NOTE

Houses Built on Sand: Police Expert Testimony in California Gang Prosecutions; Did *Gardeley* Go Too Far?

by PATRICK MARK MAHONEY*

I. Introduction

In the 1980's, the California legislature declared that California was in a "state of crisis" caused by gang members who "threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods."[1] The legislature found that there were nearly 600 criminal street gangs operating in California.[2] In Los Angeles alone, there were 328 gang-related murders in 1986.[3] In 1997, the California Supreme Court found that crimes committed by gangs such as "[m]urder, attempted murder, drive-by shootings, assault and battery, vandalism, arson, and theft [remained] commonplace."[4]

Law enforcement agencies and courts were frustrated in their attempts to eradicate criminal gang activity through traditional criminal prosecution techniques.[5] This frustration was due in large part to the organizational structure of gangs and "their willingness to use violence to achieve their ends."[6] Common problems that district

---

* Juris Doctor 2004, University of California, Hastings College of the Law.

1. CAL. PENAL CODE § 186.21 (West 2003).

2. *Id.*

3. *Id.*

4. People *ex rel.* Gallo v. Acuna, 14 Cal. 4th 1090, 1100 (1997) (describing the Rockspings area of San Jose).

5. Beth Bjerregaard, *The Constitutionality of Anti-Gang Legislation*, 21 CAMPBELL L. REV. 31, 31-32 (1998).

6. David R. Truman, Note, *The Jets and Sharks Are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH U. L.Q. 683, 685 (1995).

attorneys faced when prosecuting gang-related crimes included gang codes of silence, witness intimidation, and the restrictions of juvenile codes.[7]

In 1988, California enacted Penal Code part 1, title 7, chapter 11, the Street Terrorism Enforcement and Prevention Act ("STEP"),[8] becoming the first state to pass legislation aimed specifically at the problem of criminal street gangs.[9] STEP was passed as part of an overall attempt to deal with those frustrations that existed at the prosecutorial level.[10] The legislature hoped that the criminal behavior of the gangs could be eradicated by focusing upon "patterns of criminal gang activity and upon the organized nature of street gangs."[11] STEP was not considered to be a final solution to the gang crisis, but rather was viewed as a tool that prosecutors and law enforcement could implement against gangs.[12]

With the passage of STEP, California courts began to gradually expand the scope of evidence admissible to prove gang membership and to loosen the restrictions on expert testimony regarding gang behavior.[13] California courts allowed police officers, qualified as experts, to give opinions based on hearsay evidence that would otherwise be inadmissible. In *People v. Gardeley*, for example, the California Supreme Court upheld an extremely broad view of permissible uses of expert testimony.[14]

This note will argue that the California Supreme Court went too far in approving the broad scope of police expert testimony in *Gardeley*. Under the guise of giving the reasons for his expert opinion, a police officer was permitted to relate to the jury otherwise inadmissible hearsay evidence of the defendant's prior criminal acts and criminal acts committed by alleged associates. The Court allowed some of this hearsay testimony to be admitted substantively to prove one of the elements of STEP.[15] In addition to this negative

7. James Blake Sibley, Note, *Gang Violence: Response of the Criminal Justice System to the Growing Threat*, 11 CRIM. JUST. J. 403, 406 (1989).

8. CAL. PENAL CODE §§ 186.20-186.33 (West 2003).

9. Bjerregaard, *supra* note 5, at 32.

10. Sibley, *supra* note 7, at 406-07.

11. CAL. PENAL CODE § 186.21.

12. Raffy Astvasadoorian, Note, *California's Two-Prong Attack Against Gang Crime and Violence: The Street Terrorism Enforcement and Prevention Act and Anti-Gang Injunctions*, 19 J. JUV. L. 272, 273 (1998).

13. Sibley, *supra* note 7, at 404.

14. 14 Cal. 4th 605, 618-20 (1997).

15. *Id.* at 619-20.

character evidence, the officer was allowed to give an opinion on the ultimate issue of the case, instructing the jury on precisely how the defendant's conduct should be interpreted.[16]

The struggle between the individual's right of liberty and society's liberty is at the heart of California's gang dilemma.[17] In *Gardeley*, the California Supreme Court missed a critical opportunity to reemphasize California's restrictive view of expert testimony and the importance of judicial gatekeeping. Undoubtedly, police officers qualified as experts give prosecutors a powerful tool to use in criminal gang prosecutions. Although gang violence remains a large problem plaguing our communities, we as a society should not overlook traditional rules of evidence and an individual's constitutional confrontation rights in an all-out attempt to eradicate street gangs.

II. STEP

STEP established a new crime of participation in a criminal street gang, punishable by up to one year in a county jail or one to three years in state prison.[18] Under STEP, "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" is guilty of a criminal offense.[19]

> A "criminal street gang," as defined by the act, is any ongoing association of three or more persons that shares a common name or common identifying sign or symbol; has as one of its "primary activities" the commission of specified criminal offenses; and engages through its members in a "pattern of criminal gang activity."[20]

A "pattern of criminal gang activity" means that *gang members* have committed (within a certain time frame) two or more of the 25 enumerated predicate offenses.[21] Additionally, a violation of STEP is a substantive offense that provides for sentence enhancements in

16. *Id.*

17. Astvasadoorian, *supra* note 12, at 272.

18. Truman, *supra* note 6, at 707.

19. CAL. PENAL CODE § 186.22(b)(1) (West 2003).

20. *Gardeley*, 14 Cal. 4th at 610.

