Motion to Exclude Gang Expert [2005]

INTRODUCTION

On February 28, 2005, this Court ordered a hearing regarding the government's proposed use of expert testimony regarding criminal street "gang" during trial in this case. The Court set the "gang expert" hearing for April 4, 2005 and April 8, 2005. Further, the Court ordered the defense to submit briefing challenging the government's use of gang experts by March 22, 2005. According, defendant XXXX XXXX respectfully submits the following motion to exclude or limit the testimony of the government's "gang experts" in this case.

The government will attempt to use the "gang expert" testimony in this case as mortar with which to build a federal case out of disparate and unrelated separate state offenses, namely drugs sales and weapons possessions by various people over the years in the Westpoint housing projects. In fact, the government is attempting to prove both the drug conspiracy (Count 16), as well as the conspiracy to use guns to protect so-called "drug turf" (Count One), solely by the testimony of "gang experts" who will supply evidence that is otherwise missing from the record. The government cannot be permitted to use such expert testimony to substitute for competent evidence. The government's proffered experts have never been qualified to testify as "gang experts" in federal court, and the one expert who has been qualified as an expert in state court does not appear to have testified for the same purpose as is being offered in this prosecution.

The government's proffered "gang experts" should be excluded for a number of reasons. First, the expert testimony should be excluded under Federal Rule of Evidence 702 because the proffered experts do not use a reliable methodology and because their expertise is not admissible for the purpose for which it is being offered in this prosecution.

Second, the experts impermissibly rely on hearsay, in violation of defendants' confrontation rights under the Sixth Amendment, as recently articulated by the United States Supreme Court in *Crawford v. Washington*, 124 S. Ct. 1354 (2004).

Third, Federal Rule of Evidence 704(b) precludes the government's experts from opining with respect to Westmob gang membership because the government is impermissibly attempting to use expert testimony to establish defendants' *mens rea* vis-a-vis the charged conspiracies.

Fourth, the government's proposed "gang expert" evidence must be excluded in its entirety as unduly prejudicial because the Ninth Circuit has recently made clear that the admission of evidence relating to gang involvement will almost always be prejudicial and will constitute reversible error, and may not be offered to prove "intent or culpability."

Fifth, the government's gang expert testimony is unnecessarily cumulative, in that the government seeks to elicit essentially identical testimony from three different witnesses.

Sixth, the government's experts should not be permitted to testify as both an expert witness and a fact witness. The portions of the experts' opinions that are not based on inadmissible hearsay are just based on the officers' observations, and such observations should not be cloaked with the mantle of "expertise," particularly where the word "gang" is not even necessary under the government's most recently articulated theory of the case.

The defense anticipates that the issues described above will be more fully elucidated at the evidentiary hearings, and that additional argument may be necessary at the conclusion of the hearings.

BACKGROUND

A. Second Superceding Indictment and First, Second, Third and Fourth Bills of Particulars

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Defendant XXXX XXXX is charged in the government's Second Superceding Indictment with knowingly and intentionally conspiring to possess 50 or more grams of cocaine base with intent to distribute in violation of 21 U.S.C. ' 846.

The government's first Bill of Particulars, filed on October 27, 2004, identified forty-seven co-conspirators in Count 16, and included a general list of indicia of Westmob membership. *See* Bill of Particulars.

On a court hearing on November 10, 2004, the Court asked government counsel for the evidence that existed in the case of Asome unlawful agreement other than . . . association?" (Transcript, p. 12, lines 7-8). AUSA Bevan responded as follows:

> This is the underpinning of a lot of our case, Your Honor, is the fact that you cannot sell drugs up there without being a member of the West Mob. It's an exclusive market. And our pitch to the jury is going to be they can find an agreement circumstantially from that fact combined with association with other West Mob members and the fact that he is selling drugs up there.

AUSA Bevan, Transcript, p. 12, lines 10-16. The Court asked whether the government could ask the jury to infer membership in a conspiracy merely from the fact of selling drugs in a certain location. AUSA Bevan responded: "Combined with B that's one factor. Combined with other evidence of gang membership which we spelled out in our Bill of Particulars." (Transcript, p. 12, lines 20-22).

On January 4, 2005, the government filed a Second Bill of Particulars and disclosed its theory of prosecution for the drug conspiracy charge. Specifically, the Second Bill of Particulars states in relevant part:

> The theory of prosecution for Count Sixteen is that during the period of the alleged conspiracy, members and associates of the Westmob gang claimed the Westpoint area as their exclusive "turf" and "market" for narcotics trafficking, to include

