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## IN THE TRENCHES OF FLORIDA'S WAR ON GANGS: A FRAMEWORK FOR PROSECUTING FLORIDA'S ANTI-GANG SENTENCE ENHANCEMENT PROVISION

Rodrigo M. Caruço\*<sup>1</sup>

### INTRODUCTION

A Hispanic male walked into a bank to commit a robbery.<sup>1</sup> Instead of concealing his identity—he advertised it. His jersey broadcast his gang's name. Moreover, he looked directly into the security camera and “threw”<sup>2</sup> a gang sign. An off-duty police officer spotted the suspect. The officer identified the suspect's gang tattoos and other marks of gang membership. Backup arrived and apprehended the suspect. Under then-existing Florida law, this person was not a criminal street gang member.<sup>3</sup>

Florida's anti-gang statute suffered a near-death experience in 1999.<sup>4</sup> The law provided for an increased sentence if an identified criminal gang member committed a crime in an effort to benefit the gang.<sup>5</sup> The Florida Supreme Court ruled the statute unconstitutional because it did not require a connection between criminal

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\* B.A., University of Central Florida; J.D. candidate, Barry University School of Law, 2010. I would like to thank everyone at the Florida Attorney General's Office of Statewide Prosecution. It was truly a privilege to work with so many talented attorneys willing to share their knowledge and insight. Special thanks to Anne Wedge-McMillan, Assistant Statewide Prosecutor, who prompted the idea for this article during my internship and was so patient to discuss various points of the law with me. Any errors or mistakes are truly my own. Also, thank you to my Note & Comment editor, Kelley Lester, whose comments made this article even better than it would have been. Thank you to Professor Leonard Birdsong for agreeing to advise me on this project and providing invaluable feedback. Thanks also to Professor Frederick Jonassen for listening all summer and making helpful suggestions as I kicked around this idea.

1. The Grand Jury refused to name this individual's gang, but the surveillance photo and related pictures indicate his membership in a gang named SUR-13. EIGHTEENTH STATEWIDE GRAND JURY, FIRST INTERIM REPORT OF THE STATEWIDE GRAND JURY: CRIMINAL GANGS AND GANG RELATED VIOLENCE 20-21 (2007), [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/07/07-1128/Filed\\_01-15-2008\\_First\\_Interim\\_Report.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/07/07-1128/Filed_01-15-2008_First_Interim_Report.pdf). SUR-13 is a prominent Hispanic gang. NATIONAL ALLIANCE OF GANG INVESTIGATORS ASSOCIATIONS, 2005 NATIONAL GANG THREAT ASSESSMENT 8 (2005), [http://www.ojp.usdoj.gov/BJA/what/2005\\_threat\\_assesment.pdf](http://www.ojp.usdoj.gov/BJA/what/2005_threat_assesment.pdf).

2. “Throwing” a gang sign means using your hands to make a gesture identifying your gang affiliation. See *State v. Cronin*, 14 P.3d 752, 754 n.2 (Wash. 2000).

3. EIGHTEENTH STATEWIDE GRAND JURY, *supra* note 1, at 19-20. The Grand Jury cited this event as a prime example of the anti-gang statute's ineffectiveness, thus it recommended many changes which later appear in the amended statute.

4. The Florida Supreme Court held the statute unconstitutional in *State v. O.C.*, 748 So. 2d 945 (Fla. 1999).

5. FLA STAT. § 874.04 (1996) (amended 2001, 2008).

gang membership and the crime.<sup>6</sup> The Florida Legislature responded by amending the statute, requiring that connection.<sup>7</sup> But the damage was done. Even on the rare occasion that a prosecutor used the statute, its stringent provisions seemed unprovable.<sup>8</sup>

After nearly a decade, Florida renewed its attack on gang-related crime. The Legislature substantially amended the faulty statute, making it easier to prove criminal gang membership.<sup>9</sup> But a funny thing happened on the way to the Governor's desk. The previous version left it to the judge, at sentencing, to review gang evidence when determining whether to enhance the defendant's sentence beyond the statutory maximum.<sup>10</sup> The United States Supreme Court moved this decision to the factfinder.<sup>11</sup> Any fact, other than a prior conviction, that increased the defendant's sentence above the statutory maximum penalty for which he was charged must be submitted to a jury and proved beyond a reasonable doubt.<sup>12</sup> The Florida Legislature made this adjustment—with a *single* sentence.<sup>13</sup> That sentence is the focus of this article.

But before continuing, consider this example to illustrate the sentence enhancement at work. Deputy Bailey, a thirteen year veteran of Alibamo County's<sup>14</sup> gang unit, is patrolling Main Street. Around 1:30 a.m., he spots four individuals spraying graffiti on the supporting walls of an overpass. Bailey knows this is a common activity for gangs to mark their territory and to intimidate rival gangs and the community. He approaches on foot and identifies himself after calling backup. The individuals run. Bailey can't catch them all, but chases one and relays the directions of the others to backup. He catches the suspect, who goes by the street name "Deebo." After placing Deebo under arrest and reading his *Miranda* rights to him, Bailey performs a search incident to arrest. He finds a concealed weapon in Deebo's waist (no permit) and twenty-one grams of marijuana in his pocket. Deebo is very well known to local law enforcement. He is an admitted gang member with a lengthy and violent criminal history.

Based on the facts above, Deebo is charged with the following offenses: (1) criminal mischief causing damage between \$200 and \$1,000;<sup>15</sup> (2) carrying a con-

6. *O.C.*, 748 So. 2d at 950.

7. § 874.04 (2001) (amended 2008).

8. *See, e.g.*, *L.B. v. State*, 965 So. 2d 1214 (Fla. Dist. Ct. App. 1st Dist. 2007); *A.K. v. State*, 724 So. 2d 660 (Fla. Dist. Ct. App. 2nd Dist. 1999); *Ariano v. State*, 961 So. 2d 366 (Fla. Dist. Ct. App. 4th Dist. 2007).

9. Act effective Oct. 1, 2008, ch. 2008-238, 2008 Fla. Laws 2758.

10. § 874.04 (2001) (amended 2008).

11. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

12. *Id.* at 476.

13. § 874.04 (2008).

Upon a finding by the factfinder that the defendant committed the charged offense for the purpose of benefiting, promoting, or furthering the interests of a criminal gang, the penalty for any felony or misdemeanor, or any delinquent act or violation of law which would be a felony or misdemeanor if committed by an adult, may be enhanced.

*Id.*

14. Assume Alibamo County is the newest addition to Florida, therefore subject to its laws. The reader will forgive a few assumptions in order to focus attention on explaining the sentence enhancement provision.

15. FLA. STAT. § 806.13(1)(b)(2) (2008).

cealed weapon;<sup>16</sup> and (3) possession of more than twenty grams of cannabis.<sup>17</sup> Counts (2) and (3) are third degree felonies,<sup>18</sup> each with a maximum sentence of five years.<sup>19</sup> Count (1) is a first degree misdemeanor,<sup>20</sup> with a maximum sentence of one year.<sup>21</sup>

Deputy Bailey works closely with Assistant State Attorney (“ASA”) Remington Martin, the office’s gang prosecutor. Martin and Bailey agree that these offenses were committed to benefit a criminal gang. Therefore, Martin adds a fifth count to the information:<sup>22</sup> the anti-gang sentence enhancement. Under this provision, the third degree felonies are now upgraded to second degree felonies. This is because the charged offenses allegedly were committed to further criminal gang activity. Instead of facing up to five years in prison, Deebo now faces up to fifteen.<sup>23</sup> Deebo is sentenced to nine years in prison. The enhancement provision has increased Deebo’s sentence beyond the original five year maximum. Previously, the sentencing judge would consider this gang evidence when determining Deebo’s sentence. Now, this provision must be submitted to a jury and proven beyond a reasonable doubt.

How does the State prosecute under this new sentence enhancement provision of Florida’s anti-gang statute? Part I discusses the general history of this provision. After a brief description of the gang problem facing Florida and the nation, this article turns to Florida’s first enactment of its anti-gang statute. The article then reviews two key U.S. Supreme Court decisions that required the Florida Legislature to amend the enhancement provision from allowing a judicial determination of the enhancement at sentencing to requiring submission to the factfinder. Part I continues by discussing Florida’s second offensive to combat gang crime through the revised statute that took effect October 1, 2008. Finally, before leaving Part I, the article provides a short review of certain rules in the Florida Evidence Code in order to highlight the controversy the amended enhancement provision creates.

Part II analyzes different state approaches to this sort of enhancement. The analysis includes a discussion of whether the particular approach is exportable to Florida. Any approach ultimately allows either the gang evidence to be introduced during the guilt phase of the trial or requires some sort of bifurcated<sup>24</sup> proceeding. The section begins with Florida. The courts have, on occasion, admitted evidence

16. FLA. STAT. § 790.01(2) (2008).

17. FLA. STAT. § 893.13(6)(a) (2008).

18. § 790.01(2) (2008); § 893.13(6)(a) (2008).

19. FLA. STAT. § 775.082(3)(d) (2008).

20. § 806.13(1)(b)(2) (2008).

21. FLA. STAT. § 775.082(4)(a) (2008).

22. There are two avenues in which a crime may be charged, an indictment or an information. Federal crimes must be charged by an indictment. U.S. CONST. amend. V. This is defined as “[t]he formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person.” BLACK’S LAW DICTIONARY 352-53 (3d pocket ed. 2006). On the other hand, Florida also allows for an information, defined as “[a] formal criminal charge made by a prosecutor without a grand-jury indictment.” *Id.* at 357. The form of an information is defined by statute. FLA. STAT. § 923.03 (2008).

