

Gang Prosecution in Virginia: Law and Perspective

by Ann Cabell Baskervill



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As the City of Richmond's assistant commonwealth's attorney responsible for prosecuting gangs and gang cases, I have quite a specific niche. Yet within this highly specialized practice area I deal with a myriad of laws and legal issues, and a subject area that is exciting, trendy, and constantly evolving. Although gang laws and legal issues were not on the law school curriculum for most of us, being knowledgeable about criminal law requires a basic grasp of this topic. Accordingly, here is a brief discussion of gang laws and legal issues. I rely on my own experiences to provide some factual context and insight on this topic, and hope this will be relevant and edifying to all attorneys as lawmakers, advocates, civic leaders, and community members.

There Is No Soundtrack

The title "gang prosecutor" is an intriguing one. While I'd be tickled if it happens to bring to mind an Angelina Jolie type role, the truth is that there is not, has never been, and will never be any sort of movie soundtrack playing as I head to work each morning. We all know that crime caper flicks

and entertaining procedurals don't address the heart-rending damage that crime inflicts on individuals, families, and communities. Yet gangs and gang issues strike us as vaguely exotic and entertainingly dramatic, do they not? This is so for lawyers as well as community residents and gang members themselves — perhaps *especially* for gang members. Herein lies part of the problem. Gang cases and issues — and gangs themselves — are so dramatic (the real, human experience kind of dramatic) that in our pop-culture-obsessed, reality-TV-saturated world, gangs and gang cases seem to beg for some kind of pulsating soundtrack. But, in real life there is no soundtrack. There simply are endless gripping tales and puzzles, intersecting with various interpersonal bonds, relationships, and disconnects. It is here that we find a growing, evolving body of laws, policies, experiences, and strategies as we cope with gang issues in our society, and seek justice.

Why This Is a Criminal Justice Issue

As advocates, we must understand, appreciate, and articulate the applicable rules of play if we are to persuade a decision-maker to endorse our positions. In gang prosecution, the rules of play are the substantive criminal statutes designating chargeable offenses, the procedural and evidentiary laws and rules regarding fairness and admissibility, and the public policy issues inherent in governing with limited resources and competing political interests.

My appreciation for Virginia's gang laws and enforcement efforts continues to grow with each experience. First, there is the fundamental truth that people act differently with others than alone.

Anyone familiar with fraternity drinking games can think of particular bonding rituals that exhilarate when performed *en masse* but would seem disgusting, if not psychotic, if undertaken solo. Or consider streaking, a caper that strikes many as hilarious when with a group, but perverted (or at least mortifying) if done alone. The bottom line is that peer pressure and group-think are powerful forces.

Once people organize themselves by groups, these affiliations can foster prejudices against others not similarly categorized.¹ Fans of the excellent movie *Gran Torino* may recall an early scene where an encounter between Hmong teens and Mexican teens threatens to escalate into an all-out brawl,² providing but one example of how us-versus-them themes affect street crimes. Certainly, gangs influence when, why, how, and with whom crimes occur. Shocking misdeeds become possible where members of a team combine efforts to maximize the force they can apply and turf they can cover, meanwhile egging each other on and dividing up tasks and responsibilities.³

Further, gangs and gang life affect social norms and twist members' perspectives in anti-social ways that run counter to the rule of law. Where a group earns "respect" and "superiority" through force, fear, and intimidation, many individual members find that being "respected" or feeling "superior" relies on their affiliation with the respected, superior, exclusive group. This is a pretty empty and morally conflicted way to live, if one thinks about it — so gang members cannot think about it. Thus instant gratification reigns, driven at least in part by the group's conquests.⁴ As a Google search of "Crips" or "Crip Killer" will reveal, inflicting violence on opposing factions is a mainstay of the culture of some gangs. While in Virginia we rarely see killings committed on the mere basis of a rival affiliation, simply talking, singing, or writing about such violence takes its toll on how some sub-cultures define acceptable behavior. Given what we know about group psychology and group-think, this becomes a public safety problem when a group's very *raison d'être* is to commit crimes. This brings us to Virginia's gang laws.

