-gang” control condition).

When the prosecutor introduced testimony on gang affiliation in argument, guilty verdicts rose significantly from 48 percent in the no-gang control condition to 60 percent in the gang affiliate condition, and 64 percent in the hardcore gang condition. Although data from this study supported the hypothesis that introducing evidence of gang affiliation increases guilty verdicts, it was not exactly clear what caused the effect, or how powerful it was. It is possible that mentioning the gang association worked very much like 1101(b) evidence,¹² in that it implied the defendant had a history of criminal behavior, leading the jurors to think it more likely that the defendant committed the act in question. Alternatively, the gang evidence may have colored the jurors’ perception of the defendant’s character just enough to push the mock jurors over the edge in a close case. Or, it may be that introducing the defendant’s gang association prejudiced the jurors to an extent that they were willing to ignore reasonable doubt in order to incarcerate a defendant whom they perceived to be a danger to society by virtue of his gang association. Unfortunately, the data from this study could not be used to test this latter possibility, because the underlying facts of the case were not skewed enough toward acquittal to gauge whether jurors were willing to disregard reasonable doubt just to convict a gang member.

A. The Current Study

The current study was designed to build on the initial work by Eisen et al., and to further examine the extent to which gang evidence can bias jury verdicts. The authors hoped to examine whether the presentation of gang evidence can prejudice jurors to such a degree that they would ignore obvious reasonable doubt and vote to convict even in the absence of sufficient evidence. In the previous study, guilty verdicts were split fairly evenly in the control condition, indicating that the evidence was equivocal, but reasonable doubt was not clearly established. In this study, we created an eyewitness identification case in which the evidence was so weak that few jurors, if any,

12. CAL. EVID. CODE § 1101(b) permits evidence of prior bad acts in order to prove certain specified things, such as identity, motive, or lack of accident.

would vote guilty in the absence of gang evidence. There was no evidence of the defendant's involvement in the crime whatsoever; he became the target of the investigation solely by virtue of his association with one of the actual robbers who confessed to the crime and his documented association with a street gang. Based on the gang connection alone, and despite the fact that the defendant did not fit the description provided by the only eyewitness, police put the defendant's picture in a six-pack photo array. According to the testimony, the witness viewed the six-pack for some time and then told the officer only that the defendant's picture looked similar to the gunman. Apart from the gang affiliation, that tentative identification was the only evidence against the defendant. Given this scenario, it would be reasonable to conclude that any jurors who voted guilty were simply ignoring reasonable doubt.

This experiment was designed to improve on Eisen et al.'s previous methodology by addressing threats to that study's generalizability. First, jurors in the previous study decided on a verdict without deliberating in groups, unlike the deliberation process at trial. In the current study, jurors deliberated in groups in addition to providing predeliberation verdicts. Second, in the previous study, the information regarding the defendant's gang affiliation was only presented through the prosecutor's opening statement and closing argument. In the current study, a gang expert testified, just as in a typical trial with gang enhancement charges. Finally, in the previous study, jury instructions were not used. In this study, standard instructions from the CALCRIM pattern instructions, including CALCRIM no. 1401 on the gang enhancement, were read to participants before testimony and just before deliberation.¹³ Taken together, these changes to the previous method increased the similarity between experiment conditions and typical criminal trial procedure.

The trial was designed for acquittal. We predicted that few if any jurors would vote guilty in the no-gang control condition. But when the defendant was charged with a gang related crime and gang testimony was added, we predicted that guilty verdicts would increase significantly despite the clear lack of evidence of guilt.

13. See JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS (2013), available at http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf.

II. METHOD

A. Participants

Participants included 212 undergraduate psychology students (139 females, 73 males) from California State University, Los Angeles. The students all participated in the study voluntarily and were recruited based on their enrollment in various undergraduate psychology classes. The participants ranged in age from eighteen to thirty-six ($M=21.80$, $SD=5.28$). The participants varied in ethnicity, with 56 percent identifying themselves as Latino, 22 percent as Asian/Pacific Islander, 4 percent as White, 7 percent as African American, 8 percent describing themselves as something other than the aforementioned ethnicities, and 2 percent not identifying their ethnicity. This distribution generally reflects the ethnic representation in the University and the surrounding geographic area.

