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## If It Walks like A Duck, and Talks like a Duck, It's A Duck, An Analysis of Police Officer's as Expert Witnesses in Gang Related Trials

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IF IT WALKS LIKE A DUCK, AND TALKS LIKE A DUCK, IT'S A DUCK, AN ANALYSIS  
OF POLICE OFFICER'S AS EXPERT WITNESSES IN GANG RELATED TRIALS

By Patrick J. Foy

5/4/2020

## **I. OVERVIEW**

Gangs often each exist as a microcosm of society, each with their own social mores and customs, sometimes even language in the form of their slang usage. This makes the world of gangs and gang membership seem largely alien to the average layperson, especially if they themselves do not come from an area with many gangs. It is therefore necessary for the Court, in trying cases related to gang activities to call upon an expert to “translate” this world so that the lay juror may be able to understand it. These experts are admitted in most if not all jurisdictions and are almost exclusively police officers. Beyond being a member of the police, it is difficult to find any other solid similarities between what makes one officer qualified as an expert, and another not. This is largely due to the vast amount of leeway given to the trial court in those determinations.

Separate from the qualification issue is a bigger question of reliability, especially when officers are called on to testify about larger scale gang workings, on a state or even national level. Since gangs are each a microcosm of society, are police officers qualified to make broad claims regarding their workings, when if one was to speak of the overall American society in the same capacity they would likely be required to be a sociologist and rely upon empirical data and statistical analysis? This paper looks to explore the current qualifications of the officers chosen as gang experts, as well as address these legitimate concerns regarding their reliability and validity.

## **II. SCOPE**

The word gang conjures an image in most minds, namely the stereotypical street gang, a group of youths in an urban area, who engage in petty theft and perhaps the sale of marijuana. However, this is only the tip of the iceberg of the types of organizations which fall under this

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broad umbrella of gangs, and gang expert testimony. This is most starkly illustrated in the Habeus Corpus hearing of Khairulla Said Wali Khairkhwa, an individual held at Guantanamo bay, accused of being a member of the Taliban.<sup>1</sup> In that hearing, the petitioner wished to rely in part on the expert testimony of Hekmat Karzai, for among other things, testimony regarding to the petitioner's status of being a member in the Taliban.<sup>2</sup> The Court deems him qualified as an expert in that matter, and uses very similar rationale as one would see a Trial judge in a case concerning street gangs would use, they cite Mr. Karzai's position as the Director of the Centre for Conflict and Peace Studies, his master's degree in strategic studies with focus on issues of terrorism, his past published scholarly works, his acquaintance with many former Taliban leaders and Afghan officials, and his past experience briefing Senior U.S. commanders in Afghanistan.<sup>3</sup> The Court also cites to *FRE 702*, *Daubert v. Merrel DowPharm., Inc.*, and *Kumho Tires Co., v. Carmichael*, all of which, as will be explained later in this paper, are the primary sources a Federal Court would cite in determining if an Officer-expert is qualified in any gang related case.<sup>4</sup>

This poses the question of why, if cases such as Khairkhwa's tracks so closely to the street gang cases in which officer-experts are relied upon, is this paper not about these far larger more nationally focused cases as opposed to the more average California or North Carolina street gang. This choice can be traced to three basic reasons. The first reason is that despite the staggering number of individuals held in Guantanamo bay, there is still more caselaw and academic studies available to this author about the more commonly encountered street gang. Second, all of the Guantanamo cases are by necessity done according to Federal law, this lack of

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<sup>1</sup> *Khairkhwa v. Obama*, 793 F.Supp.2d 1 (D.D.C 2011), *aff'd*, 703 F.3d 547 (D.C. Cir. 2012)

<sup>2</sup> *Id.* at 12

<sup>3</sup> *Id.* at 11-2

<sup>4</sup> *Id.* at 10

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any State involvement would preclude a comparison of how different states approach this issue, and would lead to the standards seeming far more concrete than they are. Finally, the cases involving street gangs are usually just plain simpler, they do not take place in nearly as rich and complex a backdrop as the Guantanamo Bay cases. This allows for this paper to be able to focus more directly on the standards and rational used by the Courts in these cases, without having to detract from it with large sections of background information on the complex structures involved in the Guantanamo Bay cases, which the average individual may not be as well acquainted with. However, it is still important and helpful to identify the parallels between the two types of cases, as it highlights that the issue at the heart of this paper reaches far beyond even the largest of city street gangs.

### **III. BECOMING A “GANG EXPERT”**

The requirements to be considered a gang expert are significantly more fluid than those to be a forensic accountant or to give expert testimony on a mental disorder. This is because the term gang expert is not as much a title conferred upon an individual following a completion of a course of study, but rather one granted to them by the Court at its own very broad discretion.<sup>5</sup> However there does appear to be several factors that Courts generally look to when making this determination.

#### **a. Gang Experience**

One criterion often used by the Court in supporting its determination of an officer as an expert is how long the officer had been with the Police Department, and specifically how long

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<sup>5</sup> *U.S. v. Hankey*, 203 F.3d 1160, 1169, (9th Cir. 2000) stating that the court is “entitled to broad discretion when discharging their gatekeeping function” in determining the qualifications for an expert witness.

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the officer had been involved in gang investigation. This is where the consensus both begins and ends, as there does not appear to be any agreement on the minimum amount of time that should be considered enough. In an Illinois case for example, the Court stated in part that a police officer with two years of gang investigation experience would know more than the lay juror and should therefore be admitted as an expert.<sup>6</sup> In stark contrast, a District Court prohibited the expert testimony of an FBI agent who had been Supervisor for the Gang Unit for eighteen months, because it was not clear that his career at the Bureau focused extensively on gang operations.<sup>7</sup>

#### **b. Trainings**

Even though no formal education or training appears to be required to be found to be a gang expert, Courts do look favorably on it. Again however, it is found that Courts do not all give these programs the same weight, and the amount of training received does appear to play a role in how much weight the Court assigns this criterion.<sup>8</sup>