Defining Criminal Street Gangs

When we speak of gangs in the context of gang prosecution or criminal laws generally, we almost always are referring to "criminal street gangs," as defined in Virginia Code § 18.2-46.1. Under the code, a criminal street gang is any ongoing organization, association, or group of three or more

persons, whether formal or informal, (i) which has as one of its primary objectives or activities the commission of one or more criminal activities; and (ii) which has an identifiable name or identifying sign or symbol; and (iii) whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity. A "pattern of criminal gang activity" means the commission of, attempt to commit, conspiracy to commit, or solicitation of two or more predicate criminal acts, provided (1) at least one of the predicate criminal acts was an act of violence as defined in § 19.2-297.1; (2) the criminal acts were not part of a common act, transaction, or scheme; and (3) the criminal acts were committed by two or more persons who are members of, or belong to, the same criminal street gang. The statute enumerates offenses deemed "predicate criminal acts," and the list is fairly extensive though not entirely predictable, with specified offenses ranging from violent felonies such as murder to certain misdemeanors such as vandalism, though perhaps inexplicably excluding burglary and possession of a firearm by a convicted felon.

Identifying Gang Members

Many law enforcement agencies have helpful lists of what they consider to be criteria of gang membership, but Virginia Code § 18.2-46.1 does not include any such list. However, the statutes do provide some guidance for gang membership criteria, in Virginia Code § 52-8.6, which addresses gang reporting requirements among law enforcement agencies.

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According to § 52-8.6, law enforcement agencies shall provide information to certain state and national databases "[w]hen it is determined . . . that a person is a member of a criminal street gang, as defined in § 18.2-46.1 by means of (i) an admission of membership in a gang; (ii) an observation by a law-enforcement officer that a person frequents a known gang area, associates with known gang members and demonstrates gang style of dress, tattoos, hand signals, or symbols; or (iii) being arrested on more than one occasion with known gang members for offenses consistent with gang activities."

Judgment Calls on Gang Evidence; Expert Testimony

How do we establish someone as a gang member, for court and prosecution purposes? Self-admissions can be extremely valuable, though there are limitations, primarily the practical difficulties and constitutional obstacles for obtaining such self-incriminating statements (not to mention the few individuals I've encountered who, for whatever reason, have *falsely* claimed gang membership, but these are outliers and often require competency evaluations on other grounds). The law-enforcement reporting statute provides some guidance, but its proper application requires expertise and good judgment.

Essentially, since this determination requires a conclusion or opinion, deciding whether someone is a gang member for court purposes relies upon expert testimony. As a general rule, opinion testimony is not admissible in court. However, a witness who is recognized as an expert by the court may testify to his or her opinion, if the opinion regards a topic that is not understood as common knowledge — that is, if the fact-finder is not equipped to draw proper inferences from the facts in evidence.⁵

The Virginia Court of Appeals addressed the admissibility of gang expert testimony in *Utz v. Commonwealth*.⁶ Noting that “[e]xpert testimony is appropriate to assist triers of fact in those areas where a person of normal intelligence and experience cannot make a competent decision,” the court held that gang-related evidence is, indeed, “beyond the common knowledge and experience of ordinary jurors.”⁷ *Corado v. Commonwealth*⁸ also provides guidance about gang expert testimony, holding that gang expert testimony is admissible where it is based on facts in evidence.⁹

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Police investigators who are familiar with gang culture and gang identifiers often are able to provide gang expert opinion testimony. Similarly well-equipped are many probation officers, corrections officers, and agency crime analysts who specialize in gang work. I don't see why a knowledgeable gang member couldn't provide appropriate gang expert testimony, but many judges

disagree. As with so many issues and questions — gang-related or not — protocols, best practices, and what “works” vary widely across jurisdictions and courtrooms. This is especially true in the gang context, since the applicable statutes are fairly modern, the case law is relatively undeveloped (particularly regarding evidentiary issues), and much remains untried and untested among judges, defense attorneys, prosecutors, and witnesses.