B. Procedures

Participants were told that they would be going to see a video of a condensed trial, and that they were being asked to act as a juror in this trial. Participants were informed that they would see opening statements from the prosecution and defense followed by the presentation of evidence, which included testimony from the investigating officer and the eyewitness, who was also the victim in this case. After the presentation of evidence, both sides would present closing arguments.

1. Jury Instructions

Following the informed consent procedures, participants listened to a set of selected CALCRIM pretrial jury instructions. The instructions were selected by a California Superior Court judge who had worked for many years as a gang prosecutor before moving to the bench. These instructions were read aloud to the participants on a prerecorded CD while they read along with their own printed copy. The following CALCRIM pretrial instructions were used: no. 110 (trial process), no. 102 (note taking), no. 103 (reasonable doubt), and no. 104 (evidence).

Following the trial, jurors were read a set of CALCRIM posttrial instructions. As with the pretrial procedure, a CD played the instructions, while participants read along on printed copies. The following CALCRIM instructions were used: no. 300 (all available evidence), no. 301 (single witness's tes-

timony), no. 315 (eyewitness identification), no. 1600 (robbery defined), no. 1603 (intent of aider and abettor in a robbery case), no. 3500 (unanimity), and no. 3550 (predeliberation instructions). In the gang condition, CALCRIM no. 1401 (crimes committed for the benefit of a criminal street gang) was also read.

2. Trial Video

Participants viewed the forty-five minute staged trial on a twenty-inch computer screen, in groups of four to seven. Two current Superior Court judges, both experienced former gang prosecutors and both currently adjunct professors at a local law school, played the prosecutor and defense attorney. A Los Angeles County deputy sheriff, who is frequently called to provide expert gang testimony in Superior Court, played the investigating officer. The deputy also testified as an expert witness in the gang condition. A professional actor played the victim.

The simulated trial contained the following stages: (1) Opening statements by the prosecution and defense counsel, (2) direct and cross-examination of the investigating officer/gang expert, (3) direct and cross-examination of the victim/witness, and (4) closing arguments by the prosecution and defense.

The victim testified that he had been robbed at gunpoint by two men after leaving a bar late at night. The witness acknowledged having had several drinks just before the event. Evidence was introduced that days after the robbery, a deputy sheriff approached a car similar to the one used in the robbery.¹⁴ The deputy testified that several young Hispanic men were surrounding the car listening to music, drinking, smoking pot, and working on the car. The car belonged to a man named Alvarez. In the car, the police found a gun that matched the one used in the robbery, as well as property stolen from the victim. The jurors heard testimony that Alvarez confessed to his involvement in the robbery and settled his case before this trial.

The defendant was one of several men seen hanging around the car when the police arrived to arrest Alvarez. The deputy testified that the defendant only became a suspect because he was a young Hispanic male, wearing a sleeveless white undershirt similar to the one described by the victim days earlier. Beyond the defendant's association with Alvarez, the police found no other evidence tying him to the crime. Further, the defendant did not match the victim's description in significant ways. Most notably, he was

14. The license plate was a partial match, and the make and color matched those of the car used in the robbery.

covered in tattoos on his arms, chest, and neck, which were never mentioned by the victim/witness. Nevertheless, the deputy put the defendant's picture in a six-pack photographic lineup. The witness reportedly studied the six-pack for some time before stating that the defendant's face looked similar to the second robber.

Experimenters created two versions of the trial tape: In the no-gang control condition, the trial contained no mention of gang involvement. In the gang condition, the investigating officer was qualified as a gang expert and testified that the defendant was a high-ranking member of a well-known criminal street gang. The prosecutor reiterated this point in his closing argument.

3. Posttrial Procedures

Following the presentation of the trial video and the posttrial jury instructions, participants were given a form titled "Verdict Form 1." Participants were reminded to vote as if they were a juror for a real trial, and the defendant was a member of their community. The form told participants to assume the defendant would return to their community if found not guilty, as he would after an actual trial. The form then asked participants to indicate how they would vote if they were asked to render a verdict "right now." In addition, participants were asked to indicate how confident they were in their verdict on a scale of 0–100, and to provide the reasons for their verdict.¹⁵

Participants were then given a second sheet of paper, titled "Trial Questionnaire." This form asked participants to mark their age, gender, and race. The form also asked several questions about the case to ensure participants had paid attention. The form asked for the defendant's name, Alvarez's identity and role (the robber who plead), the defendant's charge, and the primary evidence against the defendant. Ten participants confused Alvarez with the defendant and/or could not identify one or either individual. Their data were dropped from the sample.