23. Assume the sentences are to run concurrently.

24. Black’s Law Dictionary defines a bifurcated trial as “[a] trial that is divided into two stages, such as for guilt and punishment . . . .” BLACK’S LAW DICTIONARY 733 (3d pocket ed. 2006).

of gang membership during the guilt phase of the trial for various reasons when the enhancement provision is not charged. The significance of this becomes apparent when the analysis proceeds to California.<sup>25</sup> Among other lessons to be learned, California courts recognize that judges have much broader discretion to admit gang evidence when the enhancement is charged, as opposed to when it is not charged.<sup>26</sup> California does not require a bifurcated trial when the sentence enhancement is charged.<sup>27</sup> Part II then continues back toward the East to analyze North Carolina and South Dakota. These states were selected because they offer distinctly different approaches than that of California. North Carolina provides clear directions for deciding whether (and how) to bifurcate the trial by statute.<sup>28</sup> South Dakota requires, in essence, a separate information and proceeding to determine whether to apply the sentence enhancement.<sup>29</sup>

Finally, Part III concludes this article with two recommendations. First, a statutory response that provides all courts in the State with clear direction to implement this provision. Second, a judicial approach for Florida courts to consistently implement a provision that is essential to Florida's war on criminal gangs.<sup>30</sup>

## PART I – THE BACKGROUND TO FLORIDA'S SECOND OFFENSIVE AGAINST GANG-RELATED CRIME

### A Brief Review of the Gang Problem Facing Florida and the Nation

Rising gang violence is not a new phenomenon.<sup>31</sup> But to understand the problem causing state legislatures to enact anti-gang statutes, a little review is necessary. A 2005 study provided a “snapshot of trends and patterns of gang activity.”<sup>32</sup> The results were compiled from submissions by 455 federal, state, and local law enforcement agencies from across the United States.<sup>33</sup>

25. The California approach is very persuasive because it was the first state to pass anti-gang legislation and remains the leader in this area. See David R. Truman, Note, *The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U. L.Q. 683, 686 (1995) (“California . . . took the lead in this statutory fight against gangs by passing the Street Terrorism Enforcement and Protection Act (STEP Act) in 1988.”).

26. *People v. Hernandez*, 94 P.3d 1080, 1087 (Cal. 2004).

27. *Id.* at 1085-86.

28. N.C. GEN. STAT. § 15A-1340.16 (2008).

29. S.D. CODIFIED LAWS § 22-10A-3 (2008).

30. The Florida RICO (Racketeer Influenced and Corrupt Organization) Act casts some doubt on exactly how central the sentence enhancement provision will actually be to Florida's war on gang violence. See FLA. STAT. § 895 (2008). However, the complexity of building a RICO case limits its application. RICO is beyond the scope of this article, but its existence is worth noting here.

31. See, e.g., Bart H. Rubin, Note, *Hail, Hail, the Gangs are all Here: Why New York Should Adopt a Comprehensive Anti-Gang Statute*, 66 FORDHAM L. REV. 2033, 2033 (1998) (“[T]here has been a steady and alarming increase in violent criminal street gang activity.”); Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 105 (2002) (noting a “‘major escalation’ of youth gang problems” in the past thirty years); Truman, *supra* note 25, at 685 (noting the “explosion” of gangs in the 80s and 90s).

32. NATIONAL ALLIANCE OF GANG INVESTIGATORS ASSOCIATIONS, *supra* note 1, at 1.

33. *Id.*

Nationally, criminal gangs are the leading distributors of drugs.<sup>34</sup> These drugs are primarily marijuana, crack cocaine, and methamphetamine.<sup>35</sup> Criminal gangs are also increasingly associating with organized crime, primarily Mexican drug organizations. These organizations utilize gangs mostly for committing street crimes and providing turf protection.<sup>36</sup> Criminal gangs are also turning to computers and technology to communicate, further their criminal activities, and avoid detection by law enforcement.<sup>37</sup>

Prison gangs remain a major problem.<sup>38</sup> Incarceration has not stopped their criminal activity.<sup>39</sup> Leaders still have significant influence outside the prison walls.<sup>40</sup> For example, the Mexican Mafia controls many Hispanic gangs in California through a “street tax on drug sales.”<sup>41</sup> As Hispanic gang membership is on the rise nationally<sup>42</sup>, the “California-style gang culture”<sup>43</sup> has migrated across the United States.<sup>44</sup> The national landscape has been so affected by gang activity, even the National Football League (NFL) has been forced to review tapes of player celebrations over concerns that players are flashing gang signs.<sup>45</sup>

The South has experienced similar trends. Membership in Hispanic criminal gangs has risen dramatically.<sup>46</sup> In addition to nationwide gangs, “homegrown”<sup>47</sup> gangs are also being reported.<sup>48</sup> The business of choice of gangs in this region appears to be the sale of marijuana and cocaine.<sup>49</sup> But gangs also commit robberies, burglaries, thefts, and even white collar crimes like identity theft.<sup>50</sup>

The Florida Department of Law Enforcement (FDLE) also conducted a survey study of criminal gang activity throughout the state.<sup>51</sup> Consistent with the national trend, drugs remain a primary source of profit.<sup>52</sup> Criminal gang activity affects

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34. *Id.*

35. *Id.* tbl.2.

36. *Id.* at vi, 2.

37. *Id.* at 3.

38. *Id.* at 5 (“Prison gangs pose a significant threat to correctional officials across the country.”).

39. NATIONAL ALLIANCE OF GANG INVESTIGATORS ASSOCIATIONS, *supra* note 1, at 6 (“In reality, incarcerated gang members often use the prison environment to recruit other members and perpetuate their criminal enterprise.”).

40. *Id.* at vi.

41. *Id.* at 6.

42. *Id.* at 7.

43. The “California-style gang culture” would be a gang that originated in California, then spread outside the state. The Sureno culture is an example. *See id.* at 27.

44. *See id.* at vi.

45. Sam Farmer, *Concerned About Gang Signs, NFL Reviews Tapes*, L.A. TIMES, July 16, 2008, available at <http://www.latimes.com/sports/football/nfl/la-sp-nflsigns16-2008jul16,0,1863890.story>.

46. NATIONAL ALLIANCE OF GANG INVESTIGATORS ASSOCIATIONS, *supra* note 1, at vii, 25.

47. A “homegrown” gang is local, perhaps confined to a specific neighborhood, and not affiliated with a national gang.

48. *Id.* at 25.

49. *Id.* at vii.

50. EIGHTEENTH STATEWIDE GRAND JURY, *supra* note 1, at 6.

51. FLORIDA DEPARTMENT OF LAW ENFORCEMENT, 2007 STATEWIDE GANG SURVEY RESULTS (2007), <http://www.fdle.state.fl.us/Publications/2007GangSurvey.pdf>. The survey results were compiled from 325 responses, which include law enforcement agencies, school resource officers, corrections, and prosecuting offices. *Id.* at 9-10.

52. *Id.* at 19.

every Florida community.<sup>53</sup> Moreover, the level of activity shows no sign of decreasing.<sup>54</sup> In fact, 39.5% of respondents to the survey noted an increase in criminal gang activity.<sup>55</sup> Like the national trend, Florida gangs are increasingly turning to computers and technology.<sup>56</sup> Not only has drug trafficking and violent crime increased, it has been accompanied by high rates of gun violence.<sup>57</sup> In fact, a 2007 study of media reports ranked Florida second in the number of drive-by shootings.<sup>58</sup>

For more than a decade, Senators Diane Feinstein (D-CA) and Orrin Hatch (R-UT) pushed for comprehensive federal anti-gang legislation.<sup>59</sup> They succeeded in the 110th Congress when the Senate passed the Gang Abatement and Prevention Act.<sup>60</sup> Among the Act's provisions is one billion dollars to fund state prosecution efforts.<sup>61</sup> Whether by design or otherwise, it was during this time that a statewide grand jury was impaneled to review, among other things, how to improve Florida's gang suppression programs. To understand Florida's revised arsenal against gangs, a brief summary of its gang suppression efforts is appropriate.

### Florida's First Response to Address Gang-Related Crime

As Dade County's State Attorney, Janet Reno conducted the first official study of criminal gangs in Florida in 1985.<sup>62</sup> The grand jury limited its study to Dade County.<sup>63</sup> It identified thirty-six criminal gangs operating within the county.<sup>64</sup> Three years later, the number more than doubled to seventy known gangs and over 3,500 members.<sup>65</sup> These gangs were organized and influenced by established criminal gangs in cities across the state with a long history of such activity.<sup>66</sup>

53. The Eighteenth Statewide Grand Jury, relying on the FDLE report, concluded that "[g]angs have been documented in all twenty judicial circuits in Florida." EIGHTEENTH STATEWIDE GRAND JURY, *supra* note 1, at 6.

54. FLORIDA DEPARTMENT OF LAW ENFORCEMENT, *supra* note 51, at 19.

55. *Id.*

56. *Id.* at 21.

57. *See id.* at 22.

58. EIGHTEENTH STATEWIDE GRAND JURY, *supra* note 1, at 7. The Grand Jury included this study in its review of Florida's gang problem, but notes that the study was conducted by The Violence Policy Center, not law enforcement. *Id.* at 7 n.3.