By describing and decoding particular gang signs, symbols, rituals, hierarchies, and slang, gang expert testimony can establish the very existence of a criminal street gang — fleshing out the sub-elements of the statutory definition under § 18.1-46.1 — and can explain how a defendant reveals his gang affiliation through certain characteristics, including factors that might seem innocuous or irrelevant to an untrained, non-expert observer. Such testimony also illuminates gang evidence for gang-specific crimes, sentencing and bail determinations, and other contexts in which gang issues are relevant.

Gang-Specific Offenses

It is not illegal to be in a gang, join a gang, or simply congregate with gang-affiliated friends. What is illegal is to *commit certain crimes* as a gang-affiliated person, where the crimes are gang-related in that there is a nexus between the gang and the crime. It is a felony under Virginia Code § 18.2-46.2 to actively participate in, or be a member of, a criminal street gang and to knowingly and willfully participate in a predicate criminal act committed for the benefit of, at the direction of, or in association with a criminal street gang.¹⁰ We recall that § 18.2-46.1 defines “criminal street gang” and “predicate criminal act.”

In the context of defining a gang under § 18.2-46.1, the term “predicate criminal acts” referred to enumerated offenses committed in the past by a group's members; a certain history of predicate criminal acts must exist before a group is a criminal street gang as defined in § 18.2-46.1. For felony gang participation under § 18.2-46.2, “predicate criminal act” still refers to the list of offenses set forth in § 18.2-46.1, but the significance is different. Under § 18.2-46.2, a predicate criminal act is the “certain crime” committed for the benefit of, at the direction of, or in association with a gang; an offender must be affiliated with a gang (as a member or participant) and must knowingly and willfully participate in that crime (the predicate criminal act) before he or she is eligible for a felony gang participation charge. A

felony gang participation charge is like the caboose of a train: just like a caboose cannot move forward without an engine to propel it, the mere fact of someone's gang involvement, in itself, is not going to move a case forward.¹¹

In addition to felony gang participation, gang recruitment is unlawful. Under Virginia Code § 18.2-46.3, it is a Class 1 misdemeanor to solicit, invite, recruit, encourage, or otherwise cause or attempt to cause another to actively participate in or become a member of what the defendant knows to be a criminal street gang. It is a Class 6 felony where the offender is eighteen years old or older and the subject of the recruitment is a juvenile; it is also a Class 6 felony if, in order to encourage an individual to join a criminal street gang, or to submit to a demand made by a gang to commit a felony, a defendant uses or threatens force against that individual or any member of that individual's family or household.¹²

Virginia Code § 18.2-46.3:3 establishes "gang-free zones" that are similar, but not identical, to school zones in the context of drug prosecutions.¹³ Under § 18.2-46.3:3, punishment for gang participation felony offenses occurring within the statutorily-defined areas shall include a mandatory minimum of two years of incarceration. Meanwhile, gang recruitment crimes occurring within gang-free zones also face increased penalties.¹⁴

Other substantive criminal statutes addressing gangs include Virginia Code § 18.2-46.3:1, which imposes enhanced penalties for repeat gang-crime offenders;¹⁵ § 18.2-55.1, which makes hazing a Class 1 misdemeanor;¹⁶ and § 18.2-46.3:2, which provides for forfeiture of gang assets.¹⁷

Gangs and Virginia Criminal Procedure

Given what we know about toxic group-think and gangs — and recognizing that *criminal activity* is a fundamental component of these gangs — it is unsurprising that Virginia law specifically and explicitly provides for the use of gang information at sentencing and bail determinations. Virginia Code § 19.2-299 directs that pre-sentencing reports shall include "any information regarding the accused's participation or membership" in a gang, including data about the gang's characteristics, rivalries, behaviors, and crimes, whether or not such descriptors are known to directly apply to a particular defendant.¹⁸ The law implicitly recognizes that, by affiliating himself with a gang, a defendant condones, endorses, supports, and inevitably is influenced by that gang's culture.