Participants were then placed in groups of four to seven and listened to an audio recording of additional jury instructions. The following CALCRIM posttrial concluding instructions were used: no. 3500 (unanimity) and no. 3550 (standard predeliberation instructions). The panel was then lead to a room for deliberation.

15. When they finished, participants were asked to put the form in a cardboard box at the front of the room. They were reassured that all responses would remain anonymous.

After deliberation, participants were each given a form titled “Post Deliberation Verdict Form.” This form instructed participants to vote on the verdict a second time, “Now that you have had the time to deliberate with your fellow jurors we would like you to vote one more time. It is assumed that you kept an open mind during the deliberations and considered your fellow jurors['] perspectives.” They were then asked for a verdict and to rate their confidence in the verdict. Participants were also asked if the verdict was unanimous, how long it took the group to reach the verdict, and the reasons supporting the verdict. Finally, participants were asked if they had any prior knowledge of this study from discussions with other students. If they reported having prior knowledge of the study, their data were dropped from the sample.¹⁶

C. Jurors’ Attitudes

After deliberations, follow-up questions were asked to examine the participants’ experience with and attitudes toward the police and gang members. In summary, 42 percent of participants reported that they had friends or family that had been part of a gang; 35 percent stated that they know someone who was falsely accused of a crime; 77 percent reported being concerned about the police lying to prosecute an innocent person; and 56 percent reported being concerned about putting a gang member back on the street.

III. RESULTS AND DISCUSSION

This study was designed to examine the potential prejudicial effect of gang evidence on juror decisionmaking. We were interested in investigating whether including a gang enhancement charge in a criminal trial would affect juror verdicts when the evidence was weak and reasonable doubt was clear.

As predicted, participants were more likely to render a guilty verdict when evidence was introduced that the defendant was a member of a gang. When participants were polled prior to deliberations, significantly more participants indicated that they would vote guilty in the gang condition compared

16. All together, sixteen participants were dropped from the study, either because they demonstrated a fundamental misunderstanding of the case (e.g., confused Alvarez, who was caught with the stolen goods and entered a guilty plea already, with Rivera, who was the defendant on trial), or because they informed the research assistants that they had been told about the details of the study before participating. Eight of the disqualified participants were male and eight were female. Nine of the disqualified participants were Latino, five were Asian, and one was White. The following analyses were conducted with the remaining 207 participants.

to the no-gang control condition.¹⁷ Guilty verdicts in the gang condition exceeded not-guilties by nearly a three-to-one margin (33 percent vs. 12 percent). The 21 percent increase in guilty verdicts from the no-gang controls to the gang condition is in line with data reported by Eisen et al.,¹⁸ who found a 19 percent increase in guilty verdicts when evidence of gang membership was introduced in a simulated trial (44 percent vs. 63 percent).¹⁹ In that study, when testimony was introduced by the investigating officer that the defendant had merely been seen hanging out with local gang members on the night of the incident (the gang-affiliate condition), guilty verdicts rose 15 percent from 44 percent in the no-gang control condition to 60 percent. Taken together, these studies show that the introduction of testimony indicating any sort of association with a gang, even a weak one, can have a significant prejudicial effect on jury verdicts.

When examining verdicts after deliberations, none of the participants in the no-gang control condition voted guilty, whereas 10 percent of the participants in the gang condition continued to vote guilty after deliberation. This included two panels that voted unanimously for a guilty verdict and one hung jury. The fact that none of the mock jurors continued to vote guilty after deliberating shows that the evidence was clearly insufficient to support a guilty verdict. So why did 10 percent of the mock jurors continue to vote guilty despite the clear lack of evidence in this case? The qualitative data give us a look into the participants' thought process.