59. Press Release, Senate Office of Diane Feinstein, Senate Unanimously Approves Feinstein-Hatch Comprehensive Gang Legislation (Sept. 21, 2007), *available at* [http://feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&ContentRecord\\_id=2984b4b3-01dd-4b5e-c972-83b004f3a838&Region\\_id=&Issue\\_id=](http://feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&ContentRecord_id=2984b4b3-01dd-4b5e-c972-83b004f3a838&Region_id=&Issue_id=)

60. Gang Abatement and Prevention Act of 2007, S. 456, 110th Cong. (2007). Unfortunately, the bill seems likely to die a common death after its arrival in the House—multiple committee review. *See* <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN00456:@@/S>.

61. S. 456 § 305, § 31707.

62. TENTH STATEWIDE GRAND JURY, CASE NO. 78,035, SECOND INTERIM REPORT OF THE TENTH STATEWIDE GRAND JURY: GANGS & GANG-RELATED ACTIVITY § IV (1992), *available at* <http://myfloridalegal.com/pages.nsf/Main/33f5f7168542f9f185256cca006be9c3>. The report was re-formatted for publication on the internet.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

A statewide response occurred in 1990. The Tenth Statewide Grand Jury began studying statewide criminal gang activity.<sup>67</sup> It identified over 10,000 members of more than 159 identified criminal gangs.<sup>68</sup> The Legislature responded by enacting the Street Terrorism Enforcement and Prevention (“STEP”) Act of 1990.<sup>69</sup> Among its provisions, the Act allowed for the enhancement of the defendant’s sentence if the judge, at sentencing, determined by a *preponderance of the evidence* that the defendant was a member of a criminal street gang at the time of the commission of the offense.<sup>70</sup>

A juvenile known only as O.C. nearly brought Florida’s STEP Act to an end. In 1997, O.C. was charged with “attempted aggravated battery to cause great bodily harm, a third-degree felony, and battery, a misdemeanor.”<sup>71</sup> As the victim exited a school bus, O.C. allegedly grabbed the victim and threw him into another juvenile.<sup>72</sup> After being punched in the face and thrown through a wooden fence, the victim was further beaten by O.C. and another juvenile.<sup>73</sup> During the beating, the victim heard something to the effect of, “This is a message for your brother.”<sup>74</sup> Upon conviction, the State Attorney filed a motion to declare O.C. a gang member in order to enhance her sentence.<sup>75</sup> O.C. responded by asserting that the statute was unconstitutional because it did not include an intent requirement, violated her free speech and freedom of association rights under the First Amendment, and “impute[d] guilt by association.”<sup>76</sup> The trial court ruled against O.C., but the Fifth District Court of Appeal reversed.<sup>77</sup> The court held the statute unconstitutional on its face because it punished “mere association.”<sup>78</sup>

The Florida Supreme Court affirmed the district court’s decision, but for a different reason.<sup>79</sup> Because the statute did not require any connection between the criminal activity and gang membership, the court found no “rational relationship to the legislative goal of reducing gang violence or activity[.]”<sup>80</sup> Substantive due process required the statute be struck down.<sup>81</sup> Upon finding the statute unconstitutional on its face, the court saw no need to address the two additional issues raised on appeal: (1) the fact that the decision to enhance is made by the judge at sentenc-

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67. *Id.* at § I.

68. *Id.* at § V.

69. FLA. STAT. § 874.01-12 (1990) (amended 1995, 1996, 1997, 2001, 2008).

70. FLA. STAT. § 874.04 (1990) (amended 1995, 1996, 1997, 2001, 2008). For example, the reader will recall from the Introduction that a third degree felony, punishable for up to five years, becomes a second degree felony, now becomes punishable for up to fifteen years.

71. *O.C.*, 748 So. 2d at 946.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 947.

78. *O.C.*, 748 So. 2d at 946.

79. *Id.* at 950.

80. *Id.* at 950. In fact, the Supreme Court pointed out that California’s version of a gang enhancement statute, which expressly included this relationship, was upheld in *People v. Gardeley*. *Id.* (citing *People v. Gardeley*, 927 P.2d 713, 725 (Cal. 1996)).

81. *Id.* at 947.

ing by a preponderance of the evidence and (2) First Amendment concerns of free speech and freedom of association.<sup>82</sup>

The Florida Legislature attempted to breathe life back into the enhancement provision in 2001. It added the connection required by *State v. O.C.*<sup>83</sup> But Florida's anti-gang statute's problems remained far from over. Though Florida now had a workable tool to use against criminal gang-related activity, prosecutors were rarely able to prove a defendant was, in fact, a member of a criminal street gang.<sup>84</sup> Either the State could not prove the gang engaged in a pattern of criminal street gang activity or that the defendant was a member of such a gang.<sup>85</sup> The inability to prove these elements rendered the enhancement provision effectively meaningless. This sword of Excalibur<sup>86</sup> remained stuck in its scabbard.

### The Continuing Struggle to Implement Florida's Anti-Gang Statute

Before enhancing a defendant's sentence, the prosecutor must first prove that a criminal street gang exists and that the defendant is a member of that gang. Case law suggests the statute made that task nearly impossible. To prove a criminal street gang<sup>87</sup> exists, a key element requires that the gang engage in a pattern of criminal street gang activity. This was defined as:

the commission or attempted commission of, or solicitation or conspiracy to commit, two or more felony or three or more misdemeanor offenses, or one felony and two misdemeanor offenses, or the comparable number of delinquent acts or violations of law which would be felonies or misdemeanors if committed by an adult, on separate occasions within a 3-year period.<sup>88</sup>

The Second and the Fourth District Courts of Appeal have routinely reversed enhanced sentences for insufficient evidence of such a pattern.<sup>89</sup>

82. *Id.* at 950.

83. See FLA. STAT. § 874.04 (2001) (amended 2008).

84. See, e.g., *L.B. v. State*, 965 So. 2d 1214 (Fla. Dist. Ct. App. 1st Dist. 2007) (unable to prove membership); *S.L. v. State*, 708 So. 2d 1006 (Fla. Dist. Ct. App. 2d Dist. 1998) (unable to prove pattern of criminal street gang activity).

85. *L.B.*, 965 So. 2d at 1216; *S.L.*, 708 So. 2d at 1008.

86. King Arthur's sword, Excalibur, is a fabled magical sword. See *Excalibur*, ENCYCLOPEDIA BRITANNICA ONLINE, March 12, 2009, <http://www.britannica.com/EBchecked/topic/197670/Excalibur>.

87. The statute defines a criminal street gang as:

a formal or informal ongoing organization, association, or group that has as one of its primary activities the commission of criminal or delinquent acts, and that consists of three or more persons who have a common name or common identifying signs, colors, or symbols and have two or more members who, individually or collectively, engage in or have engaged in a pattern of criminal street gang activity.

FLA. STAT. § 874.03(1) (2001) (amended 2008).

88. *Id.* § 874.03(3) (2001) (amended 2008).

89. *S.P. v. State*, 664 So. 2d 1064, 1065-66 (Fla. Dist. Ct. App. 2d Dist. 1995); *A.K.*, 724 So. 2d at 660; *S.L.*, 708 So. 2d at 1008; *Ariano*, 961 So. 2d at 368.

*S.P. v. State* illustrates the difficulty prosecutors had in proving criminal street gang activity.<sup>90</sup> A juvenile known only as S.P. was charged with “throwing a deadly missile at or into an occupied vehicle” and battery.<sup>91</sup> The trial court granted the State Attorney’s motion to declare S.P. a criminal street gang member.<sup>92</sup> The Second District struck down the order.<sup>93</sup> S.P. committed the delinquent acts on August 12, 1994.<sup>94</sup> But the “comparable number of delinquent acts” language did not take effect until October 1, 1994.<sup>95</sup> At the time S.P. committed those acts, delinquency was not part of a pattern of criminal street gang activity as defined by the statute.<sup>96</sup> The complexity of the statute’s requirements seemed likely to trip up even the most able prosecutor.

Even if a prosecutor could prove a criminal street gang existed, it remained just as difficult, if not more so, to prove membership in the gang. Under the defendant must meet two criteria out of a list of eight.<sup>97</sup> The subsection most often used, and just as often rejected, was § 874.03(2)(d), requiring the prosecutor to prove the defendant “resides in or frequents a particular criminal street gang’s area *and* adopts their style of dress, their use of hand signs, or their tattoos, *and* associates with known criminal street gang members (emphasis added).”<sup>98</sup>

The real life scenario that began this article provides a perfect example. A Hispanic male wearing a jacket advertising his gang membership intended to commit a bank robbery, but not before flashing gang signs directly at the security

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90. *S.P.*, 664 So. 2d 1064.

91. *Id.* at 1064.

92. *Id.*

93. *Id.* at 1066.

94. *Id.* at 1065.

95. *Id.* at 1065-66.

96. *Id.* In other cases, the trial court simply did not inquire into the existence of criminal street gang activity. See, e.g., *Ariano*, 961 So. 2d at 368; *A.K.*, 724 So. 2d at 660.

