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*He's Pushin' the Rock, Pullin' the Trigger, and Perpetuating Fear: Why the Use of Gang Expert
Testimony Should be Substantially Limited in Criminal Trials*

by
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I. INTRODUCTION

A defendant is on trial for first-degree murder.¹ The state alleges that he shot a man in cold blood during a mass fight near a convenience store.² Three people discharged guns during the struggle,³ but no one saw who fired the fatal shot.⁴ Video evidence shows two men holding guns at the scene, but the defendant is not one of them.⁵ The defendant concedes that he was at the convenience store during the shooting and that he was carrying a gun.⁶ He explains, however, that he shot his gun into the air for the sake of scaring people off, thereby acting in self-defense.⁷

During trial, the prosecutor presents the testimony of a police officer who is qualified as an expert in gang culture.⁸ The testimony is offered to prove that the killing was premeditated.⁹ The prosecution ultimately wants to show that the defendant is a member of a gang that has a violent rivalry with the victim's gang; that the defendant shot the man in retaliation for the victim's crossing onto the defendant's turf.¹⁰ The officer discusses details about general gang culture and also specific information about the defendant's group.¹¹ He identifies former confrontations between the two gangs involved, how the defendant's gang uses gun violence to gain respect, and that the defendant is a "hardcore," generational member of his group.¹² The jury returns a guilty verdict and the defendant is sentenced to life in prison without the possibility of parole.¹³

¹ See *People v. Bynum*, No. 307028, 2013 WL 1689660, at *1 (Mich. Ct. App. 2013), *perm. app. granted*,

² *Id.* at 1.

³ *Id.* at 3.

⁴ *Id.* at 1-2.

⁵ *Id.* at 2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 6.

⁹ *Id.*

¹⁰ *Id.* at 7-8.

¹¹ *Id.* at 7.

¹² *Id.*

¹³ *Id.* at 3.

This testimony was proffered in *People v. Bynum*, a case pending on appeal in the Michigan Supreme Court.¹⁴ *Bynum* illustrates the serious consequences that a criminal defendant faces when broad, highly prejudicial expert testimony is admitted at trial. If evidence is not properly monitored, the jury may render a verdict based on otherwise impermissible information. Indeed, a defendant is entitled to a fair and impartial jury under the Sixth Amendment of the United States Constitution.¹⁵ But, beyond the rights of the accused, when a court abuses its discretion and admits improper expert testimony, the judicial system's integrity is compromised.

The court's admission of such testimony typically stems from the pretrial process, when a court serves as "gatekeeper" and determines whether the evidence is admissible.¹⁶ With regards to the admissibility of gang expert testimony, the Supreme Court has not considered the issue,¹⁷ leaving lower federal and state courts responsible for determining the admissibility of such evidence. Understandably, courts are inconsistent on the extent to which gang expert testimony may be permitted.¹⁸ Beyond general admissibility of gang experts, there is an ongoing struggle with respect to the function and scope of the testimony and how it affects a jury.¹⁹ The court is responsible for ensuring that irrelevant and unfairly prejudicial evidence stays out of the courtroom to keep the jury from reaching a verdict based on impermissible purposes.²⁰

¹⁴ 838 N.W.2d at 884.

¹⁵ SEE U.S. CONST. AMEND. VI.

¹⁶ See *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

¹⁷ But see *Dawson v. Delaware*, 503 U.S. 159 (1992) (the use of gang involvement in sentencing is unconstitutional because the reference "was without relevance to the sentencing proceeding").

¹⁸ Some courts have a general presumption of admissibility if certain factors are met and other courts merely use the 403-balancing test to determine admissibility. Compare *People v. Gardely*, 927 P.2d 713 (Cali. 1996) (gang expert testimony admissible if related to culture, habits, or psychology of a gang) with *United States v. Street*, 548 F.3d 618 (8th Cir. 2008) (gang expert testimony rejected as irrelevant where gang ties to defendant are minimal).

¹⁹ Cf. Placido G. Gomez, *It is Not so Simply Because an Expert Says it is so: The Reliability of Gang Expert Testimony Regarding Membership in Criminal Street Gangs: Pushing the Limits of Rule 702*, 34 ST. MARY'S L. J. 581, 600-605 (2003) (criticizing the Texas courts' analyses of gang experts' reliability).

²⁰ See e.g., *Fed. R. Evid.* 401-403 (1973); see also *Gen. Elect. Co. v. Joiner*, 522 U.S. 136 (1997).

Typically, two tough issues arise when the prosecution offers a gang expert at trial. First is the question of whether gang opinion testimony is reliable²¹ and also whether its prejudicial nature outweighs its probative value.²² Regarding the former, the court must determine whether the testimony is the product of reliable methodology or sources.²³ Gang experts are typically law enforcement officers “who ha[ve] significant law enforcement training focusing on gangs and gang-related crime.”²⁴ Although experienced-based experts are allowed to shed light on a fact or issue not generally known to the average person, the *opinions* offered by officers are typically suspect and “do not lend themselves to systematic scrutiny based on objective retesting, and the data cannot be [easily] validated.”²⁵

For the latter issue, the word “gang” has a strong stigma attached to it. “[G]angs are particularly susceptible to labeling as deviant, regardless of their behavior.”²⁶ Thus, even the mention of a defendant’s gang affiliation likely straddles the line of impermissible character evidence either by triggering general bias against gang members or the common assumption of “guilt by association.”²⁷ Pair the mention of gang activity with the support of expert testimony and the risk of prejudice is substantially heightened. Generally, when such testimony is introduced, juries are instructed to disregard such biases.²⁸ However, instructions may not be

²¹ See Placido G. Gomez, *It is Not so Simply Because an Expert Says it is so: The Reliability of Gang Expert Testimony Regarding Membership in Criminal Street Gangs: Pushing the Limits of Rule 702*, ST. MARY’S L. J., 581, 589-90 (2003) (citations omitted).

²² Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739 (1990).

²³ See FED. R. EVID. 702 (1973); see also *Daubert*, 509 U.S. at 588.

²⁴ See *supra* note 21.

²⁵ *Id.* (emphasis added); see also Edward J. Imwinkelried, *The Next Step After Daubert, Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 CARDOZO L. REV. 2271, 2279 (1994).

²⁶ Joan W. Moore, *Isolation and Stigmatization in the Development of an Underclass: The Case of Chicano Gangs in East Los Angeles*, 33 SOC. PROBS. 1, 2 (1985).

²⁷ David Cole, *Hanging with the Wrong Crowd: of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 224 (1999).

²⁸ See *Id.*; see also *United States v. Modanlo*, No. 8:10-cr-00295-PJM, 2013 WL 6689117, at * 1 (2013) (jury instructions attached).

enough to keep the jury's improper inferences away when a party introduces such highly prejudicial evidence.

This paper asserts that courts must do more to monitor the admissibility and scope of gang expert testimony. A criminal defendant's constitutional right to a fair and impartial trial is on the line and, in gang cases, an expert's opinions pose the risk of being unreliable and too prejudicial. Courts should stick to the traditional expert analysis and also adopt a number of additional protective measures to make up for the extreme nature of these particular opinions.

Part II outlines the general framework in which courts admit or exclude expert testimony with an emphasis on the Federal Rules of Evidence ("FRE"). The section next demonstrates why gang expert testimony is problematic and how courts need to pay particular attention to the reliability and risk-of-unfair-prejudice analyses. Part III focuses on California's gang expert jurisprudence to demonstrate how not to analyze the admissibility of such testimony.

Part IV suggests that gang expert testimony is more appropriate in cases where gang affiliation is an essential element of the crime, but explains how, although more probative to a case, that testimony should still only be admitted in narrow circumstances. When gang affiliation is not an essential element of the crime, Part V proposes that courts should consider the admissibility of gang expert witnesses similar to the way courts consider the admissibility of conspiracy testimony. Specifically, other gang evidence should be presented to corroborate the gang expert's statements.

Part VI argues for a presumption that general gang testimony is inadmissible because the prejudicial nature of such testimony always outweighs its probative value. Also, in a case where expert testimony is admitted, courts should take steps to substantially limit the scope of what the expert can and cannot discuss. Part VI also suggests that a jury instruction should always be

included as a final safeguard before the jury deliberates. To conclude, Part VII applies this paper's recommendations to the *Bynum* case illustrated above and a California case, *People v. Killebrew*, to demonstrate how such protections would limit, yet allow, gang expert testimony.

II. QUALIFYING AN EXPERT AT TRIAL AND CAREFUL CONSIDERATIONS FOR A GANG EXPERT

Expert testimony is quite effective, especially if not met with contradicting testimony by the opposing side.²⁹ In fact, “experts are used more frequently, particularly by the prosecution” because the evidence is quite persuasive to juries.³⁰ Consequently, courts are being introduced to “increasingly innovative use[s] of expert testimony in criminal cases,” like gang expert testimony.³¹ Regardless of the type of expert testimony, courts are required to consider a number of factors before the expert may testify.

A. *The Traditional Expert Analysis*

A trial court serves as a “gatekeeper” of expert testimony.³² Each court addresses whether a witness qualifies as an expert through what is supposed to be a very fact-specific inquiry.³³ Most courts have adopted all or part of the Federal Rules of Evidence (“FRE”). For purposes of this paper, those rules will be emphasized to demonstrate the conventional expert analysis.