A. Qualitative Analyses

Among participants in the gang condition who voted guilty prior to deliberation, the most common reason provided for finding the defendant guilty was related to the defendant's gang membership and/or his previous criminal

17. A binary logistic regression was conducted with predeliberation verdict as the dependent variable and trial condition (gang vs. no-gang control), gender, ethnicity, and age as predictors. Since approximately half of the participants were Latino, ethnicity was dummy coded as Latino v. non-Latino. The chi-square test for change in likelihood due to the model was significant $X^2(4, N=207)=18.59, p=.001$. Based on the Wald test of significance, both trial condition ($Wald=9.33, p<.02$), and ethnicity ($Wald=7.35, p=.007$) were each significant predictors of the predeliberation verdict, while age and gender were not found to be related to the predeliberation verdict. Specifically, 33 percent of participants indicated they would have voted guilty before deliberations in the gang condition compared with 12 percent in the no-gang condition. Regarding ethnicity, non-Latinos were more likely to vote guilty before deliberation, regardless of trial condition (32.5 percent compared with Latinos 17.3 percent).

18. Eisen et al., *supra* note 11.

19. *Id.*

history (35 percent). The second most common reason provided was that incriminating evidence was found in his friend Alvarez's car (26 percent). Following deliberations, thirty-one participants in the gang condition changed their verdicts from guilty to not guilty. Participants stated that they changed their verdicts due to lack of evidence (48 percent); difference in the defendant's appearance from the suspect in the victim's description (29 percent); not understanding the facts well before deliberations (10 percent); and lack of witness credibility (10 percent). Deliberations of the groups that continued to vote guilty in the end showed that they all focused on the defendant's gang membership and/or criminal history. This latter point is significant, as no mention of criminal history was introduced, so jurors must have inferred this by virtue of his gang affiliation.

In the no-gang control condition, only 13 percent of the mock jurors voted guilty before deliberations, and all of them either reported voting guilty because of his affiliation with one of the actual robbers or the eyewitness testimony. All of these mock jurors changed their verdicts to not guilty after deliberations.

B. How Did the Gang Evidence Affect Verdicts?

The prejudicial gang effect observed in this study could be attributed to confirmation bias. Accordingly, charging the crime as gang-related may have convinced the mock jurors that the defendant was a bad actor, independent of any evidence presented by the prosecutor. This may have further led the jurors to infer that the defendant had probably committed this crime, based on his presumed history of criminal activity. From this perspective, the gang evidence simply bolstered the prosecution's case, resulting in a greater likelihood of guilt, and thus tipping the scales enough to affect verdicts.

Alternatively, the mock jurors who continued to vote guilty may not have simply viewed the gang evidence as an additive factor that helped tip the scales toward a guilty verdict. Rather, those mock jurors may have ignored reasonable doubt altogether because of the gang evidence. We argue that this alternative explanation is clearly plausible, and is best supported by the data.

C. Ignoring Reasonable Doubt

As noted above, after deliberation, none of the jurors in the no-gang control condition voted guilty. These data provide strong support for the notion that reasonable doubt was well established. Thus, it appears that the mock jurors in the gang condition who continued to vote guilty after deliberating simply ignored reasonable doubt in spite of clearly insufficient evidence. These jurors voted to convict

the defendant based at least in part on the fact that he was a member of a criminal street gang. The qualitative data supports this explanation. The most common reason provided by participants in the gang condition who voted guilty predeliberation was the defendant's gang affiliation and/or his criminal background. As noted above, the only bit of evidence suggesting that the defendant even had a criminal background was his gang membership. Moreover, the defendant's gang affiliation and criminal history were discussed during the deliberations of each panel when the mock jurors ultimately voted guilty.

D. Jury Nullification in the Reverse?

Taking a dangerous gang member off the street sounds like commonsense justice to many, and the merits of such an outcome are hard to argue with. If, however, the decision to convict and incarcerate the defendant is made based in part or whole on the argument that he is a dangerous gang member and a threat to the community, and not based on the evidence of the charged crime, then this type of decision could be characterized as a type of jury nullification in the reverse.

