CHALLENGING EXPERT TESTIMONY IN GANG CASES

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I. INTRODUCTION

In virtually every gang case, the district attorney will call an "expert" witness. This witness will invariably be a police officer who has arrested a lot of gang members, and who will testify that every crime committed by every person who is in any way acquainted with a gang member is gang related. These witnesses have become such a fixture in criminal trials that it becomes tempting to pay less and less attention to what they are saying. However, there are many fruitful areas for challenging the testimony of these experts, and these should be thoroughly explored in every gang case.

II. ADMISSIBILITY

Before attempting to launch an attack on the substance of the gang expert's testimony, it should first be determined that the testimony was in fact admissible. California law permits a person with special knowledge, skill, experience, training, or education in a particular field to qualify as an expert witness and to give testimony in the form of an opinion. (Evid. Code, secs. 720, 801.) Expert testimony is admissible only if the subject matter of the testimony is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. (Evid. Code, sec. 801, subd. (a); *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) The opinion must be based on matter perceived by, or personally known, or made known to the witness at or before the hearing that is of the type that reasonably may be relied on in forming an opinion on the subject to which the expert's testimony relates. (*Ibid.*) The use of expert testimony in the area of gang sociology and psychology

is well established (*People v. Olguin* (1994) 31 Cal.App,.4th 1355, 1370; see also *People v. Champion* (1995) 9 Cal.4th 879, 919-922; *People v. Gamez* (1991) 235 Cal.App.3d 957, 965-966.) It must be ascertained that two basic requirements were met before the expert's testimony was admitted: (1) the witness was qualified as an expert in the area in which he or she is testifying (Evidence Code sec. 720, subd. (a)); and (2) the testimony must be based on matter that may reasonably be relied upon by an expert in forming an opinion regarding the subject of the testimony, but not on matter which an expert is precluded from relying upon by law, such as an unreliable scientific procedure. (Evidence Code sec. 802.) The qualification of expert witnesses, including foundational requirements, rests in the sound discretion of the trial court. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1175.) Absent a manifest abuse, the court's determination will not be disturbed on appeal. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1115.)

III. GANG EXPERTS

A. WHAT ARE THEY CALLED UPON TO ESTABLISH?

A criminal defendant can be charged with either a substantive gang crime (Penal Code sec. 186.22, subd. (a)) or with a gang enhancement attached to another substantive crime. (Penal Code sec. 186.22, subd. (b).) The district attorney must prove several things which the gang expert is used to establish.

1. Penal Code section 186.22, subdivision (a)

    a. The defendant actively participated in a street gang;

    b. When the defendant participated in the gang, he/she knew that members of the gang engage in or have engaged in a pattern of criminal activity; and

    c. The defendant willfully assisted, furthered, or promoted felonious criminal

conduct by members of the gang either by

1. Directly and actively committing a felony offense; or
2. Aiding and abetting a felony offense.

2. Penal Code section 186.22, subdivision (b)

a. The defendant committed or attempted to commit the crime for the benefit of, at the direction of, or in association with a criminal street gang

b. The defendant intended to assist, further, or promote criminal conduct by gang members

Each of these elements consists of still more elements. While it may at first seem a daunting task to wade through all of these requirements in search of a failure of proof, the more the district attorney has to prove, the more opportunities there are for him or her to make mistakes and for challenge.

B. CHALLENGING PROOF OF THE ELEMENTS

1. Did the Expert Evidence Establish The Existence of a Criminal Street Gang?

Obviously, there has to *be* a gang before the defendant can actively participate in it or commit crimes for its benefit. Thus its existence must be established for either a substantive gang crime or an enhancement. In order to prove the existence of a criminal street gang, the district attorney must prove that there is an ongoing organization, association, or group of three or more persons, whether formal or informal which (1) has a common name or common identifying sign or symbol; (2) that has, as one or more of its primary activities, the commission of one or more crimes listed in Penal Code section 186.22, subdivision (e)(1) through (25) and (31) through (33); and (3) whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal activity. (Pen. Code sec. 186.22, subds. (f), (e)(1), (2); *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464-1465.)

a. Common Name or Identifying Symbol

This is rarely a fruitful area for challenge. Symbols can by anything from the color of clothing to tattoos, monikers, or graffiti. Nevertheless, it is an element that must be shown to establish the existence of the gang, and the expert testimony should be carefully examined to ensure that such evidence was actually given.

b. Primary Activities

The district attorney must prove that a group with a common name or symbol has as one of its primary activities the commission of one or more of the crimes listed in Penal Code section 186.22, subdivision (e)(1)-(25), (31)-(33). (Penal Code sec. 186.22, subd. (f).) Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group's primary activities. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently* and *repeatedly* have committed criminal activity listed in the gang statute or expert testimony regarding the primary activities of the gang. (*Id.,* at p. 324.)

This is an area that is vulnerable to attack. Very often, the expert will testify simply that he "knows" the gang members have engaged in the enumerated crimes in the past without testifying to the circumstances of the crimes or how the expert obtained the information. Such testimony lacks an adequate foundation since "[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 matter that is reasonably relied upon by an expert in forming an opinion on the subject to which his or her testimony relates. [Citations.]" (*Olguin, supra,* 31 Cal.App.4th at p. 1371.) "While experts may

offer opinions and the reasons for their opinions, they may not under the guise of reasons bring before the trier of fact incompetent hearsay evidence." (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1003.) Therefore, appellate counsel should ascertain that the expert witness has testified as to the factual basis for his or her opinion, and that the basis is reasonably reliable.