> the possession of crack cocaine for sale and the distribution of crack cocaine. Only members and affiliates of the Westmob gang could traffick (sic) narcotics within the Westpoint area during the period of the charged conspiracy.
>
> The existence of the conspiratorial agreement among the defendants charged in Count Sixteen, and others within Westmob, will be established by proof that (1) the defendant was a member or affiliate of Westmob at some point during the period of the charged conspiracy; (2) the area of Westpoint, as a market for the trafficking of narcotics, was exclusive to members and affiliates of Westmob during the charged conspiracy period; (3) on one or more occasion within the charged conspiracy period, the defendant committed a drug trafficking offense within the Westpoint area; or in lieu of item #3, the defendant used, carried, or possess (sic) a firearm on one or more occasions within the Westpoint area or elsewhere to further the objective of the charged conspiracy.
>
> The prosecution theory is that every member and associate of Westmob involved in narcotics trafficking within the area of Westpoint during the charged conspiracy period, was a member of the drug conspiracy charged in Count Sixteen. The proof at trial will be that all members of Westmob sold drug in Westpoint.

Sec. Bill of Part. at 3:25-4:14 (emphasis added).

The Second Bill of Particulars effectively equates anyone who is a member or associate of Westmob with a co-conspirator as charged in Count 16.

In the Third Bill of Particulars, filed February 28, 2005, the government stated that Westmob has the ”affiliate” names of ”full Fledge” and ”Ruthless by Law.” The government defined ”affiliate” as ”member” or ”associate.” The government defined ”member” as ”any person who actually and in fact belongs to the Westmob gang” where the ”criteria” for determining membership are cited as being the list of 16 so-called ”objective factors” identified in the government’s Second Bill of Particulars, Section C. (These include factors, as described further below, such as associating with other Westmob members, wearing Westmob apparel, being present in Westpoint some time between 1997 and 2002, and the like). In the Third Bill of

Particulars, the government defined ”associate” as anyone ”other than a Westmob member” who ”participates in the criminal activities of the Westmob gang” ”participates in criminal activities with a Westmob member” or his/her conduct to promote or further the criminal activities of the Westmob gang, or intends his/her conduct to maintain or increase his/her position in relation to the Westmob gang.” Third Bill of Particulars, p. 2.

The Court instructed the government to provide a definition of the term ”gang.” The government’s Fourth Bill of Particulars, filed March 21, 2005, defined the term Westmob ”gang” as being synonymous with ”criminal street gang” and as having the following definition: ”[T]he group of persons, associated in fact, who (1) claimed or regarded the Westpoint area as their ‘turf’ (meaning the geographical territory from which rival gang members are excluded; or (2) claimed or regarded the area as their market for narcotics trafficking; or (3) claimed or affiliated himself with that area, or with persons in that area, for purposes of securing and maintaining that area against rival gangs in the Hunters Point area.” Fourth Bill of Particulars, pp. 2-3.

B. The Government’s Proffered ”gang experts”

To support its theory that Westmob is a gang and that the defendants in this case are gang members, the government proffers the testimony from three purported ”gang experts” each of whom are employees of the San Francisco Police Department (ASFPD”). Specifically, the government seeks to qualify the following persons: (1) Inspector Robert McMillan; (2) Inspector Toney Chaplain; and (3) Officer Leonard Broberg. In addition to the qualifications of these individuals, the government’s disclosures under Fed. Rule Crim. Proc. 16 summarize the subject of each witness’s proposed opinion testimony, as well as the factual bases for the proposed testimony. *See generally*, February 11, 2005 Letter from AUSA XXXX Bevan, Jr. to defense counsel (providing written summaries of testimony pursuant to Rule 16) (herein ”Rule 16 Letter”).

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1. Inspector Robert McMillan

Robert McMillan is an inspector with the SFPD. He was formerly a member of the disbanded street crime unit "CRUSH" and is currently assigned to the department's "gang Task Force." The government intends to offer Inspector McMillan as both a fact witness and an expert witness. As an expert, McMillan will testify to the following:

> 1. He will identify two gangs, Big Block and Westmob, within Hunter's Point.
>
> 2. He will trace the chronology and historical development of the Big Block and Westmob/RBL gangs in Hunters Point in the 1990's to the present date.
>
> . . . .
>
> 3. He will identify the core members, associates, and affiliates within the Big Block and Westmob gangs.
>
> 4. He will trace the historical development of other groups, such as Kirkwood, BNT, and Keith and Revere, becoming affiliated with Big Block.
>
> 5. He will identify the area claimed by Big Block as its exclusive "drug turf." This area is known as Harbor Road and is in the public housing area of Harbor/Northridge Roads.
>
> 6. He will identify the area claimed by Westmob/RBL as its exclusive "drug turf." This area is known as Westpoint or Hunters View, and is in the public housing area of Westpoint/Middlepoint Roads.
>
> 7. He will trace the history of Acie Matthews in Hunters Point, beginning with conflict in the Sunnydale area; to his affiliation with Harbor Road; to the period in which he was at odds with Harbor Road; his affiliation with RBL; his exclusion from Harbor Road; his affiliation with RBL; and his affiliation with Westpoint and Westmob.
>
> 8. He will describe the role of enforcers within street gangs in Hunters Point.
>
> 9. [Repeats number 8].