Jury nullification occurs when sympathetic jurors disregard the specific letter of the law and instead vote to acquit morally acceptable (but legally guilty) defendants.²⁰ These jurors take the law into their own hands in order to administer their own version of commonsense justice. Most research on jury nullification has focused on the instances in which jurors acquit legally guilty but perhaps morally innocent defendants.²¹ This study presents an opportunity to examine what happens when jurors face the opposite scenario: in which the evidence against the defendant is weak, but the defendant is understood to be a morally corrupt member of a dangerous street gang whose prime objective is to terrorize the community at large. In such an instance, if reasonable doubt has been clearly established by the defense, the jurors would be placed in an arguably difficult position: They could elect to put a dangerous criminal back on the street, or they could decide to act with their conscience, ignore the reasonable doubt, and lock up the dangerous criminal, and by extension complete their civic duty as a juror by reducing the larger gang threat to the community. In this instance, many ordinary folks would agree that locking him up is a notion that has genuine merit and may be the morally correct choice whereby the ends ultimately justify the means.

20. See Irwin A. Horowitz & Thomas E. Willging, *Changing Views of Jury Power: The Nullification Debate, 1787–1988*, 2 LAW & HUM. BEHAV. 165, 174 (1991).

21. See Irwin A. Horowitz et al., *Chaos in The Courtroom Reconsidered: Emotional Bias and Juror Nullification*, 30 LAW & HUM. BEHAV. 163, 164 (2006).

In the current study, the gang expert described in detail to the jury his personal knowledge that the defendant was a high-ranking member—a “shot-caller”—in a violent criminal street gang. The officer explained that the gang was in the business of intimidation, extortion, drug dealing, and murder.

Finkel describes jury nullification as commonsense justice, noting that nullification decisions by jurors result in judgments of “what ordinary people think the law ought to be.”²² Finkel notes that jury nullification requires four criterion to be met. First, the proper verdict must be apparent, and jurors must knowingly rule differently. Second, the correct verdict must be an actual option for the jury. Third, jurors must fully understand the concept of reasonable doubt, to a degree that their verdict does not merely represent a misunderstanding of that concept. Finally, the jurors must understand the legal instructions, and knowingly act against them.²³

Our reverse nullification argument meets Finkel’s four criterion for jury nullification. First, reasonable doubt was apparent, as demonstrated by the fact that no participants in the no-gang control condition voted guilty in the no-gang condition after deliberation. Second, the correct verdict—acquittal—was an actual option for the jury. Third, an understanding of reasonable doubt was established the same way it is done in any actual trial, through reading legal instructions to jurors. Finally, the fact that no participants voted guilty in the no-gang control condition indicates that reasonable doubt was in fact established, and the standard was understood by the participants in this study. Thus, those jurors who voted guilty postdeliberation knowingly acted against those instructions.

Horowitz noted that in nullification cases, jurors spend time discussing the defendant’s characteristics and often acquit those defendants whom they find morally acceptable.²⁴ In this study, an examination of the deliberations among those jurors who voted guilty in the gang condition consistently revealed that discussions of the defendant’s gang membership was central to the ultimate verdict. In this instance, when discussions turn to the moral acceptability of the violent gang member, it appears likely that jury verdicts were influenced in the reverse direction.

22. See NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS’ NOTIONS OF THE LAW 2 (2001); see also Norman J. Finkel, *Commonsense Justice and Jury Instructions: Instructive and Reciprocating Connections*, 6 PSYCHOL. PUB. POL’Y & L. 591 (2000) [hereinafter Finkel, *Commonsense Justice*].

23. See Finkel, *Commonsense Justice*, *supra* note 22, at 628.

24. See Irwin. A. Horowitz, *The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials*, 9 LAW & HUM. BEHAV. 25, 25–36 (1985).

E. Bifurcation: A Rarely Used Remedy

In order to prevent gang evidence from biasing the trier of fact, a defendant may seek to bifurcate the trial, separating the gang enhancement charges from the underlying charges, just as allegations regarding prior convictions are commonly bifurcated. The party seeking bifurcation has the burden of clearly establishing that there is a substantial danger of prejudice, which requires that the charges be separately tried. Bifurcation, however, is generally denied when “gang affiliation and activity [are] woven into the factual fabric” throughout the case.²⁵

When bifurcation is granted, the gang evidence is considered in a separate phase of the trial and only if the defendant is first convicted. Certainly, in some cases, as in retaliation shootings, the gang allegation is central to the prosecution’s case in chief. In these cases, gang evidence must be presented to the jurors in order to prove the charges. A similar situation frequently arises when the perpetrator announces his or her gang affiliation as part of the offense. Not presenting gang evidence when it is central to the prosecution’s case would be problematic, as it would deprive the jurors of getting a full picture of the totality of the evidence.