In In re *Alexander L.* (2007) 149 Cal.App.4th 605, 611 an expert witness testified: "I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations." The Fourth District held that this was an insufficient foundation since there was no showing that the basis for the expert testimony was reliable.

After *Alexander L.*, the Fourth District decided *People v. Martinez* (2008) 158 Cal.App.4th 1324. There the appellant contended, as had been done in *Alexander L.,* that there was no evidence of how the expert knew of or had obtained his information about the gang's primary activities, and thus his testimony lacked foundation. However, in *Martinez*, the expert witness testified that he had experience and training as a gang expert. He specifically testified as to the primary activity of the gang, based upon eight years spent dealing with that specific gang, including investigations and personal conversations with members, and review of reports. (*Id.,* at p. 1330.) The Court found that this distinguished the case from *Alexander L.* where the expert simply testified that he "knew" the gang had been involved in certain crimes.

The lesson to be drawn from *Alexander L.* and *Martinez* is that the expert's testimony, including the voir dire, should be carefully scrutinized to ensure that a proper foundation was laid. Expert testimony simply saying he knows these things, without more, is inadequate and should be challenged.

The district attorney will typically introduce court records showing that a gang member was in the past convicted of one of the enumerated crimes in order to establish a pattern of criminal activity. (See III.B.1.c., *infra*.) This can be challenged as insufficient to show primary activities. "The phrase 'primary activities' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the groups' members . . . Section 186.22 . . . requires that one of the primary activities of the group or association itself be the commission of [specified] crime[s] . . . '" (*Sengpadychith, supra,* 26 Cal.4th at pp. 323-324.) Without more, two or three convictions do not establish the kind of consistent and repeated conduct required by the gang statute. (*Ibid.; Duran, supra,* 97 Cal.App.4th at p. 1465.) This can be a particularly effective argument where the expert has, as they often do, emphasized what a vast enterprise the gang is. Where the expert has testified that the gang boasts hundreds and even thousands of members, two or three convictions is simply insufficient to establish consistent and repeated commission of the enumerated offenses.

c. Pattern of Criminal Activity

As used in the gang statute, a pattern of criminal gang activity means the commission of, attempted commission of, conspiracy to commit, or solicitations of, sustained juvenile petition for, or conviction of two or more of the 33 enumerated offenses, provided at least one of them occurred after September 26, 1988, and the most recent crime occurred within three years after one of the earlier crimes, and the offenses were committed on separate occasions, or by two or more persons (Penal Code sec. 186.22, subd. (e).) It may not be established solely by proof of commission of offenses enumerated in subdivision (e)(26)-(30) [felony theft of an access card or account

information (Pen. Code sec. 484e); counterfeiting, designing, using, attempting to use and access card (Pen. Code sec. 484f); felony fraudulent use of an access card or account information (Pen. Code 484g); unlawful use of personal identifying information to obtain credit, goods, services, or medical information (Pen. Code sec. 530.5); or wrongfully obtaining DMV documentation (Pen. Code sec. 529.7.)].

This element is less prone to attack than the "primary activity" element since the statute specifies that two offenses are sufficient and since it is proved by the introduction of court records of prior convictions; thus it is not a proper subject for expert testimony. If the expert does render such an opinion and trial counsel does not object, appellate counsel should investigate the viability of a claim of ineffective assistance of counsel. Because these prior offenses are almost always proved by the introduction of court documents, appellate counsel must make sure that those documents met all requirements for admission. If they were not included in the record, be sure to request them from the Superior Court pursuant to California Rules of Court, rules 8.340(b), 8.320(c)(13)(C).)

2. Did the Expert Establish the Defendant's Active Participation in a Criminal Street Gang?

A finding of guilt of a substantive gang crime requires that the defendant "actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity . . ." (Pen. Code sec. 186.22, subd. (a).) It is not necessary for the prosecution to prove that the defendant devotes all, or a substantial part, of his or her time or efforts to the criminal street gang, nor is it necessary to prove that the person is a member of the criminal street gang. "Active participation in the criminal street gang is all that is required." (Pen.

Code sec. 186.22, subd. (i).) The California Supreme Court has defined active participation as follows: " . . . one 'actively participates' in some enterprise or activity by taking part in it in a manner that is not passive. Thus, giving these words their usual and ordinary meaning, we construe the statutory language 'actively participates in any criminal street gang' [citation] as meaning involvement with a criminal street gang that is more than nominal or passive." (*People v. Castenada* (2000) 23 Cal.4th 743, 747.)

While this may seem like a difficult aspect of the expert testimony to attack, there are some areas that are vulnerable. For example, it is not enough that a defendant actively participated in a criminal street gang at any point in time. A defendant's active participation must be shown at or reasonably near the time of the crime. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509.) Therefore, even if the expert testifies that the defendant has in the past engaged in criminal activity at the direction of or for the benefit of a gang and is therefore an active participant, if that event can be characterized as not reasonably close in time to the charged crime, the active participation element can be challenged.

