RICK HOROWITZ #248684
2014 TULARE STREET, SUITE 627
FRESNO, CALIFORNIA 93721

(559) 233-8886
(559) 233-8887

rick@fresnocriminaldefense.com

[Actual author for ] Attorney for Defendant

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO, CENTRAL DIVISION

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff,<br><br>vs.<br><br>NAME DELETED,<br>Defendant. | **Case No.: [deleted]**<br><br>MOTION *IN LIMINE* TO EXCLUDE PROSECUTION'S GANG COP TESTIMONY AND GANG EVIDENCE<br><br>Date: [deleted]<br>Time:<br>Place: |

PLEASE TAKE NOTICE that on February X, 2006 in Department XX at 8:30 a.m. or as soon thereafter as the matter may be heard, the defendant, NAME DELETED, will move that the court exclude, or prevent, the prosecution's use of a gang cop to offer testimony relating to gangs in this case.

This motion is based upon this notice of motion, memorandum of points and authorities served and filed herewith, on such supplemental declarations as attached hereto and as may hereafter be filed with the court, on all papers and records on file in this action and on such oral and documentary evidence as may be presented at the hearing of the motion.

Dated: _____, 2006

_____
RICK HOROWITZ
[actual author for]
Attorney for Defendant,
NAME DELETED

RICK HOROWITZ #248684
2014 TULARE STREET, SUITE 627
FRESNO, CALIFORNIA 93721

(559) 233-8886
(559) 233-8887

rick@fresnocriminaldefense.com

[Actual author for] Attorney for Defendant

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO, CENTRAL DIVISION

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff,<br><br>vs.<br><br>NAME DELETED,<br>Defendant. | **Case No.: No. [deleted]**<br><br>POINTS AND AUTHORITIES IN SUPPORT OF MOTION *IN LIMINE* TO EXCLUDE PROSECUTION'S GANG COP TESTIMONY AND GANG EVIDENCE |

Defendant submits the following points and authorities in support of the motion to exclude testimony by the prosecution's gang cop in this case. This evidence is precluded by Evidence Code sections 350, 352, 801 *et seq.*, as well as the California and United States Constitutions.

//

//

## ARGUMENTS

### I

### GANG COP TESTIMONY IS INADMISSIBLE BECAUSE IT IS IRRELEVANT IN THE INSTANT CASE; THERE HAS BEEN NO EVIDENCE CONCERNING, INVOLVING, OR IMPLICATING GANGS IN THE CHARGED CRIMES

"No evidence is admissible except relevant evidence." (Evid. Code § 350; *People v. Carter* (2005) 36 Cal. 4th 1114, 1166 [32 Cal.Rptr.3d 759].) It is established by statute and case law that relevant evidence is evidence "having a tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code § 210; *Carter, supra*, 36 Cal.4th at 1166.) At a more basic level, evidence – whether relevant or not – "means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." (Evid. Code § 140; *People v. Lee* (1985) 164 Cal. App. 3d 830, 841 [210 Cal.Rptr. 799].) However, questions put to witnesses by attorneys are not evidence. (*People v. Dunkle* (2005) 36 Cal. 4th 861, 894 [32 Cal.Rptr.3d 23]; *People v. Southern Cal. Edison Co.* (1976) 56 Cal. App. 3d 593, 606 [128 Cal.Rptr. 697]; see also 1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 3d 2005) Relevancy and General Principles of Evidence, § 19.7, p. 286.)

In the instant case, the prosecution alleges that a witness, WITNESS NAME DELETED, contradicted statements he had made to detectives during the investigation

when he testified at the preliminary hearing. (PRT 15-24.)[1] The prosecution speculates that the reason for the changed testimony is WITNESS NAME DELETED's fear of gang retaliation. (*Ibid*.) In fact, at the preliminary hearing, the only "evidence" to support this contention was provided by the prosecutor, who stated:

> Q: Well, but aren't you – are you concerned, I should say, that right now you're testifying against Mr. NAME DELETED and at one time you were both involved with the Selma Bulldogs?
>
> (PRT 40:4-7.)

The court sustained an objection to the question, which constitutes the only indication of gang involvement in the case, other than the prosecution's letter to defense counsel (Exhibit A), which references the possibility that WITNESS NAME DELETED's testimony changed because of his fear of the gang. WITNESS NAME DELETED's own testimony indicated that his fear originated from other sources, including the fact that he was afraid of the prosecutor and the police. (PRT 37:18.)

WITNESS NAME DELETED not only denied, under oath, being afraid of a gang, but discovery provided by the prosecution indicates that WITNESS NAME DELETED was potentially a physical threat to the defendant! (Exhibit B.) In an interview dated September 29, 2004, WITNESS NAME DELETED told Detective Amador that he was thinking of hurting the defendant. (*Ibid*.) A witness willing to threaten to physically hurt

[1] "PRT" refers to the Reporter's Transcript of the Preliminary hearing filed February XX, 200X in the Superior Court of the State of California in and for the County of Fresno, Central Division. Defendant asks the court to take judicial notice of the preliminary hearing transcript for the instant case. (Evid. Code § 452(d)(1).)

a defendant is probably not afraid to testify against him. The prosecutor's speculation as to the witness' state of mind is not only inappropriate, but off-target.

The best "evidence" that might appear to justify the prosecutor's speculation concerning the source of WITNESS NAME DELETED's fear comes from a statement WITNESS NAME DELETED made at the preliminary hearing concerning being "a rat." (PRT 38:6-7.) Yet the labeling of people who testify as "rats" is neither new, nor limited to cases involving gangs. (See Alexandra Marks, *Wall of silence: Cracked but not crumbling*, Christian Science Monitor (May 27, 1999) [labeling police officers who testify against other police officers as "rats"]; Doug Robinson, *By saying very little, McGwire lost a lot*, Deseret Morning News (Salt Lake City, March 21, 2005) [comparing baseball players testifying before Congress to rats]; Carl Campanile, *Kim's Fans Threaten Rap Rats*, The New York Post (March 7, 2005) ["rapper Lil' Cease ratted out his former partner Lil' Kim during her perjury trial"].) In fact, the use of the word "rat" to indicate "a person who deserts his associates" goes back to 1812; it acquired the meaning of "police informer" by 1902. (James J. Kilpatrick, *The Lady Dropped a Dime on Him*, Universal Press Syndicate (July 22, 2001) *available at* http://www.uexpress.com/coveringthecourts/?uc_full_date=20010722.)

In *People v. Martinez* (2003) 113 Cal.App.4th 400, 413-414 [7 Cal.Rptr.3d 49], the Court held that a gang cop's testimony "about what it meant to be a 'rat' in gang culture was relevant to help the jury understand discrepancies between some of the witnesses' statements to the police and their testimony at trial…." However, that case differed from the instant case in that *Martinez* involved the allegation that the crime itself

had been a gang crime. The evidence was already admissible on the separate ground that "evidence relating to 'paybacks' was relevant to the issues of motive and intent for the charged offenses…." (*Id*. at 413.) Therefore, there was independent evidence in *Martinez* of gang involvement from which the prosecution could reasonably argue a witness' testimony was changed by the fear of retaliation from that gang. After all, in *Martinez*, the working theory was that the crimes were gang-related and there was ample evidence to support this theory. (*Id*. at 404.) To say that such evidence from a gang cop would be relevant in a scenario like that in the instant case, where there is no independent evidence of gang interest or involvement, is to say that gang cop testimony would be relevant in all cases where unsworn persons said one thing to investigators and another when under oath in a courtroom.

There is no reason to believe that WITNESS NAME DELETED's indication that he did not wish to be a "rat" is connected with anyone's alleged involvement with a gang. Many individuals with no connections to gangs whatsoever wish to avoid being considered "rats" even when it comes to reporting their next-door neighbors for creating a public nuisance. In the instant case, no evidence of any gang interest or involvement has appeared. The prosecution's arguments to the contrary are pure speculation.

In fact, absent the speculation of the prosecution, there is no admissible evidence of any gang involvement on the part of the defendant or any witnesses in the case. How can the defendant make this claim? "In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal." (*People v. Hernandez* (2004) 33 Cal.4th

1040, 1049 [16 Cal.Rptr.3d 880], italics in original, underlining added; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 342 [128 Cal.Rptr.2d 411].)

As already noted above, this is not a gang case. There is no gang enhancement charged. There is no allegation that implicates any gang in this case. Instead, the prosecution guesses that perhaps WITNESS NAME DELETED's testimony has changed because of his fear of gang retaliation.