> 10. He will describe and identify the differences and similarities in structure, organization, and leadership with Big Block and Westmob.

Rule 16 Letter at 3-4.[1]

In addition to his training and experience, the bases for McMillan's opinions include out-of-court statements from third persons: "citizen informants; confidential informants, . . . the observations of other law enforcement officers/agents communicated to him; police reports; . . . [and] information from cooperating Big Block defendants. . . ." *Id.* at 4.

McMillan's opinions regarding Big Block and Westmob/RBL membership, affiliation, and association are also based, *inter alia*, on out-of-court statements from third persons. *See id.* at 3. In addition to those sources identified above, McMillan's opinions membership, affiliation and association are:

> (1) self-admission, or admission of family member of gang member; (2) photographed/videotaped with other gang members; (3) photographed/videotaped displaying gang sign(s); (4) wearing gang apparel; (5) arrested in gang territory for possession of drugs for sale; (6) arrested in possession of a firearm in gang territory; (7) in possession of a firearm in gang territory; (8) present in gang territory during the period; (9) observed in the company of other gang members; (10) having tattoos expressing affiliation with that gang; (11) having participated in a shooting against a rival gang/gang member; (12) identified by rival gang member as affiliated with that gang; (13) observed associating with other gang members; (14) identified by a gang member/associate as being affiliated with that gang; (15) identified in prisoner classification as being affiliated with that gang; and (16) individual's name and street nickname in graffiti in gang territory.

Id. (emphasis added).

2. Inspector Toney Chaplin

Toney Chaplain is also an SFPD inspector assigned to the department's "gang Task Force." The government intends to call Chaplin as a fact witness and an expert witness,

and "possibly as a fact witness depending upon developments at trial." *Id.* at 4. It intends to offer Chaplin's expert opinion regarding the following:

> 1. He will identify and trace the origin of African American gangs in San Francisco, as being neighborhood-based.
>
> 2. He will identify the role of gang graffiti, including the concept of graffiti marking the gang's territory, and expressing its conflict with rival gangs.
>
> 3. He will identify the role of gang signs and gang apparel.
>
> 4. He will identify and describe how gangs come to claim a geographic area as their own.
>
> 5. He will identify the area claimed by Westmob/RBL as its exclusive "drug turf." This area is known as Westpoint or Hunters View, and is in the public housing area of Westpoint/Middlepoint Roads.
>
> 6. He will describe the role of enforcers within street gangs in Hunters Point, as including protection of turf and establishing the exclusivity of their area for narcotics trafficking by members, affiliates, and associates of the gang.
>
> 7. He will describe the role of enforcers within street gangs in Hunters Point.
>
> 8. He will describe the chronology of the armed conflict between Big Block and Westmob.
>
> 9. He will identify particular persons as being members, affiliates, and associates of the Westmob gang.

Id. at 5.

Like Inspector McMillan, Chaplin will base his opinion on, *inter alia*, out-of-court statements from third persons. The bases for Chaplin's opinions will include "interviews of gang members; interviews of family members of gang members; information from other law

enforcement officials; police reports; neighborhood residents; citizen informants; and confidential informants." *Id.* at 4.

Additionally, the bases for Chaplin's identification of Westmob members, affiliates and associates are nearly identical to those upon which McMillan will rely. The bases include, at a minimum, the following out-of-court statements from third persons: (1) admission of family member of gang member; (2) identification by rival gang member affiliated with Westmob/RBL; (3) identification by a Westmob gang member/associate as being affiliated with Westmob; and (4) identification in prisoner classification as being affiliated with Westmob. *See id.*

3. Officer Leonard Broberg

The government's final proposed expert is Officer Leonard Broberg. Like McMillan and Chaplin before him, Broberg is also an SFPD officer and assigned to the department's "gang Task Force." The government also intends to call Broberg as both a "fact witness" and an expert. The government has indicated that Broberg will opine as an expert with respect to the following:

1. He will identify Westmob as a gang.

2. He will describe the role of enforcers within Westmob.

3. He will establish the Westpoint area as the exclusive drug turf claimed by Westmob.

4. He will discuss the role of gang graffiti.

5. He will discuss the existence of Westmob's gang signs; the use of gangs (sic) signs; and the significance of the gang signs.

6. He will establish the varieties of gang apparel for Westmob.

7. He will discuss gang photographs, and identify persons in gang photos designated by the government for use at trial.

> 8. He will identify particular persons as being members of Westmob, to include XXXXXX, and others identified by the government. . . .
>
> . . . .
>
> 9. He will differentiate members, associates, and affiliates of a gang.

Id. at 7.