The active participation requirement as it relates to the substantive gang crime necessarily includes knowledge that members of the gang engage in or have engaged in a pattern of criminal gang activity. (Pen. Code sec. 186.22, subd. (a).) Thus, to be charged with the substantive gang crime in a case in which there are codefendants or at least cohorts, the defendant must know that the other actors are in fact gang members. Penal Code section 186.22, subdivision (b) is worded slightly differently in that it requires that a felony be committed for the benefit of, at the direction of, or in association with any criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members. Courts may infer that the Legislature's failure to include the

knowledge language was intentional. (See *People v. Hagedorn* (2005) 127 Cal.App.4th 734, 743.)

There is still a viable argument, however, that courts have interpreted the Penal Code section 186.22, subdivision (b) to require knowledge that the other parties involved are gang members. " . . . the STEP[1] Act does not punish a defendant for the actions of associates; rather the act increases the punishment for a defendant who committed a felony to aid or abet criminal conduct of a group that has as a primary function the commission of specified criminal acts and whose members have actually committed specified crimes, and who acted with the specific intent to do so." (*Gardeley, supra,* 14 Cal.4th at p. 624, fn. 10.) This would seem to imply that just committing a crime with someone else who *happens* to be a gang member is insufficient without *knowledge* that the person is in fact a gang member. (See also *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 [finding it significant that the defendant knew that the two codefendants with whom he committed robberies were in fact gang members].)

Even if the expert testifies to all of the elements establishing the existence of a criminal street gang, it can still be argued in the appropriate case that the expert has not shown that the defendant had knowledge that he was in fact committing crimes with gang members, and consequently that active participation has not been proven.

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[1] The Street Terrorism Enforcement and Prevention Act

3. The Requirement That Defendant Either Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct By Members of the Gang Either by Directly and Actively Committing a Felony Offense or by Aiding and Abetting a Felony Offense (Pen. Code sec. 186.22, subd. (a)); or Committed or Attempted to Commit the Crime for the Benefit of, at the Direction of, or in Association With a Criminal Street Gang and Intended to Assist, Further, Or Promote Criminal Conduct By Gang Members (Pen. Code sec. 186.22, subd. (b)(1).)

The intent that must be shown for either the substantive gang crime or the enhancement is not the intent to commit the crime, but the intent to promote, further, or assist the gang in its felonious conduct, irrespective of who actually commits the offense. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467.) An expert witness may not testify to the subjective knowledge and intent of the defendant or anyone else involved. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 658.) He or she *can* testify to a gang member's expectation of what might occur when confronted with a specific action. (See *Olguin, supra,* 31 Cal.App.4th at p. 1371.) Thus, it is permissible for the expert to testify about what a gang member might typically expect, but he or she may not give his or her own opinion as to whether the defendant's involvement in the commission of the offenses was done with the specific intent to promote, further, or assist in any criminal conduct by street gang members. This is improper expert opinion.

Expert witnesses also sometimes give opinions that can be challenged as irrelevant and unnecessary. For example, whether a defendant had the requisite specific intent is not a subject for which expert testimony is necessary. Testimony about how gangs act or what they expect in a given situation is admissible, but for an expert to go beyond that and testify that these actions or expectations show a particular intent does nothing more than to inform the jury of the expert's beliefs about the suspects' knowledge and intent. His opinion about these matters is irrelevant and unnecessary. (*Killebrew, supra,* 103 Cal.App.4th at p. 658.) In addition, these are issues to be

decided by the jury. An expert's opinion regarding subjective intent improperly braces an ultimate fact for the trier of fact to determine.

An illustrative case is *In re Frank S.* (2006) 141 Cal.App.4th 1192, where the defendant was arrested for being in possession of a concealed knife. He told the officer that he had been attacked two days earlier and needed the knife for protection against "the Southerners" because they believed he supported northern street gangs, among whom he had several friends. At trial, an expert witness testified that it was her belief that the defendant possessed the knife to protect himself. She said that gang members use knives for protection from rival gang members and to assault rival gang members. She stated further that possession of the knife benefitted defendant's gang by providing them with protection should they be assaulted. (*Id.,* at pp. 1195-1196.)

The Fifth District Court of Appeal held that this testimony was insufficient to support the gang enhancement. The defendant's criminal history and gang affiliations cannot solely support a finding that a crime is gang related. The Court stated that "[w]hile evidence established the minor has an affiliation with the Nortenos, membership alone does not prove a specific intent to use the knife to promote, further, or assist in criminal conduct by gang members. [Citations.]" (*Id.,* at p. 1199; see also *People v. Martinez* (2004) 116 Cal.App.4th 753, 761-762 [appellant's criminal history and gang affiliations cannot solely support a finding that a crime is gang-related under section 186.22].)