Aside from the rank speculation of the prosecution, there is no evidence that suggests any gang interest in the victim, the defendant, or any of the witnesses. Astrologers sometimes "predict" things which ultimately actually happen. And, yet, while "[a]n astrologer or palm reader may have testimony that could sway the jury…no court could say that a defendant has the constitutional right to present such evidence." (*Morris v. Burnett* (2003) 319 F.3d 1254, 1276.) The same should apply to prosecutors.

Prosecutors are well aware of the prejudicial nature of gang testimony. Volume XX, no. 3 of the *Prosecutor's Brief*, a publication of the California District Attorneys Association, clarifies this:

> Special Evidentiary Opportunities With Section 186.22(a)[2]
>
> Section 186.22(a) should be filed and proven in each gang motivated case for the following reasons. First, the defense will move to sever the gang enhancement from the trial. This would probably mean the jury would not hear any gang evidence. You should fight to keep the enhancement part of your case in chief…. Second, the defense may admit the section 182.66(b) enhancement allegation in an attempt to limit or exclude gang evidence…. ¶ To combat the effort to bifurcate or

[2] The reference is to California Penal Code § 186.22(a), a portion of the Street Terrorism Enforcement and Prevention Act.

> admit the enhancement, a prosecutor should file and prove the section 186.22(a) substantive crime…. ¶ …. It has also been productive to file a conspiracy charge, if possible. Judges seem more amenable to the cross-admissibility of evidence argument, if the conspiracy is charged.

(Randy Pawloski & Bryan Brown, S.T.E.P. on Gangs, *Prosecutor's Brief*, Vol. XX, No. 3 (date unknown) pp. 43, 46.)

Best of all, Pawloski and Brown note, "The S.T.E.P. Act is Easy to Prove" because "a gang expert can rely on hearsay….the gang expert makes your case in chief." (Pawloski & Brown, *supra*, at p. 46.) It is worth remembering the policy reasons behind the exclusionary rules the prosecution wishes to abrogate. Earlier case law in California excluded hearsay statements "because of the likelihood that they might be false." (1 Witkin, Cal. Evidence 4th ed. 2000) Hearsay § 52.) More recent cases have been concerned with protecting personal rights and eliminating illegal police practices, including pressuring witnesses to obtain involuntary statements. (*Id*. at §§ 52, 54.) As will be discussed further *infra*, at Argument V, the United States Supreme Court has also attacked the indiscriminate use of hearsay in criminal prosecutions.

This blatant appeal to prejudicial material of questionable reliability notwithstanding, there is at least another step or two from the idea that defendant and WITNESS NAME DELETED are gang members to the idea that WITNESS NAME DELETED changed his testimony from fear of gang retaliation; mere membership alone is not direct evidence of the speculative threat. WITNESS NAME DELETED's testimony could have changed for any number of reasons. He himself offered alternative explanations, including fear of being labeled a "rat" – which, as noted above, does not need to be specifically a fear of gang retaliation – and fear of members of the

prosecution's team. There is no evidence here of any implied or direct threat from a gang. Reputation evidence might provide such a link and this appears to be the prosecution's reason for calling a gang cop to testify. (See Exhibit A.)

The case of *In re Wing Y.* (1977) 67 Cal.App.3d 69 [136 Cal.Rptr. 390] is instructive. In *Wing*, a minor of Chinese descent was charged with robbing a liquor store in the company of another Chinese man. Several other Chinese persons were called as witnesses. On cross-examination, over an objection of irrelevance, the prosecutor elicited testimony aimed at showing that witnesses in the trial were biased, because all were members, or potentially members, of the Wah Ching gang. (*Id*. at 72-73.) When one witness testified that members of the Wah Ching gang did "normal things," the prosecution called a Los Angeles police officer who specialized in Chinese gangs to provide reputation evidence in rebuttal of this claim. (*Id*. at 74.) The officer also testified that prosecution was difficult because "I feel the fear syndrome in Chinatown is very high at this time." (*Id*. at 75.) Finally, the officer testified that the defendant was a member of the Wah Ching and testified as to the culture and activities of the Wah Ching. (*Ibid*.)

On appeal, the Court noted that it was true that a prosecutor could elicit testimony of a common gang membership to establish bias on the part of testifying witnesses. (*Wing*, *supra*, 67 Cal.App.3d at 76.) "However, at that point the inquiry…should have ended." (*Ibid*.)

> [N]either the described criminal activities of Wah Ching nor the asserted active membership in the group by the minor Wing, as testified to by Officer Lou, had any "tendency in reason" to prove a disputed fact, i.e.,

> the identity of the person who committed the charged offense. Membership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion. Hence, the evidence was not relevant. It allowed, on the contrary, *unreasonable* inferences to be made by the trier of fact that the minor Wing was guilty of the offense charged on the theory of "guilt by association."
>
> (*Wing*, *supra*, 67 Cal.App.3d at 79, italics in original.)

Just as in *Wing*, where gang reputation testimony offered by a member of the Asian Task Force who specialized in Chinese street gangs was held inadmissible, so, in the instant case, the reputation of the gang is inadmissible. The question in *Wing* was whether the minor committed the charged crimes; the question in the instant case is whether the defendant committed the charged crimes. In *Wing*, the prosecution deemed the witnesses' testimony untrustworthy because of the Wah Ching gang; in the instant case, the prosecution deems the witnesses' testimony untrustworthy because of the Bulldogs gang. In *Wing*, the prosecution put on generalized evidence pertaining to the gang; in the instant case, the prosecution hopes to put on generalized evidence pertaining to the gang. In *Wing*, the Court held the admission of such evidence was reversible error; in the instant case….

//

//

//

//

//

//

## II

## EVEN IF THE COURT DEEMS IT RELEVANT, GANG EVIDENCE IS MORE PREJUDICIAL THAN PROBATIVE OF ANY DISPUTED FACT IN THE CASE.

### A. Evidence Code § 352 requires the Court to perform a balancing test to determine admissibility so as to avoid the possibility that a jury will unjustly convict persons such as the defendant in the instant case for the wrong reasons.

Evidence Code § 352 puts forth circumstances under which evidence – even if relevant – might still be excluded. The essence of 352 is the recognition that justice requires the prosecution's case to "survive the crucible of meaningful adversarial testing." (*Dunkle*, *supra*, 36 Cal. 4th at 930.) This cannot occur when evidence is admitted with probative value that is substantially outweighed by the potential that the fact finders will be distracted from their legitimate task. One such source of distraction occurs when the jury becomes sidetracked by the undue consumption of time. (Evid. Code § 352(a).) Similarly, where the proffered evidence is such that it will create a substantial danger of undue prejudice, the jury's legitimate task is potentially abrogated; the undue prejudice may result in a conviction on unsound grounds. (Evid. Code § 352(b).) Juries are also subject to failing in their task of weighing the truth of the issues before them when other issues, improperly introduced, confuse them. (*Ibid*.) Put another way, the jury is simply mislead. (*Ibid*.)

An analysis based on Evidence Code § 352 is essentially a balancing test. (*Kessler v. Gray* (1978) 77 Cal.App.3d 284, 291 [143 Cal.Rptr. 496].) In performing this balancing test, factors to consider include the relationship between the evidence and the relevant inferences to be drawn from it; whether the evidence relates to the main, as

opposed to only a collateral, matter; and the necessity of the evidence to the proponent's case. (*Ibid.*) Where evidence relates to a non-critical issue, does not directly support an inference relevant to a critical issue, or other evidence more directly supports the same inference, a lesser showing of prejudice is required. (*Id*. at 292.)