#### **IV. AFFILIATION WITH GANG INVESTIGATION ASSOCIATIONS**

Numerous associations do exist which claim to prepare officers to be gang experts at trials. Courts appear to look favorably upon such membership, given it requires more than simply paying a registration fee and showing up for the lectures.<sup>9</sup> Since there does not appear to be any form of governing body, something akin to the American Medical Association for

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<sup>6</sup> *People v. Ayala*, 567 N.E.2d 450, 455 (Ill.Ct.App.1990)

<sup>7</sup> *U.S. v. Norwood*, 16 F.Supp3d 848, 863 (E.D.Mich. 2014)

<sup>8</sup> Compare *Utz v. Commonwealth*, 28 Va.App. 411, 425 (1998) (finding that an officer with over 500 hours of gang training, and who gives lectures on gang activity was qualified) with *U.S. v. Ledbetter*, 2016 WL 1019260 (S.D.Oh. 2016) (holding that an officer who attend a pair of 1 weeklong seminar on gang activity, which only required the participants pay the fee and “show up” is not enough basis to be considered an expert)

<sup>9</sup> *Id.*

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Doctors, this associations vary in apparent quality and legitimacy and it would seem can be separated into three categories; Governmental, Organizational, and For profit.

**a. Governmental**

The United States Department of Justice oversees the National Gang Center “NGC.” The NGC offers a wide array of resources for both law enforcement and lay people concerning information and statistics on gangs and gang membership.<sup>10</sup> They offer trainings for law enforcement in street gang intelligence, gang unit supervision and gang investigations. Their Street Gang Investigator training is a three-day course, before which an 80 minute online module must be completed, and provides law enforcement offers with general knowledge concerning gangs, as well as a regional breakdown of the largest gangs in the country, as well as trial preparation strategies.<sup>11</sup> While detailed information is not very readily accessible to the public, the NGC does state that it’s courses have been used throughout the country and are taught by experts with at least ten years’ experience in the field.

**b. Associations**

This category of groups refers with those which seem more peer to peer, and are largely run by law enforcement officials, for law enforcement officials. They tend to be separated geographically, with two examples being The Midwest Gang Investigators Association<sup>12</sup> and The Mid Atlantic Regional Gang Investigators Network “MARGIN”.<sup>13</sup> Both claim to focus on more

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<sup>10</sup> Nationalgangcenter.gov. 2020. *What We Do*. [online] Available at: <<https://www.nationalgangcenter.gov/What-We-Do/#training>> [Accessed 2 April 2020].

<sup>11</sup> *Street Gang Investigator Training*., Nationalgangcenter.gov, <https://www.nationalgangcenter.gov/Training-and-Technical-Assistance/GangTraining> (Last Visited April 2, 2020)

<sup>12</sup> Midwest Gang Investigators Association, Welcome to the Midwest Gang Investigators Association, <https://mgia.org/> (last visited April 2, 2020)

<sup>13</sup> Mid Atlantic Gang Investigators Network, <http://margingangs.org/> (Last Visited April 2, 2020)

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localized gang knowledge than the NGC, and are closer to a network of police officer's exchanging information than a formal class or training. MARGIN holds its training courses and conferences in partnership with the US Attorney's office, it does not say on the Midwest Gang Investigators Association website whether their trainings are in partnership with any Government office.<sup>14</sup>

### **c. For Profit**

This category of groups refers to those companies which offer classes or certificates in gang knowledge. An example of one such program is National Gang Academy.<sup>15</sup> They offer three "levels" of training, for civilians, private security, and for law enforcement, and offer it as an eight week course focusing on both historical and modern information regarding gangs and their operations.<sup>16</sup> Additionally they offer a 4 week long certification course which they say is to be able to show the public that you have been found by an independent professional organization to be competent in the area of gangs and gang knowledge, which sounds almost specifically targeted to those officers looking to be called as expert witnesses in gang cases.<sup>17</sup>

Due to both the variety of available courses, and the vast discretion given to the trial judge it is difficult, if not impossible to determine which of these categories is preferred by the Court. Furthermore, it is not possible to accurately compare the curriculum of each of the different courses to each other, both because there is no overall standard to compare them to, and

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<sup>14</sup> *Training*, Mid Atlantic Gang Investigators Network, <http://margingangs.org/training> (Last Visited April 2, 2020)

<sup>15</sup> *Gang Enforcement Training Center*, National Gang Academy, <https://www.nationalgangacademy.com/> (Last Visited April 3, 2020)

<sup>16</sup> *Explore Our Courses*, National Gang Academy, <https://www.nationalgangacademy.com/explore-our-courses.html> (Last Visited April 3, 2020).

<sup>17</sup> *Explore Our Courses*, National Gang Academy, <https://www.nationalgangacademy.com/explore-our-courses.html> (Last Visited April 3, 2020).



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because most of them keep that information behind a paywall, only showing it to enrolled individuals. Likewise, this makes it very difficult for anyone on the outside to verify or audit these programs or study them to see exactly what information is being taught in these programs. All these factors contribute to a healthy degree of skepticism towards these courses, particularly the for-profit ones, if not in the Courts' eyes, then in the eyes of the other side, normally the Defense attorneys, working these gang cases.

## V. MATTERS TESTIFIED ON

While the specifics of each trial are inherently different, and thus the evidence and testimony offered is different, there are five main areas on which Police gang experts are most often called to testify on, each with its own potential issues.