21. CAL. PENAL CODE § 186.22(e) (West 2003) (including assault with a deadly weapon, robbery, homicide, shooting at an inhabited dwelling or vehicle, arson, the sale of drugs, intimidation of witnesses and possession of a firearm).

addition and consecutive to the punishment normally prescribed for that particular felony.[22] Further enhancements are possible for gang members who commit felonies on or near school grounds.[23]

The California legislature did not create new evidentiary rules with the passage of STEP. Nevertheless, STEP gave prosecutors a vehicle to introduce a broad range of evidence that would otherwise be excluded under traditional hearsay rules. Generally, evidence of gang membership or a defendant's prior bad acts cannot be admitted to show the defendant's criminal propensities or conformity with the current crime charged.[24] Since proof of gang membership and prior crimes committed by gang members are specific elements of the substantive offense created by STEP, however, this evidence is allowed in. Furthermore, traditional rules excluding the introduction of hearsay evidence move aside under the expert testimony rule.[25]

In the early days of STEP, prosecutors often had difficulty demonstrating the required pattern of gang activity.[26] One might assume from the statute that the term "pattern" means that the defendant had a practice of committing illegal acts, or had done so on at least two occasions.[27] However, California courts have concluded that a "pattern of criminal activity" can be established by demonstrating that the defendant was involved in two or more incidents, or by demonstrating that multiple offenders committed one or more offenses in a single incident . . . ."[28] Further still, *Gardeley* holds that both offenses do not have to be gang related.[29] As one commentator pointed out,

> this means that in California, a juvenile who has sustained a previous juvenile petition prior to gang involvement will be eligible for prosecution under STEP once it is demonstrated that he had committed one of the enumerated crimes, *regardless of whether this individual acted alone or in the company of other gang members.*[30]

22. *Gardeley*, 14 Cal. 4th at 610.

23. CAL. PENAL CODE § 186.22(b)(2) (West 2003).

24. CAL. EVID. CODE § 1101(a) (West 2003); *see* Williams v. Superior Court, 36 Cal. 3d 441, 448 (1984).

25. CAL. EVID. CODE § 801 (West 2003).

26. Bjerregaard, *supra* note 5, at 46.

27. *Id. See* CAL. PENAL CODE § 186.21 (West 2003).

28. *Id.*

29. People v. Gardeley, 14 Cal. 4th 605, 621 (1997).

30. Bjerregaard, *supra* note 5, at 45 (emphasis added).

It is difficult to see how characterizing one illegal act committed without accompaniment as a pattern of criminal activity specifically addresses California's gang crisis.[31]

III. *People v. Gardeley*

People v. Gardeley represents a typical use of police expert testimony in a STEP prosecution.[32] In August 1992, around 2 a.m., Rochelle Lonel Gardeley, Tommie James Thompson, and Tyronne Watkins approached Edward Bruno, who had the misfortune of stopping to urinate in the carport of an apartment complex "controlled by the Family Crip gang."[33] The defendants robbed and beat Bruno, at one point breaking a large rock over his head.[34] A short time later, police officers stopped and searched a car in which Thompson was driving and Gardeley was a passenger.[35] The police recovered a small bag of cocaine and observed that Gardeley had a bloody lip and blood on his shirt.[36]

Gardeley and Thompson were charged with attempted murder, assault with a deadly weapon, and robbery.[37] Additionally, each of these offenses was alleged to have violated STEP.[38] At trial, the prosecution presented eyewitnesses and physical evidence regarding the attack on Bruno.[39] Then, the prosecution called Detective Boyd, as an expert witness, to testify on gang practices.[40] Detective Boyd had 23 years of experience in the investigation of criminal street gangs and had interviewed both Thompson and Gardeley after their arrests.[41] He had also interviewed Tyrone Watkins, Bruno's third assailant, who had been charged with Gardeley and Thompson, but pled to a lesser charge before trial.[42] When the prosecutor asked

31. *Id.*

32. *See* People v. Killebrew, 103 Cal. App. 4th 644, 657 (2002) (citing extensive list of criminal gang cases using expert testimony).

33. *Gardeley*, 14 Cal. 4th at 610.

34. *Id.*

35. *Id.* at 611.

36. *Id.*

37. *Id.*

38. *Gardeley*, 14 Cal. 4th at 611.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

Detective Boyd what Watkins had told him, the defense counsel objected on hearsay grounds.[43]

The prosecutor stated that he sought to elicit testimony from Detective Boyd "not for the truth of the matter asserted," but to give the jury the facts that formed the basis of his expert opinion.[44] The trial court held a hearing out of the presence of the jury to allow the prosecution to make an offer of proof about the hearsay evidence that he intended to present.[45] The prosecutor stated that he intended to have Detective Boyd testify about the facts surrounding the crimes upon which the prosecutor intended to establish the necessary pattern of criminal activity and predicate offenses.[46] During this hearing, Detective Boyd admitted that his opinion was not based on any personal knowledge.[47] Rather, he could only summarize information given to him by other officers and gang members.[48]

The trial court ruled that such evidence was admissible and qualified Detective Boyd as a gang expert.[49] The trial court told the prosecutor that the hearsay "cannot be considered for the truth of the matter, but can be considered as it related to the expert opinion."[50] The court then informed the jury that hearsay evidence would be admitted and gave them the limiting instruction that they "may not consider those statements for the truth of the matter, but only as they give rise . . . to the expert opinion . . . ."[51]

Detective Boyd testified that the defendants had told him they were gang members and revealed their Family Crip names.[52] He also gave opinion testimony that the gang's primary purpose was to sell narcotics as well as engage in witness intimidation and violence "to further its drug-dealing activities."[53] After being presented with hypothetical facts identical to the present case, Detective Boyd opined that the defendant's actions were clearly gang-related and

43. *Gardeley*, 14 Cal. 4th at 611-12.

44. *Id.* at 612.

45. *Gardeley*, 14 Cal. 4th at 612.

46. People v. Gardeley, 36 Cal. Rptr. 2d 136, 141 (Cal. Ct. App. 1994) (official reporter superseded by California Supreme Court decision in People v. Gardeley, 14 Cal. 4th 605 (1997)).

47. *Id.*

48. *Id.*

49. *Gardeley*, 14 Cal. 4th at 612.

50. *Gardeley*, 36 Cal. Rptr. 2d at 141.