Virginia Code § 19.2-303 authorizes judges to impose gang-related conditions of probation and suspended sentences.¹⁹ In my experience, such conditions can be meaningful crime-prevention tools, while proactive enforcement of them can promote important public safety goals while perhaps averting greater dangers.

Regarding bail determinations, under Virginia Code § 19.2-120, there is a rebuttable presumption against bail where a defendant is charged with a gang participation or gang recruitment crime.²⁰ The same statute includes a defendant's gang membership as a factor to be

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considered in determining whether a defendant is a flight risk or public safety threat.²¹

Gang Evidence to Show Motive, Bias

Gang issues — and gang evidence — also come into play to show motive and bias, regardless of whether any gang-specific charges are being prosecuted. I have found that the relevance and admissibility of gang evidence to show motive or bias is a fiercely litigated issue. Of course, a broad range of information is accepted as relevant to motive and bias, and that relevant evidence is admissible where it is more probative than prejudicial. Unfortunately (from my perspective, at least), to mention the word "gang," with its scandalous and threatening connotations, is to expect an almost automatic objection from defense counsel and skepticism from the bench as to the potential prejudice. Yet the admissibility of such gang evidence is justified and endorsed by well-established case law.

Addressing the relevance and admissibility of gang evidence to show bias in *United States v. Abel*,²² the United States Supreme Court ruled unanimously in favor of admitting evidence of the defendant's prison gang affiliation — evidence of his gang membership and the gang's core tenets — both in cross-examination and with rebuttal testimony of extrinsic evidence showing bias.²³

Similarly, in *Payne v. Commonwealth*,²⁴ the Virginia Supreme Court found that "[e]vidence that defendant wanted to be feared as a killer in



order to join the local chapter of a motorcycle gang was relevant on the question of defendant's motive because, even though the prosecution is not required to prove motive, evidence of motive is relevant to establish a defendant's intent."

Likewise, in *Utz v. Commonwealth*, the Virginia Court of Appeals upheld the use of expert testimony by a gang investigator describing "the characteristics and culture of street gangs and, particularly, about the gangs of which the victim and [defendant] were respective members," where that evidence was offered to show that the defendant "had a motive, other than self-

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defense, for shooting the victim."²⁵ The *Utz* court cited *Abel*²⁶ and *Payne*,²⁷ among other cases, and observed, "Gang membership has frequently been found to be probative and admissible, for example, as evidence of a possible motive for the crime." Meanwhile, and again allowing gang evidence to be admitted where relevant, *Cousins v. Commonwealth*²⁸ endorses a defendant's right to cross-examine a prosecution witness about gang membership to show bias.²⁹

Concluding Thoughts

If this essay conjures up thoughts of a soundtrack, perhaps we imagine the dull sounds of typing and law book page turning inherent in legal research; the everyday in-court conversations and testimonies as we put the laws into practice; and the raucous chatter among police investigators, colleagues, and other agency partners, not to mention crime victims, civilian witnesses, and cooperating co-defendants, any or all of whom may be gang affiliated, as we share our perspectives, observations, stories, predictions, and other concepts that help us navigate through our gang prosecution efforts together. And sometimes the most appropriate soundtrack is the utter silence conducive to organizing each case. I laugh that litigating gang cases requires trials-within-trials-within-trials, given all the elements and sub-elements of issues that must be proven (and proven fairly expediently and gracefully). The best advice I can share with other criminal attorneys who are or may be handling gang cases is to sug-

gest a trial-within-trial-within-trial framework for organizing and analyzing your evidence, facts, laws, and strategies.