In the instant case, the prosecution wishes to bring in highly-prejudicial evidence based on speculation about an issue not critical to the case. Whether or not WITNESS NAME DELETED changed his testimony about seeing the defendant with a gun the summer before the charged crimes does not provide "direct evidence" as to whether the defendant, as opposed to someone else, committed the charged crimes. (See PRT 30.) Nor does it "directly support an inference" that defendant committed the crimes.[3] (*Kessler, supra*, 77 Cal.App.3d at 291.) So even if it turned out to be true that WITNESS NAME DELETED changed his testimony because he was afraid the gang would consider

---

[3] "Direct evidence is evidence that directly proves a fact, without the necessity of an inference. It is evidence which by itself, if found to be true, establishes that fact." (*People v. Honig* (1996) 48 Cal. App. 4th 289, 340 [55 Cal.Rptr.2d 555].) And an inference "is the result of a reasoning process by which a fact is found to exist by making a deduction of its existence that is logically and reasonably drawn from another fact or group of facts established by evidence in the action." (Evid.Code § 600(b); 1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 3d 2005) Relevancy and General Principles of Evidence, § 19.2, p. 284.) Whatever it means to "directly support an inference," defendant submits that WITNESS NAME DELETED's statement to police that he saw defendant with a shotgun the summer before the charged crimes neither directly nor indirectly supports any inference that defendant committed the charged crimes. At best, it supports an inference that defendant possessed the type of gun the prosecution's key witness, WITNESS-2 NAME DELETED, says defendant used to commit the crimes. One must then suppose that WITNESS-2 NAME DELETED was telling the truth about the crimes and that he did not come up with the description of the weapon used based on the same knowledge WITNESS NAME DELETED is alleged to have had: that defendant owned such a weapon.

him a "rat," that does not show that the defendant in this case committed the charged crimes. What it does do is consume time. Not only does the prosecution gang cop have to be called to testify, but for reasons relating to discovery problems to be discussed below, the cross-examination will be longer than normal. Additionally, the defense must then put on its own gang expert to explain the problems with the testimony of the prosecution's expert. In the midst of all this undue consumption of time, it would take a spectacularly-focused jury not to lose sight of the substantive issues in the instant case.

**B. Gang evidence is particularly inflammatory and is of little probative value in determining whether the defendant in this case committed the charged crimes; this heightens the risk that a jury will convict the defendant in this case for the wrong reasons.**

Turning specifically to the question of allowing gang evidence in the instant case, *Hernandez, supra,* is instructive. There, the California Supreme Court gave focused consideration to the issue of the prejudicial nature of such evidence.

In *Hernandez,* the defendant was charged with robbery, with a gang enhancement based on California Penal Code section 186.22(b)(1). (*Hernandez, supra,* 33 Cal.4th at 1044.) On appeal, the defendant contended that the trial court erred in failing to grant bifurcation as to the gang enhancement. (*Ibid.*) While the California Supreme Court denied that the trial court had abused its discretion in refusing to bifurcate, the Court noted:

> This is not to say that a court should never bifurcate trial of the gang enhancement from trial of guilt. The authorization we found in Calderon for bifurcation of a prior conviction allegation also permits bifurcation of the gang enhancement. The predicate offenses offered to establish a "pattern of criminal gang activity" need not be related to the crime, or even the defendant, and evidence of such offenses may be unduly

> prejudicial, thus warranting bifurcation. Moreover, some of the other gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt.

(*Hernandez, supra*, 33 Cal.4th at 1049, citations omitted.)

As noted above, the prosecution in the instant case has proposed to put a gang cop on the stand. (Exhibit A.) In a letter to defense counsel, the prosecutor stated:

> I met with deputy Lyman today starting at noon and discussed the case with him and any potential testimony. Based on that discussion and his review of the reports I will be calling him for the purpose of explaining why WITNESS-3 NAME DELETED testified to facts that were different then [sic] those he related to the detectives during his interview regarding his knowledge of the defendant, whether or not the defendant had previously possessed a sawed-off shot gun, and his knowledge of the whereabouts of the defendant and WITNESS-2 NAME DELETED on the evening that America Gonzalez was last seen by her family prior to being found murdered at Lincoln and lndianola Avenues. In particular detective Lyman will discuss why either gang members, associates, or even relatives of gang members would testify in a way to benefit the defendant. The reasons will include but not be limited to fear, respect, and intimidation. <u>In the course of this opinion, detective Lyman will testify about criminal street gangs in general and the dynamics, sociology, psychology, culture and habits of said gangs</u>, in relation to the aforementioned question. I will be asking detective Lyman to give an opinion whether or not the defendant, WITNESS-3 NAME DELETED or WITNESS NAME DELETED, are affiliated with criminal street gangs. I would reserve the right to call detective Lyman in rebuttal to any opinions offered by a defense gang expert on the aforementioned issue or any others that the defense might tender to the jury.

(Exhibit A, emphasis added.)

In short, the prosecution has made it clear that the defendant can expect to face the same sort of generalized gang testimony which courts have already determined is "inherently prejudicial." (*People v. Ruiz* (1998) 62 Cal. App. 4th 234, 242 [72

Cal.Rptr.2d 572]; *NAME DELETED, supra*, 33 Cal.4th at p. 1049.) In fact, the California courts have held that even when it is relevant, gang evidence may have such an inflammatory effect on the jury that this may warrant exclusion. (*People v. Williams* (1997) 16 Cal. 4th 153, 193 [66 Cal.Rptr.2d 123]; *People v. Avitia* (2005) 127 Cal. App. 4th 185, 192 [24 Cal.Rptr.3d 887].)

The defendant contended above (see Argument 1) that there is no relevance because of the lack of any evidence, other than prosecution speculation, about gang involvement in this case. Even if there was some probative value to the testimony of a gang cop, however, the only issue on which it would be probative concerns whether or not WITNESS NAME DELETED changed his story because of his own subjective fear of having a gang fear that he was a "rat." The panoply of prejudicial statements the gang cop is expected to parade before the jury is barely probative on that point. It is significantly less probative on the issue of whether *this* defendant in *this* case committed the crimes charged.

That gangs sometimes intimidate witnesses is not evidence that any gang has intimidated WITNESS NAME DELETED for testifying in the instant case. Even if some unnamed gang member did intimidate WITNESS NAME DELETED – and no evidence has been offered showing that this has happened – that is not probative as to whether the defendant committed the charged crimes. If a gang member – and the defendant is at pains to make clear that he does not believe this to be the case, but is merely providing a "best-case hypothetical" for the prosecution – actually did threaten WITNESS NAME DELETED, it could just as easily be because WITNESS NAME DELETED is testifying

in a criminal case…period. Even if there were evidence that such a thing happened and the evidence indicated that the defendant in this case made the threat himself, while such evidence might be probative on the issue of whether the defendant threatened the witness, it would not necessarily have great probative value as to whether defendant committed the charged crimes; it might show, at most, only that defendant was angry that a fellow gang member was testifying in the case.[4]

On the other hand, as noted, evidence of gang membership itself is "potentially prejudicial and should not be admitted if its probative value is minimal." (*NAME DELETED, supra,* 33 Cal.4th at 1049, underlining added; *Bojorquez, supra,* 104 Cal.App.4th at 342.) "When offered by the prosecution, we have condemned the introduction of evidence of gang membership if only tangentially relevant, given its highly inflammatory impact." (*People v. Cox* (1991) 53 Cal. 3d 618, 660 [280 Cal.Rptr. 692], superseded by statute on other grounds; *People v. Maestas* (1993) 20 Cal. App. 4th 1482, 1498 [25 Cal.Rptr.2d 644].)

In *Maestas*, "gang-violence-fear-retribution testimony" created a "miscarriage of justice" and resulted in a reversal. (*Maestas, supra,* 20 Cal.App.4th at 1501.) In *Maestas*, a gang cop was allowed to testify in a manner similar to that proposed by the

---

[4] Defendant realizes that if this last hypothetical were true, some evidence concerning it – possibly even from a gang cop – would be admitted, because there would be greater probative value, even though it still would not prove guilt as to the charged crimes. The point here is that even in that hypothetical situation, this would constitute circumstantial and thus not direct evidence. The probative value of the actual evidence proffered by the prosecution, as noted, is barely probative on the point of whether WITNESS NAME DELETED changed his testimony out of fear of a gang. It has less than minimal probative value as to the substantive charges of this case.

prosecution in the instant case. (*Id.* at 1500.) There was, however, one major difference: In *Maestas*, a witness testified that he was, in fact, afraid of gangs and had lied on the stand because of this fear. (*Ibid.*) In the instant case, no witness has thus testified; the prosecution, rather, speculates that a witness has lied because of such a fear.

In *Maestas*, the introduction of "gang-violence-fear-retribution testimony resulted in a miscarriage of justice" and caused an appellate court to say "The judgments are reversed." (*Maestas, supra*, 20 Cal.App.4th at 1501.) In the instant case, where the evidence justifying such evidence is even less than in *Maestas*, gang-violence-fear-retribution testimony will likely also result in a miscarriage of justice and cause an appellate court to say "The judgment is reversed."

## III

## GIVEN THE EVIDENCE AND CIRCUMSTANCES OF THIS CASE, USE OF THE GANG COP TO FILL EVIDENTIARY HOLES IN THE PROSECUTION THEORY FOR WITNESS NAME DELETED'S "CHANGED" STORY IS IMPROPER UNDER EVIDENCE CODE §§ 801 AND 803

### A. The question the prosecution wishes to have the gang cop answer is not beyond the common knowledge of the average juror; use of the gang cop is improper under Evidence Code §§ 801(a).