97. After proving the criminal street gang exists, the eight criteria from which to identify a defendant as a member are:

- (a) Admits to criminal street gang membership.
- (b) Is identified as a criminal street gang member by a parent or guardian.
- (c) Is identified as a criminal street gang member by a documented reliable informant.
- (d) Resides in or frequents a particular criminal street gang’s area and adopts their style of dress, their use of hand signs, or their tattoos, and associates with known criminal street gang members.
- (e) Is identified as a criminal street gang member by an informant of previously untested reliability and such identification is corroborated by independent information.
- (f) Has been arrested more than once in the company of identified criminal street gang members for offenses which are consistent with usual criminal street gang activity.
- (g) Is identified as a criminal street gang member by physical evidence such as photographs or other documentation.
- (h) Has been stopped in the company of known criminal street gang members four or more times.

FLA. STAT. § 874.03(2)(a)-(h) (2001) (amended 2008).

98. § 874.03(2)(d) (2001) (amended 2008).

camera. The surveillance video alone provides evidence of adopting a criminal street gang's style of dress, hand signs *and* tattoos.<sup>99</sup> His co-conspirators may even be enough to meet the requirement that he also associates with known criminal street gang members. But the State Attorney could not charge the enhancement.<sup>100</sup> No evidence (or not enough evidence) proved the suspect "resides in or frequents a particular criminal street gang's area."<sup>101</sup> In another example, the First District refused to affirm the enhanced sentence of a defendant—identified by others as a gang member—because of the failure to meet this clause.<sup>102</sup>

The Florida Legislature continually adjusted the anti-gang statute to ease the many concerns of Florida courts. It was able to adequately address the Florida Supreme Court decision in *State v. O.C.* by requiring a nexus between the criminal act and gang membership. However, the Legislature met mixed success in shaping how to prove gang membership and criminal street gang activity. In all of the reported cases, the enhancement provision has never been upheld.<sup>103</sup> The U.S. Supreme Court would soon enter the enhanced sentence battleground. Two decisions, *Apprendi* and *Blakely*, would prove to be the crack in the foundation when Florida renewed its effort to combat gang activity.<sup>104</sup>

#### CHANGING THE RULES: THE RAMIFICATIONS OF *APPRENDI* AND *BLAKELY*

Charles Apprendi opened fire into the home of an African-American family on December 22, 1994.<sup>105</sup> He pleaded<sup>106</sup> guilty to three of the twenty-three counts in the grand jury indictment.<sup>107</sup> Under the plea agreement, the prosecutor dismissed the remaining counts<sup>108</sup> and reserved the right to seek an enhanced sentence for the December 22nd shooting because the offense had a biased purpose.<sup>109</sup> Likewise, Apprendi reserved the right to challenge the enhancement as unconstitutional under the U.S. Constitution.<sup>110</sup> After the plea, but before sentencing, the judge held an evidentiary hearing on the issue of Apprendi's "'purpose' for the shooting on De-

99. EIGHTEENTH STATEWIDE GRAND JURY, *supra* note 1, at 20 (the page includes a screenshot of the video as well). The suspect was a member of a gang known as SUR-13. Proving this gang engaged in criminal street gang activity would be relatively easy because it is very well known to law enforcement. A brief review of the gang is available in the 2005 *National Gang Threat Assessment*. See NATIONAL ALLIANCE OF GANG INVESTIGATORS ASSOCIATIONS, *supra* note 1, at 22.

100. EIGHTEENTH STATEWIDE GRAND JURY, *supra* note 1, at 20 (all three were wearing their gang jerseys).

101. *Id.*

102. In *R.C.*, the defendant was identified as a gang member by his grandmother, but the State failed anyway because it did not present any testimony that he met this clause of the subsection. *R.C. v. State*, 948 So. 2d 48, 50-51 (Fla. Dist. Ct. App. 1st Dist. 2007). Because this subsection was more specific than another one that *R.C.* could have met, the district court required the State to meet this strict provision. *Id.* at 52 n.2.

103. This is not to say the State has never succeeded in applying the enhancement provision. Only that district courts have not upheld this provision when it has been appealed.

104. *Apprendi*, 530 U.S. at 466; *Blakely v. Washington*, 542 U.S. 296 (2004).

105. *Apprendi*, 530 U.S. at 469.

106. For the careful reader, "pleaded" is the traditional and "best choice" for the past-tense and past-participle of the term "plead." GARNER'S MODERN AMERICAN USAGE 612 (2d ed. 2003).

107. *Apprendi*, 530 U.S. at 469-70.

108. *Id.* at 470.

109. This was based on a statement made by Apprendi, after arrest, which he later recanted. See *id.* at 469.

110. *Id.* at 470.

ember 22nd.”<sup>111</sup> Ultimately, the trial judge applied the enhancement.<sup>112</sup> The U.S. Supreme Court held that this violated *Apprendi*’s constitutional rights.<sup>113</sup> Any fact that increased a defendant’s sentence beyond the statutory maximum must be proven to a jury *beyond a reasonable doubt*.<sup>114</sup> The only exception is a prior conviction.<sup>115</sup>

The U.S. Supreme Court applied the *Apprendi* rule for the first time in *Blakely v. Washington*.<sup>116</sup> Ralph Blakely, Jr. kidnapped his estranged wife after she filed for divorce.<sup>117</sup> In fact, he “[bound] her with duct tape and forc[ed] her at knifepoint into a wooden box in the bed of his pickup truck[.]” while demanding she dismiss the divorce suit.<sup>118</sup> Blakely pleaded guilty. Based on the facts admitted in his plea, Blakely faced a statutory maximum of fifty-three months.<sup>119</sup> The judge applied a statutory enhancement available under state law.<sup>120</sup> Blakely would serve ninety months after the judge concluded he acted with “deliberate cruelty.”<sup>121</sup>

The judge did not rely on facts that were admitted by Blakely, nor were they found by a jury.<sup>122</sup> In fact, the enhancement *could not* be based solely on what Blakely admitted in his plea.<sup>123</sup> To enhance a sentence, Washington state law required factors *in addition* to those used to compute the standard range sentence.<sup>124</sup> Blakely found himself in the same situation as Charles *Apprendi* four years earlier. Therefore, the enhancement deprived Blakely of his constitutional right to due process before depriving him of his liberty.<sup>125</sup>

The Florida Legislature did not amend its anti-gang statute for the purpose of complying with *Apprendi* and its progeny. A plain reading of the amended statute betrays an obvious purpose—make it easier to prosecute gang crime. However, during the amendment process, *Apprendi* simply could not be ignored.

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111. *Id.*

112. *Id.* at 471.

113. *Id.* at 476.

114. *Id.* The Court applied an existing rule under the Fifth and Sixth Amendments to state statutes under the Fourteenth Amendment. *Id.*

115. *Id.*

116. A reading of both *Apprendi* and *Blakely* introduces the reader to an ongoing debate concerning whether sentence enhancements are elements of the crime or a sentencing factor. See, e.g., Nancy J. King, *Essential Elements*, 54 VAND. L. REV. 1467 (2001); Andrew J. Fuchs, Note, *The Effect of Apprendi v. New Jersey on the Federal Sentencing Guidelines: Blurring the Distinction Between Sentencing Factors and Elements of a Crime*, 69 FORDHAM L. REV. 1399 (2001). However, that minefield is beyond the scope of this article.

117. *Blakely*, 542 U.S. at 298. *Blakely* is included here because it was the first application of the *Apprendi* rule.

118. *Id.*

119. *Id.* at 299.

120. *Id.* at 300.

121. *Id.*

122. *Id.* at 303.

123. *Blakely*, 542 U.S. at 304.

124. *Id.* (citing *State v. Gore*, 21 P.3d 262, 277 (Wash. 2001), *overruled on other grounds by State v. Hughes*, 110 P.3d 192, 199 (Wash. 2005)).

125. *Id.* at 313-14 (“The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to ‘the unanimous suffrage of twelve of his equals and neighbours,’ . . . rather than a lone employee of the State.”).

### Florida's Bold Approach to Restructuring its Arsenal

In 2008, the Florida Legislature re-armed prosecutors for a full frontal assault on gang violence. The campaign began when Governor Charlie Crist called for, and the Florida Supreme Court impaneled, a statewide grand jury on June 20, 2007, "to investigate, among other issues, the growing problem of gang violence in Florida."<sup>126</sup> In its first interim report, the Eighteenth Statewide Grand Jury made sixteen recommendations to the Legislature.<sup>127</sup>

The Legislature responded. It asserted the "compelling interest" in stopping the "proliferation of criminal gangs and the graduation from more primitive forms of criminal gangs to highly sophisticated criminal gangs."<sup>128</sup> Prosecutors around the state now had a statute making it easier to attack activity. The biggest changes dealt with the definitions of a criminal gang and a criminal gang member.

Originally, a criminal gang was defined as:

a formal or informal ongoing organization, association, or group that has as one of its primary activities the commission of criminal or delinquent acts, and that consists of three or more persons who have a common name or common identifying signs, colors, or symbols and have two or more members who, individually or collectively, engage in or have engaged in a pattern of criminal street gang activity.<sup>129</sup>

As of October 1, 2008, the new definition eliminates the phrase, "and have two or more members who, individually or collectively, engage in or have engaged in a pattern of criminal street gang activity."<sup>130</sup> This means that a prosecutor no longer needs to engage in the mathematical analysis necessary to establish a pattern of criminal gang activity. Now the distinction between a gang (not illegal) and a criminal gang (illegal) rests on the definition of "primary activities."<sup>131</sup> This definition was added to the new statute. "Primary" is defined as when "a criminal gang spends a substantial amount of time engaged in such activity, although such activity need not be the only, or even the most important, activity in which the criminal

126. EIGHTEENTH STATEWIDE GRAND JURY, *supra* note 1, at 3.

127. *Id.* at 42-45.

