

#### 4.34. Gang Membership and Activity

**(1) Evidence of gang activity and a defendant's membership in a gang is inadmissible if it cannot logically be connected to some specific material issue in the case and tends only to demonstrate the defendant's propensity to commit the crime charged. The requisite connection can exist and evidence of the defendant's gang membership can be admitted when the defendant's gang membership: (a) provides a motive for the crime charged; or (b) is inextricably interwoven with a charged crime; or (c) is necessary to explain the relationships of the individuals involved or otherwise necessary to provide background information relevant to the commission of the crime or its participants; and (d) the probative value of the evidence outweighs its prejudicial effect.**

**(2) When evidence of gang membership reveals, directly or indirectly, the commission of crimes, wrongs, or other bad acts, a limiting instruction on the reason for and use of the evidence is warranted.**

#### Note

**Subdivision (1).** Evidence of gang activity and a defendant's membership in a gang normally will reveal, directly or indirectly, the commission of crimes or bad acts and thus analytically whether to admit the evidence or not falls under the umbrella of *People v Molineux* (168 NY 264 [1901]; *People v Bailey*, 32 NY3d 70, 83 [2018]). In short, that means that evidence of gang activity and a defendant's gang membership will not be admissible "if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate the defendant's propensity to commit the crime charged," and the probative value of the evidence does not outweigh its prejudicial effect (*People v Kims*, 24 NY3d 422, 438 [2014]; see *Bailey*, 32 NY3d at 83; *People v Boxill*, 111 AD2d 399, 401 [2d Dept 1985], *affd for reasons stated in mem of App Div 67 NY2d 678* [1986] ["in the absence of a connection between gang membership and the crime or crimes for which a defendant is being tried, the prosecutor's questions as to gang membership are improper"]; Guide to NY Evid rule 4.28, Evidence of Crimes and Wrongs [*Molineux*]).

So analyzed, the Court of Appeals has held that evidence of a defendant's membership in a gang can be admitted to show motive for the commission of the

crime (*People v Moore*, 42 NY2d 421, 428, 433 [1977] [“evidence of the defendant’s relationship with the (Black Liberation Army) and their stated hostility to the police was properly admitted at trial to show the motive for the crime” of attempted murder of two police officers even though “it reflected on the defendant’s character”]). Further, the Court has held that evidence of a defendant’s membership in a gang can be admissible “to provide necessary background, or when it is inextricably interwoven with the charged crimes, or to explain the relationships of the individuals involved” (*People v Bailey*, 32 NY3d at 83).

In *Bailey*, the defendant and two inmates were charged with assault of another inmate and there was evidence that during the assault one of the perpetrators—not the defendant—in response to the complainant’s request for a “fair fight” (one-on-one) said, “ain’t nothing fair, only Blood rules” (*id.* at 73). After the attack, when the defendant said he could not get a fair fight, the same codefendant yelled out “power Blood rules” (*id.*). The Court of Appeals held that “the testimony elicited by the People about the Bloods was probative of defendant’s motive and intent to join the assault on complainant, and provided necessary background information on the nature of the relationship between the codefendants . . . . The testimony was intended to explain why defendant and one of the codefendants were quick to join in the fight, as well as the gang-related meaning of the words complainant alleged that the codefendant used during and after the attack. In fact, very little of the investigator’s testimony focused on sensational details about the Bloods. The testimony described how members are identified and briefly discussed how carrying out an act of violence on behalf of a member might allow another member to rise in the gang’s hierarchy” (*id.* at 83).

Examples of other decisions admitting evidence of gang activity and a defendant’s membership in a gang include:

- *People v Benjamin*, 203 AD3d 617, 617 (1st Dept 2022) (In a prosecution for manslaughter, the admitted evidence, “which included expert testimony regarding the history of a specific conflict between two gangs, a photo in which defendant made a gang sign accompanied by two known members of the gang, and a photo in which two members of the gang made the same sign in defendant’s presence[,] was probative of motive since it provided an explanation as to why defendant would . . . shoot the victim. Although defendant’s confession also discussed his motive, his explanation made no sense except in the context of a gang rivalry” [internal quotation marks and citations omitted]).
- *People v Hilts*, 187 AD3d 1408, 1414 (3d Dept 2020) (In a prosecution for the sale of a firearm, an FBI confidential informant [CI] arranged to purchase a firearm from the defendant. The CI had worked for the Bloods as an “enforcer” in guarding a store where the Bloods conducted firearms transactions and it was in the store’s parking lot that the sale was arranged.