Defendant does not object to the introduction of evidence – if there is any such evidence in this trial – that a witness changed his testimony because of fear, even fear of a gang.

> Generally, evidence that a witness is afraid to testify is admissible as relevant to the witness's credibility. (Evid. Code, § 780; *People v. Warren* (1988) 45 Cal.3d 471, 481 [247 Cal. Rptr. 172, 754 P.2d 218].)
>
> (*People v. Dickey* (2005) 35 Cal.4th 884, 913 [28 Cal.Rptr.3d 647],

> citing *People v. Sapp* (2003) 31 Cal.4th 240, 301 [2 Cal.Rptr.3d 554, 73 P.3d 433].)

What defendant moves to preclude is the prosecution's intended use of a gang cop to provide this "evidence," particularly where there otherwise is no such evidence.

Evidence Code § 801 limits the testimony of expert witnesses. Specifically, subsection (a) limits it to "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code § 801(a).) In *People v. Killebrew* (2002) 103 Cal.App.4th 644, 656 [126 Cal.Rptr.2d 876], the Fifth Appellate District stated:

> [T]he decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.

Assuming *arguendo* that WITNESS NAME DELETED actually changed his story, the question presented is whether or not he changed his story in a way that is unfavorable to the prosecution <u>because</u> he was in fear of a criminal street gang. If he did, the prosecution has a problem.

Since the prosecution knows full-well the requirements of Evidence Code § 801(a), it is safe to assume the prosecution believes that fear of criminal street gangs is beyond the common knowledge of people of ordinary education such that the jurors will require an "assist" from the gang cop on this issue. Yet this makes no sense. If there is any matter that is clearly <u>not</u> beyond the common experience of a person of ordinary education, it is that criminal street gangs are to be feared. Indeed, gang cops frequently

testify that a primary motivator for criminal street gangs is the desire to instill fear in others and cause them to "respect" the gang. (*People v. Partida* (2005) 37 Cal. 4th 428, 441 [35 Cal.Rptr.3d 644]; *Hernandez, supra*, 33 Cal. 4th at 1046.) If there is one thing people associate with "gangs" these days, it is that someone talking to authorities about their activities should be afraid. (*Morris v. De La Torre* (2005) 36 Cal. 4th 260, 277-278 [30 Cal.Rptr.3d 260].)

Defendant makes this argument notwithstanding an apparent contrary view from the California Supreme Court:

> A juror unfamiliar with the particulars of gang intimidation may well consider it abnormal for a witness not to want to testify against an individual who committed a violent crime against himself or a family member or friend.

(*People v. Ward* (2005) 36 Cal. 4th 186, 211 [30 Cal.Rptr.3d 464].)

The Court also said that such evidence "helped explain" why a defendant committed certain crimes "without fear of being identified." (*People v. Monterroso* (2004) 34 Cal. 4th 743, 772-773 [22 Cal.Rptr.3d 1].)

Frankly, these are bizarre statements. The *Monterroso* statement is logically inconsistent with itself. If "gangs operate on fear" and no one in the community can be expected to identify the criminal because of this fear, then in what way can such fear be sufficiently beyond the common experience of a person of ordinary education? If such a fear were not part of the common experience then it could not effectively silence entire communities of witnesses.

Regardless, what might conceivably be true in some other universe is not true in Fresno. Thanks to frequent local coverage of gang issues in print, radio and television news, Fresnans are better informed about gangs. (See Exhibit C.) Indeed, a recent story in the Fresno Bee drew a simile for readers stating that a particular Shiite leader "uses language similar to that of a street gang leader" when he talks about how the Shiites operate. (Hamza Hendawi, *Iraqis leaving mixed-religion areas for safety*, The Fresno Bee (January 29, 2006) p. A10, col. 3.) The simile was expected to work for readers of the story. It could do so because of the amount of news coverage in Fresno – particularly, but not exclusively, in the Fresno Bee – concerning gangs.

At any rate, cases where the Supreme Court allows gang cops to testify regarding this completely unexpected impact of a fear of gangs on witness testimony differ from the instant case in one important respect: In those cases, there was evidence that the witnesses were afraid to testify because of gang activities. (*Ward, supra,* 36 Cal.4th at 211; *Monterroso, supra,* 34 Cal.4th at 771.) There was also already other evidence of gang activity relating to the crimes. (*Ward, supra,* 36 Cal.4th at 196; *Monterroso, supra,* 34 Cal.4th at 753-754.) In the instant case, there is neither.

In the instant case, WITNESS NAME DELETED testified that he was, at best, afraid of being considered a "rat." (PRT 38:6-7.) It is not beyond the common experience of a juror of ordinary education to understand how fear might alter a witness' testimony. A "jury generally is as well equipped as the expert to discern whether a witness is being truthful." (*People v. Coffman and Marlow* (2004) 34 Cal. 4th 1, 82 [17 Cal.Rptr.3d 710].)

When it is boiled down, that, really, is the only question here.

**B. The gang cop testimony aims at contradicting WITNESS NAME DELETED's statement about his own state of mind and providing the jury with another explanation for his state of mind; it is improper under Evidence Code § 803.**

In the instant case, WITNESS NAME DELETED testified that he was, at best, afraid of being considered a "rat." (PRT 38:6-7.) This is not evidence that he was afraid of a criminal street gang. Additionally, there has been no evidence in this case that implicates gangs. This case concerns allegations that a boyfriend, for reasons yet unknown, shot his girlfriend. (PRT 73:26-74:5, 153:17.) As noted in Argument I above, WITNESS NAME DELETED's allegedly altered story does not inexorably lead to an inference that WITNESS NAME DELETED is afraid of gang retaliation. In fact, WITNESS NAME DELETED testified that he was afraid of the police and the prosecution. (PRT 37:18.) Additionally, WITNESS NAME DELETED testified that he was not afraid of gang retaliation. (PRT 38:5-10.)

The prosecution contends not only that WITNESS NAME DELETED changed his story, but also that he lied about the reasons for changing his story on the stand. The prosecution rejects WITNESS NAME DELETED's explanation for why he might be afraid to testify. Yet WITNESS NAME DELETED is the only one who really knows what is going on inside WITNESS NAME DELETED's head. Rather than produce objective evidence, the prosecution proposes to bring on a gang cop to opine on what WITNESS NAME DELETED might be thinking and why he might have changed his story on an issue which is, after all, peripheral to the substantive crimes charged in this case.

**C. The gang "expert" in this case is really intended to fill in gaps in the prosecution's case which exist because of an absence of evidence.**

In *Nishikawa v. Dulles* (1958) 356 U.S. 129, 137 [78 S.Ct. 612; 2 L.Ed.2d 659] (superseded by statute on other grounds), "disbelief of [the witness'] story of his motives and fears [to] fill the evidentiary gap" were found to be unacceptable, requiring reversal. In *Nishikawa*, the issue involved whether or not an act had been performed voluntarily. The government – relying on the "ordinary rule" that duress is a matter of affirmative defense – contended that the normal presumption is that when an individual performs an act, he does so voluntarily. (*Nishikawa*, *supra*, 356 U.S. at 134.)

In the instant case, it is unclear what "ordinary rule" the prosecution might be relying upon to arrive at a presumption that WITNESS NAME DELETED lied at the preliminary hearing out of fear of retribution from a criminal street gang. As in *Nishikawa*, where the only evidence on the issue before the Court was the testimony of the witness, so here the only evidence before the trial court is the testimony of WITNESS NAME DELETED, the witness. (*Nishikawa, supra,* 356 U.S. at 131.) In *Nishikawa*, the trial court decided – contrary to the testimony of the witness – that Nishikawa's actions had been voluntary. (*Id*. at 132-133.) In the instant case, the prosecution has decided – contrary to the testimony of the witness – that WITNESS NAME DELETED's actions stem from fear of a criminal street gang. In *Nishikawa*, there was an absence of evidence – an "evidentiary gap" – which the trial court filled based on its own opinion. (*Id*. at 137.) In the instant case, there is an absence of evidence – an "evidentiary gap" – which the prosecution hopes to fill based on a gang cop's opinion.

In *Nishikawa*, this resulted in reversal. (*Nishikawa, supra,* 356 U.S. at 138.)