### **a. Information on a specific gang<sup>18</sup>**

While this is perhaps the most obvious, it is still worth noting, as without the ability to testify with respect to it, showing proper expertise with the other four areas becomes exponentially more difficult. This testimony is what establishes the existence of a criminal gang, with the officer describing things such as member demographics, territory, signs/insignia used, colors, organization, and what activities the gang primarily engages in.<sup>19</sup>

### **b. The Defendant's membership in the gang<sup>20</sup>**

Once the existence of a gang has been established, it is necessary to show that the Defendant was a member of that gang. The gang expert, usually having been involved in the

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<sup>18</sup> Magdalena Ridley, *Down by Law: Police Officers as Gang Sociology Experts*, 52 No. 4 Crim. Law Bulletin ART 7, 1-28. 4-5, (Summer 2016)

<sup>19</sup> Magdalena Ridley, *Down by Law: Police Officers as Gang Sociology Experts*, 52 No. 4 Crim. Law Bulletin ART 7, 1-28. 4-5, (Summer 2016)

<sup>20</sup> *Id.* at 5

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investigation will testify about times the defendant was seen wearing the gang colors, using or displaying the gang's signs or insignia, or associated with known members of that gang.<sup>21</sup> They also often testify to any statements made by the defendant which denotes gang membership, such as admittance or the presence of a gang related nickname.<sup>22</sup>

### **c. Gang Culture and Sociology**

This area includes statements made as to the innerworkings of the particular gang, or the symbolic or perceived value of an action within that gang.<sup>23</sup> For example in one California case, in which three individuals were charged with armed robbery in furtherance of their gang, the officer-expert testified about the role of guns in that particular gang.<sup>24</sup> He testified that it was a way to increase the prestige in the gang if one not only committed a crime for the gang, but did so with a firearm, as this was seen to increase the amount of respect the gang would receive in the community, and that this was of great importance to this particular gang.<sup>25</sup>

### **d. Gang-Related Motives**

What is seen as one of the original and still often used areas is for the expert to testify on how the Defendant's membership in a certain gang, and that gang's values and culture, resulted in the Defendant's motive for committing the crime they were charged with.<sup>26</sup> This is most often done by the officer-expert explaining, by way of hypothetical, how the particular crime charged, would within the gang's culture, result in some benefit to either the gang member's standing or

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<sup>21</sup> Magdalena Ridley, *Down by Law: Police Officers as Gang Sociology Experts*, 52 No. 4 Crim. Law Bulletin ART 7, 1-28. 4-5, (Summer 2016)

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *People v. Albillar*, 51 Cal.4th 47 (2010)

<sup>25</sup> *Id.*

<sup>26</sup> Magdalena Ridley, *Down by Law: Police Officers as Gang Sociology Experts*, 52 No. 4 Crim. Law Bulletin ART 7, 1-28. 5-6, (Summer 2016)

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the gang as a whole.<sup>27</sup> This area is widely used since the testimony in it can be used not only to help show the Defendant possessed a motive for the crime, but also because it shows the crime was committed to benefit the gang, which is what is required for many states which have gang based sentencing enhancement provisions.<sup>28</sup>

#### **e. Foreseeable Consequences to Gang Member Actions**

Gang experts are often called to testify to the causal link between actions taken by the gang member defendants, and the final offense.<sup>29</sup> One example of this is in a California case, where the Defendant was convicted of attempted murder, despite not having been the one who pulled the trigger.<sup>30</sup> In that case the Defendant was a gang member and was involved in a fight with the member of a rival gang, following that fight, one of the Defendants, colleagues shot the member of the rival gang.<sup>31</sup> The Prosecution contended that the Defendant's act of having a fight with the rival gang, was the cause of the shooting and that the Defendant was guilty under the "natural and probable consequences" doctrine.<sup>32</sup> The officer expert in that case was called on to testify as to the violent culture of that gang and others like it, and how in the gang context, it is entirely reasonable to believe that someone would be armed, and that any escalation of a

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<sup>27</sup> Magdalena Ridley, *Down by Law: Police Officers as Gang Sociology Experts*, 52 No. 4 Crim. Law Bulletin ART 7, 1-28, 5-6, (Summer 2016)

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 6.

<sup>30</sup> *People v. Montes*, 74 Cal. App. 4th 1050 (4<sup>th</sup> Dist. 1999)

<sup>31</sup> *Id.*

<sup>32</sup> "... a defendant may be held criminally responsible as an accomplice \*1055 not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime." *People v. Montes*, 74 Cal. App. 4th 1050, 1054-1055 (1999) (quoting *People v. Prettyman*, 14 Cal.4th 248, 261 (1996))

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situation could result in a shooting.<sup>33</sup> Their testimony furnished the link in the causal chain that would otherwise have been missing between the Defendant's conduct and the ultimate crime.

## **VI. METHODS USED AS BASIS**

As outlined above, there is no set methodology or procedure for an officer expert to use in gathering the information which is used as a basis for their testimony. There are, however, several general methods which appear to be the most widely used by officers who ultimately testify as gang experts. None of these methods are scientific as either a layperson or a social scientist understands the term, and issues of reliability and validity exist within each one.

### **a. Aesthetics**

As discussed above, one of the primary reasons officer-experts are called to testify is to establish both the existence of, and the defendant's membership in, a gang. One of the bases an officer-expert would use to establish these facts is physical displays, such as tattoos, wearing certain colors and avoiding others, making signs etc. associated with a specific gang.<sup>34</sup> This appears on the surface to make perfect sense, however this "walk like a duck" approach is overly simplistic. Scientific studies in both sociology and psychology have found that some individuals adopt some or many of these "gang aesthetics" without truly being a gang member.<sup>35</sup> It may be used by a nongang member as an attempt at camouflage, to lessen their chances of being targeted by their local gang or a rival one.<sup>36</sup> It may be adopted as a fashion statement or as part of a

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<sup>33</sup> *People v. Montes*, 74 Cal. App. 4th 1050 (4<sup>th</sup> Dist. 1999), and see Magdalena Ridley, *Down by Law: Police Officers as Gang Sociology Experts*, 52 No. 4 Crim. Law Bulletin ART 7, 1-28. 5-6, (Summer 2016)

<sup>34</sup> Christopher McGinnis & Sarah Eisenhart, *Interrogation is not Ethnography: The Irrational Admission of Gang Cops as Experts in the Field of Sociology*, 7 Hastings Race & Poverty L. J. 111, 133 (Winter 2010)

<sup>35</sup> Christopher McGinnis & Sarah Eisenhart, *Interrogation is not Ethnography: The Irrational Admission of Gang Cops as Experts in the Field of Sociology*, 7 Hastings Race & Poverty L. J. 111, 134 (Winter 2010)

