

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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| WAYNE WASHINGTON, |) | |
| |) | No. 16 CV 1893 |
| Plaintiff, |) | |
| |) | |
| v. |) | Honorable John F. Kness |
| |) | |
| |) | Magistrate Judge Maria Valdez |
| CITY OF CHICAGO, <i>et al.</i> , |) | |
| Defendants. |) | JURY TRIAL DEMANDED |

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| TYRONE HOOD, |) | |
| |) | No. 16 CV 1970 |
| Plaintiff, |) | |
| |) | |
| v. |) | Honorable John F. Kness |
| |) | |
| |) | Magistrate Judge Maria Valdez |
| CITY OF CHICAGO, <i>et al.</i> , |) | |
| Defendants. |) | |

**THE OFFICER DEFENDANTS’ MOTION IN *LIMINE* No. 15
TO ADMIT RELEVANT AND PROBATIVE GANG EVIDENCE**

Defendants, KENNETH BOUDREAU, GERALD CARROLL, JOHN HALLORAN, ROBERT LENIHAN, JAMES O’BRIEN, and BERNARD RYAN, (the “Officer Defendants”), through their undersigned counsel, move *in limine* to admit gang evidence.

1. Gang evidence should be admitted at trial because it is inextricably connected to the underlying criminal investigation and the actions of two central witnesses, namely Wayne Washington and Jody Rogers. More specifically, the evidence is relevant to Washington’s motive for committing the crime, the reason Jody recanted and Washington’s damages. Prohibiting such evidence would leave a chronological and conceptual void in the story, greatly prejudice the Officer Defendants’ ability to present a coherent defense, and materially interfere with the jury’s ability to determine facts at issue and make credibility determinations.

2. The Seventh Circuit has “long recognized that gang membership has probative value under appropriate circumstances.” *U.S. v. Lewis*, 910 F.2d 1367, 1372 (7th Cir. 1990); *U.S. v. Ozuna*, 674 F.3d 677, 681 (7th Cir. 2012) (despite risks of prejudice, “evidence of gang affiliation is not automatically inadmissible” and “has been deemed admissible where it is found to be more probative than prejudicial”). For instance, in the context of civil rights cases stemming from reversed convictions, this Court has admitted evidence of gang affiliation for limited purposes, such as understanding the circumstances of the underlying crime, including motive and identification, the gang affiliation of central witnesses, and a key witness’s recantation due to gang intimidation. See *Rivera v. Guevara*, No. 12-CV-04428, 2018 U.S. Dist. LEXIS 248406 (N.D. Ill. May 30, 2018), attached hereto as Ex. A; *Kuri v. City of Chicago*, No. 13-C-1653 (N.D. Ill. September 17, 2018), attached hereto as Ex. B.

3. For starters, the evidence is relevant to Washington’s motive for wanting to commit the crime. At the time of his arrest in May 1993, Washington was undeniably a member of the Black P Stones or “Blackstones” street gang and had the “pyramid” symbol for the Black P Stone gang tattooed on his arm. (Washington Deposition, p 46:15-17, 49:20-50:8, 100:24-102:9, attached as Exhibit C; Washington Trial Testimony on 8/14/96, at 134:8-16, attached hereto as Exhibit D).

4. In the confession he provided to felony review ASA James Brown, Washington stated that he had been “\$30 short” due to slow drug sales when he discussed committing the armed robbery with Hood and Jody. (Washington Statement, dated May 29, 1993, at 2, attached hereto as Exhibit E). Despite the allegation that his confession was false and fabricated, Washington admitted at his criminal trial that he really was \$30 short that day, but for reasons, he claimed, he did not tell felony review ASA Brown. (Ex. D, p. 114:22-115:22). Washington also admitted that

his failure to account for the missing \$30 could have severe consequences with his gang. (Ex. C, p. 318:23-319:20).

5. The gang evidence also explains why Jody Rogers recanted his statement to detectives and his grand jury testimony. Jody told detectives that was present when Hood and Washington discussed committing an armed robbery, that he told them where to find a gun, and that he heard Hood make an incriminating statement weeks later. Jody testified at Washington's criminal trial that sometime in 1994, he was visited by a member of Washington's gang, Cannon McAfee, who threatened that harm would come to Jody and his family if Jody testified. (Jody Rogers's Trial Testimony in *People v. Washington*, p. 13: 16 – 15: 20, attached as Exhibit F). Washington testified that McAfee was a fellow Blackstone, as was Washington's sister. (Ex. C, p. 147:20-150:8). After the visit from McAfee, Jody recanted to Mullenix in 1994 and again in 1995 to Washington's grandmother. (Ex. F, p. 15: 21 – 21: 14). Then in 1995 or 96, prosecutors offered Jody a reduced sentence on pending criminal charges in return for recanting his recantation and testifying at the trials of Hood and Washington.