## IV

## A REAL EXPERT WITNESS DOES NOT HAVE *CARTE BLANCHE* TO SERVE AS A DUMPTRUCK FOR OTHERWISE INADMISSIBLE EVIDENCE; THIS SHOULD APPLY AS WELL TO THE PROSECUTION'S GANG COP

For too long, courts have allowed incompetent hearsay on the basis of the idea that the evidence is "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates…." (Evid. Code § 801(b).) But as the ellipsis in the previous sentence hints, there is more to this. Where an expert is "precluded by law from using such matter as a basis for his opinion," it is disallowed. (Evid. Code § 801(b).) While it may be reasonable to allow law enforcement officers to rely on such evidence to establish probable cause for investigation, the quality of such evidence is not reasonably relied upon for the idea that a particular group or individual has definitely done a particular deed. It makes even less sense to reasonably rely upon such evidence for presenting to the jury an opinion as to why a particular individual on a particular occasion testified to a particular set of facts.

In fact, the law does not allow it. Expert witnesses are precluded by law from giving an opinion on the subjective reasons or beliefs of specific individuals. (*People v. Coleman* (1985) 38 Cal. 3d 69, 92 [211 Cal. Rptr. 102]; *Killebrew, supra,* 103 Cal.App.4th at 658.) While some gang cop testimony as to the generalized expectations of gang members has been allowed, at some point "expectation" and generalized

testimony butts up against the issue of an individual's subjective knowledge and intent. (*Killebrew, supra,* 103 Cal.App.4th at 658.)

In the instant case, there is no justification for allowing the gang cop testimony regarding gangs and intimidation of witnesses. Not only is there no evidence of gang involvement and no evidence that a gang member has intimidated anyone in this trial in order to effectuate a change in testimony, but the witness' own statement contradicts such speculation by the prosecution. (PRT 37:18, 38:5-10; Exhibit B.)

## V

## ALLOWING THE GANG COP TO OFFER OPINIONS BASED ON OTHERWISE INADMISSIBLE HEARSAY IS A VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER *CRAWFORD V. WASHINGTON*

When it comes to determining admissibility of evidence provided by gang cops, the trial court is usually given broad discretion. (*People v. Manriquez* (2005) 72 Cal.App.4th 1486, 1492 [86 Cal.Rptr.2d 69], citing *People v. Valdez* (1997) 58 Cal.App.4th 494, 506 [68 Cal.Rptr.2d 135].) Nevertheless, this discretion is not unlimited. (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523 [3 Cal.Rptr.2d 833]; *People v. Ross* (1979) 92 Cal.App.3d 391, 407 [154 Cal.Rptr. 783].)

> The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown.

(*Korsak, supra,* 2 Cal.App.4th at 1523.)

One such legal principle was outlined in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177].)

The relevant facts of *Crawford* for present purposes were these: At Crawford's trial for attempted murder, a tape-recording of his wife's police interview was admitted into evidence against him. The wife was unavailable to testify because of the state marital privilege. The state's evidence code, however, contained an exception for out-of-court statements which were admissible under a hearsay exception. The State invoked the hearsay exception, claiming the wife's statement was a statement against penal interest. (*Crawford, supra,* 541 U.S. at 39-40.)

At the time – and for a quarter of a century before that time – the rule for determining admissibility of this type of evidence was controlled by *Ohio v. Roberts* (1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597]. The primary aim was to ensure that a witness' admitted statements "bear adequate indicia of reliability." (*Crawford, supra,* 541 U.S. at 40, internal quotations omitted.) The two ways courts made this determination were through the recognition of a "firmly rooted hearsay exception," or by determining that the statements bore "particularized guarantees of trustworthiness." (*Ibid*.)

Before overruling the quarter-century-old holding of *Roberts*, Justice Scalia's opinion for the *Crawford* Court explored the history of the Confrontation Clause in great detail. (See *Crawford, supra,* 541 U.S. at 42-50.) In the analysis which followed, the Court determined that the particular "principal evil" against which the Confrontation Clause was aimed was the practice of obtaining "statements…made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Id*. at 50, 52.)

The Court stated that the right to cross-examine where such statements would be available for use at a later trial was "not merely one of several ways to establish reliability[,]" but was, on the contrary, "dispositive." (*Crawford, supra,* 541 U.S. at 55-56.)

In the instant case, the prosecution proposes to have a gang cop testify as to his opinion about…

> …why either gang members, associates, or even relatives of gang members would testify in a way to benefit the defendant. The reasons will include but not be limited to fear, respect, and intimidation. In the course of this opinion, detective Lyman will testify about criminal street gangs in general and the dynamics, sociology, psychology, culture and habits of said gangs, in relation to the aforementioned question.

(Exhibit A.)

After defense counsel begged, cajoled and threatened the prosecution (with motions for discovery sanctions) for several months, a 15-sentence "report" from the gang cop was belatedly provided pursuant to Penal Code § 1054.1(f). (Exhibit D.)

Several of these sentences contain references to hearsay material of questionable quality. Other conclusory statements are clearly based upon hearsay of questionable quality.

For example, the "report" states that "Intimidation is used on a gang member by other gang members in order to keep control of the gang member." (Exhibit D.) Presumably, there is some basis for this opinion. If there is, more likely than not it involves conversations with alleged gang members. Such material must, of necessity,

involve out-of-court statements made to the police officer which will be offered in court for the truth of the matter asserted. Furthermore,

> when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an expert opinion is worth no more than the reasons upon which it rests.

(*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal. App. 4th 1108, 1117 [8 Cal.Rptr.3d 363].)

A purported expert witness "does not possess *carte blanche* to express any opinion within the area of expertise." (*Jennings, supra,* 114 Cal.App.4th at 1117.) "[A]n expert's opinion based on assumptions of fact without evidentiary support…has no evidentiary value." (*Ibid*, internal citations omitted.) This applies equally well to gang cops as to real experts.

Thus, it would seem almost a requirement that otherwise inadmissible statements be admitted in order to show the basis for the gang cop's conclusions. And, indeed, courts over the last decade or so have almost always allowed gang cops to relate large amounts of inadmissible hearsay. (*Killebrew, supra,* 103 Cal.App.4th at 653; *Valdez, supra,* 58 Cal.App.4th at 510; *People v. Gardeley* (1996) 14 Cal.4th 605, 618 [59 Cal.Rptr.2d 356].) The justification given for this is Evidence Code § 802. (*Gardeley, supra,* 14 Cal.4th at 618.) Evidence Code § 804(c), making opinions based "in whole or

in part" on opinions or statements of others is ignored, possibly because § 804(d) permits ignoring subsection (c) when the declarant is unavailable for examination.[5]

Cases such as *Gardeley* and *Valdez* demonstrate the dangers of permitting police officers who qualify as "experts" to testify under the expert witness rules: They become conduits for otherwise inadmissible hearsay, which is often quite prejudicial. (*United States v. Wells* (8th Cir. 2003) 347 F.3d 280, 290.) It is worth noting that cases such as *Gardeley* and *Valdez*, as well as the precedential cases of *People v. McDaniels* (1980) 107 Cal.App.3d 898 [166 Cal.Rptr. 12] and *People* v. *Gamez* (1991) 235 Cal.App.3d 957 [286 Cal.Rptr. 894], were decided many years prior to *Crawford*. And while the court might be tempted to think of them as established law, it is worth remembering that *Ohio v. Roberts* was established law until *Crawford* came along as well.

So far only <u>one</u> California court– the Fourth Appellate District – has addressed the issue of whether *Crawford* requires the exclusion of inadmissible hearsay allowed under Evidence Code sections such as § 802 when the declarant is unavailable for cross-examination.[6] The Court did this in the case of *People v. Thomas* (2005) 130

---

[5] The constitutionality of Evidence Code § 804(d), however, should be reevaluated in light of *Crawford*.

[6] Of note, *McDaniels*, *supra*, 107 Cal.App.3d at 904 contains only a discussion of the admissibility of opinions based on inadmissible hearsay. There is no discussion concerning the admissibility of any hearsay statements themselves. Subsequent cases as noted above, however, relied on *McDaniels* for admitting otherwise inadmissible hearsay statements that provided the foundation for the argument. (*Gamez, supra,* 235 Cal.App.3d at 966.) Currently, the erroneous idea that "anything goes" is based on some combination of cases that relied upon *McDaniels* and Evidence Code § 802. (*Gardeley, supra,* 14 Cal.4th at 617-618.) Again, all such cases so far either pre-date *Crawford* and/or simply failed to discuss the issue of any modification required by *Crawford*.

Cal.App.4th 1202 [30 Cal.Rptr.3d 582]. This case and the cases upon which it relies are instructive in several ways.

In *Thomas*, the defendant was arrested for stealing a truck. Because there was testimony that someone had yelled "F--- you, E.Y.C.," a gang enhancement was added. (*Thomas, supra,* 130 Cal.App.4th at 1205.)