51. *Gardeley*, 14 Cal. 4th at 612.

52. *Id.*

53. *Id.*

performed for the purpose of securing the gang's drug-dealing territory.[54]

Finally, Detective Boyd attempted to establish the additional required predicate offense by describing in detail three prior criminal incidents.[55] The first incident was a May 1993 shooting at an apartment complex involving defendant Thompson and one Mario Phipps. Detective Boyd confirmed that Mario Phipps was a Family Crip gang member.[56] The second incident was a July 1989 incident involving a "a threat against a drug dealer . . . by defendant Gardeley and three other persons, whom Detective Boyd testified were members of the Family Crip Gang.[57] The third incident related to the jury involved a December 1987 arrest of Gardeley for drug possession.[58] The trial court then allowed the prosecutor to admit certified copies of the information charging Mario Phipps and Gardeley, as well as abstracts of judgment documenting Phipps' and Gardeley's convictions for the prior offenses charged in these informations.[59]

A jury convicted defendants Gardeley and Thompson of attempted murder and assault with a deadly weapon.[60] The jury found that these offenses had been committed "for the benefit of, at the direction of, or in association with a criminal street gang" and Gardeley and Thompson were given sentences that included enhanced penalties under STEP.[61] The trial court sentenced Gardeley to state prison for 17 years and Thompson to state prison for 9 years.[62]

Both defendants appealed their conviction. They contended that the criminal street gang substantive offense and the STEP enhancement were not supported by substantial evidence.[63] Additionally, each contended that admission of hearsay evidence violated their constitutional right to confrontation.[64] The Court of Appeals affirmed the convictions of attempted murder and assault

54. *Id.* at 613.
55. *Id.*
56. *Gardeley*, 14 Cal. 4th at 613.
57. *Gardeley*, 14 Cal. 4th at 613.
58. *Id.*
59. *Id.* at 613-14.
60. *Id.* at 614.
61. *Id.*
62. *Gardeley*, 14 Cal. 4th at 614..
63. People v. Gardeley, 36 Cal. Rptr. 2d 136, 138 (Cal. Ct. App. 1994).
64. *Id.*

with a deadly weapon, but reversed the criminal street gang substantive offense and the gang related enhancements under STEP.[65] The court concluded that the prosecution had failed to prove the two or more predicate offenses required by statute to establish that Gardeley and Thompson were members of a criminal street gang within the meaning of the statute.[66]

The Court of Appeals was troubled that the prosecution chose to rely on hearsay testimony despite the "explicit ruling by the trial court that such testimony was inadmissible to prove the truth of the matter asserted."[67] The court noted that Detective Boyd admitted that he was not testifying from personal knowledge, but was only repeating what he had learned from gang members, other officers, and what he had read in police reports.[68] The court allowed that this evidence was admissible to show the jury the basis of his expert opinion.[69] However, the court emphasized that this evidence was not competent to serve as substantive proof of the required predicate offenses.[70] The court said that the elements of STEP, including the "offenses necessary to satisfy the pattern requirement," must be proven through competent evidence and that these predicate offenses must be gang-related.[71] The court reasoned that "[t]o allow otherwise would be to punish defendant for the *unrelated* actions of people with whom he associated."[72]

Specifically, the court stated that the prosecution had not proven the required second predicate offense.[73] On appeal, the State argued that STEP's required pattern of criminal activity had been adequately proven.[74] The first of the "two or more" enumerated offenses had been proven through eyewitness and physical evidence of the attack on Bruno. The State contended that the second offense had been proven through a combination of the certified copy of the abstract of judgment showing Mario Phipps' conviction for shooting into an inhabited dwelling and Detective Boyd's testimony of the events

65. *Gardeley*, 14 Cal. 4th at 614.
66. *Id.*
67. *Gardeley*, 36 Cal. Rptr. 2d at 142.
68. *Gardeley*, 36 Cal. Rptr. 2d at 141.
69. *Id.* at 142.
70. *Id.*
71. *Id.* at 141.
72. *Id.*
73. *Gardeley*, 36 Cal. Rptr. 2d at 142.
74. *Id.*

surrounding that shooting.[75]

The court disagreed, stating that the abstract of judgment was not proof that Mario Phipps' conviction was in anyway related to Gardeley, Thompson, or the Family Crip gang.[76] The court stated: "The People ignore that Officer Boyd's recitation of the facts surrounding this crime was hearsay admitted not for the truth of the matter asserted, but merely as the basis for expert testimony."[77] Furthermore, since the facts and assumptions that formed the basis for Detective Boyd's opinion were not based on personal knowledge, "those facts had to be proved by competent evidence elicited by other witnesses and/or physical evidence."[78] Finally, the court admonished, "while experts may offer opinions and the reasons for their opinions, they may not under the guise of reasons bring before the trier of fact incompetent hearsay evidence."[79]

IV. The California Supreme Court Opinion

The California Supreme Court reversed the Court of Appeals and reinstated Gardeley's and Thompson's STEP convictions.[80] The California Supreme Court found that the Court of Appeals erred in holding that the required predicate offenses have to be gang related.[81] The Court then found that the prosecution had proven the requisite pattern of criminal activity through competent evidence.[82]

The Court used *Gardeley* to reduce some of the confusion that surrounded STEP prosecutions.[83] The Court interpreted the STEP legislation to mean that as long as the predicate crime is one of the enumerated offenses, it does not have to be gang-related.[84] Furthermore, the Court clarified that the State can rely on the instant offense as one of the two required predicate offenses.[85] On its

75. *Id.* at 143.

76. *Id.*

77. *Id.*

78. *Gardeley*, 36 Cal. Rptr. 2d at 143.

79. *Gardeley*, 36 Cal. Rptr. 2d at 144 (quoted in *In re* Nathaniel C., 228 Cal. App. 3d 990, 1003-04 (1991)).

80. People v. Gardeley, 14 Cal. 4th 605, 626 (1997).

81. *Id.* at 610.