6. Consistent with McAfee's threat, Jody was then beaten at Cook County jail just before he testified at Washington's trial. (Ex. F, p. 13:16-21:14; Higgins Deposition, p. 54:11-57:8, 95:10-97:13, 98:24-109:5, 159:22-161:18, attached hereto as Exhibit G). The trial prosecutor, ASA Rosemary Higgins, testified that she had Jody moved out of the same division as Washington at Cook County jail and into protective custody, away from Washington, because Jody's father reported to her that Jody had been threatened. (Ex. G, at 93:3-97:13).

7. Plaintiffs will try to downplay Jody's criminal trial testimony that he was threatened by McAfee into recanting his statement to police, simply because Jody disowned that trial

testimony decades later and said that McAfee did not threaten him. But that argument boils down to a question of credibility, which goes to weight, not admissibility, and is for a jury to decide.

8. Jody's attempts to disown his trial testimony are also dubious. Though Jody testified at his deposition that he recanted in 1994 out of a desire to tell the truth, when asked what changed his mind in the 10 months between his statement to police and his recantation to Hood's attorney, James Mullenix, he had no explanation. (Jody Roger's Deposition, p. 123: 10 – 127: 2, attached as Exhibit H). He was unable to identify anything that made him suddenly want to be truthful. He also had no memory of anything that happened in 1993 or 1996 and could only say what was written on "paper," which was a reference to the recantation Mullenix prepared. (Ex. H, at 161:18-164:18). The reason for Jody's recantation to Mullenix is a pivotal question of fact for the jury to resolve, and the gang evidence is relevant to which version to believe – the one involving Jody's desire to be "truthful" or the one in which Washington's fellow gang member, McAfee, threatened him into recanting. The gang evidence is not only relevant to why Jody recanted, but also to Jody's credibility.

9. Hood also indicated he was fearful of Washington and the Blackstones. Hood also told detectives on May 27, 1993, that he wanted to go with them when they drove Washington to the police station to be interviewed about his "alibi," because Hood was afraid Washington would think he was snitching on Washington or other members of Washington's gang. (Supplementary Report, dated 6/11/93, at 6, attached hereto as Ex. I). Regardless of whether Hood denies that statement now, the statement corroborates Jody's trial testimony that he was threatened by a member of Washington's gang and explains why Hood went with detectives to Area Two on May 27, 1993. Hood's fear was corroborated by Jody's brother, Kenneth Crossley, who testified that rumors were swirling around the neighborhood that he and Jody were talking to police, and that

“snitches get stiches.” (Crossley’s Deposition, p. 87:3-11, 142:21-143:2, 145:14-146:2, 173:19-174:11, attached hereto as Ex. J).

10. Hood’s fear of Washington and the gang was confirmed by Washington’s admission in his confession that, only days after the murder, he scolded Hood because Morgan, Jr.’s body was still in the car. While on the witness stand at his trial, Washington disputed that he told Hood, “What the fuck is he still doing in the car?” two days after the murder, and clarified that what he actually said was, “I told Tyrone I asked him why was he still in the car.” (Ex. C, at 128: 16 – 129: 8).

11. In addition, the gang membership is relevant to counter Plaintiffs’ argument that Hyde is a potential alternate suspect. The Officer Defendants should be allowed to rebut that argument with evidence that Laron Hyde was part of Washington’s gang and that Hyde’s involvement as a fellow gang member does not absolve Washington. Evidence of Washington’s gang ties is relevant to explaining how Laron Hyde is connected to the crime. (Supplementary Report, dated 6/13/93, at 9, attached as Exhibit K). Washington gave a statement admitting to his involvement in the crime and a bag belonging to Hyde was found in the car with Marshall Morgan, Jr.’s body.