At the trial, the gang cop testified that he had spoken with other gang members, who told him the defendant was a gang member. (*Thomas, supra,* 130 Cal.App.4th at 1206.) As another demonstration of his expertise, the gang cop testified that defendant's tattoo of the word "Brand" was "in association with EME gang members." (*Id.* at 1206, note 4.) The cop testified that "EME runs the southern faction of the prison system, in the state prison system." (*Id.* at note 3.) As it turned out, the tattoo actually spelled out "Brandy." Upon realizing his mistake, the gang cop demonstrated his value as an "expert" by quickly changing his testimony, stating that "it was common for people to have their girlfriends' names as tattoos." (*Id.* at note 4.)

The *Thomas* Court ultimately stated:

> Here, the conversations with other gang members were mentioned only as a basis for [the gang cop's] opinion that defendant was a gang member. There was no *Sixth Amendment* violation based on [the gang cop's] reliance on hearsay matters. ¶ Moreover, although no published California case has yet addressed whether *Crawford* applies to hearsay statements that are used not as direct evidence against the defendant but merely as the basis for an expert's opinion, courts in other jurisdictions have held [sic] upheld such use.

(*Thomas, supra,* 130 Cal.App.4th at 1210.)

The Court then cited to three cases for support: *People v. Goldstein* (2004) 14 A.D.3d 32 [786 N.Y.S.2d 428] ("*Goldstein I*"); *Howard v. Walker* (W.D.N.Y., July 21, 2004, No. 98-CV-6427FE) 2004 WL 1638197, 2004 U.S. Dist. LEXIS 14425 ("*Howard I*"); and *United States v. Stone* (E.D. Tenn., 2004) 222 F.R.D. 334 ("*Stone I*"). The first two of these cases has since resulted in reversal. (*People v. Goldstein* (2005) 2005 N.Y.LEXIS 3389 ("*Goldstein II*"); *Howard v. Walker* (2d Cir. 2005) 406 F.3d 114 ("*Howard II*").) *Goldstein I* was reversed on *Crawford* grounds. (*Goldstein II, supra,* 2005 N.Y. LEXIS 3389 at 11.) The second case did not apply *Crawford* because a final conviction occurred before *Crawford* was decided. (*Howard II, supra,* 406 F.3d at 123.) That case, however, was reversed because of significant issues involving cross-examination and hearsay; for precedent, the decision relied heavily upon *Bruton v. United States* (1968) 391 U.S. 123 [20 L.Ed.2d 476; 88 S.Ct. 1620] and *Lilly v. Virginia* (1999) 527 U.S. 116 [144 L.Ed. 2d 117, 119 S.Ct. 1887] to determine that the proffered out-of-court statements did not satisfy the *Roberts* test. (*Howard II, supra,* 406 F.3d at 123-125.) In the third case, the Court stated the agent "arguably relied on 'testimonial hearsay' statements." (*United States of America v. Stone* (6th Cir. 2005) 2005 U.S.App.LEXIS 28457 [2005 FED App. 0485P] ("*Stone II*").) Thus, the Court appears to endorse a potential for reversal on *Crawford* grounds. However, because *Crawford* was only applicable to testimonial hearsay evidence introduced at trial and in *Stone II* such evidence was only introduced at sentencing, *Crawford* was inapplicable. (*Id.* at 6.)

*Goldstein II* is a goldmine of reasoning potentially helpful in the instant case.[7] *Goldstein I* originally involved a case where a doctor relied upon information obtained during interviews of third parties. (*Goldstein II*, *supra*, 2005 N.Y. LEXIS 3389 at 3.) Although the defense objected, the doctor was allowed to testify as to what she was told by six interviewees. (*Ibid*.) As is the case in California, the Court in *Goldstein II* noted:

> We have held in section I only that [the expert witness'] *opinion*, although based in part on statements made out of court, was admissible because those statements met the test of acceptance in the profession. Both parties seem to assume that, if that test was met, [the expert] was free, subject to defendant's constitutional right of confrontation, not only to express her opinion but to repeat to the jury all the hearsay information on which it was based.

(*Goldstein II, supra,* 2005 N.Y. LEXIS 3389 at 9, italics in original.)

This New York holding is similar to the holding of California courts examining opinion testimony. It is noteworthy regarding the above assumption that New York's highest court said, "That is a questionable assumption." (*Goldstein II*, *supra*, 2005 N.Y. LEXIS 3389 at 9.) As the *Goldstein II* Court noted,

> it can be argued that there should be at least some limit on the right of the proponent of an expert's opinion to put before the fact-finder all the information, not otherwise admissible, on which the opinion is based. Otherwise, a party might effectively nullify the hearsay rule by making that party's expert a "conduit for hearsay."

---

[7] The Fourth Appellate District case of *Thomas* is not binding on a trial court in the Fifth Appellate District. According to the attorney on *Thomas*, that case is getting ready to enter the federal judicial system on a *habeas* petition where, based on the trend in other jurisdictions, it will be overturned. Defendant invites the trial court to follow the same path relied upon by the *Thomas* Court and adopt the *Crawford* reasoning of the federal cases which reviewed and reversed the cases relied upon by the *Thomas* Court.

(*Goldstein II, supra,* 2005 N.Y. LEXIS 3389 at 10, citing *Hutchinson v. Groskin* (2d Cir 1991) 927 F.2d 722, 725, emphasis added.)

This, of course, is exactly what defendant in the instant case, after reviewing numerous California cases, fears.

At any rate, the Court in *Goldstein II* went on explain why *Crawford* required reversal where an expert has relayed hearsay statements to a jury in order to support an opinion founded thereon. First, the prosecution had contended that the statements were not hearsay, because they were not offered to establish the truth of the matter asserted. (*Goldstein II, supra,* 2005 N.Y. LEXIS 3389 at 13.) Defendant in the instant case makes here the same argument the Court made in *Goldstein II*: It is impossible to see how the jury could use the statements to evaluate the opinion without accepting as a premise that the statements were either true, or they were false. (*Ibid.*) The prosecution obviously wanted the jury to take the statements as true. (*Ibid*.) Citing Kaye, et al., The New Wigmore: Expert Evidence § 3.7 at 19 [Supp 2005], the Court noted that "[t]he factually implausible, formalist claim that experts' basis testimony is being introduced only to help in the evaluation of the expert's conclusions but not for its truth ought not permit an end-run around a Constitutional prohibition." (*Ibid*.)

Secondly, the Court held, the evidence was "testimonial." (*Goldstein II, supra,* 2005 N.Y. LEXIS 3389 at 15.) The expert witness was hired to testify for the People. Although the record did not specifically reveal that the declarants knew that, it would be strange if the expert did not tell the declarants that. None were making casual remarks to an acquaintance and all should have reasonably expected any statements they made to be

available for use at a later trial. (*Ibid*.) The Court in *Goldstein II* referenced *Crawford* in holding that the statements need not be under oath and need not be formal in their language.

The Court closed out its opinion in *Goldstein II* by lamenting the fact that the required reversal would result in a third trial in this case. (*Goldstein II*, *supra*, 2005 N.Y. LEXIS 3389 at 21.) However,

> [C]onstitutional rules that guarantee defendants a fair trial must be enforced, and few such rules are more important than the one that guarantees defendants the right to confront the witnesses against them.

(*Goldstein II*, *supra*, 2005 N.Y. LEXIS 3389 at 22.)

In the instant case, defendant is entitled to a fair trial. As *Crawford* holds, the introduction of an opinion based on hearsay, where the declarants will be unavailable for cross-examination, will violate defendant's constitutional rights under the Sixth Amendment. Furthermore, the refusal to honor defendant's constitutional rights by allowing otherwise inadmissible hearsay evidence is itself a violation of due process of law. When we allow gang cops to introduce testimonial hearsay of a type that would be inadmissible if it were not for the fact that gang cops have decided they are reasonable when they rely upon it, we transform our justice system from a system of law into a sham of the law. Justice "shows" don't hesitate to traffic in rumor and speculation. (Bryan Burrough, *Missing White Female*, Vanity Fair (January 2006) p. 157.) Real justice demands otherwise.

//

//

## VI

## THE PEOPLE HAVE REPEATEDLY VIOLATED PENAL CODE § 1054.1 WITH RESPECT TO THE PROPOSED GANG EVIDENCE; EXCLUSION WOULD BE AN APPROPRIATE SANCTION BECAUSE OF THE IMPACT ON DEFENDANT'S CONSTITUTIONAL RIGHTS

Penal Code § 1054.1(f) includes in the listing of materials the prosecution is to deliver to the defendant:

> Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case….