As Judge Harvey Brown explained, a party must open a series of “gates” to qualify a witness as an expert.³⁴ Those gates include helpfulness, qualifications, relevancy, reliability, and finally, the risk of prejudice.³⁵ Gang expert testimony also triggers the rule against character evidence under FRE 404.³⁶ Therefore, courts must ask whether the purpose of the testimony is

²⁹ See generally Paul S. Meyer, *Expert Testimony in Criminal Trials*, LITIGATION, Winter 1982, at 23-27.

³⁰ *Id.* at 27.

³¹ *Id.* at 23.

³² See *Daubert*, 509 U.S. at 597.

³³ *Id.* at 579-80.

³⁴ Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 758 (1999).

³⁵ *Id.*

³⁶ See FED. R. EVID. 404 (1973).

offered to show that the defendant acted in accordance with a particular propensity on a particular occasion.³⁷

When a party offers expert testimony, a court will first consider the helpfulness of the testimony, which reflects FRE 702.³⁸ The rule states that a witness may testify as an expert if his “knowledge will help the trier of fact to understand the evidence or . . . determine a fact in issue.”³⁹ As such, the expert’s knowledge of a subject must impress “upon an experience confessedly foreign in kind to [the jury’s] own.”⁴⁰ For most jurisdictions, “[an] expert may aid the jury in understanding even familiar matters if the expert’s experience or training provides a more . . . refined understanding than ordinary experience provides.”⁴¹ However, other courts strictly follow the traditional rule that the “subject matter must be beyond the common knowledge of the average layman.”⁴²

Second, the expert must be qualified to talk about or proffer an opinion on a particular subject.⁴³ For example, FRE 702 allows “expert testimony in scientific, technical, or other specialized areas” so long as the witness has the requisite “knowledge, skill, experience, training, or education.”⁴⁴ “The level of [expertise] a person must possess to be considered an expert on a particular topic is difficult to quantify by ‘definite guidelines.’”⁴⁵ In applying the rule, the United States Court of Appeals for the Seventh Circuit recognized that,

³⁷ *See Id.*

³⁸ *See* FED. R. EVID. 702 (1973).

³⁹ *Id.*

⁴⁰ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (quoting Judge Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 54 (1901)).

⁴¹ *See supra* note 34 at p. 751.

⁴² *See* Michael H. Graham, *Handbook of Federal Evidence* § 702.4, at n.4 (4th ed. 1996) (recognizing that some courts still use the common language that the “subject matter must be beyond the common knowledge of the average layman” when addressing Rule 702); *see also* *People v Kowalski*, 821 N.W.2d 14 (Mich. 2012) (“Where the proffered testimony is not relevant or not helpful because it does not involve matters beyond the common understanding of jurors, it is inadmissible”).

⁴³ *See supra* note 34.

⁴⁴ FED. R. EVID. 702.

⁴⁵ *See supra* note 34 p. 758.

[w]hile extensive academic and practical expertise in an area is certainly sufficient to qualify a potential witness as an expert, Rule 702 specifically contemplates the admission of testimony by experts whose knowledge is based on experience . . . a court should consider a proposed expert's full range of practical experience as well as academic or technical training when determining whether that expert is qualified to render an opinion in a given area.⁴⁶

Gang experts fall into the latter category and generally qualify as experts based on their membership experiences with gangs or extensive training as law enforcement officers.⁴⁷

Courts are next required to assess whether the expert testimony is relevant to the case.⁴⁸

This means that the expert's testimony must "tend to prove or disprove some fact at issue in the proceeding."⁴⁹ The relevancy threshold is generally low,⁵⁰ which is apparent in the use of the word "tend" in FRE 401, but courts are in no position to blast past this analysis.⁵¹ In fact, higher courts have overturned jury verdicts in cases where gang experts have offered irrelevant testimony.⁵²

In *United States v. Street*,⁵³ the state tried to prove motive by showing that the defendant adopted a gang's policy against "snitches."⁵⁴ A detective testified about an outlaw motorcycle gang and its extensive criminal history.⁵⁵ However, it was undisputed that the defendant was not a part of that gang, but merely had associations with gang members.⁵⁶ The United States Court of Appeals for the Eighth Circuit held that the testimony was largely irrelevant because the expert's

⁴⁶ *United States v. Parra*, 402 F.3d 752, 758 (7th Cir. 2005).

⁴⁷ *See supra* note 21.

⁴⁸ *See e.g.*, FED. R. EVID. 402 (1973); *see also supra* note 34; *Daubert*, 509 U.S. at 587.

⁴⁹ *See e.g.*, FED. R. EVID. 401 (1973).

⁵⁰ *See Tenard v. Dretke*, 542 U.S. 274, 285 (2004) (explaining that the relevance analysis is a "low threshold").

⁵¹ *See supra* note 49.

⁵² *See e.g.*, *United States v. Street*, 548 F.3d 618 (8th Cir. 2008); *see also State v. DeShay*, 669 N.W.2d 878 (Minn. 2003).

⁵³ 548 F.3d at 618.

⁵⁴ *Id.* at 631.

⁵⁵ *Id.*

⁵⁶ *Id.* at 631-32.

discussion about the gang's violent past had nothing to do with its "no snitch" policy.⁵⁷ Also, the defendant's nominal ties with the gang did not tend to prove motive, since other witnesses testified that his associations with the gang were minimal at best.⁵⁸ As *Street* demonstrates, the expert's testimony must at least aid in determining some contested issue.

Assuming that the testimony is relevant, the judge then considers whether it is reliable.⁵⁹ In the landmark case *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the United States Supreme Court first addressed the reliability requirement for experts.⁶⁰ The Court laid out four non-exclusive factors that trial courts may consider when evaluating reliability, including:

whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate, and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community.⁶¹

Kumho Tire Co., Ltd. v. Carmichael later extended the *Daubert* analysis to encompass any expert testimony rather than just scientific expert testimony.⁶² The Court further recognized that the determination of reliability is a "flexible" one and that *Daubert*'s factors "do not all necessarily apply even in every instance in which the reliability of . . . testimony is challenged."⁶³ Hence, the reliability standard is highly discretionary.⁶⁴

The final step of the analysis is the trial court's determination of what is traditionally known as the "403-balancing test."⁶⁵ The court must analyze whether the danger of unfair

⁵⁷ *Id.* at 632.

⁵⁸ *Id.* at 633 ("we conclude that Cook's testimony about outlaw motorcycle gangs and El Forasteros was excessive, unduly prejudicial, and in great part completely irrelevant to the charged offenses").

⁵⁹ *See supra* note 34; *see also* FED. R. EVID. 702; *Daubert*, 509 U.S. at 591.

⁶⁰ 509 U.S. at 591.

⁶¹ *Id.* at 592-93.

⁶² 526 U.S. at 147-48.

⁶³ *Id.* at 141.

⁶⁴ *Cf. Id.*

⁶⁵ *See e.g.*, FED. R. EVID. 403 (1973).

prejudice substantially outweighs its probative value.⁶⁶ “Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force . . . exercises more control over experts than over lay witnesses.”⁶⁷ Also, when a jury evaluates whom to believe, “an expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang its hat.”⁶⁸ This sentiment is especially true in cases where an expert offers testimony on a subject that has a strong stigma of criminality and so this analysis is extremely important in cases where a gang expert is offered.⁶⁹

While considering whether the prejudicial nature substantially outweighs its probative value, the court, in effect, must consider FRE 404.⁷⁰ Such testimony may be held impermissible because it triggers the rule against character evidence.⁷¹ Typically, the evidence is offered to boost the probability that the defendant committed the criminal act charged.⁷² Although probative, evidence of a defendant's character is not admissible for the purpose of proving that

⁶⁶ See e.g., *Id.*; see also *Huddleston v. United States*, 485 U.S. 681 (1988) (the trial court should assess such evidence under the usual rules for admissibility: “[t]he determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence . . . appropriate for making decisions of this kind under Rule 403”).

⁶⁷ *Daubert*, 509 U.S. at 595 (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)).

⁶⁸ Judge David Hoort, “*Expert Testimony—Gangs and Otherwise*,” BlogSpot (March 21, 2014 12:12 PM), http://judgedavidhoort.blogspot.com/2013_04_01_archive.html.

⁶⁹ See Barry F. McNeil and Bill Morrison, *The expert testimony must not be confusing or prejudicial under Rule 403*, 4 BUS. & COM. LITIG. FED. CTS. 40, 42 (3d ed.) (citing Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)); see also *Casey v. Geek Squad*, 823 F. Supp. 2d 334, 347-48 (2011) (noting that “expert testimony has the potential to be both powerful and quite misleading, particularly as to technical and scientific matters”).

⁷⁰ FED. R. EVID. 404 (1973).

⁷¹ See e.g., FED. R. EVID. 404(a)(1); see also Lee E. Teitelbaum, Gale Sutton-Barbere & Peder Johnson, *Evaluating The Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147, 1150 (1983) (stating that the balancing test is what courts use to protect the jury from hearing bad character evidence).