For working with gang members and participants, whether as clients, victims, defendants, coincidental witnesses, cooperators, or any other role that comprises the fabric of your case, the suggestion I will posit is to remember the soundtrack as initially mentioned here. I think of some gang participants imagining their criminal exploits to be accompanied by pulsating music, as in movies or television, adding drama, excitement, glamour, entertainment, and a distraction from the destruction and pain that results from such exploits. The soundtrack represents expectations for an identity characterized by importance, power, and greed. Those of us on the outside recognize that there is no soundtrack; any enticement or "coolness" is just a mirage. I have found that if I can evaluate a gang-related person's reaction to the soundtrack metaphor, it will provide guidance for communicating and proceeding from that point forward, whether by pursuing an advocacy goal or clarifying or strategizing for a particular legal or policy position.

Endnotes:

- 1 See, e.g., E. O. Wilson, "What's Your Tribe?" NEWSWEEK, April 9, 2012, at p. 42-46 (excerpted from EDWARD O. WILSON, THE SOCIAL CONQUEST OF EARTH (2012)). As Professor Wilson describes, "Experiments conducted over many years by social psychologists have revealed how swiftly and decisively people divide into groups and then discriminate in favor of the one to which they belong. Even when the experimenters created the groups arbitrarily, prejudice quickly established itself. Whether groups played for pennies or were divided by their preference for some abstract painter over another, the participants always ranked the out-group below the in-group. They judged their 'opponents' to be less likable, less fair, less trustworthy, [and] less competent. The prejudices asserted themselves even when the subjects were told the in-groups and out-groups had been chosen arbitrarily." *Id.* at 44. Professor Wilson explains that when our minds entertain prejudicial perspectives, our thought processes become ruled by the amygdala, the brain's center of fear and anger. And when the amygdala controls, "there is little or no guilt in the pleasure experienced from watching violent sporting events and war films in which the story unwinds to a satisfying destruction of the enemy. The horrors make the fascination. War is the strong life; it is life *in extremis*." *Id.* at 45. Professor Wilson's thesis did not relate to gangs, but readers can see how these concepts apply to gangs.
- 2 Clint Eastwood (Producer, Director, and Star), *Gran Torino* [film]; Warner Bros., 2009.