<sup>36</sup> *Id.*

teenagers rebellious period to show disdain or rejection for the larger culture or for authority as a whole.<sup>37</sup> Finally, it may be a result of imitation or idolization, more commonly termed as “wannabes.”<sup>38</sup> One example of this is a study which observed preschoolers (4-5 years old) wearing baseball caps with the brim slanted wither to the right (an insignia of support of the Disciples, a local gang) or to the left (displaying an allegiance to the Vice Lords gang).<sup>39</sup> Another would be a neighborhood where a group of pre-teens idolized a gang known as the Four Corners, and would imitate their style and language, but they lacked any organization or involvement in the Four Corners or any criminal activity at all.<sup>40</sup> Reliance on physical insignia therefore results in both false positives and false negatives in determining gang membership. False positives for the reasons listed above, and false negatives because a more sophisticated gang may have more subtle or hidden ways of denoting membership, which would not be as readily noticed by police.<sup>41</sup>

#### **b. Self-Admittance and Current Gang Member reporting**

Another basis for an officer-experts testimony on a gang is the admittance by the Defendant to being in a gang, or a statement made by a current or former gang member concerning another’s membership in that gang.<sup>42</sup>

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<sup>37</sup> Christopher McGinnis & Sarah Eisenhart, *Interrogation is not Ethnography: The Irrational Admission of Gang Cops as Experts in the Field of Sociology*, 7 Hastings Race & Poverty L. J. 111, 134 (Winter 2010)

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Christopher McGinnis & Sarah Eisenhart, *Interrogation is not Ethnography: The Irrational Admission of Gang Cops as Experts in the Field of Sociology*, 7 Hastings Race & Poverty L. J. 111, 133, 135, (Winter 2010)

i. Self-Reported Gang Membership

While on the surface this would appear to be a “slam-dunk” for basis of one’s membership in a gang, especially if the admittance was not made during interrogation, studies have found that it is far from that simple.<sup>43</sup> For example, one study of 1,527 “at risk” youth found no correlation between self-proclaimed gang membership, and actual participation in gang related criminal activities.<sup>44</sup> While this and other such studies do not invalidate all self-admittance of gang membership as invalid, it does suggest that it should not be taken on its own as dispositive proof of one’s criminal gang status.

ii. Reports by current or former gang member

The report by a current or former gang member is another seemingly reliable basis which suffers from two potential issues.<sup>45</sup>

The first issue stems from the context most of these reports are gathered from, post-arrest interrogations.<sup>46</sup> Common sense suggests, and research supports, that in an arrest situation, one’s primary focus most often turns to self-preservation, namely lessening the consequences they may face as a result of their arrest.<sup>47</sup> The arrested gang member may identify others as gang members in hope of receiving a lessened charge or a lighter sentence, with the only constraint on who they identify being the potential for violent retaliation from the individual they “turn in.”<sup>48</sup> of retaliation, either from the individual they named, or from other gang members. In balancing

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<sup>43</sup> Christopher McGinnis & Sarah Eisenhart, *Interrogation is not Ethnography: The Irrational Admission of Gang Cops as Experts in the Field of Sociology*, 7 *Hastings Race & Poverty L. J.* 111, 133, 135, (Winter 2010)

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 135

<sup>46</sup> *Id.*

<sup>47</sup> Christopher McGinnis & Sarah Eisenhart, *Interrogation is not Ethnography: The Irrational Admission of Gang Cops as Experts in the Field of Sociology*, 7 *Hastings Race & Poverty L. J.* 111, 135, (Winter 2010)

<sup>48</sup> Christopher McGinnis & Sarah Eisenhart, *Interrogation is not Ethnography: The Irrational Admission of Gang Cops as Experts in the Field of Sociology*, 7 *Hastings Race & Poverty L. J.* 111, 135, (Winter 2010)

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these two dangers, potential prison time vs gang repercussions, it becomes very attractive for the arrestee to identify someone tangential to the gang, or the arrested offense, but who is not a true gang member.<sup>49</sup> In this way the arrestee may think they found the best of both worlds, the lighter sentence from cooperating with the investigation, without being branded a “snitch” by their gang.<sup>50</sup> However, such an identification is useless for finding out the actual members of the gang.

The second issue with these kinds of reports is related to the first, and goes to the general truthfulness of the gang members making the reports.<sup>51</sup> The first cause of doubt is the factor of the police presence, as it has been found to lead a suspect to color or slant their story in ways which result in the quickest way to end the case, and as stated above, the least consequence to the suspect.<sup>52</sup> The second reason is that the very status of the current gang member, especially if they have been arrested, as a gang member does nothing to help instill a sense of trustworthiness in their statements.<sup>53</sup>

## VII. LEGAL ANALYSIS

Police gang expert testimony is largely treated as any other expert testimony for purposes of rules of evidence admittance. In this section, several jurisdictions’ rules on expert testimony admittance will be compared, and how they have been applied to police officer gang experts explained.

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<sup>49</sup> Christopher McGinnis & Sarah Eisenhart, *Interrogation is not Ethnography: The Irrational Admission of Gang Cops as Experts in the Field of Sociology*, 7 *Hastings Race & Poverty L. J.* 111, 135, (Winter 2010)

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 136

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

**a. Federal System**

The rule outlining the qualifications for an expert to be considered as such is Rule 702.<sup>54</sup> FRE 702 states that a witness may be qualified as an expert by “knowledge, skill, experience, training, or education” either in the form of opinion or otherwise as long as four factors are present.<sup>55</sup> Those factors are; (a) that the expert’s specialized knowledge will assist the trier of fact in determining a fact in issue, (b) their testimony is based on sufficient data or facts, (c) their testimony is a result of reliable principles or methods, and (d) those methods or principles have been reliably applied by the expert to the facts of the case.<sup>56</sup> These factors were further fleshed out, and the gatekeeping role of the trial court judge solidified in the landmark case of *Daubert v. Merrel Dow Pharmaceuticals*, where the Supreme Court both emphasized the flexibility of the factors while giving a list of its own for the trial judge to consider when gauging the validity of expert testimony, particularly scientific testimony.<sup>57</sup> What would come to be seen as the *Daubert* factors are; (1) the testability and falsifiability of the technique or theory used, (2) whether it has been subjected to peer review, (3) the rate of error of the technique and the use of accepted ways to mitigate that error, and (4) whether the theory has general acceptance in the field.<sup>58</sup> The application of the *Daubert* factors to experts which testify on not scientific, but rather technical or other knowledge, was made slightly more clear in the case of *Kumho Tire Co. Ltd. v. Carmichael*, with the Court once again going to great lengths to emphasize that no one factor of either test was dispositive, and that the trial judge is granted an extraordinary amount of discretion in making their decision.<sup>59</sup> Rather than a list of nonexhaustive factors, the Court in