⁷² For a detailed explanation on character evidence and its history along with an argument against stringent rules on improper character evidence, see Chris William Sanchirico, *Evidence and the Object of Trial*, 101 COL. L. REV. 1227, 1233 (2001).

the defendant acted in accordance with that character on a particular occasion.⁷³ This evidence will only be considered if it fits into a jurisdiction's recognized exception or is offered for some "non-propensity reason," such as motive or identity.⁷⁴

The reasons for excluding such evidence are "that there is a danger that a jury will convict a defendant to penalize him or her for . . . past deeds or simply because he or she is an undesirable person."⁷⁵ Also, "there is a possibility that the jury will overvalue the character evidence in assessing guilt for the crime charged" and "it is unfair to require a defendant to be prepared not only to defend against immediate charges, but also to disprove or explain his or her personality or prior actions."⁷⁶

In assessing whether testimony is impermissible character evidence, courts are required to determine the purpose of the party's offer.⁷⁷ There is a difference between testimony that is actually offered for a non-propensity purpose and evidence that is offered under the guise of a non-propensity purpose. For example, where the identity of a gang member is at issue, expert testimony that explains a gang's requirement that all members get a specific tattoo on a particular part of the body is acceptable to prove that the defendant is a member based on the existence and placement of that tattoo.⁷⁸

However, many cases arise where the purpose of the testimony is not crystal clear or

⁷³ *See Id.*

⁷⁴ *See Id.*; *see also* FED. R. EVID. 404(a), (b)(2). The majority of states have similar rules to the Federal rules.

⁷⁵ 23 C.J.S. *Criminal Law* § 1105 (2014) (citing *Masters v. People*, 58 P.3d 979 (Colo. 2002); *Ridgeway v. State*, 779 A.2d 1031 (Md. App. 2001), *judgment aff'd*, 797 A.2d 1287 (2002); *State v. Gowan*, 13 P.3d 376 (Mont. 2000)).

⁷⁶ *See Id.*

⁷⁷ *See e.g.*, *United States v. King*, 230 F.3d 1361, 1366 (6th Cir. 2000); for a broad explanation on a trial courts' duties *see* 88 C.J.S. *Trial* § 184 (2014) (citing *Security Ins. Co. of Hartford v. Owen*, 501 S.W.2d 229 (1973); *Van Ornum v. Otter Tail Power Co.*, 210 N.W.2d 188 (N.D. 1973); *McGrath v. Rohde*, 289 N.E.2d 619 (1972)).

⁷⁸ *See e.g.*, *State v. Torrez*, 874 A.2d 1084, 1089 (N.J. 2005).

minimally relates to the purpose for which it is being offered.⁷⁹ For example, a prosecutor might offer gang expert testimony to prove a non-propensity reason such as motive, yet the testimony nominally ties the defendant to the purpose, while at the same time discusses the gang's violent activities.⁸⁰ This was the case in *United States v. Garcia*.⁸¹ The prosecution introduced a gang expert to support the state's theory of motive; that since the defendant was a member of a gang, he was more likely to agree and aid in the commission of a murder.⁸² The court expressed that "the theory that the defendant aided and abetted a murder by 'fanning the fires of gang warfare'" would be a smack of "guilt by association."⁸³ Thus, courts must go beyond the offering party's asserted purpose, and scrutinize whether the testimony actually tends to prove that purpose.

B. Why Gang Expert Testimony is Problematic

Gang expert testimony is challenging because it is unreliable, highly prejudicial, and triggers the rule against character evidence. There are issues with the reliability of gang expert testimony because both the experts and their sources are considered suspect.⁸⁴ However, "[m]any jurors believe that police officers possess an "aura of special reliability and trustworthiness."⁸⁵ The reliability vs. credibility dichotomy poses a problem because jurors are more inclined to rely on unverifiable testimony in gang cases, especially if the information rendered is proffered a police officer.

Second, any mention of gang affiliation is highly inflammatory to the jury. The stigma is

⁷⁹ See e.g., *State v. Thomes*, 697 A.2d 1262, 1265 (Me. 1997) (district court allowed introduction of sexually explicit statements to show his motive to seduce two minor girls); see also *Cotney v. State*, 26 So. 2d 603 (Ala. 1945) (offer of evidence showing dying declaration not crystal clear).

⁸⁰ See e.g., *United States v. Garcia*, 151 F.3d 1243 (9th Cir. 1998).

⁸¹ *Id.*

⁸² *Id.* at 1244.

⁸³ *Id.* at 1245 (citing *Mitchell v. Prunty*, 107 F.3d 1337, 1342 (9th Cir.1997)).

⁸⁴ See *supra* note 21 (noting that the general reliability analysis for gang experts is defective).

⁸⁵ Patrick Mark Mahoney, Note, *Houses Built on Sand: Police Expert Testimony in California Gang Prosecutions: Did Gardeley Go Too Far?*, 31 HASTINGS CONST. L. Q. 385 (2004).

so strong that even in areas where more jurors tend to distrust law enforcement and the criminal justice system, “these same people . . . have to live with gang violence within their families and neighborhoods. [T]he group of jurors who used to be the most favorable to a defendant all of a sudden becomes the least favorable.”⁸⁶ This leads to the last issue, that a party’s offering of gang expert testimony always triggers the character evidence rule.⁸⁷ Gangs are so attached to the stigma of criminality that many jurors wish to punish the defendant for his affiliations or believe that the defendant is guilty because he is associated with a group that may be involved in illegal activity.

1. Why gang experts may be unreliable

Gang experts are considered suspect because of their status and also because of the information that they rely on to render their opinions. Gang experts are generally law enforcement officials with significant training in gang-related activity.⁸⁸ Although experience in an area is enough to become an expert at trial,⁸⁹ the testimony rendered must be based on reliable sources.⁹⁰ The problem begins with the suspicious nature of the sources and also the drawback that the information is not easily verifiable.

Most gang experts generally rely on a number of factors specifically developed to identify a gang or its members.⁹¹ One issue with these considerations is that they are either too department-specific or too broad to encompass the uniqueness of each gang.⁹² The problem with department-specific factors is that they are not generally accepted or recognized by the law

⁸⁶ Erin R. Yoshino, *California’s Criminal Gang Enhancements: Lessons From Interviews with Practitioners*, 18 USC Rev. of L. & Soc. Just. 107, 135 (2008).

⁸⁷ FED. R. EVID. 404; *see also* Gutierrez v. State, 32 A.3d 2, 11 (2011).

⁸⁸ *See supra* note 21.

⁸⁹ *See e.g.* Fed R. Evid. 702; *see also* *Daubert*, 509 U.S. at 579.

⁹⁰ *Kumho Tire Co.*, 526 U.S. at 142.

⁹¹ *See supra* note 21 at p. 605; *see also supra* note 86 at p. 113 (for a list of factors that officers may rely on).

⁹² *Cf. supra* note 21 at p. 606.

enforcement community and thus do not fall with *Daubert*'s general acceptance factor.⁹³ On the other hand, if a set of criteria is used by agencies on a national level, questions are raised as to how those factors can be applied to specific groups in widespread areas that likely have very different characteristics.⁹⁴ Not all gangs are violent and not all gangs push drugs.⁹⁵

The basis for the criteria may be inaccurate as well.⁹⁶ Many of the factors that departments rely on to identify a gang or its members are constructed through what may be considered questionable sources—such as former gang members or police officers.⁹⁷ The problem with former gang members is that they tend to over-exaggerate their experiences with the gang or skew facts.⁹⁸ There is no method to decipher whether the former member is actually giving trustworthy information or if he or she is trying to lead officials astray about a specific group. This has been the case in circumstances where a gang member in custody gives information in exchange for a lower charge or immunity.⁹⁹ In fact, it has been argued, “[t]here is nothing inherently reliable about interviews with suspected gang members that have been arrested.”¹⁰⁰

Also, police officers' information may be considered highly suspect since many departments respond to pressure from the legislature or the media, which are inclined to oversensationalize gang activity and demand justice when brutal crimes are allegedly committed by

⁹³ See *Daubert*, 901 U.S. at 595.

⁹⁴ See Gomez, 34 St. Mary's L. J. at 609 (citing Cheryl Renee Rosier, *Former Gang Member's Experiences of Getting in and Getting out of a Gang: A Phenomenological Study* at 118 (1998) (unpublished Ph.D. dissertation, St. Mary's University) (on file)).

⁹⁵ See Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 979 (1993).

⁹⁶ Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 771 (1990); see also *supra* note 21.

⁹⁷ See *Id.*

⁹⁸ See *Id.* at 747 (“gang members lie to police with great regularity”).