IV. EXCLUDING THE ADMISSION OF THE DEFENDANT'S STATEMENTS TO A THIRD PERSON AS PART OF THE BASIS FOR AN EXPERT OPINION ON CONFRONTATION CLAUSE GROUNDS NOTWITHSTANDING *GARDELEY*

A. Introduction

Unfortunately, many of our clients talk much more than they should when taken into custody. As stated above, in order to prove one or more of the elements required in a gang case, the prosecutor may introduce the testimony of a "gang expert" who in turn may often rely on the defendant's own statements to some third person to prove that he is a gang member, that he is an active participant in a gang, or that he willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by directly and actively committing a felony offense or by aiding and abetting a felony offense. (Pen. Code, sec. 186.22, subd. (a).) His statements may also be used to prove that he committed or attempted to commit the crime for the benefit of, at the direction of, or in association with a criminal street gang and that he intended to assist, further, or promote criminal conduct by gang members. (Pen. Code, sec. 186.22, subd. (b)(1).)

In *Gardeley, supra,* 14 Cal.4th at p. 618, the California Supreme Court stated that "[s]o long as [the] threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony. [Italics in original.]" *Gardeley* also suggested that such "basis" evidence is not offered for its truth, but only to reveal the basis for the expert opinion. (*Gardeley, supra,* 14 Cal.4th at p. 619.) Many courts, and certainly many district attorneys, have interpreted *Gardeley* to permit virtually unlimited admission of statements by defendants as long as they can be classified as merely information upon which the expert witness based his or her opinion rather than being offered for the truth of the matter stated. (See, e.g. *People v. Hill* (2011) 191 Cal.App.4th 1104, 1127-1128; *People v. Sisneros* (2009) 174 Cal.App.4th 142,

153-154; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426-1427; *People v. Thomas* (2005) 130 Cal.App.4th 1202, , 1210.) However, a majority of justices on both the United States Supreme Court and the California Supreme Court have indicated that expert basis evidence is indeed offered for its truth and should be subject to the confrontation clause. (*Williams v. Illinois* (2012) 567 U.S. ___ [183 L.Ed.2d 89, 132 S.Ct. 2221]; *People v. Dungo* (2012) 55 Cal.4th 608.) In *Williams, supra,* in a plurality decision, the Court held that the admission of a laboratory expert's testimony that a DNA report from a prior case which was not introduced into evidence, matched a DNA sample taken from the defendant did not offend the confrontation clause. The plurality opinion reasoned that the report was not offered for its truth, but rather for the limited purpose of explaining the basis for the assumptions underlying the expert's independent conclusion that the samples matched, and even if it was admitted into evidence for its truth, the report was not testimonial. (*Williams, supra,* 132 S.Ct. at p. 2228.) The remaining five justices all expressed the view that the report was offered for its truth. In a concurring opinion, Justice Thomas stated that the report was offered for its truth but was not testimonial. (*Id.*, at p. 2257 [conc. opn. of Thomas, J.].) In a dissenting opinion joined by three justices, Justice Kagan stated that the expert's description of the report "was offered for its truth because that is all such 'basis evidence' can be offered for." (*Id.,* at p. 2273, [dis. opn. of Kagan, J.].)

In a California case, *Dungo, supra,* 55 Cal.4th at pp. 618-619, a forensic pathologist testified the victim in the case had been strangled, basing his opinion on facts contained in an autopsy report prepared by another pathologist, which was not introduced into evidence. The majority held that the statements in the report were not testimonial, and therefore were not subject to the confrontation clause. (*Dungo, supra,* 55 Cal.4th at p. 621.) Justices Corrigan and Liu dissented, stating "When an expert witness treats as factual the contents of an out-of-court statement, and relates as true the

contents of that statement to the jury, a majority of the high court in *Williams* . . . rejects the premise that the out-of-court statement is not admitted for its truth." (*Id.,* at p. 635, fn. 3 (dis. opn. of Corrigan, J.).)

Although these cases do not specifically involve gang experts, they illustrate that there is a fair amount of disagreement in the area of expert testimony. Given the differing opinions on this issue, it is in our clients' best interests to try to characterize expert testimony as being offered for the truth of the matter stated *and* testimonial in order to bring it within the ambit of the confrontation clause. It is especially important for attorneys practicing in the Sixth District because Presiding Justice Rushing has recently dissented in several unpublished cases. In each, he stated his belief that trial courts violate defendants' right to confront witnesses against them when the courts permit gang experts to serve as a conduit for incriminating extrajudicial statements gathered by police officers while investigating criminal street gangs and their activities. (See *People v. Rojas* (Feb. 11, 2014, H037357) [nonpub. opn.] (dis. opn. of Rushing, J.); *People v. Espinoza* (Jan. 31, 2014, H038508) [nonpub. opn.] (dis. opn. of Rushing, J.); *People v. Zavala* (Oct. 22, 2013, H036028) [nonpub. opn.] (dis. opn. of Rushing, J.).)

B. Challenging the Admission of the Defendant's Statements on the Grounds that it Violates His Right to Confront the Witnesses Against Him

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." The Fourteenth Amendment renders the Clause binding on the States. (*Pointer v. Texas* (1965) 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923; *Michigan v. Bryant* (2011) ___ U.S. ___, [131 S.Ct. 1143, 1152].) "In *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d

177, the high court held that this provision prohibits the admission of out-of-court testimonial statements offered for their truth, unless the declarant testified at trial or was unavailable at trial and the defendant had had a prior opportunity for cross-examination. (See *Davis v. Washington* (2006) 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224; *People v. Cage* (2007) 40 Cal.4th 965, 969.)" (*People v. Livingston* (2012) 53 Cal.4th 1145, 1158.) Article I, section 15 of the California Constitution provides: "The defendant in a criminal cause has the right . . . to be confronted with the witnesses against the defendant." The California Constitution also states: "In criminal cases the rights of a defendant . . . to confront the witnesses against him or her . . . shall be construed by the courts of this State in a manner consistent with the Constitution of the United States." (Cal. Const., art. I, sec. 24.)