The Court held that the “CI’s testimony about his former gang membership, the affiliation between his gang and the Bloods and his position of trust as an enforcer explained the FBI’s interest in his services as a CI. His testimony about the [store’s] owner’s gang affiliation provided background information that explained the FBI’s surveillance of the store and the CI’s presence there. As for defendant himself, evidence of his gang membership and status within the gang hierarchy helped the jury to understand why the CI felt comfortable approaching him about the gun sale and how defendant was able to arrange the sale while removing himself from physical involvement”).

- *People v Argueta*, 194 AD3d 857, 858 (2d Dept 2021) (In a prosecution for attempted murder, the “testimony regarding the defendant’s membership in a gang and prior encounters with the victim was properly admitted to establish motive and intent, and to explain the defendant’s connection to his accomplices and their relationship with the victim, and the prejudicial effect of that testimony did not outweigh its probative value” [citations omitted]).
- *People v McCommons*, 143 AD3d 1150, 1154 (3d Dept 2016) (In a prosecution for murder and other crimes, the trial court “did not err in permitting the People to establish that defendant was a gang member.” The evidence “provided background information that assisted the jury in understanding the audiotaped conversation [that contained incriminating admissions], as well as defendant’s trusting relationships with, among others, certain gang members to whom he made admissions and a gang member who loaned him the gun used in committing the crimes. Notably, the court again mitigated any undue prejudice by providing limiting instructions” [citations omitted]).

By contrast, in *People v Kims* (24 NY3d at 439), the Court of Appeals held that “the references to gang activity were not relevant to any material issue. The People’s theory centered on possession and on intent to sell [drugs]. It is clear that the testimony about defendant’s alleged gang affiliation would not have provided any relevant background information about how the drugs came to be located in his apartment. Similarly, there was no need to explain the defendant’s relationship to the witnesses by referencing gang affiliation; the testimony clearly indicated their status as buyers as well as their respective relationships to the defendant. Finally, gang affiliation was not interwoven with the charges because there was no evidence that defendant was working with fellow members of his gang to distribute drugs.”

*Bailey*, *Benjamin*, *Hilts*, *McCommons*, and other cases illustrate varying methods by which a gang affiliation or gang activity may be proved, namely, reference to a gang during commission of the crime (*Bailey*); photographs evincing the defendant’s affiliation with a gang (*Benjamin*); a confidential

informer whose membership in a gang facilitated his purchase of a firearm from the defendant (*Hilts*); admissions (*McCommons*); identification of the defendant at trial as the shooter “by a fellow gang member” (*People v Evans*, 132 AD3d 1398, 1398 [4th Dept 2015]); clothing identified with a particular gang (*Matter of Donovan B.*, 278 AD2d 95, 95-96 [1st Dept 2000] [“(A)ppellant, who was wearing blue clothing associated with the ‘Crips’ gang, was engaged in a punching and kicking fight with an individual wearing red, associated with the ‘Bloods’ gang”]); gang insignia (*see Matter of Doyle v Prack*, 115 AD3d 1110, 1111 [3d Dept 2014] [contrary to prison rules, petitioner possessed gang-related material, namely, a “black wristband with a white ‘1%er’ insignia”]).

**Subdivision (2).** As noted, evidence of gang membership may involve the revelation directly or indirectly of the commission of crimes or bad acts, and a court must therefore by its instructions to a jury guard against the jury utilizing the evidence to prove a defendant’s criminal propensity (*Bailey*, 32 NY3d at 83).

In *Bailey*, for example, after finding the gang activity evidence admissible, the Court of Appeals concluded: “Regardless, because the court’s instructions addressed any possible prejudice to defendant, we cannot say the court’s ruling was error” (*Bailey*, 32 NY3d at 83-84). The trial court instruction recited in *Bailey* at 76-77 adapted the jury instruction set forth in CJI2d(NY), General Applicability, *Molineux*. (*See Benjamin*, 203 AD3d at 617 [“The probative value of defendant’s gang affiliation outweighed any prejudice, which was minimized by the court’s limiting instructions”]; *People v Johnson*, 106 AD3d 1272, 1274 [3d Dept 2013] [the trial court “properly balanced the probative value of (defendant’s gang membership) evidence against its prejudicial effect and gave appropriate limiting instructions”].)