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<sup>54</sup> Fed R. Evid. 702

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Daubert v. Merrel Dow Pharmaceuticals*, 509 U.S. 579 (1993)

<sup>58</sup> *Daubert*, 509 U.S. at 592-594

<sup>59</sup> *Kumho Tire Co., Ltd v. Carmichael*, 526 U.S. 137 (1999)



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*Kumho* instead held that the particularized or technical knowledge of the expert must be found to be relevant and closely related to the issue of fact that expert is called to assist with.<sup>60</sup> This resulted in a highly flexible, standard for admittance, and a great deference to the trial judge's ruling through *Daubert*, with *Kumho*, simultaneously applying a more abstract version of *Daubert* to technical experts, while leashing such testimony with the additional relevance and relatedness requirement.

### **b. California**

California has no statute specifically addressing gang expert testimony, relying instead on its expert testimony rule and a developed body of case law. California's rule regarding expert testimony does not mirror the Federal rule verbatim but appears to capture a similar idea. California's rule requires that the expert witnesses testimony be related to a topic outside the knowledge of a layperson, and therefore helpful to the trier of fact, and that they base their opinion on matter that is typically relied upon in that field in forming an opinion such as the one the expert is called to testify on.<sup>61</sup>

### **c. New Jersey**

New Jersey, like California has no statutes regarding gang experts or what they can/cannot testify on. It, therefore, relies on its evidentiary rule for expert admittance as the bar for such experts. The New Jersey rule is very much like the Federal one, but with slight language changes, generally stating that when scientific, technical or other specialized

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<sup>60</sup> *Kumho*, 526 U.S. at 154-56 (holding that a tire design was not an acceptable expert to testify on the question of the cause of a tire's failing, despite being more than qualified to testify as to the design of the tire)

<sup>61</sup> *Cal. Evid. Code* § 801 (West, 2020)

knowledge may be helpful to the trier of fact, a witness qualified as an expert, and basing their testimony on “knowledge, skill, experience, training, or education” may testify in the form of opinion or otherwise.<sup>62</sup> With respect to the basis of their testimony, New Jersey, like many states, requires the facts or data be those made known or perceived by the expert at the time of the hearing, if those facts/data are those reasonably relied upon by those in the expert’s field in forming their opinion.<sup>63</sup>

#### **d. Alaska**

While Alaska is notable for many things, most would not associate it with criminal gang expert testimony legislation. However, Alaska is in fact the only state in the country with a statute specifically addressing this issue.<sup>64</sup> In this statute, the Alaskan legislature outlines seven things that an expert may be used to show in regarding a “specific criminal street gang, or criminal street gangs whose conduct is relevant to the case.”<sup>65</sup> Those seven things are; (1) common characteristics of members of that gang(s), (2) gang rivalries, (3) Common practices and operations of the gang, (4) social mores of the gang or gang members, (5) gang terminology, (6) the “code of conduct” of a certain gang, and (7) the types of criminal activity most often committed by members of that gang.<sup>66</sup> This list closely mirrors the areas that gang officer experts are most likely called to testify on in such cases, as described earlier in this paper. It is noteworthy, that nowhere in the statute does Alaska give guidance to what would deem an expert qualified. Alaska’s general rule on admittance of a witness as an expert is largely a reiteration of

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<sup>62</sup> *N.J.R.E.* 702

<sup>63</sup> *N.J.R.E.* 703 (As of July 1, 2020, the rule will be amended, with the word “proceeding” replacing the word “hearing” however, for purposes of this paper, that change has little to no impact)

<sup>64</sup> According to a jurisdiction survey search done via Westlaw using the search tags of “Criminal gang” & “Expert” and including variations of each i.e. gang, gangs, etc.

<sup>65</sup> *ALASKA STAT.* § 12.45.037

<sup>66</sup> *Id.*

FRE 702, with an additional limiting each side to 3 experts for any given issue, a number which may be modified by the trial judge.<sup>67</sup>

## **VIII. SOCIAL SCIENCES ANALYSIS**

While the legal admissibility of officer-expert testimony is well founded, and seemingly settled, this does not answer the question of whether it is reliable and valid in the fields these officer-experts are often lumped into, the fields of psychology and sociology.<sup>68</sup> This results in a two prong problem, where equating officer-experts with sociologists forces the comparison between the police's methods of gathering data to the experiments conducted by sociologists, and potentially lessening the scientific nature of sociological research by allowing "experts" in a subfield of it to not follow the scientific method, and not have the proper educational credentials.

### **a. Validity**

In the social sciences, the concept of validity refers to the ability of a research method to relate to the concept being researched.<sup>69</sup> A common learning example is to use a clock, the validity of the clock is how close it is to the correct time. In a true sociology or psychology experiment this is most often done by comparing the results of the experimental test, to the findings of the same participants on other established tests. This is more difficult to attempt to test in the real world, especially with the myriad of variables affecting what an individual is charged with and ultimately convicted of, and difficulty of showing truth at all. However, recent events have suggested two systems used by police, specifically the LAPD, appear to be wrought with errors in their validity. The first method is field interview cards, a form that a police officer

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<sup>67</sup> *AK R REV* Rule 702 (West, 2020)

<sup>68</sup> Magdalena Ridley, *Down by Law: Police Officers as Gang Sociology Experts*, 52 NO 4 CRIMLAWBULL ART 7 (2016)

<sup>69</sup> Zina O'Leary, *The Social Science Jargon Buster* 242 (2007)