82. *Id.*

83. Pamela L. Schleher, *California Supreme Court Survey April 1996 - July 1997*, 25 PEPP. L. REV. 261, 265 (1997).

84. *Gardeley*, 14 Cal. 4th at 625 n.12.

85. *Id. See also* People v. Olguin, 31 Cal. App. 4th 1355, 1383 (1994).

surface, the decision appears to be a rational interpretation of the legislative intent behind the STEP statute. Certainly, *Gardeley* sends a message that crimes committed in furtherance of gang activity will be punished severely.[86] The Court erred, however, in stating that the predicate crime did not have to have any relationship to the criminal street gang.

Surely, though, the required predicate crime must have some relationship to the defendants or the criminal street gang at issue. Without Detective Boyd's hearsay testimony, there is nothing in the record that links Phipps' conviction to Gardeley or the Family Crip gang. In overlooking this fact, the Court missed a critical opportunity to reexamine the use of police expert testimony in STEP prosecutions.

V. Expert Testimony

The scope of permissible expert testimony has long been the source of critical commentary. Even states that purport to strictly regulate the type of evidence an expert is allowed to bring before a jury struggle with several issues.[87] First, if police officers are allowed to testify as experts, how strenuously should a trial judge test the credibility of the underlying data on which the officer has based his opinion?[88] Second, if the court allows the officer to give his opinion, should the officer be allowed to relate any hearsay evidence that formed the basis of his in-court opinion?[89] Finally, should the underlying basis of the police officer's testimony be admissible as substantive evidence? When police officers testify as expert witnesses the inherent prejudicial dangers of expert testimony are magnified by their official status.[90] Furthermore, in criminal cases, police expert testimony poses a serious risk to a defendant's Sixth Amendment right of confrontation.[91]

Under the former common law system, expert witnesses were allowed to state their opinions only on facts already admitted into evidence or those gained from firsthand knowledge.[92] The expert

86. Schleher, *supra* note 83, at 265.

87. Ronald L. Carlson, *Experts, Judges, and Commentators: The Underlying Debate About an Expert's Underlying Data*, 47 MERCER L. REV. 481, 482-83 (1996).

88. *Id.*

89. Carlson, *supra* note 87, at 483.

90. *See infra* Part VIII.

91. *See infra* Part VI.

92. Roberta N. Buratti, *What is the Status of "Inadmissible" Bases of Expert*

either attended the trial and listened to the witnesses or was asked a hypothetical question based on evidence that had been introduced at the trial.[93] Hearsay problems were avoided because the experts were limited to opinions based only on admissible evidence.[94]

In 1966, California adopted the first evidence code that allowed experts to base their opinions on information that was not received into evidence.[95] California evidence law permits a person with "special knowledge, skill, experience, training or education" in a particular field to qualify as an expert witness.[96] Such an expert is allowed to testify only if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of the expert would assist the trier-of-fact."[97] If a witness is testifying as an expert, his testimony is limited to an opinion "based on matter . . . perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type reasonably relied upon by an expert in forming an opinion . . . ."[98] A fair reading of California Evidence Code section 801 seems restrictive in its application to hearsay evidence. The drafters intended that the use of inadmissible evidence would be determined case-by-case and would not form the basis of all expert testimony.[99]

Accordingly, expert opinions may be based on inadmissible evidence only if it is material that is of a type reasonably relied upon by other experts in their field.[100] Also, any material that forms the basis of an expert's opinion must be reliable.[101] Read together, California Evidence Code sections 720 and 801(b) mandate that trial courts act as gatekeepers, screening expert testimony to ensure that

---

Testimony?, 77 MARQ. L. REV. 531 (1994); JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 14 (4th ed. 1992).

93. Buratti, *supra* note 92, at 531.

94. *Id.* at 531-32.

95. Charles J. Walsh & Beth S. Rose, *Increasing the Useful Information Provided by Experts in the Courtroom: A Comparision of Federal Rules of Evidence 703 and 803(18) with the Evidence Rules in Illinois, Ohio, and New York*, 26 SETON HALL L. REV. 183, 196-97 (1995).

96. CAL. EVID. CODE § 720 (West 2003); People v. Gardeley, 14 Cal. 4th 605, 617 (1997).

97. CAL. EVID. CODE § 801(a) (West 2003).

98. *Id.* § 801(b).

99. Walsh & Rose, *supra* note 95, at 197.

100. CAL. EVID. CODE § 801(b); *Gardeley*, 14 Cal. 4th at 618.

101. *Gardeley*, 14 Cal. 4th at 618.

its basis is reliable.[102] Courts have an obligation to limit expert testimony to the area of the professed expertise and to require reliable foundations for the opinion.[103] If the articulated basis is not reliable, then the opinion has no evidentiary value and must be excluded.[104]

As the California Supreme Court noted in *Gardeley*, "the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based."[105] The trial court retains "considerable discretion" to control the manner in which an expert is questioned in order to prevent the jury from learning of incompetent hearsay.[106] Mere recitation of sources on which an expert relied upon in making his opinion "does not transform inadmissible matter into independent proof."[107]

California Evidence Code section 802 allows an expert to "state on direct examination the reasons for his opinion and the matter . . . upon which it is based . . . ."[108] However, section 802 does not address whether or not those reasons may be received as independent evidence. Even when gang evidence is relevant and admissible under a specific evidence code section, the court may still refuse to admit it if its probative value is outweighed by prejudice to the defendant.[109] When such prejudice exists, courts should refuse to admit such evidence under California Evidence Code section 352.[110] The California Supreme Court has stated, "where the risk of improper use of the hearsay outweighs its probative value as a basis for the expert opinion it may be necessary to exclude the evidence altogether."[111] The *Gardeley* court notes that under Federal Rule of Evidence (FRE)

---

102. *Id.* at 617-18; *see also* Thomas R. Freeman, *Guardians at the Gate: In Both Federal and California Courts, Judicial Scrutiny Has Been Extended From Scientific to Nonscientific Expert Testimony*, L.A. LAW., Aug. 24, 2001, at 26 (discussing CAL. EVID. CODE § 801(b)).