⁹⁹ *Id.*

¹⁰⁰ See *supra* note 85 at p. 409.

gangs.¹⁰¹ Furthermore, officers who testify are in a position where detecting and minimizing gang activity is their duty, adding to the suspect nature of the testimony.¹⁰² In fact, when a police officer in California was asked how he determined whether an individual was affiliated with a gang he said, “if it looks like a duck, quacks like a duck, and swims like a duck, it must be a duck.”¹⁰³ He further described his method as “basically guilt by association,” and “identifying individual gang members by their appearance.”¹⁰⁴

Many states also have “gang banks.”¹⁰⁵ These banks are typically computer programs that keep track of individuals identified as actual gang members or possible gang members.¹⁰⁶ One officer explained that law enforcement officials add people to gang banks because they are seen hanging out with other potential gang members.¹⁰⁷ In fact, in one circumstance, someone was entered into a gang bank because he had a basketball hoop in front of his parent’s house.¹⁰⁸ Kids affiliated with local gangs would play basketball in his driveway.¹⁰⁹ No other evidence corroborated the individual’s relationship to the gangs, but the name was entered into the bank anyway.¹¹⁰ Also, the information may not be entered correctly; “information entered into official gang files may sound unimpeachable, yet mistakes are often made.”¹¹¹

¹⁰¹ See Scott Decker & Kimberly Kempf–Leonard, *Constructing Gangs: The Social Definition of Youth Activities*, in *The Modern Gang Reader* 14, 20 (Malcolm W. Klein Eds. 1995); see also Robert J Bursik, Jr. & Harold G. Grasmick, *Defining Gangs and Gang Behavior*, in *The Modern Gang Reader* 8, 9 (Malcolm W. Klein Eds. 1995); see also *supra* note 96 at 747 (indicating that statistics may be altered to meet law enforcement needs).

¹⁰² *See Id.*

¹⁰³ *See supra* note 86 at p. 108.

¹⁰⁴ *See Id.*

¹⁰⁵ See K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 620, 653 (2011).

¹⁰⁶ *See Id.*

¹⁰⁷ *See supra* note 86 at p. 105.

¹⁰⁸ *See supra* note 86 at p. 103.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *See supra* note 85 at p. 408.

2. Gang expert testimony is highly prejudicial and triggers the character evidence rule

For gang cases, the risk of undue prejudice is particularly high because gangs are attached to the stereotype of being affiliated with criminality.¹¹² Individuals who are associated with gangs are “defined as criminals rather than as [merely] social bandits . . . [i]n city after city, the . . . gang is . . . clearly defined as a social problem.”¹¹³ Furthermore, the media typically sensationalizes gang activity through programs like *Sons of Anarchy* and *Boyz n the Hood*.¹¹⁴ These shows depict gang members as vengeful and violent and also display frequent drug activity and murder as if they are normal, day-to-day gang activities.¹¹⁵

Jurors are more likely to suspect that since the defendant is engaged in a culture purportedly involved with illegal activities, that the defendant likely engaged in the crime at issue. Once again, this inference is unacceptable under rule 404, yet undeniably unavoidable where a gang relationship is asserted.

III. PROBLEMS WITH GANG EXPERT TESTIMONY ARE NOT BEING ADDRESSED: A FOCUS ON CALIFORNIA JURISPRUDENCE

California has over six hundred identified gangs, which is the most out of all fifty states.¹¹⁶ California’s courts, in effect, are confronted with a high volume of gang-related criminal cases.¹¹⁷ The excessive number of gang-related crimes resulted in the legislature enacting the California Street Terrorism Enforcement and Prevention Act (“STEP Act”) in 2008

¹¹² Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739 (1990).

¹¹³ Joan W. Moore, *Isolation and Stigmatization in the Development of an Underclass: The Case of Chicano Gangs in East Los Angeles*, 33 SOC. PROBS. 1, 2 (1985).

¹¹⁴ See *supra* note 112 at p. 771.

¹¹⁵ Cf. *Id.*

¹¹⁶ See FBI, *National Gang Threat Assessment—Emerging Trends*, NATIONAL GANG INTELLIGENCE CENTER 12 (2011), <http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment/2011-national-gang-threat-assessment-emerging-trends>.

¹¹⁷ See *Id.*

to fight gang activity within the state.¹¹⁸ The STEP Act enhances sentences in gang-related cases.¹¹⁹ The legislature explained that California is “in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.”¹²⁰ The proposed purpose is to “secure and protect[]” the citizens of the state “from fear, intimidation, and physical harm caused by the activities of violent groups and individuals.”¹²¹

Before the sentence is increased, the state must prove to a jury that the defendant is involved in a “criminal street gang.” Typically, the enhancement will increase the sentence time beyond that of the crime’s statutory maximum. Thus, the prosecution must prove that the defendant is a part of a gang beyond a reasonable doubt under the United States Supreme Court’s *Apprendi* decision.¹²² This makes the use of a gang expert much more probative in California cases where gang affiliation is asserted. However, just because evidence is more probative does not mean it is automatically admitted. The court must also balance the risk of prejudice. However, although the STEP Act did not create new evidentiary rules, it “became a vehicle to introduce a broad range of evidence that would otherwise be excluded.”¹²³

A. The Admissibility of Gang Experts Under California Law

Generally, in California, “[t]he requirements for expert testimony are that it relate to a subject sufficiently beyond common experience as to assist the trier of fact and be based on a matter that is reasonably relied upon by an expert in forming an opinion on the subject to which

¹¹⁸ CAL. PENAL CODE § 186.2 (West 2008).

¹¹⁹ *See Id.*

¹²⁰ See *People v. Rodriguez*, 290 P.3d 1143 (2012).

¹²¹ *Id.*

¹²² *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that enhancing criminal sentences beyond statutory maxima must be decided by the jury beyond a reasonable doubt).

¹²³ Gregory A. Dohi and Darrell Mavis, *Getting a Good Grasp on Gang Cases* (April 16, 2014) available at <https://www.dailyjournal.com/cle.cfm?show=CLEDisplayArticle&qVersionID=338&eid=913976&eid=1&qtypeid=8>

his or her testimony relates.”¹²⁴ The basic requirement does not deviate from traditional expert analyses, however, the STEP Act made the initial inquiry superfluous in gang cases.

Under the statute, a “criminal street gang is defined as any organization, association or group of three or more persons . . . which (1) has continuity of purpose, (2) seeks a group identity, and (3) has members who individually or collectively engage in or have engaged in a pattern of criminal activity.”¹²⁵ The pattern of criminal activity element requires the state to show that a gang’s primary activities include the actual commission of one or more enumerated (out of a list of thirty-three) criminal acts.¹²⁶

In *People v. Gardeley*, the California Supreme Court held that the state need not prove that the defendant committed the criminal acts, but may prove that the defendant’s alleged gang committed those acts.¹²⁷ Furthermore, the Supreme Court stated that “[i]n general, where a gang enhancement is alleged, expert testimony concerning the culture, habits, and psychology of gangs is permissible because these subjects are 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'”¹²⁸

California’s Supreme Court essentially broadened the admissibility of gang expert testimony without regard to traditional evidence rules.¹²⁹ In essence, the state initiated a presumption that evidence tending to show gang culture, habits or psychology is generally permissible.¹³⁰ The problem with the legislature’s and the court’s evidential expansion may be reflected in the relative number of prisoners in California that are reported to have some kind of

¹²⁴ See *People v. Olguin*, 31 Cal. App. 1355, 1371 (1994).

¹²⁵ § 186.22(f) (emphasis added).

¹²⁶ See *Id.*

¹²⁷ See *People v. Gardeley*, 927 P.2d 713, 721 (Cal. 1996).

¹²⁸ *People v. Valdez*, 58 Cal. App. 494 (1997).

¹²⁹ See 927 P.2d at 721.

¹³⁰ *Id.*

gang affiliation.¹³¹ It's concerning to think that perhaps the high numbers of incarceration relate to the admission of otherwise inadmissible information if analyzed under the traditional expert analysis.¹³²

B. Why California's Law is Too Expansive

The STEP Act and its progeny have a direct impact on California courts' determinations on the permissibility and scope of gang expert testimony. The Act allows experts to characterize gangs as "criminal," allows evidence of gang activity be based on three broad categories without further analysis, and allows experts to testify about heinous crimes, which the defendant may not have committed, or even been involved with.

First, during trial, any gang is considered a "criminal street gang" because of the STEP Act's statutory definition.¹³³ Thus, if the state alleges gang affiliation, then the jury will hear the judge, attorneys, and expert witnesses refer to the gang as "criminal" before the jury goes into the deliberation room. The prosecution has an advantage here because the gang expert, who is typically used to identify a gang or its members, will be asked to render an opinion about whether the defendant is part of a "criminal street gang." This characterization triggers both rules 403 and 404 because the label is extremely prejudicial to the defendant and supports the inference that because the gang that the defendant is affiliated with is "criminal," than the defendant is "criminal" as well.¹³⁴

Second, California courts are left with determining what testimony falls under the "culture, habits, and psychology" classifications.¹³⁵ The confusion turned into a presumption that if gang activity is alleged, gang testimony is permissible so long as that testimony somehow fits

¹³¹ See *supra* note 116.

¹³² See FED. R. EVID. 403.

¹³³ See § 186.

¹³⁴ See FED. R. EVID. 403, 404.

¹³⁵ See *e.g.*, *People v. Killebrew*, 103 Cal. App. 644 (2002).

at least one of those three criteria.¹³⁶ The more important analyses, such as relevance, reliability, and the risk of undue prejudice, are lost because California's lower courts are focused on addressing whether the gang expert's testimony falls under one of the three categories.