As indicated above, Officer Broberg will opine that B with the exception of XXX XXXX B each of the defendants is a member of Westmob.[2] *See id.* at 7. Broberg purports to rely upon various of sixteen "factors" to support his opinion regarding membership. *See id.* The sixteen factors are nearly identical to those relied upon by both McMillan and Chaplin. They are:

> (1) self-admission, or admission of family member of gang member; (2) photographed/videotaped with other Westmob/RBL members; (3) photographed/videotaped displaying Westmob gang sign(s); (4) wearing Westmob and/or RBL/Full Fledge apparel; (5) arrested in Westpoint for possession of drugs for sale; (6) arrested in possession of a firearm in Westpoint; (7) in possession of a firearm in Westpoint; (8) present in Westpoint during that period; (9) observed in the company of other Westmob members; (10) having tattoos expressing affiliation with Westmob/RBL; (11) having participated in a shooting against a rival gang/gang member; (12) identified by rival gang member as affiliated with Westmob/RBL; (13) observed associating with other Westmob members; (14) identified by a Westmob gang member/associate as being affiliated with that gang; (15) identified in prisoner classification as being affiliated with Westmob; and (16) individual's name and street nickname in graffiti in Westpoint.

Id. at 6 (emphasis added).

With respect to XXXX XXXX, Broberg will opine that Mr. XXXX is a Westmob member based upon factors 1, 2, 3, 4, 5, 7, 8, 9, 11, 12, 13, 14, and 15 (Ato be confirmed"). February 26, 2005 Letter from AUSA XXXX Bevan, Jr. to defense counsel

(providing supplement to gang expert summary). At a minimum, four of these factors are comprised of out-of-court statements from third persons. It appears that multiple other "factors" B including numbers 7, 8, 9, 11, 13 B may be based on third-party statements as well, depending on the facts of each case.

ARGUMENT

A. The Admissibility of Expert Testimony in Federal Court

When subjected to the requirements articulated in *Daubert* and to the Federal Rules of Evidence, the government's proposed gang expert testimony must either be excluded in its entirety or strictly limited.

The Supreme Court has made clear that federal trial judges have a special Agatekeeping" obligation to insure that only *reliable* expert testimony be presented to jurors. *Kumho Tire v. Carmichael*, 526 U.S. 137, 147 (1999) ("In *Daubert*, this Court held that Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to ensure that any and all [expert] testimony . . . is not only relevant, but reliable.") (quoting *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 589 (1993)). Although the admissibility of expert testimony is generally governed by the principles of Federal Rule of Evidence 104, Federal Rule of Evidence 702 is the "primary locus" of this relevancy and reliability determination. *See Daubert*, 509 U.S. at 589; *United States v. Chischilly*, 30 F.3d 1144, 1152 (9th Cir. 1994).

A court assessing the proffer of expert testimony under Rule 702 must also consider other rules applicable to experts, including Federal Rule of Evidence 703. *Id.* Rule 703 provides that an expert may only base her opinion upon "facts and data" that are *reasonably* relied upon by others in the witness's field of expertise. Fed. R. Evid. 703; *see also* 4 Jack V. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* ' 703.04[1] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2004).

Finally, when evaluating the admissibility of expert testimony, the district court must also conduct a prejudice analysis under Federal Rule of Evidence 403. Indeed, because expert evidence can be both powerful and quite misleading, the district court must exercise particular vigilance when considering its prejudicial force. *See Daubert*, 509 U.S. at 595 ("Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.") (internal quotation omitted); *Chischilly*, 30 F.3d at 1156 ("Nevertheless, we take seriously the Court's admonition in *Daubert* that [expert] evidence must withstand close scrutiny under Rule 403.").

B. The Government's Proposed Experts Do Not Qualify Under Rule 702

The government's gang expert evidence fails to pass muster under Federal Rule of Evidence 702. As discussed above, Rule 702 is the "primary locus" of the reliability determination for expert testimony. *See Daubert*, 509 U.S. at 589; *United States v. Chischilly*, 30 F.3d 1144, 1152 (9th Cir. 1994) Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. As is plain from the text, "Rule 702 sets forth the overarching requirement of reliability" articulated by the Supreme Court in *Daubert*. Fed. R. Evid. 702 advisory committee's note.

"While the terms 'principles' and 'methods' [in Rule 702] may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge." *See id.* If an expert is

> relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply Ataking the expert's word for it."

Id. (citing *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995).

1. The Government's Proposed Experts Do Not Explain Their AMethodology"

Although the government has provided resumés for each of its proposed gang experts, the proposed experts have not described any objective methodology that they purport to reliably apply to the facts of this case. Without such a showing, the government's proposed gang experts may not testify. *See* Fed. R. Evid. 702. Furthermore, should the government attempt to make such a showing at the scheduled *Daubert* hearing, the defense reserves the right to examine the proposed gang experts regarding their training, experience, "methodology" and whether the "methodology" is reliably applied here

It is important for this Court to consider that while the proffered experts may have training that makes them better investigators and officers, and while seminars and specialized training may assist them in investigating potential gang suspects and in cracking a case, this on-the-street training clearly does not necessarily translate into a methodology that permits them to testify in court. For example, the proffered experts may get instructed at their training sessions that it is useful to learn if other people (such as informants) identify Person X as a gang member for the purposes of investigating Person X, but that does not mean that the officer can come to federal court and say that Person X is a gang member simply because that is one of his methods on the street.