103. *Gardeley*, 14 Cal. 4th at 618.

104. *Id.*

105. *Id.*

106. *Id.* at 619.

107. *Id.*

108. CAL. EVID. CODE § 802 (West 2003).

109. Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 764 (1990).

110. CAL. EVID. CODE § 352; *see* Freeman, *supra* note 102.

111. People v. Coleman, 38 Cal. 3d 69, 92 (1985).

Rule 703, "evidence admitted solely to form the basis of an expert's opinion will not support a prima facie case."[112]

The debate over whether expert witnesses should be allowed to introduce hearsay evidence into the trial record is really part of a larger question: how active should the trial court be in policing expert testimony?[113] At trial, the judge's responsibility includes not only deciding whether a piece of evidence is reliable proof of a fact in issue, but also "whether the jury is likely to misuse the item as proof of another fact."[114] Allowing a prosecutor to elicit (or an expert to give) a description of technically inadmissible evidence would severely curtail judicial authority.[115] Such a passive approach would mean that "rigorous application of hearsay doctrine, requiring that the author of the underlying hearsay document be present or at least have been cross-examined, is abandoned."[116] With the adoption of the revised FRE 703, it is clear that the drafters did not intend to so curb a judge's power.

Before *Gardeley*, California took one of the most restrictive approaches towards admitting the basis of an expert's testimony.[117] Yet after stating the general rules governing expert testimony, the Court in *Gardeley* stated: "Detective Boyd could testify as an expert witness and could reveal the information on which he had relied in forming his expert opinion, including hearsay."[118] As an expert witness, Detective Boyd stated that the attack on Bruno was a "'classic' example of gang-related activity."[119] As the basis for his expert opinion, Detective Boyd was allowed to relate to the jury hearsay statements that incriminated Watkins and Thompson.[120]

Much of this hearsay testimony was extremely prejudicial.

---

112. *Gardeley*, 14 Cal. 4th at 619 (quoting Michael H. Graham, *Expert Witness Testimony and Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U. ILL. L. REV. 43, 66 (1986)).

113. Ronald L. Carlson, *Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony*, 76 MINN. L. REV. 859 (1992); Freeman, *supra* note 102.

114. Edward J. Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, 47 MERCER L. REV. 447, 479 (1996).

115. *Id.*

116. Carlson, *supra* note 113, at 860.

117. Carlson, *supra* note 87, at 483; *see also* People v. Nicolous, 54 Cal. 3d 551 (1991) (holding that while an expert may give reasons on direct for his opinions, he may not under the guise of reasons bring before the jury incompetent hearsay).

118. People v. Gardeley, 14 Cal. 4th 605, 619 (1997).

119. *Id.*

120. *Id.*

Detective Boyd testified that Gardeley had attempted to coerce an independent drug dealer named Michael Haliburton to sell drugs for the Family Crip gang.[121] Gardeley allegedly followed Haliburton home, called his mother to the door, and told her to bring Haliburton outside "so they could kill him."[122] Boyd also described to the jury an incident where Gardeley was allegedly flagging down cars in order to make narcotics sales. The most egregious example of hearsay testimony came when Detective Boyd testified about the circumstances surrounding the conviction of Mario Phipps.[123] Detective Boyd testified that Phipps and Thompson were involved in a fight with members of the "415 E.P.A. Killers" gang and that Family Crip members arrived "wearing hoods and carrying shotguns and shot up the apartment complex."[124]

Ordinarily, evidence of gang membership or other prior criminal acts is not admissible to show a defendant's bad character or criminal propensities.[125] Even if the evidence is relevant for another reason such as motive or intent, it may still be inadmissible if the probative value is outweighed by prejudice to the defendant.[126] Here, though, Detective Boyd was permitted to relate both of these stories to the jury simply to give them the basis of his expert opinion. The obvious effect of such evidence was to prejudice the jury against Gardeley and Thompson. As one commentator stated:

> What criminal trial lawyer has not been frustrated by an opposing expert witness who, during direct examination, orally dumps into the record for the jury to hear, hearsay statements of others, the contents of inadmissible documents and loads of other inadmissible evidence upon which the expert says he 'relied' in forming his opinion?[127]

The Court declared in a footnote that there was no reason to decide whether Detective Boyd's expert testimony was admissible as substantive evidence because they had already decided that the second predicate crime did not have to be gang-related.[128] The

121. People v. Gardeley, 36 Cal. Rptr. 2d 136, 140 (Cal. Ct. App. 1994).

122. *Id.*

123. *Id.* at 139-40.

124. *Id.*

125. CAL. EVID. CODE § 1101(a) (West 2003).

126. *Id.* § 352; Burrell, *supra* note 109, at 764.

127. Carlson, *supra* note 113, at 868.

128. People v. Gardeley, 14 Cal. 4th 605, 624 n.10 (1997).

California Supreme Court did not disagree with the Court of Appeals' characterization of Detective Boyd's expert testimony. However, the Court saw this testimony as existing solely to establish that the second predicate crime committed by Mario Phipps was gang-related in the sense that it was committed "for the benefit of, at the direction of, or in association with" the Family Crip gang.[129]

The Court makes a crucial error in not realizing that without Detective Boyd's testimony, there is no credible evidence that Phipps is even a *member* of the gang. Arguably, if the certified copy of the abstract of judgment showing Phipps' conviction contained this information about Phipps' gang membership, then this information would have been established without the expert testimony.[130] The Court chose not to decide whether the documentary evidence of the conviction constituted hearsay evidence when the prosecution offered it to prove the truth of matters contained in that judgment.[131] Certainly, today after the passage of Evidence Code section 452.5, a certified copy of conviction is admissible to prove both the fact of conviction and also that the offense reflected in the record occurred.[132] Not all records of conviction, however, will contain the information about which the expert testifies. For example, Phipps' record of conviction would not necessarily specify that he was a Family Crip gang member.