The deviation from traditional evidence rules is shown in the opinion, *People v. Killebrew*.¹³⁷ The California Court of Appeals listed thirty different cases that considered eight factors found to be permissible under the "culture, habits, and psychology" requirement.¹³⁸ The court determined that since none of those cases considered the subject of the expert's testimony in its case (determining intent), the testimony was improper and fell outside of the "culture, habits, and psychology" realm.¹³⁹ On that basis, the court held that the lower court's decision to permit the expert was clear error.¹⁴⁰

Killebrew did not question the reliability of the expert's analysis nor did the court balance the risk of prejudice to the evidence's probative nature. This fact is particularly disturbing because both the reliability and undue prejudice analyses were established to protect the rights of the accused. By way of those factors, California has ultimately opened the gates for its courts to admit improper gang expert testimony so long as the evidence, even nominally, falls under one of the three extremely broad classifications.

The danger that a jury will make an improper inference when gang a gang relationship is

¹³⁶ See *Id.* For an argument regarding the repercussions of the *Gardeley* decision, see Patrick Mark Mahoney, Note, *Houses Built on Sand: Police Expert Testimony in California Gang Prosecutions: Did Gardeley Go Too Far?*, 31 HASTINGS CONST. L. Q. 385 (2004).

¹³⁷ *Killebrew*, 103 Cal. App. at 657.

¹³⁸ *Id.* (The cases that cite *Gardeley* repeatedly refer to expert testimony about the "culture and habits" of criminal street gangs in eight ways . . . size, composition or existence of a gang . . . gang turf or territory . . . an individual defendant's membership in, or association with, a gang . . . the primary activities of a specific gang . . . motivation for a particular crime, generally retaliation or intimidation . . . how a crime was committed to benefit or promote a gang . . . rivalries between gangs . . . gang-related tattoos, gang graffiti and hand signs . . . colors or attire) (citations omitted).

¹³⁹ *Id.* at 658.

¹⁴⁰ *Id.*

alleged is substantial, and accordingly, trial courts must ensure that the jury does not consider unreliable information, nor may the jury have the impression that gang membership alone equates to guilt. Although a jurisdiction's rules of evidence and a defendant's right to appeal exist to protect the rights of the accused,¹⁴¹ they do not protect against complete disregard of traditional rules, especially when the higher court supports the departure. Even so, the likelihood that a higher court will reverse such a discretionary decision is minimal at best.¹⁴²

Finally, the California Supreme Court's *Gardeley* decision held that the "pattern of gang activity" prong may be shown "by introducing evidence of one or more of the crimes enumerated in the statute that were committed by *any* of the gang's members, not necessarily by the defendant, even if the defendant did not know the perpetrators, as many gangs tend to be quite large."¹⁴³

The court's holding explicitly violates the rule against character evidence.¹⁴⁴ By allowing a gang expert to testify about the gang's prior criminal acts in general, the court actually supports a party's offering evidence for an impermissible purpose. The state can prove an element by showing that the defendant is a part of a group that commits crimes, and because of that fact, he acted in accordance with the gang, and committed a crime, too. Also, the expert is likely to testify about former crimes that are quite violent.¹⁴⁵ One attorney noted that a "gang expert will

¹⁴¹ See *Green v. Block Laundry Mach. Co.*, 490 U.S. 504, 529 (1981) (Scalia, J., concurring) (citing Note, *Procedural Protections of the Criminal Defendant: A Reevaluation of the Privilege Against Self-incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 Harv. L. Rev. 426, 440, 450 (1964)).

¹⁴² See Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 987-988 (2005).

¹⁴³ See note 125; see also Gregory A. Dohi and Darrell Mavis, *Getting a Good Grasp on Gang Cases* (April 16, 2014) available at <https://www.dailyjournal.com/cle.cfm?show=CLEDisplayArticle&qVersionID=338&eid=913976&eid=1&qtypeid=8>

¹⁴⁴ See FED. R. EVID. 404.

¹⁴⁵ See Erin R. Yoshino, *California's Criminal Gang Enhancements: Lessons From Interviews with Practitioners*, 18 USC Rev. of L. & Soc. Just. 117, 135 (2008).

often choose the most heinous and violent crimes to illustrate the gang’s pattern of criminal activity.”¹⁴⁶ Thus, the testimony further prejudices the defendant not only by introducing crimes not necessarily committed by him or her, but by allowing the expert to testify about crimes that likely shock the conscience and substantially prejudice the defendant.

The state does allow gang enhancements to be bifurcated from the original charge and considered at a separate jury trial.¹⁴⁷ However, when a deputy public defender in California was asked how often a gang enhancement is bifurcated, he replied, “[a]bout as often as the Clippers win the Championship,” which means almost never.”¹⁴⁸ He “believed that gang enhancements are rarely bifurcated because of the prosecutorial advantages of a gang enhancement and because of judges’ concerns for judicial efficiency.”¹⁴⁹ The defendant must then defend against the crime charged and against crimes committed by the gang that he or she allegedly belongs, which is inherently unfair, especially when the topic is so inflammatory.

IV. GANG EXPERT TESTIMONY IS MORE APPROPRIATE IN CASES WHERE CHARGES INCLUDE AN ELEMENT OF GANG AFFILIATION SO LONG AS NO OTHER LESS PREJUDICIAL EVIDENCE EXISTS

A number of states have passed laws to combat gang activity, similar to California. In those states, a statute’s language may incorporate the element of gang membership.¹⁵⁰ Consequently, prosecutors are placed in a position where they must prove gang ties beyond a reasonable doubt. For that reason, the state must introduce evidence of a gang relationship or there is no basis for a conviction.

¹⁴⁶ *See Id.*

¹⁴⁷ *See* § 186.22

¹⁴⁸ *See supra* note 143.

¹⁴⁹ *See Id.*; *see also* *People v. Hernandez*, 94 P.3d 1080 (2004) (holding that the lower court did not abuse discretion when it did not bifurcate gang enhancement from other charges).

¹⁵⁰ Georgia has the “Georgia Street Gang Terrorism and Prevention Act of 1992”, GA. CODE. ANN. § 16-15-1. Minnesota has a number of statutes such as MINN. STAT. § 609.229, entitled “Crime Committed for the Benefit of a Gang.”

There is a significant difference between a case in which gang activity is part of the crime¹⁵¹ and a case where gang activity is used to prove a crime.¹⁵² In the former, the prosecution must establish that gang activity actually exists.¹⁵³ In the latter, on the other hand, evidence of gang ties need not be admitted for the state to prevail.¹⁵⁴ Accordingly, a gang expert's testimony is much more relevant to cases where gang activity is part of the charge. This is especially true if the defendant denies that he or she is part of a gang.

Yet, courts are still required to balance the risk of unfair prejudice versus the probative value of the evidence.¹⁵⁵ When this analysis is under way, courts should consider the gang expert testimony in light of the other evidence available. The court should be more inclined to exclude the testimony when the prosecution can prove this element with alternate forms of evidence. Although gang expert testimony may be more relevant in cases where gang affiliation is an essential element of the crime, the probative value of the testimony is reduced if the state can prove the element through other, less prejudicial, means. In that sense, the use of a gang expert in this context is still quite narrow.

For example, if the state cannot sufficiently prove gang ties without an expert that tends to prove an affiliation, then the use of a gang expert may be proper. However, if the prosecution can sufficiently prove the element by introducing other evidence such as eyewitness testimony, then the probative value of the gang expert's testimony lowers to only nominal probative value. Additionally, when a gang expert takes the stand, there is a significant likelihood that certain

¹⁵¹ *See Id.*

¹⁵² *Compare* State v. DeShay, 669 N.W.2d 878 (Minn. 2003) (where defendant was charged with conspiracy to commit crime in furtherance of a gang) to State v. Burrell, 772 N.W.2d 459 (Minn. 2009) (defendant was charged with first-degree murder and the state introduced a gang expert to demonstrate his motive for killing a rival gang member).

¹⁵³ *Id.*

¹⁵⁴ *See Id.*

¹⁵⁵ *Id.* A state likely has the same standard, but may have integrated it into a different section of its evidence rules.

characteristics of a gang—such as illegal tendencies or violent characteristics—will be exposed.¹⁵⁶ If a court finds that less prejudicial evidence is sufficient, then the court is also fulfilling its duty to avoid improper character inferences by the jury.

This theory has been adopted in a number of states. For example, in *State v. Deshay*, the Minnesota Supreme Court explained, “[just because] criminal gang involvement is an element of the crime does not open the door to unlimited expert testimony.”¹⁵⁷ *Deshay* involved a defendant who was charged with committing a drug crime for the benefit of a gang.¹⁵⁸ The defendant argued that he was not a member of the alleged gang, thus putting the state in a position where it had to prove that element through other evidence.¹⁵⁹ The state offered not only gang expert testimony by a police officer, but also witness testimony by three lay witnesses who testified that the defendant was, in fact, a part of the gang.¹⁶⁰ The jury convicted the defendant.¹⁶¹ On appeal, the Court reversed the verdict because the expert testimony was unduly prejudicial.¹⁶² The court alluded that the eyewitness testimony was enough to sufficiently prove the element of a gang relationship.¹⁶³ The court reasoned that, “[i]n this noncomplex drug conspiracy case, much of the gang expert's testimony was duplicative and of little real assistance to the jury”¹⁶⁴

This kind of analysis is not brand new. In fact, there are other instances in which a court has denied certain prejudicial evidence in favor of less prejudicial evidence that serves to prove

¹⁵⁶ See Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 761-62 (1990) (explaining through a series of cases how admitted experts typically have an opportunity to discuss prejudicial “extraneous evidence” at trial).