1. Arguing that the Out-Of-Court Statement was Offered for its Truth

The United States Supreme Court has not said whether the Sixth Amendment confrontation clause is violated when a gang expert bases his or her opinion on statements by witnesses who are not present at trial and whom the defendant has not had the opportunity to cross-examine. However, prior to the decision in *Crawford v. Washington, supra*, 541 U.S. 36, the California Supreme Court held hearsay statements testified to by a gang expert as a basis for his or her expert opinion are not offered for the truth of the matter asserted. (*People v. Gardeley, supra*, 14 Cal.4th at p. 619.) That conclusion is of course binding on Courts of Appeal. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Thus, even if the statements are deemed to be testimonial, the confrontation clause would not bar their admission given they were not offered for their truth. (*Crawford v. Washington, supra*, 541 U.S. at p. 60, fn. 9; see *Sisneros, supra*, 174 Cal.App.4th at pp. 153–154 [confrontation clause applies to testimonial statements offered for their truth, not

statements relied on by expert in forming opinion]; *Ramirez, supra,* 153 Cal.App.4th at p. 1427 [*Crawford* did not condemn hearsay used to support expert's opinion]; *People v. Cooper* (2007) 148 Cal.App.4th 731, 747 [*Crawford* applies to substantive use of hearsay evidence, not with evidence admitted for nonhearsay purpose]; *Thomas, supra,* 130 Cal.App.4th at p. 1210 ["*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions."].) Clearly, the district attorney and the Attorney General will argue that opinion evidence was admitted as a basis for the gang expert's opinion and not for the truth of the statements.

In arguing that the expert opinion testimony was in fact offered for its truth, counsel should rely on *Hill, supra,* 191 Cal.App.4th 1104. There, the court recognized, as counsel must, that lower courts are bound by the California Supreme Court's opinion in *Gardeley, supra*, 14 Cal.4th 605, for the conclusion that hearsay statements testified to by an expert witness as the basis for an opinion are not offered for the truth of the matter. (*Hill, supra*, 191 Cal.App.4th at p. 1127.) However,

> . . . the *Hill* court disagreed with the Supreme Court's conclusion. [Citation.] It found essential to *Gardeley*'s conclusion was 'the implied assumption that the out-of-court statements may help the jury evaluate the expert's opinion without regard to the truth of the statements. Otherwise, the conclusion that the statements should remain free of *Crawford* review because they are not admitted for their truth is nonsensical. But this assumption appears to be incorrect.' [Citation.] The court in *Hill* reviewed a New York case, *People v. Goldstein* (2005) 6 N.Y.3d 119 [810 N.Y.S.2d 100, 843 N.E.2d 727], in which the appellate court rejected the reasoning invoked by the *Gardeley* court. [Citation.] The *Hill* court agreed with the observation in *Goldstein* that in using the hearsay statement to test the validity of the expert's opinion, the jury must either assume the statement is true or assume it is false, and that in such a case '"[t]he distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in [the Sixth Amendment] context.' [Citation.]" [Citation.]

(*People v. Sanchez* (2014) 223 Cal.App.4th 1, 17-18.) Thus it appears that "[w]ere it not for our

Supreme Court's precedent to the contrary, the *Hill* court would have adopted *Goldstein*'s reasoning. [Citation.]" (*Id.*, at p. 18.)

In arguing that the statements upon which the expert relies are indeed admitted for their truth, counsel should rely on *Hill, supra,* 191 Cal.App.4th 1104 while acknowledging the binding authority of *Gardeley*. As was observed in *Hill,* it should be argued that when basis evidence consists of out-of-court statements of the defendant to some third party other than the expert, "the jury will often be required to determine or assume the truth of the statement in order to utilize it to evaluate the expert's opinion." (*Hill, supra,* 191 Cal.App.4th at p. 1131.)

2. Arguing that the Out-Of-Court Statement is Testimonial

To be subject to the confrontation clause, out-of-court statements must be "testimonial." (*Crawford, supra,* 541 U.S. at p. 59.) Although *Crawford* did not clearly define the term, it did state that the confrontation clause applies to police interrogations which in that case included recorded statements by a witness in response to structured police questioning. (See *Cage, supra,* 40 Cal.4th at p. 978 [explaining *Crawford*]; *People v. Valadez* (2013) 220 Cal.App.4th 16, 33.) Later, in *Davis v. Washington, supra,* 547 U.S. 813, the United States Supreme Court held: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis, supra,* 547 U.S. at p. 822; see *Michigan v. Bryant* (2011) 562 U.S. ___, ___ [179 L.Ed.2d 93, 131 S.Ct. 1143, 1157.].)