128. FLA. STAT. § 874.02(2) (2008). Note also that the term "street" has been removed and the term is now "criminal gang."

129. § 874.03(1) (2001). The reader will recall that a pattern of criminal street gang activity encompassed the convoluted definition of:

the commission or attempted commission of, or solicitation or conspiracy to commit, two or more felony or three or more misdemeanor offenses, or one felony and two misdemeanor offenses, or the comparable number of delinquent acts or violations of law which would be felonies or misdemeanors if committed by an adult, on separate occasions within a 3-year period.

*Id.* § 874.03(3) (2001). If it sounds confusing, don't worry—it is.

130. *Id.* § 874.03(1) (2008).

131. *Id.*

gang engages.”<sup>132</sup> “Activities” are also defined.<sup>133</sup> On its face, it is now arguably much easier to define an organization as a criminal gang.<sup>134</sup> If that alone was not enough, another sweeping change is the broadening of the definition of a criminal gang member.

Before the amended statute, a prosecutor faced various difficulties proving gang membership. Such a definition required meeting two out of eight criteria.<sup>135</sup> One such criterion, § 874.03(2)(d), proved most troublesome.<sup>136</sup> A prosecutor ordinarily could meet most clauses in that provision, but not all. In at least one case, a Florida appellate court held that a specific provision overruled a more general one.<sup>137</sup> Therefore, if a piece of evidence could meet section 874.03(2)(d) and also a more general provision, the specific provision controlled, and the State lost. This troublesome provision originally contained four clauses, but has now been split up so that each clause is a separate criterion. Now a prosecutor can prove gang membership by meeting two out of *eleven* criteria.<sup>138</sup> The provisions are now specific enough to avoid being subject to the general/specific rule of construction.

132. *Id.* § 874.03(1)(b) (2008). The term substantial is not defined by the statute. Though it remains an open question, it too is beyond the scope of this article.

133. It is defined as one of the following:

- (a) An activity committed with the intent to benefit, promote, or further the interests of a criminal gang, or for the purposes of increasing a person’s own standing or position within a criminal gang;
- (b) An activity in which the participants are identified as criminal gang members or criminal gang associates acting individually or collectively to further any criminal purpose of a criminal gang;
- (c) An activity that is identified as criminal gang activity by a documented reliable informant; or
- (d) An activity that is identified as criminal gang activity by an informant of previously untested reliability and such identification is corroborated by independent information.

*Id.* § 874.03(4)(a)-(d) (2008).

134. Another interesting observation is that “ongoing” is defined as “in existence during the time period charged in a petition, information, indictment, or action for civil injunctive relief.” *Id.* § 874.03(1)(a) (2008). Another open question, unfortunately also beyond the scope here, is what happens to investigations that include the time before and after the new statute goes into effect?

135. *See supra* note 97.

136. § 874.03(2)(d) (2001) (amended 2008).

137. *R.C.*, 948 So. 2d at 52 n.2 (“However, a more specific statutory provision governs over a more general provision” . . . Therefore, [§ 874.03(2)(d)] is applicable, and not criterion [§ 874.03(2)(g)].”

138. The new set of criteria is as follows:

- (a) Admits to criminal gang membership.
- (b) Is identified as a criminal gang member by a parent or guardian.
- (c) Is identified as a criminal gang member by a documented reliable informant.
- (d) Adopts the style of dress of a criminal gang.
- (e) Adopts the use of a hand sign identified as used by a criminal gang.
- (f) Has a tattoo identified as used by a criminal gang.
- (g) Associates with one or more known criminal gang members.

The Florida Legislature exercised substantial care in amending the anti-gang statute so that law enforcement and prosecutors have clear direction in identifying a defendant as a criminal gang member. Though to a lesser extent, it is also now easier to categorize a specific group as a criminal gang. The purpose of this article is to focus on a missed opportunity to continue this momentum by failing to give clear direction on how to introduce evidence of both the existence of a criminal street gang and the defendant's membership in the gang at trial.

The sentence enhancement provision in Florida's anti-gang statute is contained in section 874.04. In its original form, the provision allowed for the enhancement of the defendant's sentence if the court, at sentencing, found by a preponderance of the evidence that the charged offense was committed "for the purpose of benefiting, promoting, or furthering the interests of a criminal street gang."<sup>139</sup> To comply with the U.S. Supreme Court's decisions in *Apprendi* and its progeny, the amended provision now requires the factfinder to make that finding beyond a reasonable doubt.<sup>140</sup> Because the Legislature provided no further guidance in the text of the statute, it placed the enhancement provision on a collision course with the Florida Rules of Evidence. A short review of key rules demonstrates that the fundamental question unanswered by this oversight is whether or not to bifurcate the trial into a guilt and penalty phase.<sup>141</sup>

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(h) Is identified as a criminal gang member by an informant of previously untested reliability and such identification is corroborated by independent information.

(i) Is identified as a criminal gang member by physical evidence.

(j) Has been observed in the company of one or more known criminal gang members four or more times. Observation in a custodial setting requires a willful association. It is the intent of the Legislature to allow this criterion to be used to identify gang members who recruit and organize in jails, prisons, and other detention settings.

(k) Has authored any communication indicating responsibility for the commission of any crime by the criminal gang.

Where a single act or factual transaction satisfies the requirements of more than one of the criteria in this subsection, each of those criteria has thereby been satisfied for the purposes of the statute.

FLA. STAT. § 874.03(3)(a)-(k) (2008). The inevitable question becomes, can this definition be applied retroactively? Will an individual, who before October 1, 2008 could not sufficiently be identified as a criminal gang member, not be so identified based on that earlier evidence? In order to focus on the implementation of the sentence enhancement provision, this question must be left for another day.

139. FLA. STAT. § 874.04 (2001) (amended 2008). The statute only affected what the statutory maximum penalty may be, not the actual sentence the defendant will serve. The actual sentence is largely determined by utilization of a scoresheet found in the Criminal Punishment Code. See FLA. STAT. § 921.0024 (2008).

140. See § 874.04 (2008).

141. Florida statutes do provide clear guidance for bifurcated trials. One example is the death penalty for capital felonies. See FLA. STAT. § 921.141(1) (2008).

### A Primer on Florida Rules of Evidence 90.401 – 90.404

The reader may recall from the first day of Evidence class that relevant evidence tends to prove or disprove a material fact.<sup>142</sup> All relevant evidence is admissible, unless prohibited by another law.<sup>143</sup> One such Florida law deals with evidence of other crimes, wrongs, or acts.<sup>144</sup> This evidence is admissible only if it is relevant to a material fact, and if it is not being admitted for the sole purpose of proving the defendant's bad character or propensity to commit the offense charged.<sup>145</sup> Some of the reasons such evidence is admissible include proving "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]"<sup>146</sup>

The implications for a gang prosecution require careful attention. Let us return to our Deebo hypothetical. Recall that Deputy Bailey arrested Deebo for criminal mischief (spraying graffiti), carrying a concealed weapon, and possession of more than twenty grams of cannabis. ASA Martin charged the sentence enhancement because he intends to prove Deebo committed these acts in furtherance of criminal gang activity. Assume Deebo claims he has no knowledge of the marijuana drug trade. ASA Martin can offer testimony of a deputy who purchased marijuana from Deebo on a previous occasion while undercover. The court is likely to admit this evidence because it is not offered to prove Deebo has a propensity to commit this sort of offense; rather, it is offered to show his knowledge of the marijuana drug trade.

To be admissible, the evidence must also pass the Florida Statute section 90.403 balancing test. Section 90.403 excludes relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury," or cumulative evidence.<sup>147</sup> The evidence of Deebo's prior sale is that of other crimes, acts, or wrongs. It is likely relevant under section 90.404(2)(a) and, unless it is unfairly prejudicial, the evidence comes in.

Armed with a brief summary of the applicable Florida Rules of Evidence, consider these additional facts. Deebo belongs to the Main Street Souljas ("Souljas"). The Souljas is a criminal gang that primarily sells marijuana, with documented ties to Mexican drug cartels. The gang's colors are orange and white, and the Alibamo County gang unit is aware of the gang signs its members use to identify themselves. In addition, members have distinct tattoos. One such tattoo is an image of a man holding a handgun with his head facing the ground, with the phrase "born to kill, born to die" above and below the illustration.

The three other individuals with Deebo the night he was arrested were Nate "Tiny Tim" Wilson, David "Pookie" Williams, and Jason "Warlord" Jones. All

142. The Florida rules in this section track nearly verbatim the Federal Rules. See, e.g., FED. R. EVID. 401; FLA. STAT. § 90.401 (2008).

143. FLA. STAT. § 90.402 (2008).

144. FLA. STAT. § 90.404(2)(a) (2008).

145. *Id.*

146. *Id.*

147. FLA. STAT. § 90.403 (2008).

three individuals have criminal histories, including convictions for resisting a law enforcement officer without violence, trafficking in marijuana, possession of a concealed weapon, and aggravated assault. ASA Martin needs to introduce all of this evidence in order for the sentence enhancement to be applied.<sup>148</sup>

Section 90.404(2)(a)<sup>149</sup> does not cover this sort of evidence. That rule governs prior acts of the defendant himself. To convict Deebo and enhance his sentence, the jury will need to hear evidence bearing on whether he committed the crimes on the night in question, as well as a substantial amount of evidence about the Souljas, its members, and their activities. This evidence concerns people other than Deebo, the defendant on trial. While it may be relevant, is its probative value substantially outweighed by the danger of unfair prejudice? After all, it has nothing to do with the actual substantive crimes charged in this case. If it would be, must the trial be bifurcated in some way so that the Legislature's intent, the eradication of criminal gangs, can be given full effect? The evidence has to be offered in some way, or criminal gang crime will continue unabated.