¹⁵⁷ 669 N.W.2d at 886.

¹⁵⁸ *Id.* at 879.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 880.

¹⁶¹ *Id.* at 883.

¹⁶² *Id.*

¹⁶³ *Id.* at 887-88.

¹⁶⁴ *Id.* at 887.

the same fact, such as proof of convict status.¹⁶⁵ Consider the United States Supreme Court decision in *Old Chief v. United States*.¹⁶⁶ The state had to prove that the defendant was a felon to show that he was guilty of felony in possession of a firearm.¹⁶⁷ The lower court allowed the prosecution to introduce the order of judgment for Old Chief's prior conviction, which showed that his former conviction was substantially similar to the charges he was facing.¹⁶⁸ Old Chief objected to the admission of the evidence on grounds that it was unduly prejudicial.¹⁶⁹ He offered to stipulate that he had been convicted of a felony without mention of what the former conviction was for, ultimately conceding for the prosecution that element of the crime.¹⁷⁰

The Supreme Court held that the admission of the order of judgment was an abuse of discretion because it was unduly prejudicial to Old Chief.¹⁷¹ The Court stated that in "weighing . . . the probative against the prejudicial, the functions of competing evidence are distinguishable only by the risk inherent in the one and wholly absent from the other."¹⁷² The Court further reasoned that the probative value of the order was significantly reduced when other, less prejudicial evidence was available.¹⁷³ Because the probative value was reduced, the risk of prejudice was too high against Old Chief.¹⁷⁴

The *Old Chief* rationale should be applied to gang expert testimony when gang affiliation is an essential element of the crime. Even the assertion of a gang relationship is incredibly inflaming to the defendant. When the state offers an expert at trial, the prosecution will likely

¹⁶⁵ See *Old Chief v. United States*, 519 U.S. 172 (1997).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 174-75.

¹⁶⁸ *Id.* at 177.

¹⁶⁹ *Id.* at 176.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 190-91.

¹⁷² *Id.* at 191.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

elicit information from that witness that goes beyond the question of whether the defendant is involved in a gang because the state must lay a foundation and rationale for the expert's opinion.¹⁷⁵ Consequently, the jury will likely learn about the gang's activities, including those that are illegal or violent. Also, the prior activities may in fact be similar to what the defendant is on trial for, substantially prejudicing the defendant. If a defendant is willing to stipulate or an eyewitness can testify that he or she is part of a gang, then the expert testimony becomes much less probative to the case. Similar to the rationale in *Old Chief*, if the prosecution can prove the element through less prejudicial means, here, being a stipulation or eyewitness testimony, then, when comparing those types of evidence to gang expert testimony, the risk of undue prejudice in the expert testimony substantially outweighs the inherent risk in the former.

There is always the argument that the prosecution is entitled to prove its case "as it sees fit" and that the state "has a right to paint a colorful story with descriptive richness."¹⁷⁶ In fact, the dissent in *Old Chief* asserts that this right is a "fundamental principle in criminal prosecution."¹⁷⁷ However, the main purpose elicited is to protect from a jury's want for more information.¹⁷⁸ The Court goes on to explain that, "as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict."¹⁷⁹

In the case where gang affiliation is an essential element, there is no risk that a "gap" in the evidentiary story occurs. The other, less prejudicial evidence is still telling the same narrative—that the defendant is a member of a particular gang—without the risk that the expert will mention certain prejudicial and non-relevant information. Although a narrative may aid the jury

¹⁷⁵ See e.g., FED. R. EVID. 703; see also *Kumho Tire Co.*, 526 U.S. at 150.

¹⁷⁶ *Id.* at 188 (citing *Parr v. United States*, 255 F. 2d 86, 88 (5th Cir. 1958)).

¹⁷⁷ *Id.* at 198 (O'Connor, J., dissenting).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 188.

in making fair inferences about guilt or innocence, the inferences elicited through a gang expert violate the rule against character evidence. If a gang expert is allowed to testify about a gang's culture that includes illegal activities, then the juror will likely infer that the defendant is a bad person because he is equated with a group that commits crimes.

By stipulating to gang affiliation or by telling the story through an eyewitness, the jury is not “missing a piece of the puzzle” so to speak because the only fact that needs to be proven is the defendant's membership in a gang. The activities of a gang are not at issue so that story is not one that the prosecution has a right to tell. Thus, there is little danger that the prosecution will be prohibited from being able to “tell a continuous story” because the story, in this case, is improper and highly inflammatory to the defendant.¹⁸⁰

V. IN CASES WHERE GANG AFFILIATION IS NOT AN ESSENTIAL ELEMENT OF THE CRIME, COURTS SHOULD ONLY ALLOW EXPERT TESTIMONY WHERE OTHER FACTS CORROBORATE THE EXPERT'S TESTIMONY

When a Court considers the admissibility of gang expert testimony in a case where gang affiliation is not an essential element of the crime, it should follow other jurisprudence that only allows the testimony if the opinion rendered is corroborated by other evidence. For example, if a co-conspirator implicates a defendant in a conspiracy, other evidence must corroborate those statements.¹⁸¹ This rule is also established in the Federal Rules of Evidence, 801(d)(2), which states that a co-conspirator's “statement must be considered but does not by itself establish the declarant's authority.”¹⁸² The “justification for this rule is that a co-conspirator's statement is considered rather unreliable.”¹⁸³ In *Bourjaily v. United States*, the Court stated, “[a] piece of

¹⁸⁰ *Id.* at 190 (majority opinion).

¹⁸¹ *See Bourjaily v. United States*, 483 U.S. 171, 186 (1987).

¹⁸² FED. R. EVID. 801 (1973).

¹⁸³ *Id.* at 179.

evidence, unreliable in isolation, may become quite probative when corroborated by other evidence.”¹⁸⁴

The justification for the corroboration rule in conspiracy cases gives support that corroboration should be required where gang expert testimony is offered for a non-propensity reason. As explained earlier, one of the stronger arguments against admitting gang expert testimony is the issue of reliability.¹⁸⁵

For most cases where a gang expert is introduced, the expert is a police officer specialized in gang-related activities.¹⁸⁶ As already discussed in section II, the trouble with this type of expert is that the police officer’s duty is to identify and eliminate illegal gang activity. For that reason, this expert has more of an incentive to testify in a way that is prejudicial to the defendant so as to further the officer’s goals of minimizing potential gang activity.

Furthermore, gang experts typically rely on a number of factors to identify a gang and its members.¹⁸⁷ These factors can either be too narrow or too broad in a sense that those factors are not generally accepted by the law enforcement community or they are accepted by many departments but do not consider the unique characteristics of each gang.¹⁸⁸ Even beyond the experiences of a gang expert, the factors that a witness uses to make an identification raise reliability concerns.¹⁸⁹ The factors are typically constructed by gang members or by law enforcement officials¹⁹⁰ who have been considered “highly suspect” sources since their agendas may substantially depart from identifying true characteristics of a particular gang.¹⁹¹ By

¹⁸⁴ *Id.* at 180.

¹⁸⁵ *See supra* note 21.

¹⁸⁶ *Id.*

¹⁸⁷ *See Gomez*, 34 St. Mary's L. J. at 605.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *See Id.* at 610.

introducing evidence that supports what a “suspect” witness says, the state is ensuring that the testimony can be verified.

Both the Second and Eighth Circuits have recognized this theory in gang cases.¹⁹² In *United States v. Frank*, the Eighth Circuit held that a gang expert’s testimony pertaining to the El Forasteros motorcycle gang was admissible based on this very premise.¹⁹³ This was the court that also rendered the opinion for *United States v. Street*, which reversed the jury’s guilty verdict because the gang expert’s testimony regarding the El Forasteros gang was unduly prejudicial and did nothing to tie the defendant to the group.¹⁹⁴ In *Frank*, the court distinguished the two cases by explaining that, in *Street*, there was no evidence corroborating that the defendant was a part of the gang. In *Frank*, on the other hand, other evidence supported the expert’s testimony that the El Forasteros gang retaliated against “snitches.”¹⁹⁵ Specifically, the expert’s opinion was bolstered by evidence showing that Frank was a former member of the motorcycle gang.¹⁹⁶ Also, lay witness testimony indicated that Frank had adopted the gang’s view of snitches.¹⁹⁷ The court concluded that the corroborating evidence made the expert’s testimony much more relevant and less prejudicial than if the testimony was offered on its own.¹⁹⁸

There is always the argument that a court’s requirement of additional or corroborating evidence is a waste of time and exhausts judicial resources.¹⁹⁹ Furthermore, the credibility of a witness is a matter for the jury—the finder of fact should decide whether to believe what an expert

¹⁹² See e.g., *United States v. Frank*, 336 Fed. Appx. 581 (8th Cir. 2009); see also *United States v. Mejia*, 545 F.3d 179 (2d Cir 2008).

¹⁹³ 336 Fed. Appx. at 581.

¹⁹⁴ 548 F.3d 618 (2008).