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is supposed to fill out following an interaction with an individual, which describes the encounter, the person's appearance, and supposedly the individual's status as a gang member.<sup>70</sup> There are some inherent issues with this method, it involves a great deal of subjectivity on the part of the officer, and is not later double checked by any other officer for accuracy.<sup>71</sup> Also there is no set standard for how an officer determines who is a gang member, leading many to rely on a "if it walks like a duck" approach.<sup>72</sup> This theoretical validity issue was shown to be more concrete in a recent L.A. Times article in which an investigation by the LAPD internal affairs department discovered numerous inaccuracies between these field report cards, and the bodycam footage of many of their officers, leading to closer investigation of over a dozen officers in that department alone.<sup>73</sup> Additional issues of validity were also recently discovered within CALGANG, the preeminent database for California law enforcement to track gang membership.<sup>74</sup> These issues of either skewed officer reports, or manual input error appear to go back at least to 2016, where a state government audit of the system found it lacking in oversight, and that the officer's often had no substantiation for the claims which led to an individual being added to the database, sometimes finding one year old children entered as registered gang members.<sup>75</sup> That 2016 audit led to the database being put under the supervision of the California Attorney General and a massive purge of thousands of names, but there is no word on any such audits happening since, leaving the validity of the data on the over 88,000 individuals listed in question.<sup>76</sup>

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<sup>70</sup> *Interrogation is not Ethnography*, 7 Hastings Race & Poverty L. J. 111 at 143

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Richard Winton & Mark Puente, *Officers Falsely Portrayed People as Gang Members, Falsified Reports, LAPD Says*, The L.A. Times, Jan. 6, 2020

<sup>74</sup> Anita Chabria, Leila Miller, & Nicole Santa Cruz, *LAPD Scandal Opens Window into California's Secret Gang Database as Reforms Debated*, The L.A. Times, (Feb. 3, 2020)

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

**b. Reliability**

In the field of sociology and psychology, the term reliability refers to the idea that the same result should occur each time the same factors are inputted.<sup>77</sup> To reiterate the clock analogy, it would be a clock, that even if it told the wrong time, would tell the same time every day. Regardless of how fast or slow it was, every day when it is really 4:00 pm, a reliable but not valid clock would say 7:00 pm, while a valid and reliable clock would say 4:00pm. Should Police-officer experts to be a reliable source of data, and thus testimony, two cases with materially similar facts, should receive similar expert testimony, and thus have a similar result, but this is not the case.

**IX. THE USEFULNESS, NECESSITY & POWER OF POLICE OFFICERS AS EXPERTS**

Seeing all these issues, both conceptual and concrete with officer-experts, it raises the question of if they are worth this potential trouble. Further, if gang experts do have a material effect on the trial's outcome, must these experts be police officers, and if not, why do they always seem to be?

**a. Effect of Gang Experts on Jury Verdicts**

Separate and apart from their ability to assist the trier of fact in understanding concepts, it is important whether a gang expert's testimony would materially affect the results of the trial. For if the expert does not, then any issues with their reliability or validity become little more than harmless error. There is research to suggest that it makes a world of difference, not only with

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<sup>77</sup> Zina O'Leary, *The Social Science Jargon Buster* 242 (2007)

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respect to gang enhancement provisions, but to whether the defendant is found guilty of the underlying crime.

One such study of 212 participants, randomly assigned to mock jury groups, quite clearly demonstrated the effect of gang evidence as opposed to victim testimony.<sup>78</sup> The participants each heard an opening statement, cross-examination of both victim and arresting officer/gang expert, closing statements, the only ways in which the two conditions differed was in the gang condition the prosecution entered evidence connecting the defendant and the accomplice to a gang, the no gang condition did not include this evidence.<sup>79</sup> The fact pattern used in both conditions, according to the researchers leaned heavily in favor of the defendant, with the only hard evidence of his involvement in the crime being that he was near the location where the police found the car the victim identified, and that he was with a man who matched one of the descriptions given by the victim.<sup>80</sup> The Defendant, however, did not match the description of the second individual described by the victim in any way but ethnicity.<sup>81</sup> After watching the trial the participants were polled on their stance of guilty or not guilty before and after being given time to deliberate with the rest of their mock jury group.<sup>82</sup> Before deliberations, only 12% of the participants believed the defendant was guilty, compared to 33% in the gang condition.<sup>83</sup> Following the deliberations, none of the mock juries in the no gang condition returned with a verdict of guilty, while in the gang condition, 10% of the juries returned a guilty verdict, 2 of the

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<sup>78</sup> Mitchell L Eisen, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?* 62 UCLA L. Rev. Disc. 2(2014)

<sup>79</sup> *Id.*

<sup>80</sup> Mitchell L Eisen, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. Rev. Disc. 2(2014)

<sup>81</sup> Mitchell L Eisen, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. Rev. Disc. 2(2014)

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

juries were unanimous for guilty, and one hung jury.<sup>84</sup> While this ten percent increase may sound small, especially when deliberations seemed to change the mind of many jurors in the gang condition, it is important to underscore that this change is due exclusively to the mere presence of gang testimony (to the extent that conditions can be controlled in an experimental setting). It is also important to note that as shown by the 0% conviction rate of the no gang condition, the presence of gang evidence in this study was not simply a grain of rice which tipped the scales, but rather a lead weight which convinced those jurors beyond a reasonable doubt of a defendant's guilt, despite the scenario being rigged in his favor.

#### **b. Other Sources of Gang Experts?**

Accepting as true the idea that gang experts are necessary to assist the trier of fact, one way to attempt to avoid some of the issues with "Officer-Experts" could be to look to other individuals who, while not being in law enforcement, may have the same or similar experience based knowledge relied upon by officer-experts. One study compared the answers of non-police individuals with gang knowledge, on a nine-question survey asking for their opinion on the matters most often testified to by an officer-expert, this was then followed by more in-depth interviews discussing the participants reasoning.<sup>85</sup> The questions referred to one of 9 fact patterns the researchers took from real life cases in California in which an officer-expert testified as a gang expert, and the defendant challenged the testimony.<sup>86</sup> The researchers separated their 72 participants into four groups based on how they gained their knowledge of gangs; (1)