The California Supreme Court has formulated a two-part test to determine whether an out-of-court statement is testimonial. "First, to be testimonial the statement must be made with some degree of formality or solemnity. Second, the statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution." (*Dungo, supra,* 55 Cal.4th at p. 619; see *People v. Lopez* (2012) 55 Cal.4th 569, 581-582.) Thus, in challenging the admission of statements made by the defendant to a third party, it is essential to characterize them as having been made with some degree of formality. It is arguable that a defendant being questioned by police during a booking process or even during a detention might be characterized as being a process which has at least "some degree of formality" in that it involves formal dialogue or interrogation. Additionally, it must be argued that the primary purpose of the questioning which yielded the statement pertains to a criminal prosecution.

V. CHALLENGING THE ADMISSION OF THE DEFENDANT'S STATEMENTS AS PART OF THE BASIS FOR AN EXPERT OPINION ON THE GROUND THAT HE WAS NOT ADVISED OF HIS RIGHT TO REMAIN SILENT PURSUANT TO *MIRANDA v. ARIZONA*

A. Introduction

When a defendant challenges the admissibility of defendant's postarrest statements on the ground they were elicited in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 [6 L.Ed.2d 694, 86 S.Ct. 1602], the prosecution has the burden of proving by a preponderance of the evidence that the statements were not the product of a *Miranda* violation. (*Missouri v. Seibert* (2004) 542 U.S. 600, 608–609, fn. 1 [159 L. Ed. 2d 643, 124 S. Ct. 2601]; *People v. Dykes* (2009) 46 Cal.4th 731, 751.)

In *Miranda*, the United States Supreme Court held that the Fifth Amendment right against self-incrimination prohibits the prosecution from using "statements, whether exculpatory or

inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." (*Miranda, supra*, 384 U.S. at p. 444.) These "procedural safeguards" require that a person in custody "first be informed in clear and unequivocal terms that he has the right to remain silent," "that anything said can and will be used against the individual in court," that he has the right to consult with a lawyer and to have the lawyer with him during interrogation," and that "if he is indigent a lawyer will be appointed to represent him." (*Id*., at pp. 467–473, 479.) Statements made in violation of these rules are inadmissible against the detained individual to prove guilt in a criminal case. (*Id*., at p. 479; *People v. Stitely* (2005) 35 Cal.4th 514, 535.)

B. When Does it Apply?

Miranda protections are triggered only if a defendant is subjected to a custodial interrogation. (*People v. Ochoa* (1998) 19 Cal.4th 353, 401.) Interrogation refers not only to express questioning, but also to its functional equivalent; i.e., " 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.' " (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 600–601 [110 L. Ed. 2d 528, 110 S. Ct. 2638], italics added.) However, not all police questioning of a person in custody constitutes interrogation. (*People v. Franzen* (2012) 210 Cal.App.4th 1193, 1201.) "The exclusion for communications 'normally attendant to arrest and custody' recognizes that the police may properly perform their normal administrative duties that are distinct from their investigatory function without giving rise to *Miranda* protections." (*People v. Andreasen* (2013) 214 Cal.App.4th 70, 86-87, citing *Muniz, supra*, 496 U.S. at pp. 600–602; see *People v. Hall* (1988) 199 Cal.App.3d 914, 921.)

Under this "routine booking question exception" to the *Miranda* rule, the police need not provide *Miranda* warnings prior to asking routine booking questions to secure biographical information. (*Muniz, supra*, 496 U.S. at pp. 601–602; see *People v. Quiroga* (1993) 16 Cal.App.4th 961, 967; *Hall, supra*, 199 Cal.App.3d at p. 921.) Also, the *Miranda* requirements are generally not implicated when the police ask questions related to safety concerns that arise during the arrest or booking process. (*People v. Gomez* (2011) 192 Cal.App.4th 609, 634–635 [*Miranda* not triggered during routine booking question about gang affiliation designed to ensure safety of jail placement].) However, a *Miranda* interrogation may emerge during routine or casual exchanges if the police ask questions "'that are designed to elicit incriminatory admissions.'" (*Muniz, supra*, 496 U.S. at p. 602, fn. 14; see *Gomez*, supra, at p. 627.)

C. Arguing that Questions About Gang Affiliation Do Not Fall Within the Booking Exception

The facts of any routine questioning or casual conversation must be carefully scrutinized to ensure that the police are not using the communication as a pretext for eliciting incriminating information. (See *Gomez, supra*, 192 Cal.App.4th at p. 630.) When evaluating whether the *Miranda* requirements should apply during noninvestigative routine or casual exchanges, relevant factors to consider include the nature of the questions, the context of the questioning, the knowledge and intent of the officer asking the questions, the relationship between the questions and the crime, the administrative need for the questions, and any other indications that the questions were designed to elicit incriminating evidence. (*Id.,* at pp. 630–631.)