2. The Proffered Experts Have Not Been Found Qualified to Testify in Federal Court as to the Matters for Which the Government Proffers Them

Only one of three proffered government gang experts has been found to qualify as an expert. That officer, Broberg, has never qualified in federal court as an expert. Further, it is not

clear that his state expert testimony was in the same context or for the same purpose for which the government seeks to admit it in this case. The defense is still awaiting full disclosure of the transcripts of his prior testimony B in particular cases involving Westmob B and will augment its argument in this respect when the full materials are produced by the government.

It is noteworthy that from the transcripts produced thus far, Broberg has not testified as to the definition of gang that the government has used in this prosecution. *See* Fourth Bill of Particulars (definition of "gang"). Instead, Broberg has testified in state court using a definition used in the state penal code. *See, e.g.,* February 7, 2005 testimony of Broberg, Bates 20637 (defining "gang" by reference to the definition in California Penal Code Section 186.22(B)). If the government had proffered that Broberg was going to testify to a different definition of gang, such as that used in the context of the state statute, ' 186.22(a), that would give rise to an additional legal objection based on impermissible testimony as to defendants' *mens rea*. However, the government has not B as of yet B proceeded on such definition.

3. The Gang Experts Impermissibly Rely On Out-Of-Court Testimonial Statements

In addition to the absence of an objective methodology for the reliable application of their "expertise" the government's proposed gang expert's opinions also rely heavily on inadmissible, testimonial statements. This Court should prohibit the use of such testimonial hearsay because it is fatally unreliable in this particular case, does not involve the application of expertise or specialized skill, and violates the Sixth Amendment as recently articulated by the United States Supreme Court in *Crawford v. Washington*, 124 S. Ct. 1354 (2004).

Thorough consideration of *Crawford* is important in this case. In *Crawford*, the Supreme Court held that where the government seeks to introduce testimonial statements from a witness absent at trial, the Confrontation Clause of the Sixth Amendment is violated unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford*, 124 S. Ct. at 1369, 1374. *Crawford* was predominantly concerned with

judicial determinations of the "reliability" of out-of-court statements: A[w]here testimonial statements are involved, we do not think the framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"[3] *Id.* at 1370. Instead, the reliability of such evidence must be tested Ain the crucible of cross-examination."[4] *Id.* The principles of *Crawford* find application here

As discussed in the Background section above, each of the government's experts base their proposed testimony on the out-of-court statements of third persons. For example, the bases for Inspector McMillan's testimony include statements from citizen informants, confidential informants, law enforcement officers, rival gang members, and police reports. *See* Rule 16 Letter at 2. With some minor variation, Inspector Chaplin and Officer Broberg rely on the same sources. *Cf. id.* at 4, 6. What is particularly troubling, however, is the manner in which the government's experts offer these testimonial statements: for their truth.

In particular, each of the government's three proposed experts opine as to the gang membership of certain individuals, including the defendants. Yet in forming their opinion, each expert simply relies on the following third-party, testimonial statements *asserting that the individual is a gang member*: (1) statements from family members; (2) statements from rival gang members; (3) statements by purported members of the same gang. *Cf. United States v. Cromer*, 389 F.3d 662, 673 (6th Cir. 2004) (holding that "testimonial" statements under *Crawford* include statements made to the authorities knowing that they will be used in investigating and prosecuting crime); *id.* at 675 ("[S]tatements of a confidential informant are testimonial"); *United States v. Nielsen*, 371 F.3d 574, 581 (9th Cir. 2004) ("Testimonial hearsay includes 'custodial examinations' and 'statements taken by police officers in the court of interrogations.'"). This type of expert testimony is objectionable on at least two grounds.

a. The Government's Experts May Not Reasonably Rely On Out-Of-Court Testimonial Statements

First, because the testimonial statements at issue here are unreliable in view of *Crawford*, this Court should prohibit their use pursuant to Federal Rule of Evidence 703. Rule 703 provides in relevant part:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived or made known to the expert at or before the hearing. If of a type *reasonably* relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

Fed. R. Evid. 703 (emphasis added). When an expert relies on otherwise inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied upon by other experts in the field. Fed. R. Evid. 702 advisory committee's note. Under Rule 703,

> [i]t is not sufficient for the court simply to ascertain that other experts do in fact rely on that type of data. Rather, the court must make an independent assessment, based on a factual showing, that the material in question is sufficiently reliable for experts in that field to rely on it.

4 *Weinstein's Federal Evidence* ' 703.04[2].