This is the situation left in the wake of Florida's amended anti-gang statute. In the absence of legislative guidance, each court will need to decide how to resolve this dilemma. Before recommending an approach, it is useful to analyze how gang membership is currently handled by Florida courts when the enhancement is not charged, as well as how other states approach this same issue.

## **PART II – IMPLEMENTATION: TO BIFURCATE OR NOT TO BIFURCATE? THAT IS THE QUESTION.**

### **Admitting Evidence of Gang Membership in Florida Courts**

Florida appellate courts have had limited opportunities to navigate through the admissibility of evidence of criminal gang membership during the guilt phase of a trial. And out of eleven total cases, the Third District decided five and the Fourth District decided four.<sup>150</sup> As a whole, Florida appellate courts have generally admitted evidence of criminal gang membership.<sup>151</sup>

148. All of these facts are required in order to prove the elements of the enhancement provision. Namely, that the criminal gang exists and that Deebo is a member of the gang.

149. Other crimes, wrongs, acts evidence.

150. *Millan v. State*, 932 So. 2d 557 (Fla. Dist. Ct. App. 3d Dist. 2006); *Reyes v. State*, 783 So. 2d 1129 (Fla. Dist. Ct. App. 3d Dist. 2001); *Gomez v. State*, 751 So. 2d 630 (Fla. Dist. Ct. App. 3d Dist. 1999); *Cook v. State*, 595 So. 2d 994 (Fla. Dist. Ct. App. 3d Dist. 1992); *Jacobson v. State*, 375 So. 2d 1133 (Fla. Dist. Ct. App. 3d Dist. 1979); *Stokes v. State*, 914 So. 2d 514 (Fla. Dist. Ct. App. 4th Dist. 2005); *Pantoja v. State*, 885 So. 2d 930 (Fla. Dist. Ct. App. 4th Dist. 2004); *Martin v. State*, 797 So. 2d 6 (Fla. Dist. Ct. App. 4th Dist. 2001); *Doherty v. State*, 726 So. 2d 837 (Fla. Dist. Ct. App. 4th Dist. 1999). The other two cases were direct appeals to the Florida Supreme Court because the trial court imposed the death sentence. See *Evans v. State*, 800 So. 2d 182 (Fla. 2001); *Smith v. State*, 403 So. 2d 933 (Fla. 1981)..

151. Though it is worth noting that Judge Taylor, in his dissenting opinion in *Martin*, said that "gang affiliation evidence is presumptively prejudicial." *Martin*, 797 So. 2d at 9 (Taylor, J., dissenting). Of course, all evidence is prejudicial, the question is whether it is *unfairly* prejudicial. See § 90.403.

Gang evidence tends to be admissible when used to impeach the credibility of a witness.<sup>152</sup> In other cases, evidence of gang membership will be excluded only if wholly irrelevant to the charged offense.<sup>153</sup> Irrelevant gang evidence is unfairly prejudicial to the defendant and the Third District has said such extreme conduct “will not be tolerated.”<sup>154</sup> Even when the appellate court found error, the court affirmed the decision below because the error was harmless.<sup>155</sup> Decisions have also dealt with other, unrelated, procedural errors, not necessarily because of the gang membership evidence itself.<sup>156</sup>

It is at least safe to say there is no specific pattern to how Florida courts deal with gang evidence. They tread lightly but generally admit the evidence.<sup>157</sup> However, one case illustrates a clear approach to introducing this evidence while providing adequate notice to the defense and presenting all this to the court in a systematic fashion.

David Millan was convicted of second degree murder.<sup>158</sup> He stabbed Roland Pastor, but claimed it was in self-defense.<sup>159</sup> The difficulty (perhaps one of many) for Millan was that Roland was found with the emblem of the Latin Kings gang carved into his forehead.<sup>160</sup> The medical examiner said this was done with a “cutting instrument at or around the time of the victim’s death.”<sup>161</sup>

ASA Gail Levine noticed the court and defense counsel of her intent to rely on evidence of other crimes, wrongs, or acts at trial.<sup>162</sup> In addition to the notice, ASA Levine later submitted a memorandum of law concerning the admissibility of gang evidence.<sup>163</sup> In the memorandum, ASA Levine detailed the facts relating to Millan’s gang membership and listed the exact evidence she intended to rely on, as

152. *Martin*, 797 So. 2d at 7-8. In another case, the gang evidence was admitted through witness testimony. While the court lamented that a conviction could stand on evidence by such a “disreputable” witness, it was for the jury to determine his credibility. *Smith*, 403 So. 2d at 934 - 935.

153. *Stokes*, 914 So. 2d at 516; *Reyes*, 783 So. 2d at 1135.

154. *Gomez*, 751 So. 2d at 632 (“[T]hese types of improper comments by ‘overzealous’ (read ‘unprofessional’) prosecutors are unfair to defendants, will not be tolerated, and will continue to result in reversals.”).

155. In *Jacobson*, for example, the court said the defendant’s criminal lifestyle was so pervasive it was inevitable that some of it, including evidence of gang evidence, would be just impossible to be kept from the jury. *Jacobson*, 375 So. 2d at 1134 – 1135.

156. In *Cook*, the court found it reversible error to deny the defendant’s motion to sever or suppress on Confrontation Clause issues regarding the co-defendants’ statements. *Cook*, 595 So. 2d at 995. Also, in *Pantoja*, the defendant claimed reversible error in repeated references to gang membership and activity on appeal, but the court held the issue was not preserved by an appropriate objection at trial. *Pantoja*, 885 So. 2d at 931.

157. See *supra* note 150.

158. *Millan*, 932 So. 2d at 558. Westlaw mistakenly indicates *Millan* is no longer good law because the mandate from the District Court was recalled. The District Court issues a mandate to the court below usually fifteen (15) days after its decision. See FLA. R. APP. P 9.340(a). In fact, a call to the clerk’s office at the court confirmed the mandate was re-issued, meaning the District Court decision was ordered enforced. Telephone call to Clerk’s Office (Aug. 1, 2008).

159. *Millan*, 932 So. 2d at 558.

160. *Id.*

161. *Id.*

162. *Id.*; Notice of Intent to Rely on Evidence of Other Crimes, Wrongs, or Acts, 2002 WL 34402285 (Fla. Cir. Ct. July 31, 2002).

163. Memorandum of Law: On the Admissibility of Gang Evidence, 2002 WL 34402286 (Fla. Cir. Ct. Oct. 10, 2002). ASA Levine’s memorandum relied on the cases presented here, as well as case law from sister jurisdictions to provide a broad view for the court. *Id.*

well as its sources (i.e. gang expert testimony, etc.).<sup>164</sup> The ingenuity of this approach is that ASA Levine did not do this because the proffered evidence was in fact evidence of other crimes, wrongs, or acts. “Rather, gang evidence is usually inextricably intertwined with the crime alleged and is thus outside the purview of [other crimes, wrongs, or acts evidence] analysis.”<sup>165</sup> Over defense objection, the trial judge agreed, and the Third District Court affirmed.<sup>166</sup>

ASA Levine adapted an existing procedure to inform the court and defense counsel of how she intended to proceed.<sup>167</sup> In the absence of legislative guidance, ASA Levine’s approach is certainly one capable of being applied successfully throughout Florida courts. A solution to implementing the sentence enhancement provision likely lies in the adaptation of one or more existing Florida procedures. But before settling on this approach, it is helpful to analyze certain other jurisdictions to see if, or how, a Florida approach may be successfully implemented.

### California’s Enforcement of its Enhancement Provision

A gun battle near the University of California at Los Angeles left a twenty-seven-year-old innocent bystander dead.<sup>168</sup> No longer was gang violence confined to South Central Los Angeles.<sup>169</sup> It was not the shot heard around the world<sup>170</sup>, but the legislators sure heard it in Sacramento.<sup>171</sup> Their response—the STEP Act.<sup>172</sup>

This Act provides for an enhanced penalty if the defendant is convicted of a felony that was committed for the benefit of a criminal street gang and with the specific intent to promote criminal conduct by gang members.<sup>173</sup> The STEP Act resembles the federal RICO statute.<sup>174</sup> Unlike its Florida counterpart, the California STEP Act lists specific offenses to be included in the formulation of the definition

164. *Id.* at 1-5.

165. *Id.* at 7 n.1. In the original wording, ASA Levine refers to the analysis as “Williams Rule analysis.” The reference to a “Williams Rule analysis” originates from the first Florida case to deal with similar fact evidence, which is now used as a catch-phrase for that sort of evidence. See *Williams v. State*, 110 So. 2d 654, 663 (Fla. 1959) (“[E]vidence of any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion.”).

166. *Millan*, 932 So. 2d at 558.

167. ASA Levine’s approach supports the purpose of this article. Here is one example of a prosecutor trying to adapt an existing process due to a lack of guidance by the Legislature. What are other prosecutors using, if they are using this provision at all? Could this provision be more effectively used with proper guidance?