In many trials that involve gang enhancement charges, however, the defendant’s gang affiliation is not central to proving the facts of the case. Yet prosecutors still argue that just about any crime committed by a gang member is done for the benefit of the gang. Gang experts frequently assert that all criminal activity perpetrated by individuals associated with a gang is part of “the work” each gang member needs to put in to rise in the ranks of the gang.²⁶ Greater utilization of bifurcation when the gang evidence is not central to proving the prosecution’s case may provide an effective remedy to eliminate the prejudicial impact of the gang evidence on jurors’ decisionmaking.

25. See *People v. Funes*, 23 Cal. App. 4th 1506, 1516–19 (1994); see also *People v. Hernandez*, 94 P.3d 1080, 1087 (2004) (“[W]e conclude that the trial court’s discretion to deny bifurcation of a charged gang enhancement is similarly broader than its discretion to admit gang evidence when the gang enhancement is not charged.”).

26. See *In re I. M.*, 125 Cal. App. 4th 1195, 1201–02 (2005) (The probation officer testified that “[v]iolent acts demonstrate the strength of the gang, and members will commit violent acts as a means of obtaining ‘stripes,’ which signify status within the gang. In order to earn a stripe, a member not only has to commit a violent act, but has to commit it in the presence of another gang member. The other gang member is supposed to provide assistance to the member committing the violent act, and is supposed to do whatever he can to prevent the offender from being criminally prosecuted for the offense. A member gains respect within the gang by lying to the police, fabricating defenses, misidentifying people, hiding evidence or aiding in the escape of a gang member who commits a crime.”)

IV. SUMMARY

The findings in this study replicate and extend those of Eisen et al. and show that introducing gang evidence at trial can have a significant prejudicial effect on juror decisions as to the defendant's guilt or innocence. Taken together, these data show that informing a jury that the defendant is a gang member significantly increases the likelihood of a guilty verdict. Further, the current data indicate that when a gang expert is called to inform the jury that the defendant is a member of a dangerous criminal street gang, as is frequently done at trial, a significant minority of jurors will vote to convict even when reasonable doubt has been clearly established.

A. Limitations

There were several limits to this study that are worth noting. First, the participants knew that they were taking part in a simulation. No matter how seriously the participants took their role in the research, the decision they were being asked to make was qualitatively different than what jurors would face in an actual trial. While the decision to convict or acquit would not have a direct effect on any actual person's life, it also would not in fact result in a dangerous gang member being released back into the neighborhood. It is also worth noting that the sample of young college students from in or around East Los Angeles used in this study is not typical of jurors in actual trials. Most of the participants grew up in neighborhoods where many of their peers were affiliated with gangs at some level. As noted earlier, 42 percent of participants in this study stated that they had friends or family who were gang members. This sample of urban college students was also highly suspicious of the authorities in general. When asked about their backgrounds and attitudes after participation, 77 percent reported being concerned about the police lying to prosecute innocent people, and 35 percent personally knew someone who was had been falsely accused of a crime. It is likely that if this study were conducted in a different setting, the gang effect would have been much larger. Future studies might sample older participants and individuals from other areas where the participants would have had less contact with and understanding of people associated with gangs.

TABLE 1. Participant's attitudes towards law enforcement, gang members, and contact with gangs.

	Predeliberation				Postdeliberation			
	Gang		No-Gang		Gang		No-Gang	
	Guilty	NG	Guilty	NG	Guilty	NG	Guilty	NG
Afraid to put a gang member back on the street?	67.6%	52.1%	50%	55.6%	63.6%	56.6%	...	54.8%
Have friends or family that have been part of a gang?	45.9%	37.3%	41.7%	42.2%	18.2%	42.6%	...	44.7%
Concerned about police lying to prosecute innocent people?	81.1%	82.7%	66.7%	72.2%	100%	80.2%	...	70.6%
Know anyone who has ever been falsely accused of a crime?	37.8%	38.7%	41.7%	28.8%	18.2%	42.6%	...	30.6%