As *Crawford* categorically denounced the reliability of testimonial statements absent cross-examination, this Court must prohibit the government's proposed experts from relying upon such statements in forming their opinions here. Moreover, reliance on such statements undermines the "overarching reliability" of the proposed expert testimony under Rule 702 and *Daubert*.

b. <u>The Proposed Gang Experts Apply No Expertise When Merely RelayingTestimonial Hearsay Statements</u>

Second, this Court should also preclude the government's gang experts from relying on the testimonial statements at issue because the experts are applying no expertise or special skill when making use of these facts. Simply put, it takes no expertise to opine that someone is a member of Westmob because an informant or some other third party stated that the person is a member of Westmob. *See United States v. Dukagjini*, 326 F.3d 45, 59 (2d Cir. 2003) ("[I]n this case the expert was repeating hearsay evidence without applying any expertise whatsoever, thereby enabling the government to circumvent the rules prohibiting hearsay."). Because an expert's mere parroting of another's statement does not "assist the trier of fact to understand the evidence" *see* Fed. R. Evid. 702, and serves as a conduit of hearsay in violation of the hearsay rule and Confrontation Clause, this Court should preclude the government experts' use of such testimonial statements. *See Dukagini*, 326 F.3d at 59 (concluding that portions of expert's testimony based on out-of-court interviews with co-conspirators, was not "within the permissible bounds of expertise" and was hearsay in violation of the Confrontation Clause); *see also generally Crawford*, 124 S. Ct. 1354. If the government intends to prove that defendants are members of Westmob B or any other fact B based on the statements of third persons, the government should call those persons to testify and subject them to cross-examination B not insulate those witnesses behind purported experts.

The extent to which the government's proffered experts rely on such hearsay, and whether their expert opinion could survive without reliance on such testimony, will be clearer after the evidentiary hearing.

C. Federal Rule of Evidence 704(b) Precludes the Government's Experts From Opining With Respect to Westmob Gang Membership

The government is impermissibly attempting to use expert testimony to establish what is the crux of the case (and the only basis for federal jurisdiction) B that there was a conspiracy to distribute drugs and that all violence was in furtherance of such conspiracy.

The government has indicated that each of its three proposed gang experts will opine that certain persons are members of the Westmob gang. *See* Rule 16 Letter at 3, 5, 7. While the government has yet to disclose to subjects of or bases for Inspectors McMillan and Chaplin's identification of particular persons as gang members (notwithstanding this Court's March 18, 2005 order that it do so), Officer Broberg will purportedly opine that XXXX XXXX B and nearly all of the other named defendants B are Westmob members. Because this type of testimony violates Federal Rule of Evidence 704(b), the government's experts must be precluded from opining as to any defendant's alleged Westmob gang membership.

While Rule 704(a) generally provides that an expert witness may opine as to an ultimate issue to be decided by the factfinder, subsection (b) of the Rule provides a limited exception:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matter for the trier or fact alone.

Fed. R. Evid. 704(b).

"A prohibited 'opinion or inference' under Rule 704(b) is testimony from which it necessarily follows, if the testimony is credited, that the defendant did or did not possess the requisite *mens rea*." *United States v. Morales*, 108 F.3d 1301, 1037 (9th Cir. 1997) (en banc). Here, if the government's gang experts were permitted to opine that Westmob is a "gang" comprised of a group of people who "claim" and "regard" Westpoint as their exclusive turf in which to sell drugs and exclude rival members from selling drugs in that area, *see* Fourth Bill of Particulars, it would necessarily follow from the expert's opinion that any alleged Westmob members possessed the requisite *mens rea* for the conspiracy charged in Count

Sixteen: the intent to conspire with other to distribute cocaine base. The government's proposed experts would complete the circle by identifying XXXX XXXX and other defendants as Westmob members or associates.

Indeed, the government identified the above as its theory of the prosecution in its colloquy with the Court on November 10, 2004. When asked by the Court what evidence the government intended to introduce at trial to prove the "unlawful agreement" between defendants, the government stated that it would ask the jury to infer the existence of the conspiracy (the agreement) from proof that in addition to the fact that defendants sold drugs in Westpoint, one cannot sell drugs in Westpoint without being *a member of Westmob*, combined with evidence of the defendants' *gang membership*. Transcript of November 10, 2004 hearing, p. 12. Thus, the intent to conspire to distribute drugs (the unlawful agreement) must be inferred from the evidence of gang membership.

Yet the intent to conspire to distribute cocaine base is *precisely* the mental state Aconstituting an element of the crime charged" in Count Sixteen. Fed. R. Evid. 704(b). Thus, were Officer Broberg to opine that XXXX XXXX or any other defendant is a member of Westmob, and to opine that Westmob is a group of people who have agreed to sell drugs in a certain area and to protect such turf, it would necessarily follow from the expert's testimony that XXXX XXXX possessed the requisite *mens rea* of the charged crime. *Cf. Morales,* 108 F.3d 1307. Broberg's proposed testimony, therefore, violates Rule 704(b).