On October X, 200X, defense counsel was forced by the accumulation of discovery issues, to file a notice of a motion for continuance. (Exhibit E.) The hearing on the motion was held on October XX, 200X. One of the issues that ultimately forced the hand of the defendant was the late remarks by the District Attorney indicating he anticipated putting a gang cop on the stand. Despite more than one request, the District Attorney refused to turn over any statement from this "expert," claiming that he was not required to do so.

Initially, the rationale behind the prosecution's refusal to turn over a statement was that no statement existed; the prosecutor subsequently stated to the court: "I admit I put – I put off – put it on the back burner getting – obtaining a statement from the gang expert." (MRT 80:1-3.)[8] The prosecutor added:

---

[8] "MRT" refers to the Reporter's Transcript of the Motions argued in the instant case in Department 98B of the Superior Court of the State of California in and for the County of

> I don't think the law would have required me to put anything in writing, but I did that because I thought I would accommodate him and help him to move this case along, and so I know I'm not perfect. I don't pretend to be perfect. I make errors. I'll probably make them again, but in terms of the – you know, I've tried to accommodate Mr. [deleted] in that respect.

(MRT 80:12-18.)

The accommodations included repeated refusals to provide any statement from the gang cop, in spite of the requirements of Penal Code § 1054.1. As the court then noted: "[A]t the time that this case goes to trial as far as the admissibility of the experts, any time that would have been caused by delay of the experts might be brought out." (MRT 80:25 – 81:1.)

The prosecution's thoughts on the law notwithstanding, the rule in California states:

> [A]n analysis of the plain meaning of the words and the grammar used in [the discovery statutes], considered together with the purpose of the statute, leads to the inevitable conclusion that its disclosure requirement applies to relevant oral statements of witnesses communicated orally to…counsel by third parties, such as an investigator.

(*Roland v. Superior Court* (2004) 124 Cal. App. 4th 154, 163 [21 Cal.Rptr.3d 151].)

Although in *Roland*, it was the defense which was trying to hide the ball, the Court indicated that the reason this rule was applicable to the defense was because it was applicable to the prosecution and "discovery is to be equal and reciprocal under

---

Fresno, Central Division on November 9, 2005. Defendant asks the court to take judicial notice of the transcript of that hearing. (Evid. Code § 452(d)(1).)

Proposition 115." (*Roland, supra,* 124 Cal.App.4th at 166, citing *Hines v. Superior Court* (1993) 20 Cal.App.4th 1818, 1822 [25 Cal. Rptr. 2d 712].)

In spite of these well-settled principles of law, endorsed by the population of the State of California via referendum, discovery issues with respect to the gang cop have continued to be a problem. Both the initial "statement" grudgingly provided on October XX, 200X, and the subsequent written report of the gang cop dated January XX, 200X (XX days before the scheduled trial date), are spartan. Gang cops are required to provide a foundation for their opinions. (*Avitia, supra,* 127 Cal.App.4th at 191; *People v. Flores* (1992) 7 Cal.App.4th 1350, 1356 [9 Cal.Rptr.2d 754].)

The failure by the prosecution to comply with the statutory discovery requirements of Penal Code § 1054.1 is a violation of defendant's Due Process rights under the Constitution of the United States of America in that the defendant has a right to assume that he will be prosecuted under the laws of the jurisdiction in which the case is tried. (*Screws v. United States* (1945) 325 U.S. 91, 129-130 [65 S. Ct. 1031, 1049; 89 L. Ed. 1495, 1518]; *Sparf v. United States* (1895) 156 U.S. 51, 74 [15 S. Ct. 273, 282; 39 L. Ed. 343, 351].) "[C]ounsel is not entitled to withhold any relevant witness statements from the prosecution by the simple expedient of not writing them down. [S]uch gamesmanship is inconsistent with the quest for truth, which is the objective of modern discovery." (*Roland, supra,* 124 Cal.App.4th at 165.)

Here, the gang cop has failed to provide a report containing more than conclusory statements of his opinion. In essence, the prosecution has withheld relevant witness statements by the simple expedient of not writing them down.

Additionally, the defendant's due process rights under the California Constitution and the United States Constitution are violated by this refusal to provide timely discovery. (U.S. Const., 4th, 5th & 14th Amends.; Cal. Const., art. I, § 15.)

In particular, the Sixth Amendment to the Constitution of the United States, in relevant part, declares: "In all criminal prosecutions, the accused shall enjoy the right to…have the assistance of counsel for his defense." (U.S. Const., amend VI.) "It has long been recognized that the right to counsel is the right to the *effective* assistance of counsel." (*McMann v. Richardson* (1970) 397 U.S. 759, 771 [90 S.Ct. 1441, 1449; 25 L.Ed. 2d 763], citing *Reece v. Georgia* (1955) 350 U.S. 85, 90; *Glasser v. United States* (1942) 315 U.S. 60, 69-70; *Avery v. Alabama* (1940) 308 U.S. 444, 446; *Powell v. Alabama* (1932) 287 U.S. 45, 57 (Italics added).) The Sixth Amendment does not merely require the *presence* of an attorney, but, rather, requires the presence of an attorney "who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington* (1984) 466 U.S. 668, 685 [104 S.Ct. 2052, 2063; 80 L.Ed.2d 674, 692].)

To fulfill the role of *effective* assistance to the defendant, defense counsel must be able to force the prosecution's case-in-chief…

> … to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

(*Dunkle, supra,* 36 Cal.4th at 930.)

In order to subject the prosecution's proposed gang witness testimony to the crucible of meaningful adversarial testing, it is necessary for the defense to have some understanding of the gang witness' background and training. There mere recitation of conference titles provides no meaningful understanding of the background and training which would justify the court's certification of the proposed witness, Fresno County Sheriff's Deputy James C. Lyman. (Exhibit F.) The prosecution has refused to provide any of the training materials Deputy Lyman relied upon. Although recently provided discovery indicates Deputy Lyman has taught, as well as attended, courses purportedly on gang topics, the prosecution makes the unbelievable claim that he did not preserve his training materials. Common sense militates against this possibility. What kind of "expert" attends training and teaches without retaining any materials relevant to his area of expertise? As it stands, the defense may be forced to expend many uncertain hours of *voir dire* with this witness to determine what differentiates the training he has received from that received by most astrologers. (*Morris v. Burnett*, *supra*, 319 F.3d at 1276.)

The near-mythical ability of gang cops self-declared to be "experts" to "assist" jurors in reaching a verdict notwithstanding, the court's obligation as gatekeeper and defense counsel's obligation as an officer of the court and advocate for the defendant necessitates some deeper understanding than that the gang cop has attended conferences that include the word "gang" in their title. (*People v. Pizarro* (2003) 110 Cal.App.4th 530, 555 [3 Cal.Rptr.3d 21] ["the trial judge serves as gatekeeper, allowing only evidence that is sufficiently reliable and trustworthy to reach the jurors"]; *In re Lucas* (2004) 33 Cal.4th 682, 722 [16 Cal.Rptr.3d 331] ["counsel has a duty to make reasonable

investigations"]; *Strickland, supra*, 466 U.S. at 690 ["counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case"].) To paraphrase another court commenting upon the practice of astrology, not all non-judicial uses of the phrase "gang expert" make it fit for admission under evidentiary law. (*United States v. Mitchell* (3d Cir. 2004) 365 F.3d 215, 243.) This is true even if they spent "one week" at each of these.

The defendant is unable to accept – and defense counsel is unable to adequately investigate – that the gang cop has the requisite training, background, and experience to comment on the sociology and psychology of gangs. (*Gamez, supra*, 235 Cal.App.3d at 966, overruled on other grounds by *Gardeley, supra*, 14 Cal.4th at 624.) The prosecution in this case has provided virtually no discovery detailing the proposed witness' "expertise" beyond a short list of items such as "Central Coast Gang Investigators Conference Monterey August 2002. One week." (Exhibit G.) Nothing about that title provides a key to determining either the character or quality of the training this law enforcement officer will bring to the issues of sociology or psychology of gangs.[9] (*Gamez, supra*, 235 Cal.App.3d at 966.) On the contrary, such information – when combined with the absence of any training materials – seems to support the idea of a law enforcement officer sitting in a room with a bunch of other law enforcement officers

[9] After this motion was written, but before it could be delivered to the prosecutor, or filed with the court, 19 pages of new discovery purported to resolve this defect by providing the titles of individual sessions offered at some conferences. However, that material is susceptible to the same complaint. The titles of conferences, or courses, tells nothing about the foundation, or quality, of the materials presented. The same arguments apply, therefore, to this new late discovery.

discussing hearsay and "war stories" handed down by other law enforcement officers, many of whom were "trained" in the same way.

