

### **Case Summary:**

The four defendants assaulted another man. One of the questions the jury had to decide was whether the defendants committed the assault to benefit the Tiny Oriental Crips, a criminal street gang they belonged to. If so, the defendants could receive a longer sentence than would apply if the assault were not gang related. The jury did find that the assault was gang related.

Sometimes, in order to prove that a crime was gang related, the prosecution will present the opinion testimony of an expert on criminal street gangs. The prosecution did that here. Often an expert will testify in response to a “hypothetical question.” A hypothetical question asks the expert witness to assume the truth of certain facts stated in the question and then provide an opinion regarding those assumed facts.

In this case, over defense objection, the prosecutor asked the gang expert two detailed hypothetical questions based on what the evidence showed were the facts of this assault. Then he asked if the expert had an opinion about whether an assault under those facts would be gang related. The expert testified that, in his opinion, an assault committed under those facts would be committed for the benefit of a gang. He also explained why he came to that conclusion.

Defendant argued at trial and on appeal that the hypothetical questions were improper because they were based on the actual defendants in a way that was only thinly disguised. The Court of Appeal agreed and found the court erred in permitting the questions. It also, however, found the error harmless and affirmed the judgment against the defendants. The Supreme Court will decide whether the trial court did err in permitting the questions and, if so, whether the Court of Appeal correctly found the error harmless.

Regarding the question of error, defendants argue that an expert may not express an opinion regarding the state of mind of the actual defendants. They also argue that simply asking him a hypothetical question obviously based on those defendants was an improper way to get around this rule. The prosecutor argues that hypothetical questions must be based on the evidence, and asking such questions is a proper way to elicit expert testimony without testifying about the actual defendants.

Regarding the question of prejudice, defendants argue that the Court of Appeal applied an incorrect standard of review, and that the evidence that the crime was gang related was weak, making the error prejudicial. The prosecutor argues the evidence of guilt was ample, and the jury would have reached the same verdict even if the prosecutor had not been permitted to ask the hypothetical questions.