168. Strosnider, *supra* note 31 at 108.

169. *Id.*

170. This well known phrase originated in the opening stanza to Ralph Waldo Emerson’s *Concord Hymn* (1837) in honor of the Battle of Concord (first battle of the American Revolution):

By the rude bridge that arched the flood,  
Their flag to April’s breeze unfurled;  
Here once the embattled farmers stood;  
And fired the shot heard round the world.

171. Strosnider, *supra* note 31, at 108.

172. The STEP Act was originally passed in 1988, the first of its kind. *Id.* at 109; Bart H Rubin, *supra* note 31 at 2063.

173. CAL. PENAL CODE § 186.22(b) (West 2008).

174. Rubin notes that RICO includes a definition of “enterprise” and “pattern of racketeering activity,” whereas in STEP it is “criminal street gang” and “pattern of criminal gang activity.” Rubin, *supra* note 31 at 2060 n.205.

of a “pattern of criminal gang activity.”<sup>175</sup> Most of the listed offenses are also used to define the existence of a “criminal street gang.”<sup>176</sup> By 1998, sixteen states had adopted some form of the STEP Act.<sup>177</sup> Today, at least twenty-five states have enhanced penalties for crimes in furtherance of gang activity,<sup>178</sup> while every state has some sort of anti-gang legislation.<sup>179</sup>

California does not require bifurcation of a trial in which gang evidence is introduced.<sup>180</sup> This is because the “enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense.”<sup>181</sup> Nothing in the statute indicates that the enhancement should receive any special treatment.<sup>182</sup> Of course, there are limits. But when the evidence is intended to prove the enhancement, bifurcation is not necessary.<sup>183</sup> The single proceeding also helps reduce costs and judicial resources.<sup>184</sup> In fact, the court’s discretion to deny bifurcation is broader than its discretion to admit gang evidence when the enhancement is not charged.<sup>185</sup> The burden is on the defendant “to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.”<sup>186</sup> If the trial court exercises its discretion by considering the objection, weighing the prejudice versus probative value of the evidence, and concludes the evidence is inextricably intertwined to mandate a single proceeding—the evidence comes in.<sup>187</sup>

The California approach is highly exportable to Florida. In fact, the approach used by ASA Levine in *Millan v. State* is strikingly similar. Like California, Florida courts also have discretion to bifurcate trials.<sup>188</sup> The charged offense and the enhancement are separate counts on the same information. Therefore, the trial should be bifurcated only in exceptional circumstances.<sup>189</sup> Noticing the court and defense counsel, as done in *Millan*, lets the defense know what evidence the prosecution intends to introduce. More importantly, it allows the court to exercise its discretion. If admitted, Defense counsel may request that the judge instruct the jury that the evidence may only be considered for its possible relevance regarding the enhancement.<sup>190</sup> The jury can also be instructed again at the close of the evidence.<sup>191</sup> Florida courts generally admit evidence of gang membership, even when

175. CAL. PENAL CODE § 186.22(e)(1)-(33) (West 2008).

176. *Id.* § 186.22(f).

177. Rubin, *supra* note 31 at 2063.

178. National Youth Gang Center, Gang-Related Legislation—Enhanced Penalties-Sentencing, [http://www.iir.com/nygc/gang-legis/enhanced\\_penalties.htm](http://www.iir.com/nygc/gang-legis/enhanced_penalties.htm) (last visited December 19, 2008).

179. National Youth Gang Center, Compilation of Gang-Related Legislation, <http://www.iir.com/nygc/gang-legis/default.htm> (last visited December 19, 2008).

180. *People v. Hernandez*, 94 P.3d 1080, 1085 (Cal. 2004).

181. *Id.*

182. *Id.*

183. *Id.* at 1086.

184. *Id.*

185. *Id.* at 1087.

186. *Id.* at 1086.

187. *People v. Martin*, 28 Cal. Rptr. 2d 660, 664 (Cal. Ct. App. 6th Dist. 1994).

188. *Williams v. Williams*, 659 So. 2d 1306, 1307 (Fla. Dist. Ct. App. 4th Dist. 1995).

189. *Id.*

190. FLA. STAT. § 90.107 (2008).

191. This is the procedure used for other crimes, wrongs, or acts evidence. See FLA. STAT. § 90.404(2)(c). (2008).

the enhancement is not charged.<sup>192</sup> Because the court has broader discretion to deal with gang evidence when the enhancement is charged, the California approach seems a realistic solution for Florida and requires little adjustment in current procedures.

### The Kansas Aggravated Range Approach

Kansas uses a sentencing guidelines approach to impose punishment on those convicted of a felony.<sup>193</sup> The sentence may exceed the maximum or fall below the minimum guideline, depending on whether aggravating or mitigating factors exist.<sup>194</sup> Any departure above the statutory maximum must be decided by a jury beyond a reasonable doubt in a separate proceeding.<sup>195</sup> Normally, the judge will sentence the defendant to a term found in the middle of the sentencing range,<sup>196</sup> but does have discretion to reach the upper and lower limits of the range (he just cannot exceed the maximum of the range).<sup>197</sup> This action is reserved for aggravating or mitigating factors that do not warrant a departure from the guidelines.<sup>198</sup> One such aggravating factor left to the judge's discretion is a finding that the offense was for the benefit of a criminal street gang.<sup>199</sup>

Kansas case law provides little in the way of guidance on how the Kansas anti-gang statute has been implemented. In one case, the Kansas Supreme Court held that sentencing a defendant to a prison term rather than probation did not extend the sentence beyond the statutory maximum which would violate *Apprendi*.<sup>200</sup> The length of punishment was the same and the Kansas anti-gang statute provided for presumed imprisonment if the offense was committed in furtherance of criminal gang activity.<sup>201</sup> No other case has reached the Kansas appellate courts concerning its anti-gang statute.

Florida's existing approach is somewhat different. Sentencing ranges like that used in Kansas are no longer used in Florida. Florida operates under the Criminal Punishment Code.<sup>202</sup> Each offense is given a classification<sup>203</sup> (i.e. capital felony, first degree felony, misdemeanor, and so on), and each classification a statutory maximum penalty.<sup>204</sup> At sentencing, each defendant is "scored."<sup>205</sup> A defendant convicted of a primary offense with the sentence enhancement provision applied

192. See *supra* note 149.

193. KAN. STAT. ANN. § 21-4704 (2006).

194. *Id.* at § 21-4716(c)(1)-(2) (2006).

195. *Id.* at § 21-4716(b) (2006).

196. *Id.* at § 21-4704(e)(1) (2006).

197. *Id.*

198. *Id.*

199. *Id.* at § 21-4704(k) (2006).

200. *State v. Garcia*, 56 P.3d 797, 799 (Kan. 2002).

201. *Id.* at 799.

202. FLA. STAT. § 921.002 (2008).

203. FLA. STAT. § 921.0022 (2008).

204. FLA. STAT. § 775.082(3)-(4) (2008).

205. A sample scoresheet is listed in a statute. Points are assigned for categories such as the primary offense, any additional offenses, the victim's injury, any prior record, and any multipliers (such as whether the offense is a criminal gang offense). See FLA. STAT. § 921.0024 (2008).

will have his subtotal score multiplied by 1.5.<sup>206</sup> The total score determines the minimum sentence the defendant must serve.<sup>207</sup>

Florida uses a different sentencing approach. But it operates similarly enough to that of Kansas that it makes little sense to advocate for the Kansas approach. Just as a Kansas judge has discretion to increase a sentence into the aggravated range (without exceeding the statutory maximum), the Florida Criminal Punishment Code provides for an automatic increased sentence if the conviction was for gang activity.<sup>208</sup> The State Attorney often may score the defendant prior to trial, so some sort of notice to the court, perhaps in some combination with the California approach, would provide the court the opportunity to decide whether bifurcation is necessary. Actually, the current Florida approach is better for law enforcement because a scored sentence above the statutory maximum, by statute, cannot be lowered.<sup>209</sup> The Florida Supreme Court has said this new mandatory minimum sentence *becomes the statutory maximum penalty allowed*.<sup>210</sup>

### North Carolina's Aggravated Factors Strategy

North Carolina statutes provide clear guidance for gang prosecutions. The fact that a crime is committed for the benefit of a criminal street gang and with the intent to further the gang's criminal conduct is categorized as an aggravating factor in sentencing.<sup>211</sup> The defendant may admit any aggravating factor.<sup>212</sup> If he does not, only a jury can determine if it exists in any charged offense.<sup>213</sup> This decision is made during the guilt phase, unless the court determines that justice requires a separate proceeding.<sup>214</sup> If the trial is to be bifurcated, the same jury hears the penalty phase.<sup>215</sup> The evidence regarding the nexus between criminal gang membership and the charged offense is heard only to determine whether this aggravated factor

206. *Id.* § 921.0024(1)(b) (2008) ("Offense related to a criminal street gang: If the offender is convicted of the primary offense and committed that offense for the purpose of benefiting, promoting, or furthering the interests of a criminal street gang as prohibited under s. 874.04, the subtotal sentence points are multiplied by 1.5.").

207. *Id.* § 921.0024(2) (2008).

208. *Id.*

209. *Butler v. State*, 838 So. 2d 554, 556 (Fla. 2003). One commentator argued that *Apprendi* effectively overruled this reasoning. Robert Batey, *Sentencing Guidelines and Statutory Maximums in Florida: How Best to Respond to Apprendi*, 74 FLA. B.J. 57, 57 (2000). The *Butler* decision, however, re-affirmed this reasoning. For the time being, it seems, the Florida Supreme Court disagrees with Mr. Batey.