Because of this on January X, 200X, the defendant *again* complained to the prosecution, stating:

> We are moving forward in preparation for trial under the assumption that you have decided against calling Fresno County Sheriff's Deputy James Lyman as a witness in Mr. NAME DELETED' trial. ¶ Our reason for this assumption is your failure – indeed, your refusal – to provide adequate discovery regarding Deputy Lyman's background and training, or any objective reason for calling him as a witness, as well as any reports indicating his opinions, or the bases of these opinions.

(Exhibit H.)

The defendant pointed out that:

> [Y]ou have so far provided a skeletal résumé for Deputy Lyman and your own indication of what you expect will be the content, with an implied reason only, of Deputy Lyman's testimony. Certainly Deputy Lyman has provided you with more than conclusory statements concerning his opinion and his expected testimony; an expert witness is not permitted to testify as to mere possibilities. (see *Abuan v. General Elec. Co.* (9th Cir. 1993) 3 F.3d 329; *Cottle v. Superior Court* (1992) 3 Cal. App. 4th 1367.) Even if Deputy Lyman has failed to provide you with his own written report, Evidence Code section 225 defines a "statement" as "an *oral* or written verbal expression" and provides a good guide for interpretation of the phrase "statements of experts" not otherwise explicitly defined within Penal Code section 1054.1.

(Exhibit H.)

In addition, defendant provided the prosecution with a preview of this portion of the instant motion.

Finally, a mere eleven days before trial, along with over 100 other pages of further discovery relating to gangs, the prosecution provided the 15-sentence "report" of the

gang cop discussed *supra* and an updated résumé intended to meet defense objections to the sparse background and paucity of foundational material.[10] (Exhibit D; Exhibit G.)

The résumé included a list of four books which the prosecution represented as supplying the foundation for the gang cop's opinion. Defendant has so far been able to obtain only one of these books, because they range from 1985 to 1997 and are apparently out-of-print. Numerous newer books exist, but the gang cop apparently chose to rely on books published primarily before California legislation defining criminal street gangs and the type of evidence used to determine when a group constitutes a criminal street gang.[11] Of course, the newer books are written primarily by sociologists and psychologists, while the older books are primarily written by law enforcement officers.

At any rate, since the District Attorney is the party offering this witness, the District Attorney should be required to provide more specific information about the background and training of his proposed "expert," as well as the bases of his opinion, in accordance with the discovery statutes and defendant's due process rights under the

---

[10] Oddly, this discovery included information from another gang cop, along with his updated résumé. (Exhibit I.) If this is indicative of an intent for this information to be admitted via Deputy Lyman, a review of *Mosesian v. Pennwalt* (1987) 191 Cal.App.3d 851 [236 Cal.Rptr. 778] and *Isaacs v. Huntington Memorial Hosp.* (1985) 38 Cal.3d 112 [211 Cal.Rptr. 356] is in order. Defendant reserves discussion of these cases for that eventuality.

[11] A short list of such books would include: Esbensen, et al, American Youth Gangs at the Millenium (2004) Waveland Press; Tovares, Manufacturing the Gang : Mexican American Youth Gangs on Local Television News (2002) Greenwood Press; Weisel, Contemporary Street Gangs: An Organizational Analysis (2002) LFB Scholarly Publishing; Lopez, Gangs: Casualties in an Undeclared War (2002) Kendall Hunt Pub; Curry & Decker, Confronting Gangs: Crime & Community, 2d Edition (2002) Roxbury; Huff, Gangs In American III (2001) SAGE Publications; and Miller, Maxson & Klein (eds.), The Modern Gang Reader, 2d Edition (2000) Roxbury.

Constitution of the United States. Only in this way can defense counsel adequately investigate the bases for these materials, permitting the "background" and "training" of the gang cop and the bases for his opinions to survive the crucible of meaningful adversarial testing.

All the above arguments are equally applicable under California's Constitution because of Article 15, section 1. Furthermore, California's discovery statutes explicitly recognize the requirement that discovery comport with principles of fairness (Cal. Pen. Code § 1054(a)) and constitutionally-enshrined rights of the defendant (Cal. Pen. Code § 1054(e)).

> It is axiomatic that a trial is a search for the truth. (*People v. Zack* (1986) 184 Cal. App. 3d 409, 415 [229 Cal. Rptr. 317].) Procedural rules, including those of discovery, are designed to ensure that the search is fair, reasonably pursued, and based on reliable information. The rationale behind California's discovery statute is that neither side should be allowed to engage in, or be subjected to, a trial by ambush.

(*People v. Bell* (2004) 118 Cal. App. 4th 249, 256 [12 Cal.Rptr.3d 808].)

What we have here, in essence, is trial by ambush.

In *Castiel v. Superior Court of San Francisco* (1958) 162 Cal.App.2d 710, 711 [328 P.2d 476], the Court wrote disapprovingly of the prosecution's refusal to timely disclose information which was "material and substantial to an adequate defense." The Court noted that the prosecution's refusal was "designed to conceal from petitioner the information to which he is admittedly entitled to the last possible moment and thus to handicap him as much as possible in the preparation of his defense." (*Ibid.*) In fact, the Court had already reversed defendant's prior conviction in the case on the sole ground of

this refusal by the prosecution to provide discovery. (*Id.* at 710-711.) They were clearly prepared to do so again. (*Id.* at 711.)

The goal of the prosecution is not to hide the ball until the last possible moment, in order to ensure that the game is won, but to establish the truth upon a fair public trial. (*Powell v. Superior Court of Los Angeles County* (1957) 48 Cal. 2d 704, 707.)

After being notified of the prosecution's intent to call a gang cop to testify as noted above, defense counsel hired its own gang expert, the renowned Lewis Yablonsky, Ph.D. What little bit of information the defendant has received from the prosecution has been turned over to this expert. On January X, 200X, after Dr. Yablonsky had told us he was unable to provide a report because of the dearth of information supplied, defense counsel requested that he submit "some kind of report" anyway. Dr. Yablonsky's report states, in part:

> In the 185+ gang cases I have worked on as an expert-witness, I have never been asked to comment and present my opinion's on a police gang expert's testimony when I have no concrete information on their testimony.

(Exhibit J.)

In the Summary of his report, Dr. Yablonsky states,

> As indicated, I find it is not possible to respond to testimony or assertions made by the prosecution's police gang expert when there is no record of what the police gang expert will say. I can only respond with the general commentary I have made in the foregoing statement. I would especially like to note that it is unprofessional of me to make any comments about my general knowledge about gangs in regard to this specific case at this time based on the lack of any statement or report from the prosecution's gang expert.

(Exhibit J.)

The California legislature has provided the means for courts to deal with this type of problem. First, there is the gatekeeping function of the trial court already noted above. (*Pizarro, supra,* 110 Cal.App.4th at 555 ["the trial judge serves as gatekeeper, allowing only evidence that is sufficiently reliable and trustworthy to reach the jurors"].) Second, possible remedies for discovery violations are spelled out in Penal Code § 1054.5(c). And while 1054.5(c) indicates that prohibition of witness testimony may be chosen only when other options have been exhausted, it is worth noting that in this case, the discovery issues have already been raised to the court in prior hearings. And, in particular, on November X, 200X, in a hearing on defendant's Motion for Sanctions, the prosecution argued that the appropriate sanctions – to wit, continuances – had already been ordered. (MRT 63:15-17.) The prosecutor then told the court:

> Well, the first thing has already taken place by another court, a continuance was granted, so the next thing would be for you to exclude testimony, I suppose, or that would be another option.

(MRT 64:16-19, underlining added.)

As noted in Arguments I and II above, gang evidence in this case is irrelevant and highly-prejudicial. The prosecution has continued to refuse to turn over discovery, continued to provide late discovery – including another 100+ pages concerning gangs on eleven days before trial and 19 pages concerning gangs at the trial conference four days before trial – and to provide inadequate discovery with respect to the basis for the gang cop's opinions. When the repeated discovery violations are added to the other issues

argued above, as the prosecutor said at the earlier motions hearing, "the next thing would be for [the court] to exclude testimony." (Pen. Code § 1054.5(c).)

## CONCLUSION

For the above reasons, the prosecution should not be allowed to introduce gang evidence into this trial and, in particular, no gang cop or other so-called "expert" on gangs should be permitted to testify.

DATED: February ___, 200X

_____
RICK HOROWITZ,
[Actual Author for]
Attorney for defendant,
NAME DELETED