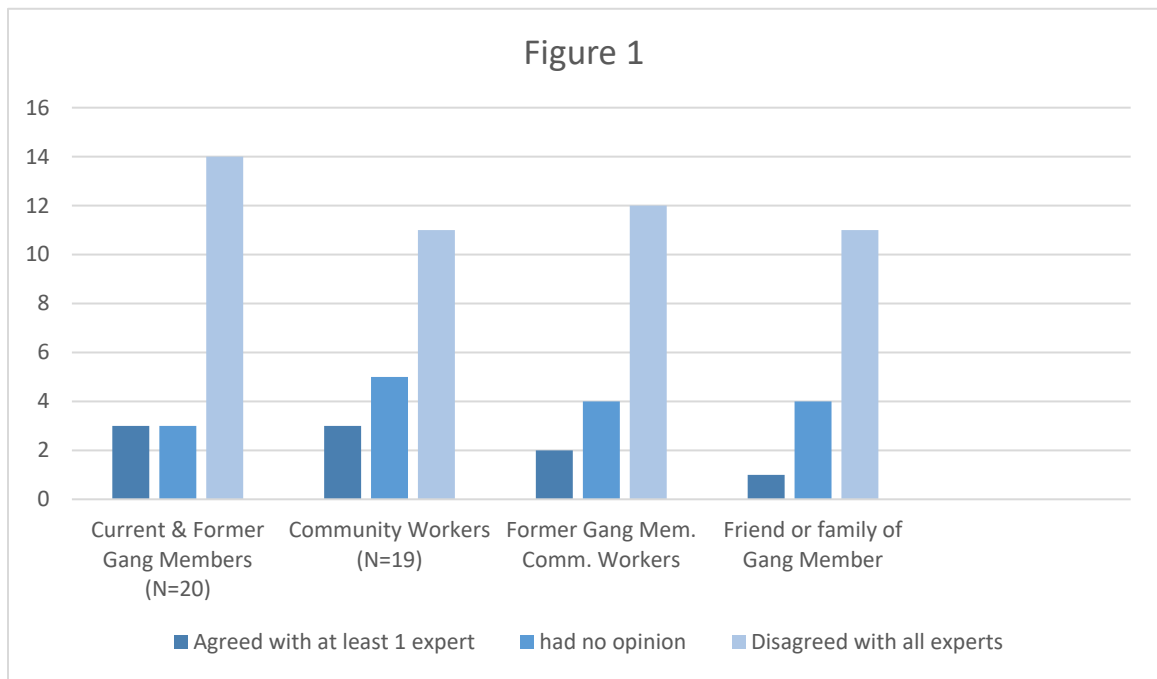
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<sup>84</sup> Mitchell L Eisen, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. Rev. Disc. 2(2014)

<sup>85</sup> Victor M. Rios, Karlene Navarro, *Insider Gang Knowledge: The Case for Non-Police Gang Experts in the Courtroom*, Crit Crim. Vol. 18, 21-39 (2010),

<sup>86</sup> *Id.* at 25

Community Workers<sup>87</sup> (2) Gang Members and former gang members<sup>88</sup> (3) Former gang member community workers,<sup>89</sup> and (4) Friend or family of gang members.<sup>90</sup> When these participants were shown the fact patterns and the officer-expert testimony/rationale, the stark bias towards “convicting the defendant” that one may presume would be present in officer-expert testimony becomes apparent.<sup>91</sup> These results are shown in the graph labeled figure 1.<sup>92</sup>



<sup>93</sup> When those participants who disagreed with all experts were asked to explain

why, many said that what the officer took as hard and fast proof of gang membership, simply

<sup>87</sup> Defined as individuals who have worked directly in gang prevention or gang intervention programs. Victor M. Rios, Karlene Navarro, *Insider Gang Knowledge: The Case for Non-Police Gang Experts in the Courtroom*, Crit Crim. Vol. 18, 21-39, at 26 (2010),

<sup>88</sup> Defined as individuals who outside of a police setting self-reported as gang members, or who were once in a gang and decided to leave it to lead a more productive life. *Id.*

<sup>89</sup> Defined as a combination of the first two categories. *Id.*

<sup>90</sup> (Defined as people who have lived among or are related to gang members.

<sup>91</sup> Victor M. Rios, Karlene Navarro, *Insider Gang Knowledge: The Case for Non-Police Gang Experts in the Courtroom*, Crit Crim. Vol. 18, 21-39 (2010),

<sup>92</sup> *Id.* at 28

<sup>93</sup> Victor M. Rios, Karlene Navarro, *Insider Gang Knowledge: The Case for Non-Police Gang Experts in the Courtroom*, Crit Crim. Vol. 18, 21-39 (2010),



was not as cut and dry.<sup>94</sup> The presence of a nickname, for example, while taken as a gang moniker by the officer, was explained by the community workers as a common occurrence in the non-gang, largely Hispanic communities the researchers focused on.<sup>95</sup> This was further supported by former and active gang members saying that many of the gang monikers of their colleagues in the gang originally were nothing more than nicknames often given to them by an uncle or parent, long before they ever became affiliated with a gang, and that many of their associates who were not in the gang also had nicknames.<sup>96</sup> Many participants also echoed the alternative reasons for what the officer took as aesthetic indicators of gang membership which were discussed earlier in this paper.<sup>97</sup> To attempt to put it more simply, while many officers appeared to take the “if it walks like a duck, talks like a duck, it’s a duck” approach mentioned above, the nonpolice expert could be said to take more of a “If it’s a duck, it waddles, but not everything that waddles is necessarily a duck” approach.

### **c. The “Badge Effect”**

In light of the above information, it can be asked why are approximately 95% (according to one study) of gang experts used in trials police officers?<sup>98</sup> The common sense answer would be that mostly prosecutors call gang expert witnesses, and police officers share their goals, and can also be more easily prepped for trial. However, the position of the police officers as being in

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<sup>94</sup> Victor M. Rios, Karlene Navarro, *Insider Gang Knowledge: The Case for Non-Police Gang Experts in the Courtroom*, Crit Crim. Vol. 18, 21-39 (2010),

<sup>95</sup> *Id.*

<sup>96</sup> Victor M. Rios, Karlene Navarro, *Insider Gang Knowledge: The Case for Non-Police Gang Experts in the Courtroom*, Crit Crim. Vol. 18, 21-39 (2010),

<sup>97</sup> Victor M. Rios, Karlene Navarro, *Insider Gang Knowledge: The Case for Non-Police Gang Experts in the Courtroom*, Crit Crim. Vol. 18, 21-39 (2010),

<sup>98</sup> *Id.*

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an authoritative role must not be ignored, especially considering the vast research done on authority.