The California Supreme Court plainly stated that the required predicate crime was satisfied by the record of conviction of "one Mario Phipps (who Detective Boyd testified was a member of the Family Crip gang)...."[133] Therefore, Detective Boyd's obvious hearsay testimony was admitted substantively to prove that Phipps was a Family Crip gang member. Even if the record of conviction was sufficient to establish Phipps' gang membership and the required predicate crime, then Detective Boyd's expert testimony should have been excluded as cumulative and lacking in probative value under California Evidence Code section 352.

Nationally, the debate over the admissibility of expert testimony came to a head in 2000 with the adoption of revised FRE 703.[134]

---

129. *Id.* at 621.

130. *Id.* at 624.

131. *Id.* at 624 n.11.

132. CAL. EVID. CODE § 425.5 (West 2003); People v. Duran, 97 Cal. App. 4th 1448, 1461 (2002).

133. *Gardeley*, 14 Cal. 4th at 624.

134. FED. R. EVID. 703 (West 2003).

Commentators believe that FRE 703 will determine "most of the future development of expert witness law."[135] As revised, FRE 703 states that the bases underlying an expert's opinion shall not be disclosed to a jury "unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion *substantially* outweighs their prejudicial effect."[136] This standard is more restrictive than California Evidence Rule 352.[137] The Advisory Committee's note explains that Rule 703 was amended to emphasize that "the underlying information is not admissible simply because the opinion or inference is admitted."[138] It seems doubtful that Detective Boyd's testimony would have been admissible under FRE 703.

In future cases, California courts should look to Revised FRE 703 and reaffirm their restrictive approach to expert testimony. California courts set an important national precedent.[139] Not only was California the first state to pass anti-gang legislation, but California court holdings are also used as guidance for other states' interpretation of their own street-gang statutes.[140] A restrictive approach helps to ensure that the jury has access to reliable information while minimizing prejudice resulting from the jury's misuse of the information.[141] Such an approach will go far toward restoring fairness in street gang prosecutions nationwide.

VI. Confrontation Clause

While the rule governing the admissibility of expert testimony present significant problems in civil cases, "[i]n criminal cases, misapplication of the rule can result in destruction of constitutional rights."[142] Evidence that rests on hearsay statements in any important way should be challenged under the Confrontation Clause when offered against criminal defendants. The Sixth Amendment gives a criminal defendant the right "to be confronted with the witnesses

135. Carlson, *supra* note 87, at 482; Imwinkelried, *supra* note 114.

136. FED. R. EVID. 703 (emphasis added).

137. CAL. EVID. CODE § 352 ("The court in its discretion may exclude evidence if its probative value is substantially outweighed by... substantial danger of undue prejudice....")

138. FED. R. EVID. 703 advisory committee's note.

139. Walsh & Rose, *supra* note 95, at 198.

140. *See, e.g.*, State v. Lewis 514 N.W.2d 63, 68 (Iowa 1994); State v. Carillo, 623 N.W.2d 922 (Minn. Ct. App. 2001).

141. Richard L. Carlson, *Is Revised Expert Witness Rule 703 A Critical Modernization for the New Century?*, 52 FLA. L. REV. 715, 742-743 (2000).

142. Carlson, *supra* note 141, at 725.

against him."[143] The Confrontation Clause is a part of our Bill of Rights and is made obligatory on the states by the 14th Amendment.[144]

Historically, the Confrontation Clause was intended to curb the legal abuses that occurred in English criminal trials prior to the 17th Century.[145] The primary purpose of the Confrontation Clause was "to prevent the trial of individuals based solely on accusations made anonymously or by the use of *ex parte* depositions or affidavits."[146] The Supreme Court has stated that the Confrontation Clause exists "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."[147] The Confrontation Clause also serves to protect "the integrity of the adversary system."[148]

Until 2004, *Ohio v. Roberts* represented the landmark guide to Confrontation Clause analysis.[149] *Roberts* presented a general two-prong test for determining whether a defendant's right to confront witnesses against him was violated by hearsay testimony.[150] The first prong is a "rule of necessity" that mandates that "the prosecution must either produce, or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant."[151] However, *Roberts* indicated that unavailability "is not always required."[152] In a footnote, the Court stated that the prosecution need not produce a seemingly available witness "when 'the utility of trial confrontation' is remote."[153] In more recent cases, the Court has simply refused to apply the unavailability requirement.[154]

---

143. U.S. CONST. amend. VI.

144. *See* Pointer v. Texas, 380 U.S. 400, 403, 406 (1965) (incorporating the Confrontation Clause into the protections assured by due process, thus applying in state courts).

145. Judge Joan Comparet-Cassani, *Balancing the Anonymity of Threatened Witnesses Versus a Defendant's Right of Confrontation: The Waiver Doctrine After Alvarado*, 39 SAN DIEGO L. REV. 1165, 1180 (2002).

146. *Id.*; *see also* Mattox v. United States, 156 U.S. 237, 242 (1895); California v. Green, 399 U.S. 149, 156 (1970); White v. Illinois, 502 U.S. 346, 362 (1992) (Thomas, J., concurring).

147. Maryland v. Craig, 497 U.S. 836, 845 (1990).

148. Comparet-Cassani, *supra* note 145, at 1189.

149. 448 U.S. 56 (1980); *see* Crawford v. Washington, 124 S. Ct. 1354 (2004).

150. *Roberts*, 448 U.S. at 65.

151. *Id.*

152. *Id.* at 65 n.7.

153. *Roberts*, 448 U.S. at 65 n.7.