¹⁹⁵ 336 Fed. Appx. at 584.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ See Christopher M. Walters, *Admission of Expert Testimony on Eyewitness Identification*, 73 CAL. L. REV. 1402, 1421 (citing Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969 (1977)).

says.²⁰⁰ However, the defendant has a constitutional right to a fair trial.²⁰¹ The court has an obligation to bar overly prejudicial information²⁰² and, in the case of a gang expert, the court should expect that the testimony will be extremely prejudicial, especially where a violent act is at issue. The additional requirement of corroborating an expert's evidence is not new, as seen with conspiracy cases.

The information boosts the reliability of the expert's testimony and at the same time protects the defendant against undue prejudice by ensuring that what the expert says has some credence. Also, by providing that the state bring more evidence to corroborate a gang expert's testimony, the courts are ultimately giving the prosecution a better opportunity to tell a "colorful" story to the jury—something even the Supreme Court has found to be quite fundamental.²⁰³

VI. IF THE TESTIMONY IS DETERMINED ADMISSIBLE THEN COURTS SHOULD ENSURE THAT THE SCOPE OF THE TESTIMONY IS SUFFICIENTLY NARROW AND IS FOLLOWED BY A JURY INSTRUCTION

Assuming that the Court went through the traditional expert analysis and determined that the expert is qualified to testify and that there is other evidence that could corroborate what the expert is going to say, the court needs to determine the scope of the testimony and rule out any information that goes beyond what the expert may discuss or what the jury is allowed to know.²⁰⁴

Courts are required to ensure that the expert only testify about information that he or she is qualified to discuss.²⁰⁵ Certainly, "a person may be qualified as an expert on one subject and

²⁰⁰ See Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 174 (1990).

²⁰¹ U.S. CONST. AMEND. IV.

²⁰² FED. R. EVID. 403.

²⁰³ See *Old Chief*, 519 U.S. at 187.

²⁰⁴ See *Daubert*, 579 U.S. at 590.

²⁰⁵ See *Id.* at 588 (citing FED. R. EVID. 702).

yet be unqualified to render an opinion on matters beyond the scope of that subject.”²⁰⁶ Beyond the qualification standard, courts must also ensure that experts only give light to issues that are contested between the two parties.²⁰⁷ The jury has no need for an expert to testify as to factual issues that the jury need not resolve, which gets support from the relevance and waste of time considerations.²⁰⁸ However, in many gang cases, the expert discusses much more than what the issue requires.²⁰⁹

In the interest of the defendant’s rights, courts should generally presume that broad testimony about gangs is impermissible. Many gangs have unique characteristics and a general overview of gangs causes the jury to assume that all gangs are the same, which is certainly not the case. Also, the witness should only relay information that proves a fact in issue, and in most cases, a general overview of a gang is not going to prove any specific fact. The facts of *State v. Hinton* show why.²¹⁰

The defendant was convicted of assault with a deadly weapon with intent to kill.²¹¹ The court allowed a police officer to testify about gang activity in the city where the shooting took place.²¹² The victim testified that he stopped at a gas station about twenty minutes before he was shot.²¹³ At the gas station, law enforcement officials found a bullet similar to the one used in the

²⁰⁶ *People v. Williams* 5 Cal. Rptr. 2d 130 (1992).

²⁰⁷ *Daubert*, 579 U.S. at 588.

²⁰⁸ See James Joseph Duane, *Screw Your Courage to the Sticking Place: The Roles of Evidence, Stipulations, and Jury Instructions in Criminal Verdicts*, 49 HASTINGS L. J. 463, 470 (“[t]here is no disagreement over that, so there was no need for evidence by either side on that point”) (quoting *United States v. Hardin*, 139 F.3d 813 (11th Cir. 1998)).

²⁰⁹ See e.g., *Street*, 548 F.3d at 618 (“testimony about [violence of] outlaw motorcycle gangs and El Forasteros was excessive”).

²¹⁰ 738 S.E.2d 241 (N.C. Ct. App. 2013).

²¹¹ *Id.* at 244.

²¹² *Id.* at 244-45.

²¹³ *Id.* at 245.

shooting and they also recovered a red bandana laying on the ground in front of a gas pump.²¹⁴ The actual shooting took place at a different location.²¹⁵

The expert was introduced to prove an aggravating factor—that gang activity was likely involved.²¹⁶ When the officer testified, he used words such as “gang,” “gangster,” “Bloods,” and “Crips” over “ninety-one times.”²¹⁷ The officer testified that Bloods and Crips are the predominant gangs in that city and discussed the different conflicts between the gangs and intra-gang violence.²¹⁸ No other evidence was presented to show that the shooting was gang related other than testimony that the bandana was the same color as the “bloods”, an item found in a wholly different location than where the actual shooting took place.²¹⁹ In fact, the state presented no evidence that the defendant was even a part of a particular gang.

On appeal, the court held that the gang-related testimony was “never ‘connected to the crime charged’ and was thus “irrelevant and inadmissible.”²²⁰ Although caught by the appeals court, the lack of limits on the gang expert’s testimony shows just how important safeguards to narrow expert testimony are. Although there may be strong public encouragement against gang activity, it does not mean that all avenues, especially judicial avenues, should be used against a potential member of a gang. As *Hinton* shows, safeguards as simple as a general narrowing of the information proffered is highly important.²²¹ The rule reduces the likelihood of appeal on grounds of abuse of discretion, reducing the risk of wasting judicial resources. The Ninth Circuit has discussed such procedures.

²¹⁴ *Id.* at 244.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 246.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* (quoting *State v. Privette*, 721 S.E.2d 299, 313 (N.C. Ct. App. 2012).

²²¹ *Id.*

In *United States v. Hudson*, an officer’s expert testimony was held relevant where the lower court took “precautions” to limit the scope of the testimony and gave a limiting instruction that emphasized that the jury could not convict the defendant solely on account of his gang affiliation.²²² The issue in the case was whether the defendant, a former felon, was in possession of a firearm.²²³ The defendant was discovered in a van with three other members all wearing the same outfit, shortly after a shooting spree took place down the street.²²⁴ The defendant was not discovered with a gun when he was arrested— one of the other members was.²²⁵ However, the gun only had the defendant’s fingerprints on it.²²⁶

The police officer that testified in the case was admitted as a gang expert related to the specific gang in question.²²⁷ He explained why the three men who ended up in the van together wearing common clothing “weren't there accidentally.”²²⁸ Hudson was wearing a local gang’s colors on the night he was arrested and the expert explained that the custom of that particular gang was that, when they wear their colors, they are getting ready for some type of gang-related activity.²²⁹ Also, the officer testified that this gang has a “loyalty” agreement and that it makes sense that the gun was passed to another member of the gang before the police could check the defendant.²³⁰

The United States Court of Appeals for the Ninth Circuit held that the “testimony thus ‘applied directly to [the defendant's] motive and preparation’ for the charged offense and did not

²²² 304 Fed. Appx. 510 (9th Cir. 2008).

²²³ *Id.* at 511.

²²⁴ For facts of the case, *see* Transcript of Oral Argument, *United States v. Hudson*, No. 07-30155, 2008 WL 5506769 (Nov. 19, 2008).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

pertain to ‘any specific, wrongful acts . . . that [were] unrelated to’ that offense.’²³¹ The court went on to applaud the district court’s assessment of the danger of unfair prejudice posed by the officer’s testimony.²³² The court expressed that, by limiting the scope of the testimony, the risk of prejudice was reduced.²³³

The other aspect of *Hudson* that should be applied in all cases where a gang expert testifies is the appropriateness of a limiting jury instruction.²³⁴ A limiting instruction is one where “the judge must intervene and attempt to remove [the] prejudicial evidence procedurally, often by issuing an instruction to disregard it.”²³⁵ Every jurisdiction recognizes this safeguard.²³⁶ The limiting instruction ensures that the jury knows what the purpose of the testimony is and also informs the jury not to use the information for any other purpose such as impermissible character inferences against the defendant. The safeguard is a simple one and should be used in all gang cases.

Hudson’s analysis of the admissibility and scope of the gang expert should be the general framework that all courts consider when a party offers this type of testimony. The court rightly limited the testimony to only discuss why it was relevant that the gun may have been passed off to another member of the car.²³⁷ Furthermore, the Court went beyond narrowing the scope of the testimony and also administered a limiting instruction to reduce the danger that the jury might

²³¹ 304 Fed. Appx. at 511 (quoting *United States v. Santiago*, 46 F.3d 885, 889 (9th Cir.1995)); see also FED. R. EVID. 404(b).

²³² *Id.*

²³³ *Id.*

²³⁴ See *supra* note 178.

²³⁵ Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions*, 6 PSYCHOL. PUB. POL’Y & L. 677, 678 (2000).

²³⁶ Cf. Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL’Y & L. 589, 600 (1997).

²³⁷ See *supra* note 178.

make improper inferences.²³⁸ These precautions are also in no way imposing on the court's resources, as they are traditional ways to further protect the defendant.²³⁹ If all courts followed *Hudson's* tough, yet traditional, scrutiny of the admission of gang experts, then courts would likely have more analogous outcomes in gang-related cases.