The effect of authority on the actions of the individual was not notably studied by Stanley Milgram in his infamous obedience experiment at Yale.<sup>99</sup> In this experiment, Milgram used cohorts in white coats as instructors, instructing participants to give increasingly powerful electric shocks to a supposed target (who in reality was nothing more than a recording).<sup>100</sup> The box of switches the participant used to administer the shocks were labeled with the voltage, and the highest, considered to be life threatening were specially marked as dangerous.<sup>101</sup> In his study, Milgram found that 26 of the forty participants despite their own reservations, administered all of the shocks, including those marked as “severe shock” and “XXX,” and only 5 of the participants stopped administering shocks before reaching the level of “extremely intense shock.”<sup>102</sup> Particularly important for this paper’s topic, is that the individuals in the white coats did not refer to themselves as doctors, psychologists, or any such thing, simply as the conductor of the this part of the experiment, it was the simple presence of a long white coat, and the commanding tone they used which made the individuals attribute the authority to them.<sup>103</sup>

It is easy to see how this can be carried over to officer-expert testimony. Much like the white coated experimenters in the Milgram experiment, the fully uniformed officer, with all the hallmarks of the authority society attributes to them, would surely have the same or similar effect on a layperson. It is also common knowledge how all of us are taught from a young age, to listen

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<sup>99</sup> Stanley Milgram, *Behavioral Study of Obedience*, Journal of Abnormal and Social Psychology, Vol. 67, No.4, 371-78 (1963)

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Stanley Milgram, *Behavioral Study of Obedience*, Journal of Abnormal and Social Psychology, Vol. 67, No.4, 371-78 (1963)

<sup>103</sup> *Id.*

to a police officer's orders, and that they are (at least conceptually) held up by society as a bastion of honesty, credibility and the public good. Further, just as the participants in the Milgram experiment ignored their own sense of morality and their own judgment when an authority figure told them to administer the potentially deadly electric shock, so too does the presence of an officer expert and the introduction of gang evidence via that expert appear to overcome the juror's own ideas of reasonable doubt and of a defendant's guilt, as explained in the above mentioned study.<sup>104</sup> While not every layperson, or every prosecutor may know of the psychological reasons behind this increased effectiveness of an officer expert, they likely are aware of it on some level, and likely that too accounts for the vast majority of expert witness particularly in gang cases being police officers.

#### **d. Lack of Counter-Experts**

Despite the seeming availability of non-officer experts, and the potential issues with officer expert testimony, there is little caselaw in which the defense challenges the officer-expert, and even less where the defense calls upon their own expert. One reason for this is, as mentioned above, that around 95% of all gang experts are police officers.<sup>105</sup> Thus, the odds are that any expert the defense would find would be a police officer, research has found that the "blue code of silence" is real and that it is very difficult to convince an officer to testify in a way that would undermine or call into question the ability or conduct of their fellow officer, regardless of the truth of the testimony they would provide.<sup>106</sup> Furthermore, even if the defense

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<sup>104</sup> Mitchell L Eisen, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. Rev. Disc. 2(2014) (Discussed in Section 8(a) of this paper)

<sup>105</sup> Victor M. Rios, Karlene Navarro, *Insider Gang Knowledge: The Case for Non-Police Gang Experts in the Courtroom*, Crit Crim. Vol. 18, 21-39 (2010),

<sup>106</sup> Gabriel J. Chin, Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, U. Pitt. L. Rev. Vol 59: 233, 237-8, (1998)

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was to attempt to use a civilian as an expert witness, the jury is more likely to believe the officer, due to the above discussed “badge effect.” There is the further issue of the complexity and hyper subjective standards of admissibility, which makes it at the least a daunting task for a defense attorney to attempt to challenge the credibility of an officer-witness. This in turn represents a great time commitment and thus either an immense strain on a public defender’s office or legal aid society, if the defendant is indigent, or a greater financial burden for the defendant if they choose to have private counsel. It is most likely this combination of public perception of Police officers as credible, the blue wall of silence, and general lack of defendant resources which result in officer-experts in gang cases mostly going unchallenged.

## **X. CONCLUSION**

Gang experts, much like most other experts, do provide a necessary window into an area the triar of fact, likely, has little to no personal experience in. However, also much like many experts the qualifications needed are nearly impossible to pin down. Furthermore, they are sometimes inaccurately grouped alongside psychological or sociological experts in terms of classification, which as discussed is inaccurate due to the officers never using the methods which would be required of an expert in either of those fields. Their methods are largely subjective, and many times have been found to be erroneous, when one is able to pin down a method used at all. This is largely due to their being no one association in the vein of the American Psychological Association, overseeing and prescribing the methods and implementation of how these officer-experts either gain their expertise, or collect their data. It should be troubling that such subjective testimony is both very often allowed by the court, while simultaneously very rarely challenged by the defense. Particularly when the impact of the simple inclusion of gang evidence has been shown to have a material effect on a jury’s verdict concerning an underlying

crime, not even to mention a gang membership sentence enhancement. While it is simple, especially if one is exceptionally cynical, to explain why a prosecutor would prefer an officer-expert over a non-officer gang expert, even if both have the same basis for their expertise, that does not explain the seeming lack of challenge and immense credence given these experts by the court, the defense, and juries. This could be traced back to the same innate obedience/trust in and of authority that Milgram demonstrated in his obedience experiment, coupled with the general societal taboo of openly accusing an officer of being a liar, even if that claim is simply of error. In light of all that is discussed in this paper, the recommendation is not to discount, discredit or avoid gang experts, even officer-experts, as there is still the vital service they provide in such cases, but rather the recommendation is that they be treated as specialized knowledge and never as psychologists or sociologists, and that their questioning be done accordingly, and that either the Courts or the defense, not simply accept these experts to testify without challenge, or an expert of their own.