210. *Id.* This rule is troubling. It is unclear whether it would hold up if this decision were to reach the U.S. Supreme Court. Upon an initial inquiry, this rule seems to have the effect of circumventing *Apprendi*. To follow this rule to its logical conclusion, the judge can hear gang evidence, apply the enhancement, and if the defendant scores above the maximum statutory limit, his sentence *becomes* the statutory limit. In that case, the sentence would never exceed the statutory maximum, thereby triggering *Apprendi*. This, too, is beyond the scope of this article, but certainly is worthy of more study.

211. N.C. GEN. STAT. § 15A-1340.16(d)(2a) (2008).

212. *Id.* § 15A-1340.16(a1) (2008).

213. *Id.*

214. *Id.*

215. *Id.*

exists.<sup>216</sup> Elements of the offense charged are not relied on to prove any aggravating factor.<sup>217</sup> Little is left to interpretation.

Only one North Carolina case references its anti-gang sentence enhancement provision.<sup>218</sup> But it is only to say that the provision became effective after the date the defendant allegedly committed the criminal acts.<sup>219</sup> North Carolina enacted this provision in response to *Blakely*.<sup>220</sup> Prior to *Blakely*, North Carolina had no mechanism for presenting aggravating factors to a jury.<sup>221</sup> In *Roberson*, the Court of Appeals considered whether the trial court erred by imposing an aggravated sentence without submitting the aggravating factor to a jury for it to find the factor's existence beyond a reasonable doubt.<sup>222</sup> Because North Carolina common law allowed for special verdicts,<sup>223</sup> failure to submit the criminal gang membership aggravating factor to a jury was harmless error.<sup>224</sup>

North Carolina is a straightforward example from which the Florida Legislature could use to provide clear guidance for its courts. The enhancement need not be listed as an aggravating factor, but the approach may still be the same. Just as the defendant may admit to the enhancement if convicted, *Apprendi* stated that he may also waive the jury and let the judge make the determination on the enhancement at sentencing.<sup>225</sup> A legislative solution should certainly be considered along with any judicial process. Defining the boundaries and providing guidelines for courts would ensure a consistent approach to a problem widely agreed to be state-wide.

### South Dakota's Separate Information Approach

South Dakota's approach is considered here because it is unique. Like Florida and other states, South Dakota's statute defines street gangs, gang membership, and patterns of gang activity.<sup>226</sup> Similarly, a conviction of an offense that was part of a pattern of criminal gang activity will result in an enhancement to the next highest penalty.<sup>227</sup> Unlike Florida, the prosecutor in South Dakota must file a separate information at the time of the arraignment for the charged offense.<sup>228</sup> At the time

216. *Id.* § 15A-1340.16(d) (2008).

217. *Id.*

218. *State v. Roberson*, 641 S.E.2d 347 (N.C. Ct. App. 2007).

219. *Id.* at 349.

220. *Id.*

221. *Id.*

222. *Id.* at 348-49. The aggravating factor was the allegation that the defendant was a member of a criminal gang and committed the charged offense in furtherance of the gang's criminal activity. *Id.* at 349.

223. BLACK'S defines this term as "A verdict in which the jury makes findings only on factual issues submitted to them by the judge, who then decides the legal effect of the verdict." BLACK'S LAW DICTIONARY 757 (3d pocket ed. 2006).

224. *Id.* The court determined that the evidence was so overwhelming that any reasonable juror would have found the aggravating factor to exist had the procedural error not occurred. *Id.* at 349-50.

225. There may even be circumstances where the defendant would want to take his chances with a judge rather than a jury on this issue.

226. S.D. CODIFIED LAWS § 22-10A-1 (2008).

227. S.D. CODIFIED LAWS § 22-10A-2 (2008).

228. S.D. CODIFIED LAWS § 22-10A-3 (2008).

of this writing, the author is not aware of any informations filed under this statute in the state of South Dakota.

A separate information approach seems too costly to recommend. The South Dakota approach concedes that every gang prosecution *must* be bifurcated. The increased cost in both funds and judicial resources associated with this concession seems exactly what the California approach sought to avoid. Perhaps this is the reason the South Dakota statute has never been applied.

### **PART III – LET’S DO IT: TWO PROPOSALS FOR FLORIDA**

States have taken different approaches to attacking gang violence. California was first to open fire and now every state has some sort of anti-gang statute that traces its roots to the California model. Florida is no exception. Faced with a growing gang problem, the Florida Legislature acted. For more than a decade, the Legislature has had to adapt to court decisions to ensure that the goal of eliminating gangs is met while constitutional rights are protected. The original statute passed by the Florida Legislature unconstitutionally punished gang membership alone and seemed nearly impossible to prove, even when the nexus between the crime and gang membership was later added. With fresh interest at the federal level looming, Florida revamped its arsenal against gangs with a vastly amended anti-gang statute, including its sentence enhancement provision. But *Apprendi* and its progeny had to be considered. Yet, there is more for the Legislature to do to give law enforcement and prosecutors clear direction on using this arsenal.

How should prosecutors implement the sentence enhancement provision? There is no reason to bifurcate the trial. The evidence should be introduced during the guilt phase because it is inextricably intertwined with the charged offense. Florida courts generally admit evidence of gang membership. And a court has broader discretion to admit such evidence when the enhancement is charged. Each state analyzed here provides good examples from which to map a path to effective implementation of Florida’s anti-gang sentence enhancement provision. A synthesis of them leads to a recommendation for the Legislature and the Judiciary. Sample legislative provisions are provided below, as well as a concise recommendation for Florida courts to follow that tracks closely the sample provisions.

#### **A Suggested Legislative Amendment**

Section 874.041. Proving the section 874.04 sentence enhancement – because the U.S. Supreme Court in *Apprendi v. New Jersey* requires the factfinder to determine beyond a reasonable doubt the existence of any fact, other than a prior conviction, that increases the defendant’s sentence beyond the statutory maximum, the Legislature seeks to provide clear guidance to Florida courts as follows:

- (1) Notice. The State shall provide to the court and the defense, no fewer than 21 days before trial, a written statement of the evidence it intends to offer for consideration of

the enhancement, describing the evidence with the particularity required of an indictment or information.

(a) The trial court is to weigh the proffered evidence within its discretion under the applicable rules of evidence and determine whether a separate proceeding is required.

(b) The rebuttable presumption is that an indictment or information including a count for the sentence enhancement should be a single proceeding because the evidence of the charged offense and the enhancement are inextricably intertwined.

(i) To rebut this presumption, the defendant shall clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.<sup>229</sup>

(c) When evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.<sup>230</sup>

(2) Separate proceeding; waiver; admission.

(a) If the trial court determines a separate proceeding is required, the proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned.

(b) The defendant may waive the separate proceeding and allow the trial court to determine the existence of the sentence enhancement during sentencing.

(i) The court shall make written findings if it applies the sentence enhancement at sentencing.

(c) The defendant may admit to the sentence enhancement being applied if convicted.

229. See *People v. Hernandez*, 94 P.3d 1080, 1086 (Cal. 2004).

230. See FLA. STAT. § 90.404(2)(c)2. (2008).

(i) If the defendant admits criminal gang membership, but pleads not guilty to the underlying offense, a jury shall be impaneled to dispose of the underlying offense. In that case, evidence that relates solely to the establishment of criminal gang membership shall not be admitted in the trial.<sup>231</sup>

(ii) If the defendant admits to the underlying offense, but contests criminal gang membership, a jury shall be impaneled to determine if the defendant is a criminal gang member and committed the offense for the purpose of benefiting, promoting or furthering the interests of the criminal gang.<sup>232</sup>

### A Judicial Approach

The suggested amendment above easily serves as a guide for a judicial approach in the absence of legislative guidance. In addition, the process looks quite similar to that utilized in *State v. Millan*. With appropriate notice, defense counsel has time to respond to the State's motion. Furthermore, a proper hearing can be held. The court should then be sure to exercise its discretion and consider the objections, perform the section 90.403 balancing test to determine whether the probative value of the evidence is *substantially outweighed* by the danger of unfair prejudice, and conclude whether the proffered evidence for the enhancement is inextricably intertwined with the charged offense to require a single proceeding.<sup>233</sup> There remains a rebuttable presumption that a single proceeding will be held. If the trial judge determines the evidence to be overly prejudicial to the defendant, she may bifurcate the proceeding. This can be done by separating the trial into two phases or using double juries in a single trial.<sup>234</sup>

To protect the defendant's rights, defense counsel first has the opportunity to object to the admission of the evidence. If the evidence is admitted, counsel can request a limiting instruction at the time of admission and again at the close of evidence. Also, the defendant retains some control over the introduction of this evidence. He may admit to criminal gang membership or waive his jury right and have the trial judge review the evidence and make the determination at sentencing. If the judge applies the enhancement, the defendant will have written findings from which to appeal.

231. See N.C. GEN. STAT. § 15A-1340.16(a2) (2008).

232. See *id.* § 15A-1340.16(a3) (2008).

233. While it seems silly to instruct a judge on how to do her job, I only include this because at least one California court reversed a trial court's decision because the judge did not follow these steps.

234. Bifurcation seems much more cost-effective, but that question is for another day.