VII. BACK TO THE BEGINNING: APPLYING THE PROPER ANALYSIS TO *BYNUM* AND *KILLEBREW*

To best show how the methodology discussed in this paper works, the *Bynum* case discussed in the Introduction and the *Killebrew* case discussed in Section III will be analyzed.²⁴⁰

In *Bynum*, the state offered the testimony of a local police officer regarding the Boardman Boyz gang during trial in order to prove that the defendant committed premeditated murder.²⁴¹ The charges against the defendant do not include gang membership as an essential element,²⁴² so the state should offer other evidence that corroborates what the expert says on the stand.

Before the officer may offer an opinion, the court must consider whether the officer is qualified to testify. Once again, this analysis follows FRE 702 discussed in Section II. The officer was an active member of the investigation and a member of the local police department.²⁴³ He is a member of the department's gang suppression unit and familiar with the alleged gang based on his experiences and observations as an officer.²⁴⁴ Although there is no information regarding the amount of time that the officer has spent in the unit, he is likely

²³⁸ *Id.*

²³⁹ *Cf. supra* note 197.

²⁴⁰ *People v. Bynum*, No. 307028, 2013 WL 1689660, at *1 (Mich. Ct. App. 2013), *perm. app. granted*, 838 N.W.2d 884 (Mich. 2014).

²⁴¹ *Id.* at *6-7.

²⁴² *Id.* at *1.

²⁴³ *Id.* at *2.

²⁴⁴ *Id.*

qualified as an expert based on his own experiences with the gang, which is admissible under FRE 702.

The next consideration is whether the testimony is helpful and relevant to the case. This means that the testimony must aid the jury and “tend” to prove a fact at issue.²⁴⁵ In this case, the state offered the expert to show why the defendant acted the way he did.²⁴⁶ In other words, that the defendant was a member of a gang that had a rivalry with the victim’s gang and that the defendant was defending his turf. The jury is likely not familiar with the customs of the gang, so the testimony would help the jury understand more in-depth what the gang does and how membership may have influenced the defendant’s actions. The state’s purpose of showing motive, although not an essential element of the crime, is always admissible and does not violate other rules, such as rule 404 against character evidence.

Next, the testimony must be reliable. As explained in sections II and V, gang expert testimony tends to be unreliable and, similar to conspiracy cases, the court should only admit the testimony if it can be corroborated with other evidence. The expert explained that he used former police reports and interviews from the defendant’s neighbors to conclude that the defendant was a member of the gang.²⁴⁷ However, the state did not introduce witnesses such as neighbors to testify that the defendant is, in fact, a member of the gang. The officer did testify that the defendant has a gang name and pictures of the defendant’s name on his hand corroborated the officer’s testimony.²⁴⁸ Also, the expert testified that the convenience store where the murder occurred is in the defendant’s gang’s territory.²⁴⁹ Another witness testified that the convenience

²⁴⁵ See FED. R. EVID. 401.

²⁴⁶ *Bynum*, 2013 WL 1689660 at *6.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at *2.

²⁴⁹ *Id.*

store was the gang's turf.²⁵⁰ This information may be sufficient to show that the police officer's testimony is reliable.

Assuming that the testimony has jumped through the first four gates, the court must then consider whether the testimony's extremely prejudicial nature substantially outweighs its probative value. In gang cases, the testimony is always prejudicial to the defendant because gangs are automatically stigmatized as criminal, and improper inferences about the defendant's bad character are high. The expert relied on former police reports, and those reports are likely to be prejudicial to the defendant to be relied upon at the trial. However, the state has offered a legitimate purpose—to show motive, so this case is the perfect example where the testimony should be limited by the court.

The expert should only testify as to how he knows that the defendant is a member based on the tattoo, where the defendant's gang hangs out (showing that the defendant was on his own turf), and finally that the defendant has a rivalry with the victim's gang without mention of previous violent acts by defendant's gang. The limit allows the expert to explain why the defendant was where he was at the time of the murder, and why the defendant may have been more likely to shoot at the victim. What the testimony does not do is introduce evidence of neither general gang testimony nor the defendant's "hardcore" membership in a violent gang, which is exactly what Michigan's district court allowed.

Finally, the court should ensure that the jury receives a jury instruction after both parties proffer their proofs. This ensures that the jury knows not to make a decision based on an impermissible purpose and also reminds them what the purpose of the expert's testimony was. The analysis ensured that the expert's testimony was reliable and allowed the state to offer the expert to tell its story without impeding on the rights of the defendant.

²⁵⁰ *Id.*

Next we consider *People v. Killebrew*.²⁵¹ The charges against the defendant include the element of gang membership, so expert testimony should be excluded if other, less probative evidence is available. In that case, Bakersfield police were on alert for East Side Crip members after another gang successfully shot and killed two of the Crip’s members at a drive-by shooting earlier in the day.²⁵² The police suspected that the Crips would attempt to retaliate later that night.²⁵³ Law enforcement observed three cars driving together, one car where police watched an individual shove a gun under the passenger’s seat, and ended up stopping all three vehicles.²⁵⁴ Killebrew was not in any car.²⁵⁵ Instead, the police watched Killebrew observe the stop while he was standing on a street corner.²⁵⁶ The police ended up discovering another handgun hidden in a box behind a taco stand near where Killebrew was standing.²⁵⁷ Ten men were arrested as a result of law enforcement’s observations and “[o]f the ten men,” the officers “recognized only one passenger [as] an East Side Crip. [O]fficers concluded . . . everyone was a member of the East Side Crips because the cars carried young Black males, it appeared the cars were being driven together, and one passenger was an East Side Crip.”²⁵⁸

Killebrew was one of the ten men arrested that night.²⁵⁹ The state alleged that Killebrew conspired with the occupants of the car to possess a handgun in furtherance of gang activity.²⁶⁰

²⁵¹ 103 Cal. App. at 644

²⁵² *Id.* at 648.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 643.

The state offered a police officer to testify as a gang expert about the East Side Crips and why the behavior that night shows the members' intent to possess a firearm.²⁶¹

Assuming that the expert is qualified to testify about the East Side Crips (there was no information regarding his qualifications), the court must then ask whether the testimony is relevant and reliable. The testimony is relevant because it tends to show why the group of men may have had the intent to possess firearms, which is probative in the case. However, the testimony would be held inadmissible because of the officer's lack of reliability. The officer testified that the only reason why Killebrew was a suspected gang member was because of the color of his skin and because another individual, who was not even with Killebrew at the time, was identified as an East Side Crips member. No other evidence was introduced to place Killebrew in the gang and the officer did not explain why those two factors were significant in making the identification. The factors that the officer relied on to identify Killebrew as a gang member are too attenuated to identify Killebrew as a member. Also, the factors are not generalized or unique to this particular gang. Thus, the admissibility of the expert's testimony would fail even before other factors are considered because the methods used to prove Killebrew a gang member are too unreliable. As demonstrated here, the analysis protects the defendant from extremely unreliable, and ultimately, prejudicial testimony that minimally ties the defendant to a gang.

VIII. CONCLUSION

The Sixth Amendment's requirement that all criminal defendants be afforded the right to a fair trial in front of an impartial jury is "a fundamental principle in our system of jurisprudence, intended to protect the individual who is charged with a crime."²⁶² Gang members are afforded

²⁶¹ *Id.* at 649-650.

²⁶² *Bacon v. State*, 71 S.E.2d 615, 616 (Ga. 1952).

the same protections and “the general character of the defendant and his conduct in other transactions is irrelevant.”²⁶³ Gang members are automatically stigmatized as criminals and the improper inference that all gang members are bad is something the courts must confront.

Courts are required to undergo a traditional analysis to qualify an individual as an expert. Courts should not fall victim to unnecessary factors such as the general “culture, habits, and psychology” factors that were introduced in California’s lower courts. When conducting the general analysis in gang cases, it is necessary for the court to focus on the reliability of the expert’s testimony and also the risk of undue prejudice. Courts should inquire into the source of expert’s information and determine that if that information is generalized or unique to the gang in question.

Also, a court must scrutinize the probative value of the testimony. If the testimony is offered to prove an essential element of the crime, the court should consider available alternatives to prove the element. If there is other evidence, then the probative value of the testimony is significantly reduced and the court should follow the *Old Chief* approach and exclude the testimony if it is highly prejudicial, yet minimally probative.

If the gang-related testimony is not offered to prove an essential element of the crime, the court should consider the purpose for which the testimony is being offered and also determine whether other evidence corroborates the testimony. If the expert testimony is presented under a permissible purpose, yet no facts can corroborate the testimony, then the court should question the reliability of the expert’s information.

Finally, if the testimony is admissible and proves a fact at issue in the case, then the court should take measures to limit the scope of the expert’s testimony. There should be a presumption that general gang testimony is inadmissible since a general overview of gangs is not specific to

²⁶³ *Id.*

the unique gang at issue and may misconstrue facts such as the gang being affiliated with activities when in fact it is not. Even when the testimony is narrowed, courts, in all gang-related cases, should use a limiting instruction to inform the jury to only use the testimony for its proper purpose. It is a common safeguard and does not run the risk of wasting judicial time and resources.

This traditional, yet critical, analysis ensures that highly prejudicial gang-expert testimony is used in the most fair and efficient manner. These guidelines preserve the rights of the defendant and at the same time promote judicial integrity.