The Ninth Circuit's opinion in *United States v. Wang* compels this conclusion. *See United States v. Wang*, 49 F.3d 502 (9th Cir. 1995). In *Wang*, the defendant was charged and convicted of conspiracy to bring aliens unlawfully into the United States. *Id*. at 503. At trial, the government proffered the testimony of an expert on the subject of alien smuggling, and questioned the expert as follows:

> Q. Have you formed an opinion as to whether the defendants in this case were part of a group of smugglers smuggling Chinese aliens into the Country?
> . . . .
> A. Yes, I formed an opinion.
>
> Q. What is your opinion?
>
> A. My opinion is yes, they were involved in an organization to smuggle aliens into the United States.

Id. at 504. The defendant objected on 704(b) grounds and appealed his ultimate conviction. *Id.*

Upon review, the Ninth Circuit found the trial court's apparent error harmless because of the overwhelming evidence of the defendant's guilt. *Id.* at 505 ("[T]he court falls back on its harmlessness in order not to overturn the conviction."). Nonetheless, the Court issued a clear warning for district courts considering similar testimony under Rule 704(b): "[W]e now make explicit, the better practice would be for the prosecutor not to ask such questions arguably bearing on intent and for a district court not to find such answers admissible." *Id.* at 504.

As the government's proposed "gang membership" testimony is indistinguishable from the erroneous testimony in *Wang*, this Court must not "find such answers admissible." *Id.* Were the government to ask its experts whether XXXX XXXX is a member of Westmob B a group allegedly distributing cocaine base B an affirmative answer necessarily means that he possessed the charged intent to distribute cocaine base. *See id.*; Fed. R. Evid. 704(b).

D. The Government's Proposed "gang expert" Evidence Must Be Excluded in its Entirety as Unduly Prejudicial

Although Mr. XXXX also disputes the relevancy and reliability of the government's proposed expert testimony, this Court need not even reach these issues because the government's gang expert evidence is properly excluded B in its entirety B under Federal Rule of Evidence 403. Because the government intends to use "gang evidence" to prove that XXXX XXXX

knowingly and intentionally entered into a drug conspiracy with the other named defendants, this Court must preclude the use "gang expert" testimony as unduly prejudicial.

The Ninth Circuit has recently made clear that the admission of Aevidence relating to gang involvement will almost always be prejudicial and will constitute reversible error. Evidence of gang membership may not be introduced, as it was here, to prove intent or culpability." *Kennedy v. Lockyer*, 379 F.3d 1041, 1055 (9th Cir. 2004). Indeed, Atestimony regarding gang membership" is particularly unfair because it Acreates a risk that the jury will probably equate gang membership with the charged crimes." *Id.*

In the instant case, the government's Second Bill of Particulars states that Athe existence of the conspiratorial agreement among the defendants charged in Count Sixteen, and others within Westmob, will be established by proof that" each of the defendants was a member or affiliate of Westmob. Sec. Bill Part. at 4. The government, therefore, seeks to use Westmob "gang membership" evidence to prove the "intent and culpability" of the defendants in this case B a use expressly prohibited in this Circuit. *See Kennedy*, 370 F.3d at 1055. Because such use of "gang evidence" is impermissibly prejudicial under Rule 403, this Court must exclude all testimony from the government's proposed gang experts in this case. *See id.*, 379 F.3d at 1056 ("[T]estimony regarding gang membership creates a risk that the jury will probably equate gang membership with the charged crimes.")[5]

E. The Government's Gang Expert Testimony is Unnecessarily Cumulative

Despite this Court's expressed concern over the government's insistence on calling multiple "gang experts" the government has designated its three gang experts for testimony on overlapping subject areas. A review of the government's Rule 16 disclosures reveals the following areas of testimonial overlap:

$ Both Inspector McMillan and Officer Broberg will identify Westmob as a gang. *See* Rule 16 Letter at 3, 6.

- $ Both Inspector McMillan and Inspector Chaplin will describe an "armed conflict" between Westmob and Big Block. *See id.* at 3, 6.

- $ All three witnesses seek to identify members, associates, and affiliates of Westmob. *See id.* at 3, 5, 7.

- $ All three witnesses seek to identify the geographic area comprising Westmob's "exclusive 'drug turf.'" *See id.* at 3, 5-6.

- $ All three witnesses will describe the role of enforcers within Westmob; both McMillan and Chaplin will describe the role of enforcers within street gangs in Hunter's Point (presumably including Westmob). *See id.* at 4-6.

- $ Both Inspector Chaplin and Officer Broberg will discuss the role of gang graffiti. *See id.* at 5-6.

- $ Both Inspector Chaplin and Officer Broberg will discuss gang signs and gang apparel. *See id.*

Since the "needless presentation of cumulative evidence" is proper grounds for exclusion under Federal Rule of Evidence 403, Mr. XXXX requests that this Court either limit the government to one gang expert, or at a minimum, to one expert per subject area.