In *Gomez, supra,* 192 Cal.App.4th 609, the defendant was arrested and asked by police whether he was an active member, associate, or former member of a gang. The defendant said that

he was an active member. He later sought to suppress these statements prior to trial. The *Gomez* court noted that up until then, there had been no California case "that squarely addresses the issue presented here." (*Gomez, supra,* 192 Cal.App.4th at p. 632.) Relying on federal authorities, the court stated:

> Courts have considered several factors, including the nature of the questions, such as whether they seek merely identifying data necessary for booking (see, e.g., *U.S. v. Washington* (9th Cir. 2006) 462 F.3d 1124, 1132; *U.S. v. Gonzalez-Sandoval* (9th Cir. 1990) 894 F.2d 1043, 1046; *U.S. v. Minkowitz* (E.D.N.Y. 1995) 889 F.Supp. 624, 627; *U.S. v. Booth* (9th Cir. 1981) 669 F.2d 1231, 1238; *Hughes v. State* (1997) 346 Md. 80, 94–95 [695 A.2d 132, 139]); the context of the interrogation, such as whether the questions were asked during a noninvestigative clerical booking process and pursuant to a standard booking form or questionnaire (see, e.g., *U.S. v. Pacheco-Lopez* (6th Cir. 2008) 531 F.3d 420, 425; *Rosa v. McCray* (2nd Cir. 2005) 396 F.3d 210, 221–222; *U.S. v. Mata-Abundiz* (9th Cir. 1983) 717 F.2d 1277, 1280; *U.S. v. Ortiz* (E.D.Pa. 1993) 835 F.Supp. 824, 835); the knowledge and intent of the government agent asking the questions (see, e.g., *Rosa v. McCray, ibid.*; *U.S. v. Scott* (1st Cir. 2001) 270 F.3d 30, 43–44, fn. 8; *U.S. v. Gill* (D.Me. 1995) 879 F.Supp. 149, 152); the relationship between the question asked and the crime the defendant was suspected of committing (*U.S. v. Foster* (9th Cir. 2000) 227 F.3d 1096, 1103; *Gonzalez-Pena v. Herbert* (W.D.N.Y. 2005) 369 F.Supp.2d 376, 394; *U.S. v. Minkowitz*, supra, at pp. 627–628); the administrative need for the information sought (*U.S. v. Gaston* (D.C. Cir. 2004) 360 U.S. App.D.C. 62 [357 F.3d 77, 87]; *U.S. v. Peterson* (D.D.C. 2007) 506 F.Supp.2d 21, 24–25); and any other indications that the questions were designed, at least in part, to elicit incriminating evidence and merely asked under the guise or pretext of seeking routine biographical information (see, e.g., *U.S. v. Clark* (6th Cir. 1993) 982 F.2d 965, 968; *U.S. v. Doe* (1st Cir. 1989) 878 F.2d 1546, 1551; *U.S. v. Glen-Archila* (11th Cir. 1982) 677 F.2d 809, 816; *U.S. v. Lewis* (E.D.Wis. 2010) 685 F.Supp.2d 935, 938–939.)

(*Gomez, supra,* at p. 630.)

The *Gomez* court concluded that the questions asked during the defendant's booking process fell within the booking question exception, finding that they "appear to have been asked in a legitimate booking context, by a booking officer uninvolved with the arrest or investigation of the crimes, pursuant to a standard booking form. . . . the questions were asked for legitimate,

noninvestigatory purposes related to the administration of the jail and concerns for the security of the inmates and staff. Significantly, there is no evidence that [the booking officer] had any knowledge of the crimes for which defendant was arrested or was suspected of committing. The interview took place the same day defendant was arrested, two days before defendant was formally charged with any crime. Although defendant was ultimately charged with certain gang enhancements and the crime of active participation in a criminal street gang, our record does not indicate whether the arresting officers indicated that this was a gang-related crime in any prebooking reports . . ." (*Gomez, supra,* 192 Cal.App.4th at p. 635.)

In *Andreasen, supra,* 214 Cal.App.4th 70, the police had in their custody a defendant who had been arrested for a stabbing and who was extremely agitated and exhibiting signs of mental illness when he was first placed in a holding cell. After the defendant calmed down, a detective read him the *Miranda* warnings. The defendant agreed to speak, and the detective questioned him about right and wrong. The detective promptly ceased the interrogation and left the room when defendant invoked his *Miranda* rights. The defendant remained in the room at the police station while awaiting routine processing prior to the transport to the jail. During this waiting period, he was placed in the care of a security officer and a police officer. Ostensibly because of the defendant's angry, delusional demeanor when he was first placed in a holding cell, the officers attempted to engage him in conversation during the early stages of the waiting period prior to the arrival of the evidence technician and phlebotomist. The conversations elicited by the guarding officers "never mentioned the offense or distinctions between right and wrong, but concerned neutral topics about defendant's interests and life." (*Andreasen, supra,* 214 Cal.App.4th at p. 89.)

The *Andreasen* court was " . . . satisfied the conversations generated by the guarding officers

fall within permissible casual conversation normally attendant to a custody situation, and they did not constitute interrogation designed to elicit incriminating responses that trigger application of the prophylactic *Miranda* rule. The use of conversation to calm a potentially explosive situation with a suspect is well within the parameters of an officer's routine performance of safety-related duties and is distinct from an officer's investigative duties. The fact that the casual conversations later constituted evidence of rationality relevant to defendant's sanity at the time of the offense does not translate into a *Miranda* violation. Because there was no interrogation after defendant's invocation of his *Miranda* rights, the trial court did not err in denying the suppression motion."