154. *See* White v. Illinois, 502 U.S. 346 (1992); United States v. Inadi, 475 U.S. 387

The second prong begins once a witness has been shown to be unavailable.[155] If the declarant is shown to be unavailable, then the out-of-court testimony must have an "adequate indicia of reliability" before it can be admitted into evidence.[156] The second prong is satisfied when "the evidence falls within a firmly rooted hearsay exception" or has "particularized guarantees of trustworthiness."[157] Firmly rooted exceptions to the hearsay rule include former testimony,[158] dying declarations,[159] business and public records,[160] statements made by co-conspirators,[161] excited utterances,[162] medical statements,[163] and past recollection recorded.[164] In general, however, a jury may consider hearsay evidence only if the witness is truly unavailable and the evidence is sufficiently reliable.[165]

The inherent danger of "hearsay statements is that they may have been made under circumstances subject to none of the protections provided by the Sixth Amendment, such as cross-examination, oath, or facial confrontation, and may thus be unreliable."[166] However, the right of the accused to confront witnesses against him is not absolute. The rights guaranteed by the Sixth Amendment may be waived, forfeited, or limited as any other constitutional right.[167] As discussed, the right is subject to recognized hearsay exceptions.[168]

Although the Constitution favors a defendant's face-to-face confrontation with the witnesses against him, the use of hearsay evidence is not automatically a violation of the Sixth Amendment.[169]

(1986).

155. *Roberts*, 448 U.S. at 65.

156. *Id.* at 66.

157. *Id.*

158. *Id.* at 66 n.8.

159. *Id.*

160. *Roberts*, 448 U.S. at 66 n.8.

161. Bourjaily v. United States, 483 U.S. 171, 183 (1987).

162. White v. Illinois, 502 U.S. 346, 355-57 (1992).

163. *Id.*

164. United States v. Cambindo Valencia, 609 F.2d 603, 633 (2d Cir. 1979).

165. Ruth L. Friedman, Comment, *The Confrontation Clause in Search of a Paradigm: Has Public Policy Trumped the Constitution?*, 22 PACE L. REV. 455, 477 (2002); *see also Roberts*, 448 U.S. at 65.

166. Comparet-Cassani, *supra* note 145, at 1191-92.

167. *Id.* at 1191.

168. *Id.*; *see also* Coy v. Iowa, 487 U.S. 1012, 1020-21 (1986); *White*, 502 U.S. at 355.

169. Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A*

Under *Roberts*, hearsay evidence that does not fit into a firmly rooted hearsay exception may still be used if the prosecutor can demonstrate the sufficient level of reliability.[170] Often, it is difficult to predict whether any particular piece of evidence will violate the Constitution outside the context in which the evidence is used.[171]

Frustrated by this unpredictability, the Supreme Court recently announced a transformation of its Confrontation Clause analysis.[172] *Crawford v. Washington* largely discards *Roberts*' two-pronged test and replaces it with a "testimonial" approach to the Confrontation Clause.[173] Under *Crawford*, the primary inquiry centers around whether a statement is considered testimonial.[174] If the statement is testimonial, and is offered to prove its truth, then it cannot be admitted unless the defendant has an opportunity for cross-examination.[175] In marked contrast to *Roberts*, "reliability cannot be a substitute for cross-examination."[176] Ideally this cross-examination should occur at trial.[177] However, if the maker of the testimonial statement is unavailable to testify at trial, then a prior opportunity for cross-examination may be sufficient.[178]

The Supreme Court neglected to provide a comprehensive definition of which statements should be considered testimonial.[179] At the minimum, testimonial statements include "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."[180] In *Gardeley*, the information supplied by Detective Boyd would appear to fall within this category. Indeed, *Crawford* itself involved testimony recorded by police officers during station-house interrogations.[181]

Response to Professor Carlson, 40 VAND. L. REV. 583, 595 (1987).

170. *Id.*

171. *Id.*

172. Crawford v. Washington, 124 S. Ct. 1354 (2004).

173. *Id.* at 1374; *see also* Richard D. Friedman, *Adjusting to* Crawford*: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. MAG. 4 (2004).

174. 124 S. Ct. at 1365.

175. *Id.* at 1368.

176. Friedman, *supra* note 173, at 7.

177. *Id.*

178. *Crawford*, 124 S. Ct. at 1365-66.

179. *Id.* at 1374.

180. *Id.*

181. *Id.* at 1356-57.

However, the Court indicated that statements that are offered for reasons other than their truth are not considered testimonial under *Crawford*.[182] In *Gardeley*, Detective Boyd's testimony was admitted to show the jury the basis of his expert opinion.[183] A danger exists that these types of statements may not be considered testimonial by some courts. Prosecutors should not be able to evade a Confrontation Clause analysis simply by arguing that such evidence is not being offered for its truth.[184]

If a statement is deemed non-testimonial under *Crawford*, it is unclear how a court should analyze it under the Confrontation Clause.[185] Are such statements exempt from Confrontation Clause scrutiny? Should *Roberts* be applied? The Court indicated that states should be allowed "flexibility in their development of hearsay law."[186] After *Crawford*, at least two courts have proceeded to analyze statements under *Roberts* after concluding that they were non-testimonial.[187] It seems likely that *Roberts* will continue to be used until the Court declares that the Confrontation Clause does not apply at all to non-testimonial statements.[188]

Before *Crawford*, at least one state found constitutional violations caused by expert testimony. In *State v. Towne*, for example, Confrontation Clause violations occurred when an expert witness was allowed to testify that the defendant was competent.[189] As a basis for his opinion, the testifying expert relied on a book written by another, non-testifying doctor.[190] The testifying expert stated that this other doctor's opinion was "in concurrence" with his own.[191] The Vermont Supreme Court was not persuaded by the prosecution's argument that the outside evidence was offered only to show the basis for the expert testimony.[192] The Court stated that the admission of the non-testifying doctor's opinion violated the

182. *Crawford*, 124 S. Ct. at 1369 n.9; *see* Tennessee v. Street, 471 U.S. 409, 414 (1985).

183. *See infra* Part III.

184. Friedman, *supra* note 173, at 7.

185. *Crawford*, 124 S. Ct. at 1374.