F. The Government's Experts Should Not Be Permitted to Testify as Both Expert Witnesses and Fact Witness

The government has indicated its intention to call Inspector McMillan and Officer Broberg as both expert witnesses and fact witnesses. Because both McMillan and Broberg are members of the SFPD Gang Task Force B and have apparently personally investigated Westmob B this dual role raises particular concerns of prejudice. As explained by the Second Circuit in *United States v. Dukagjini*:

> when the prosecution uses a case agent as an expert, there is an increased danger that the expert testimony will stray from applying reliable methodology and convey to the jury the witness's Asweeping conclusions" about [the defendants'] activities, deviating from the strictures of Rules 403 and 702. . .

> . As the testimony of the case agent moves from [applying expertise] to providing an overall conclusion of criminal conduct, the process tends to more closely resemble the grand jury practice, improper at trial, of a single agent simply summarizing an investigation by others that is not part of the record. Such summarizing also implicates Rule 403 as a Aneedless presentation of cumulative evidence" and a Awaste of time."

United States v. Dukagjini, 326 F.3d 45, 54 (2d Cir. 2003) (internal citations omitted). Indeed, the Court in *Dukagjini* concluded that the district court erred by allowing the government's expert to act "as a summary prosecution witness." *Id.* at 55.

Furthermore, the dual role of fact witness and expert witness may cause juror confusion, *see id.* ("Some jurors will find it difficult to discern whether the witness is relying properly on his general experience and reliable methodology, or improperly on what he has learned of the case."), "inhibit cross-examination, thereby impairing the trial's truth-seeking function" *id*. at 53, or "create[] a risk of prejudice because the jury may infer that the agent's opinion about the . . . defendant's activity is based on knowledge of the defendant beyond the evidence at trial." *Id.*

The concerns articulated in *Dukagjini* may well be present here. First, it appears that the government intends to use Inspector McMillan as a summary prosecution witness by "simply summarizing an investigation" of not only Westmob/RBL and Big Block, but also of individual defendants such as Acie Mathews. *See id.* at 55; Rule 16 Letter at 3-4. Moreover, since both McMillan and Broberg seek to offer testimony based on personal observation and interviews, the line between fact witness and expert witness may become impermissibly blurred. As these issues may become more fully developed after the court-ordered *Daubert* hearing, the defense requests an opportunity to more fully argue these issues post-hearing. At a minimum, however, this Court should order the government to disclose the substance of McMillan and Broberg's "fact witness" testimony at this time for further evaluation.

The overlap between the fact and expert testimony also makes it clear that much of what the government attempts to do is to bolster what is essentially percipient witness testimony, and to give it the glow of "expert" opinion. Excluding the bases for the opinions that are just rank hearsay, much of what the witnesses will testify to involves their observations of the defendants over an extended period of time. They do not need to be qualified as experts to do this.

For the foregoing reasons, defendant respectfully requests that the Court exclude or limit the proposed testimony of the government's proffered "gang experts."

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[1] The government's Rule 16 disclosures are not complete because the government did not disclose all of the bases for the conclusions (i.e. the identity of the persons whose hearsay statements are being relied upon, as well as all records of those statements). However, the defense anticipates that it will be permitted to question the proffered experts as to the bases of their opinions at the hearing, which would remedy the Rule 16 disclosure deficiencies.

[2] Apparently, Acie Mathews is only "affiliated with Westmob." *Id.*

[3] *Crawford* overturned the Court's previous decision *Ohio v. Roberts*, 448 U.S. 56 (1980), which permitted admission of the unavailable witness's statement B absent cross-examination B so long as the statement bore "adequate indicia of reliability." *Crawford*, 124 S. Ct. at 1358.

[4] Moreover, a recent decision of the Ninth Circuit confirms that evidentiary reliability is the primary focus of *Crawford*. In *Bockting v. Bayer*, ___ F.3d ___, 2005 WL 406284 (9th Cir. Feb. 22, 2005), the Ninth Circuit concluded that the holding of *Crawford* constituted a new rule that applied retroactively because Confrontation Clause violations seriously undermine the accuracy and reliability of a proceeding. *See Bockting*, 2005 WL at *7-8.

[5]Nor is it even evident at this point, since defendants are not charged as a criminal street gang or a criminal enterprise, why the use the word "gang" is necessary or proper in this prosecution. If the experts are simply being proffered to say (according to the Fourth Bill of Particulars) that this group of men (1) sell drugs in Westpoint to the exclusion of other people, and (2) protect their turf, there is no reason whatsoever for the word "gang" to be used at all. Unlike prosecutions in which such evidence would be permissible, here membership in a gang is not an element of the offense or a sentencing enhancement. Defendants move to exclude any reference to the word "gang" as irrelevant and prejudicial on this basis alone.