12. The Seventh Circuit recognizes that gang evidence is admissible to show conspiracy between gang members, bias, for impeachment, and to explain inconsistencies in witness statements due to fear of gang retaliation. *United States v. Suggs*, 374 F.3d 508, 517 (7th Cir. 2004) (evidence of defendants’ gang affiliation admissible to show existence of a conspiracy); *United States v. Abel*, 469 U.S. 45, 49 (1984) (evidence demonstrating gang membership was “sufficiently probative of possible bias towards respondent to warrant its admission into evidence.”); *Clark v. O’Leary*, 852 F.2d 999 (7th Cir. 1988) (witness’ membership in rival gang admissible for purposes of impeachment to show bias); *United States ex rel. Garcia v. Lane*, 698

F.2d 900 (7th Cir. 1983) (gang membership of defendant admissible to explain earlier inconsistent statement of witness due to fear of retaliation). Between Jody's original statement, his criminal trial testimony that he was threatened McAfee, McAfee's membership in the same gang as Washington, Jody's father's plea to Higgins to move Jody to protective custody, and the injuries Jody suffered just before Washington's trial after he had recanted his recantation of his statement to police, there is enough direct and circumstantial evidence for the jury to decide whether Washington leveraged his gang membership to intimidate Jody into recanting.

13. The gang evidence is also relevant to Washington's damages. Washington admits that his prison experience was directly impacted by his gang membership, that the gang had a *de facto* security detail that protected him and that guards "looked the other way" when he had sexual encounters with girlfriends during visits. (Ex. C, p. 62:15-64:22, 80:15-81:22, 84:1-16, 122:1-123:18). This all goes to and corroborates Washington's ability to leverage his gang membership for benefits while in prison and to coerce or intimidate witnesses outside of prison, or in Jody's case, while inside Cook County jail.

14. Plaintiffs will likely argue that this clearly relevant evidence should be precluded under Fed. R. Evid. 403 because it is somehow unfairly prejudice. That argument has no merit because there is plenty of evidence that Washington's gang played a role in this case, both leading up to the murder of Morgan, Jr., and after the murder as part of an attempt to intimidate witnesses while Washington was in jail. It is also relevant to Washington's experiences while in prison.

15. Moreover, Hood not only acknowledged his fear of Washington's gang when he went with detectives to Area Two on May 27, 1993, but he was a direct beneficiary of the attempts by McAfee to intimidate Jody into recanting. Ultimately, those threats worked, and Jody recanted the recantation of his recantation of his statement to police. Given the strong evidence that

Washington's gang played a role in Jody's recantation, the evidence is properly considered in Hood's case as well. Far from being unduly prejudicial, the gang evidence is highly relevant. Excluding it would be unduly prejudicial to the Officer Defendants.

16. The Seventh Circuit deems it appropriate to use gang evidence for the purpose of providing a trier of fact an accurate context within which to weigh the facts presented. See *United States v. Hattaway*, 740 F.2d 1419, 1425 (7th Cir. 1984) (evidence of motorcycle gang's lifestyle admissible to provide accurate description of kidnapping victim's "ordeal"). Here, Plaintiffs have made no secret of their plan to argue that they are entirely innocent of the Morgan, Sr. homicide, and that their innocence is proof that officers framed them. Conversely, the Officer Defendants will argue they did nothing wrong, that Plaintiffs were involved in the crime and that their convictions should never have been overturned. The evidence of Plaintiffs' involvement in the crime is therefore highly relevant. And part of that evidence is Washington's membership in the Blackstones and his motivation for committing the crime and his use of the gang to intimidate a witness. The contextual facts concerning Washington's gang evidence simply cannot be denied.

17. Though "[g]uilt by association is a genuine concern whenever gang evidence is admitted," *United States v. Irvin*, 87 F.3d 860, 865 (7th Cir. 1996), that concern does not exist in this case because Defendants are not offering the gang evidence simply to show guilt by association. Instead, the evidence is probative of, and intertwined with, the essential facts, issues and claims underlying this case. Further, to provide protection against the minimized risk of allowing gang evidence at trial, the Court a jury instruction can nullify the risk. *U.S. v. Morales*, 2009 WL 1456567, at *17 (N.D. Ill. May 22, 2009) (cautionary instructions regarding gang evidence provided a fair trial); see also *U.S. v. Hardin*, 209 F.3d 652, 663-64 (7th Cir. 2000) (cautionary instructions made gang evidence at most harmless error).

18. The Officers Defendants conferred with Plaintiffs about this motion, and Plaintiffs have indicated they intend to object to the evidence that the Officer Defendants seek to admit.

WHEREFORE, the Officer Defendants respectfully request that Plaintiffs and their witnesses and attorneys be ordered not to mention, refer to, adduce, interrogate concerning, voluntarily answer, introduce any physical evidence concerning or attempt to convey to the jury at any time during these proceedings in any manner, directly or indirectly, the subject matter as stated above, and that each counsel is instructed to warn and caution each and every witness under their control appearing in this litigation to strictly comply with the ruling of this Court..

Dated: January 11, 2023.

Respectfully submitted,

By: /s/ Patrick R. Moran
Special Assistant Corporation Counsel
One of the Attorneys for Defendant Officers

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