More recently in *People v. Elizalde* (2013) 222 Cal.App.4th 351, review granted April 9, 2014, S215260 [2], the First District Court of Appeal considered a case in which during the booking procedure, the defendant stated "I'm a gang banger, but I'm not a murderer." (*Elizalde, supra,* 222 Cal.App.4th at p. 371.) An officer who worked in the jail's classification unit then interviewed the defendant because he "appeared to be gang affiliated." (*Id.*, at p. 372.) This officer used a classification questionnaire on which he indicated that the defendant had identified himself as "affiliated with the Sureno street gang" and that he was an active Sureno gang member. (*Ibid.*)

Citing *Rhode Island v. Innis* (1980) 446 U.S. 291 [64 L.Ed.2d 297, 100 S.Ct. 1862], the *Elizalde* court found that the classification officer should have known that the questions regarding the defendant's gang affiliation were reasonably likely to elicit an incriminating response. (*Elizalde,*

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[2] The issues to be briefed and argued are limited to the following: Was defendant subjected to custodial interrogation without the benefit of warnings under *Miranda v. Arizona* (1966) 384 U.S. 436 when he was questioned about his gang affiliation during an interview while being booked into jail, or did the questioning fall within the booking exception to Miranda? If the questioning fell outside the booking exception, was defendant prejudiced by the admission of his incriminating statements at trial?

supra, 222 Cal.App.4th at pp. 374, 378.) The Court noted that the California street Terrorism Enforcement and Prevention Act had been enacted in 1988, some 20 years before the questioning took place. "In light of the length of time these laws had been on the books, a law enforcement professional should have known that an incoming inmate's admission of gang membership could well be incriminating." (*Ibid*.) The Court stated that ". . . the fact of gang membership is not 'routine' identifying information." (*Id.,* at p. 380.) It pointed out that when the question was put to him, the defendant ". . . had two choices. He could either admit to gang membership and incriminate himself or he could lie or refuse to answer the question and risk physical injury when he was housed with Norteno inmates. We know of no other case involving the routine booking exception where the defendant was asked to choose between incriminating himself or risking serious physical injury. The price of protecting oneself from harm while in custody should not be incriminating oneself." (*Id.,* at pp. 380-381.) The Court held that the defendant's answers to the "classification" questions about gang membership could not be admitted at trial, though it also held that the admission was harmless beyond a reasonable doubt since there were numerous other indications that the defendant was a gang member.

It is unfortunately that review has been granted in *Elizalde*. However, counsel can still use its reasoning. When arguing that statements admitting gang membership or affiliation were obtained in violation of the Fifth Amendment, it is necessary of course to first establish that the client was in custody and undergoing interrogation. It is then vital to characterize the questioning as being outside the scope of the booking exception. Counsel should try to demonstrate that the questions did not merely seek identifying date, such as date of birth, physical descriptions, and so on. Look at the context of the questions. Did the officer use a prepared form? Who was asking the questions? Was

it one of the arresting officers who had knowledge of the offense for which the defendant was arrested, or merely a booking officer? If it was a booking officer, did he know what the charges were? Why was information about gang affiliation needed?

D. Prejudice

It is of course not sufficient to merely show that the statements should have been excluded. It must also be shown that their admission was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824.) In order to make this showing, counsel should carefully evaluate any and all other evidence indicating that the client is a gang member or affiliate in order to argue that had the statement not come in, the jury would not have been able to find that the client was a gang member.

VI. FRAMING THE ARGUMENT

Hopefully, defense counsel will have objected to an improper expert opinion, whether it be because there was an insufficient foundation, it was unreliable hearsay, or it embraced an ultimate issue of fact for the jury to decide. If so, the argument can be cleanly presented on its own merits. If not, the issue must obviously be framed as an ineffective assistance of counsel argument since in the absence of a timely and specific objection on the ground sought to be urged on appeal, the trial court's rulings on admissibility of evidence will not be reviewed. (Evid. Code sec. 353; *People v. Clark* (1992) 3 Cal.4th 41, 125-126; *People v. Bury* (1996) 41 Cal.App.4th 1194, 1201.)

With respect to the constitutional challenges, they are of course also forfeited if not raised at trial. (*People v. Tafoya* (2007) 42 Cal.4d 147, 166 [defendants forfeited confrontation clause claim by failing to raise it at trial].) The general rule is that a defendant must make a specific objection on *Miranda* grounds at the trial level in order to raise a *Miranda* claim on appeal. (*People*

v. Crittenden (1994) 9 Cal.4th 83, 126; *People v. Milner* (1988) 45 Cal.3d 227, 236 [pretrial motion was not pursued to obtain a ruling]; *People v. Rogers* (1978) 21 Cal.3d 542, 548; see also *People v. Visciotti* (1992) 2 Cal.4th 1, 54; *People v. Kelly* (1992) 1 Cal.4th 495, 519.)

CONCLUSION

When a witness is qualified as an expert in a particular field, many jurors may view him or her as being cloaked in mantel of credibility. Often, it appears that defense counsel puts up very little resistance to such witnesses, sometimes leading to some very questionable testimony. For this reason, it is important to carefully review the testimony given by gang experts and challenge it whenever possible.