- 3 For a well-articulated law enforcement perspective on this issue, see AL VALDEZ, PH.D., *GANGS: A GUIDE TO UNDERSTANDING STREET GANGS*, 4th Ed. (2005), at 64, 67-68.
- 4 For an excellent, insightful discussion of similar ideas and observations, see VALDEZ, at 31, 64, 74-76.
- 5 *Simpson v. Commonwealth*, 227 Va. 557 (1984). See also *Grubb v. Hocker*, 229 Va. 172 (1985).
- 6 *Utz v. Commonwealth*, 28 Va. App. 411 (1998)
- 7 *Utz*, 28 Va. App. at 423 and 426. See also *Irvine v. Commonwealth*, 06 Vap UNP 2546043 (2006) (applying *Utz*); *Hubbard v. Commonwealth*, 06 Vap UNP 2511043 (2006) (applying *Utz*).
- 8 *Corado v. Commonwealth*, 47 Va. App. 315 (2005),
- 9 E.g., *Simpson*, 227 Va. 557.
- 10 Virginia Code § 18.2-46.2. The baseline charge under this statute is a Class 5 felony; meanwhile, it is a Class 4 felony if the defendant who is a participant or member of the criminal street gang is eighteen years old or older and knows or has reason to know that the criminal street gang also includes a juvenile member or participant.
- 11 The predicate criminal act, itself, need not be charged, but it must exist.
- 12 Virginia Code § 18.2-46.3.
- 13 Certain drug offenses within designated school zones are punished under Virginia Code § 18.2-255.2.
- 14 Virginia Code § 18.2-46.3:3 directs, “Any person who violates 18.2-46.2 (i) upon the property, including buildings and grounds, of any public or private elementary, secondary, or postsecondary school, or any public or private two-year or four-year institution of higher education; (ii) upon public property or any property open to public use within 1,000 feet of such school property; (iii) on any school bus as defined in 46.2-100; or (iv) upon the property, including buildings and grounds, of any publicly owned or operated community center or any publicly owned or operated recreational center is guilty of a felony punishable as specified in 18.2-46.2, and shall be sentenced to a mandatory minimum term of imprisonment of two years. A person who violates 18.2-46.3(A) upon any property listed in this section is guilty of a Class 6 felony, except that any person 18 years of age or older who violates 18.2-46.3(A) upon any property listed in this section, when such offense is committed against a juvenile, is guilty of a Class 5 felony. Any person who violates 18.2-46.3(B) upon any property listed in this section is guilty of a Class 5 felony. It is a violation of this section if the person violated 18.2-46.2 or 18.2-46.3 on the property described in clauses (i) through (iii) regardless of where the person intended to commit such violation.”
- 15 Under Virginia Code § 18.2-46.3:1, a third or subsequent conviction under § 18.2-46.2 or § 18.2-46.3, within a ten-year period, where each offense occurred on a different date, is a Class 3 felony.
- 16 Virginia Code § 18.2-55.1 provides, “It shall be unlawful to cause bodily injury by hazing (i) any member of a criminal street gang as defined in 18.2-46.1, or (ii) a person seeking to become a member of a youth gang or criminal street gang.
- Any person found guilty of hazing is guilty of a Class 1 misdemeanor. For purposes of this section, ‘hazing’ means to recklessly or intentionally endanger the health or safety of a person or to inflict bodily injury on a person in connection with or for the purpose of initiation, admission into or affiliation with or as a condition for continued membership in a youth gang or criminal street gang regardless of whether the person so endangered or injured participated voluntarily in the relevant activity.”
- 17 Virginia Code § 18.2-46.3:2 provides, in pertinent part, “All property, both personal and real, of any kind or character used in substantial connection with, intended for use in the course of, derived from, traceable to, or realized through, including any profit or interest derived from, any conduct in violation of any [gang crime statute] is subject to civil forfeiture to the Commonwealth. Further, all property, both personal and real, of any kind or character used or intended to be used in substantial connection with, during the course of, derived from, traceable to, or realized through, including any profit or interest derived from, criminal street gang recruitment as prohibited under Va. Code § 18.2-46.3 is subject to civil forfeiture to the Commonwealth. . . . The application of one civil remedy under the article does not preclude the application of any other remedy, civil or criminal, under this article or any other provision of the Code.”
- 18 Virginia Code § 19.2-299, in pertinent part, provides that a presentence report include “any information regarding the accused’s participation or membership in a criminal street gang as defined in § 18.2-46.1. . . . [I]nformation regarding the accused’s participation or membership in a criminal street gang may include the characteristics, specific rivalries, common practices, social customs and behavior, terminology, and types of crimes that are likely to be committed by that criminal street gang.”
- 19 Virginia Code § 19.2-303 provides, in pertinent part, “After conviction and upon sentencing of an active participant or member of a criminal street gang, the court may, as a condition for suspending the imposition of the sentence in whole or in part or for placing the accused on probation, place reasonable restrictions on those persons with whom the accused may have contact. Such restrictions may include prohibiting the accused from having contact with anyone whom he knows to be a member of a criminal street gang, except that contact with a family or household member, as defined in § 16.1-228, shall be permitted unless expressly prohibited by the court.”
- 20 Virginia Code § 19.2-120(B)(9).
- 21 Under Virginia Code § 19.2-120(D)(2), in determining whether a defendant can rebut a presumption against bond and whether there are conditions of release that will reasonably assure the defendant is not a flight risk or danger to public safety, the court shall consider “the history and characteristics of the person, including his . . .

