

[Attorney header]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

\_\_\_\_\_ APPELLATE DISTRICT

|                                    |   |                |
|------------------------------------|---|----------------|
| PEOPLE OF THE STATE OF CALIFORNIA, | ) | No. _____      |
|                                    | ) |                |
| Plaintiff and Respondent,          | ) | _____ County   |
|                                    | ) | Superior Court |
| v.                                 | ) | No. _____      |
|                                    | ) |                |
| APPELLANT [A],                     | ) |                |
|                                    | ) |                |
| Defendant and Appellant.           | ) |                |
| _____                              | ) |                |

**NOTICE OF JOINDER BY APPELLANT [A]  
IN ARGUMENTS BRIEFED IN OPENING BRIEF  
FILED BY COAPPELLANT [B]**

TO THE HONORABLE \_\_\_\_\_, PRESIDING JUSTICE,  
and to the Honorable Associate Justices of the Court of Appeal of  
the State of California, \_\_\_\_\_ Appellate District: Appellant [A],  
through his counsel, pursuant to California Rules of Court, rule  
8.200(a)(5), respectfully submits the enclosed joinder in arguments  
presented in the opening brief filed by coappellant [B].

**INTRODUCTION**

Appellant [A], appellant [B] and appellant [C] were charged  
jointly with [\_\_\_\_\_], and were tried together before the same jury.  
Appellant [A] filed his opening brief on [date]. Appellant [B] filed his

opening brief on [date]. In Argument III of his brief, appellant [B] joined in three arguments raised by appellant [A]. (See Appellant [B's] AOB p. \_\_.) Appellant [C's] opening brief is due for filing on [date].

**APPELLANT [A] JOINS IN ARGUMENT I  
OF APPELLANT [B]'s OPENING BRIEF**

Appellant [A] joins in Argument I of appellant [B]'s brief as he objected on the same bases and was equally prejudiced by the error. Argument I states: [**specify: such as the following framed issues**]

THE TRIAL COURT VIOLATED APPELLANT'S  
FEDERAL CONSTITUTIONAL RIGHTS TO DUE  
PROCESS AND CONFRONTATION BY ALLOWING  
EVIDENCE OF INADMISSIBLE HEARSAY  
STATEMENTS THROUGH THE TESTIMONY OF  
"GANG EXPERT" SMITH TO SUPPORT THE  
PREDICATE OFFENSE ELEMENT OF THE GANG  
ENHANCEMENT ON COUNT 1 AND SUBSTANTIVE  
GANG CRIME CHARGED IN COUNT 2

(Appellant [B's] AOB pp. 28-34.) All three defendants were charged in Count 2 with "street terrorism" [Pen. Code § 186.22, subd. (a)], and with a special allegation in Count 1 [Pen. Code § 187, subd.(a)] with having committed murder while an active participant in a criminal street gang [§186.22, subd. (f)]. (CT 275-280.) All three defendants were accused of association with the same alleged criminal street gang (Original Gangsters Surenos ["OGS"]). As stated in Appellant

[A's] opening brief, according to the gang expert:

[A] and [B] were each validated OGS member before the shooting, and [C] was validated shortly after the incident. (RT 2184, 2188, 2191-2192, 2260.) Smith opined that the three defendants had participated in a criminal street gang activity by their involvement in the shooting of [victim]. The incident was an attempt by the OGS to protect their "turf." (RT 2194-2195.)

(Appellant [A's] AOB p. 23.) Like the other defendants, [A] was convicted in Count 2 and the gang enhancement in Count 1 was found true. (CT 523-524.)

[A] unsuccessfully moved to dismiss the gang count and gang enhancement allegation under Penal Code section 995. (CT 126.) Subsequently, [B] filed a written motion challenging the constitutionality of the hearsay testimony of the prosecution's gang expert to prove up the gang count and gang enhancement allegation. (CT 306.) At the hearing on the motion, [A] and [C] joined the motion and were deemed by the trial court to have a "continuing objection" to the gang expert's anticipated testimony. (RT 220-221.) [A] also joined [B's] specific objection to the use of certified records of prior convictions of alleged gang members to prove the predicate offenses under Penal Code section 186.22, subdivisions (a) and (b). (RT 2175.) The predicate offenses evidence was offered against all three defendants.

[A] objected on the same basis as [B] and was prejudiced to

the same degree, consequently, joinder in Argument I of [appellant B's] opening brief is proper.

**Appellant [A] JOINS IN ARGUMENT II  
OF APPELLANT B's OPENING BRIEF**

Appellant [A] joins in Argument II of the Appellant [B] brief as he objected on the same bases and was equally prejudiced by the error. Argument II states:

BY FAILING TO REQUEST LIMITING INSTRUCTIONS  
REGARDING GANG EVIDENCE, TRIAL COUNSEL  
FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF  
COUNSEL, AS GUARANTEED UNDER THE SIXTH  
AMENDMENT TO THE UNITED STATES  
CONSTITUTION AND ARTICLE I, SECTION 15 OF  
THE CALIFORNIA CONSTITUTION

(Appellant [B]'s AOB pp. 36-43.) This argument concerns the same prejudicial and improper evidence objected to in Argument I, but here the challenge is based on the failure to seek limiting instructions despite –

the fact that [the gang expert's] hearsay evidence was not admissible for its truth, counsel never requested a limiting instruction to the jury informing them of this fact. In addition, Smith was allowed to recount multiple other crimes and "bad acts" evidence in support of his opinions regarding whether OGS was a criminal street gang and whether the charged crimes were committed "for the benefit of, at the direction of, and in association with a criminal street gang" within the meaning of section 186.22, subdivision (b)(1). Despite the fact that this evidence was inadmissible as character evidence, counsel failed to request a limiting instruction on this basis either. [¶] By not requesting a properly focused limiting instruction concerning hearsay and the other

crimes evidence, counsel rendered ineffective assistance of counsel.

(Appellant [B] AOB p. 36.)

As previously noted, the jury found against Appellant [A], like Appellant [B], on the substantive gang count and the gang enhancement. Specifically with regard to the claim of ineffective assistance of counsel in Argument II, as with Appellant [B], Appellant [A]'s trial counsel failed to request limiting instructions on the gang expert's hearsay evidence. As with Appellant [B]'s counsel, there was no plausible strategic basis for Appellant [A]'s counsel's failure to request said limiting instructions nor was there any conceivable benefit to Appellant [A] in permitting the evidence to be considered by the jury without such instructions. Therefore, joinder by Appellant [A] with Argument II is proper.

Dated:

Respectfully submitted,

[NAME]  
Attorney for Appellant [A]