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membership in a criminal street gang as defined in 18.2-46.1.”

22 *United States v. Abel*, 469 U.S. 45 (1984).

23 *Id.* The Court stated, “A witness’ and a party’s common membership in an organization, even without proof that the witness or party has personally adopted its tenets, is certainly probative of bias.” *Id.* at 52. The Court further explained, “For purposes of the law of evidence the jury may be permitted to draw an inference of subscription to the tenets of the organization from membership alone, even though such an inference would not be sufficient to convict beyond a reasonable doubt in a criminal prosecution under the Smith Act [forbidding syndicalism].” *Id.* at 53.

The *Abel* court noted, and rejected, the claim of the defendant that evidence of gang affiliation and gang tenets was more prejudicial than probative.

“Respondent argues that even if the evidence of membership in the prison gang were relevant to show bias, the District Court erred in permitting a full description of the gang and its odious tenets. Respondent contends that the District Court abused its discretion under Federal Rule of Evidence 403, because the prejudicial effect of the contested evidence outweighed its probative value. In other words, testimony about the gang inflamed the jury against respondent, and the chance that he would be convicted by his mere association with the organization outweighed any probative value the testimony may have had on [the defense witness’] bias.

“Respondent specifically contends that the District Court should not have permitted [the rebuttal witness’] precise description of the gang as a lying and murderous group. Respondent suggests that the District Court should have cut off the testimony after the prosecutor had elicited that [the defense witness] knew respondent and may have belonged to an organization together. This argument ignores the fact that the *type* of organization in which a witness and a party share membership may be relevant to show bias. If the organization is a loosely knit group having nothing to do with the subject matter of the litigation, the inference of bias arising from common membership may be small or nonexistent. If the prosecutor had elicited that both respondent and [the defense witness] belonged to the Book of the Month Club, the jury probably would not have inferred bias even if the District Court had admitted the testimony. The attributes of the Aryan Brotherhood – a secret prison sect sworn to perjury and self-protection – bore directly not only on the *fact* of the bias but also on the *source* and *strength* of [the defense witness’] bias. The tenets of this group showed that [the defense witness] had

a powerful motive to slant his testimony towards respondent, or even commit perjury outright.”

Id. at 53-54 (emphasis in original; alterations added).

The Supreme Court also rejected the defendant’s protest that the gang-related evidence was not offered to show bias, but instead was offered to suggest that the witness’ membership in the gang was impermissible (and inadmissible) past conduct bearing on his veracity and character for truthfulness. The Court stated, “It seems clear to us that the proffered testimony with respect to [the defense witness’] membership in the Aryan Brotherhood sufficed to show potential bias in favor of respondent; because of the tenets of the organization described, it might also impeach his veracity directly. But there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case. It would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar.” *Id.* at 56.

See also *Dawson v. Delaware*, 503 U.S. 159 (1992), in which the Supreme Court rejected a broad First Amendment claim offered by the defendant regarding a gang-related stipulation used at his capital sentencing proceeding. The stipulation was undetailed and provided no context for its declaration that the defendant was affiliated with a prison gang, and the Court found it inadmissible and irrelevant on that basis. However, the Court’s strong and extensive dicta indicates that if the prosecution had offered more extensive gang-related evidence, such as testimony of an expert witness, then such evidence would have provided the necessary context to make the gang-related stipulation relevant. In other words, it was the dearth of context that was the problem; further information about the gang and its tenets could have and surely would have been probative of legitimate death-penalty issues.

24 *Payne v. Commonwealth*, 233 Va. 460 (1987), cert. denied, 484 U.S. 933 (1987).

25 *Utz*, 28 Va. App. at 418.

26 *Abel*, 469 U.S. 45.

27 *Payne*, 233 Va. 460.

28 *Cousins v. Commonwealth*, 56 Va. App. 257 (2010).

29 *Id.* at 275.