186. *Id.*

187. *See* State v. Rivera, 844 A.2d 191, 200-01 (Conn. 2004); People v. Coker, No. 238738, 238739, 2004 WL 626855, at *6 n.5 (Mich. Ct. App. 2004).

188. Friedman, *supra* note 173, at 13.

189. 453 A.2d 1133, 1136 (Vt. 1982).

190. *Id.* at 1134.

191. *Id.* at 1136.

192. *Id.* at 1135.

defendant's Sixth Amendment right to confrontation because the defense was prevented from cross-examining the out-of-court declarant.[193]

The Supreme Court's interest in testing reliability through cross-examination represents a basic evidentiary dimension underlying the Confrontation Clause.[194] In this sense, the purpose of the hearsay rule and the Confrontation Clause are parallel.[195] However, one evidence scholar has argued that the Confrontation Clause, when considered as part of the entire Bill of Rights, functions to restrain "the capricious use of governmental power" especially the power of the government to convict criminal defendants using manufactured or carefully orchestrated hearsay statements.[196]

This interpretation of the Bill of Rights views the Confrontation Clause as a check against the might of government-sponsored prosecutions. There is a potential for abuse when the government is allowed to use evidence obtained through private interviews. "The prosecution has the incentive and the power to shape the witness's answers in accordance with its theory of the case."[197] Therefore, hearsay statements procured by the prosecution or police should be treated differently than hearsay created without governmental intrusion.[198] In particular, hearsay statements elicited by government agents as part of planned interviews should be excluded unless the declarant is produced at trial.[199] As the *Crawford* Court realized, these types of planned custodial interviews, like the interviews of Gardeley and Thompson, are dangerous precisely because the officer may realize that the defendant will not testify at trial.[200]

VII. Denial of Writ of *Habeas Corpus*

After the California Supreme Court reinstated his STEP conviction, Gardeley filed a petition for a writ of habeas corpus in

193. *Id.* at 1136.

194. Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623, 627 (1992).

195. *Id.*

196. Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 559-60 (1992).

197. Berger, *supra* note 196, at 561.

198. *Id.*

199. *Id.* at 562, 609.

200. Crawford v. Washington, 124 S. Ct. 1354, 1367 n.7 (2004); Berger, *supra* note 196, at 609.

federal court in the Northern District of California.[201] Gardeley asserted among other claims that the admission of hearsay evidence in support of the STEP offense violated his Sixth Amendment rights by denying him the right to confront and cross-examine witnesses against him.[202] The court denied his petition, deferring to the California Supreme Court's decision because it was not "contrary to, [n]or involved an unreasonable application of clearly established Supreme Court precedent."[203] The California Supreme Court's conclusion that STEP does not require that the predicate offenses be gang-related was binding on the federal district court.[204] Therefore, the federal court found that Detective Boyd's testimony was irrelevant to Gardeley's trial and conviction.[205]

The federal district court stated that a defendant's right to confront witnesses through confrontation "is limited to issues relevant to the trial."[206] Since the California Supreme Court's decision that predicate crimes did not have to be gang-related was binding, the federal court was unable to reach the issue of whether or not Detective Boyd's expert testimony violated Gardeley's constitutional right to confrontation. This denial of Gardeley's petition for habeas corpus relief only reinforces the danger caused by the California Supreme Court's decision. If federal courts continue to be this deferential, it is imperative that California courts take a more exacting look at how expert testimony is being used.

If the California Supreme Court had correctly identified the substantive use of Detective Boyd's expert testimony in *Gardeley*, then the issue would have been ripe for Confrontation Clause analysis. Detective Boyd testified that Mario Phipps was a member of the Family Crip street gang. Either Thompson, who allegedly acted with Phipps, or Phipps himself, had given this information to Detective Boyd. It is also possible that this information came to Boyd from fellow officers. Under *Crawford*, such substantive use of hearsay evidence generated by police investigation should clearly be considered testimonial. Because the defendants in *Gardeley* had no

201. Gardeley v. Clarke, No. C98-3832 VRW, 1999 WL 672320, at *1 (N.D. Cal. 1999).

202. *Id.* at *4.

203. *Gardeley*, No. C98-3832 VRW, 1999 WL 672320, at *6; *see* 28 U.S.C. § 2254(d)(1) (2002); Davis v. Kramer, 167 F.3d 494, 500 (9th Cir. 1999).

204. *Gardeley*, 1999 WL 672320, at *8; *see* Stanton v. Benzler, 146 F.3d 726, 728 (9th Cir. 1998).

205. *Gardeley*, 1999 WL 672320, at *8; *see* United States v. Bonanno, 852 F.2d 434 (9th Cir. 1988).

206. *Gardeley*, 1999 WL 672320, at *8.

opportunity to cross-examine the sources of Detective Boyd's information, his testimony should have been excluded.

Even under *Roberts*' looser standards, the basis of Detective Boyd's expert opinion should not have been admitted. Under *Roberts*, the State would have to show that the out-of-court declarant was unavailable. In *Gardeley*, the State made no such showing. Nothing was mentioned of Phipps' unavailability and there was no indication that Thompson refused to testify on Fifth Amendment grounds. Even if Thompson had refused to testify, the court still should have weighed the potential for prejudice under California Evidence Code section 352.

If unavailability were not required, the testimony would still need to be admissible under a firmly rooted hearsay exception or its reliability shown through some other particularized guarantee of trustworthiness.[207] California's evidence code does not specifically address whether the basis of an expert's opinion could be admitted as substantive evidence.[208] In *Gardeley*, the California Supreme Court cites a case that dates back to 1895 as support for allowing an expert to describe the basis of his opinion.[209] *People v. Shattuck* states that "the party is entitled to have the reasons for the [expert's] opinion, so the jury can estimate its value."[210] However, *Shattuck* does not discuss the substantive use of such evidence.[211] It is not obvious that the State can demonstrate that such a firmly rooted hearsay exception exists. Furthermore, police expert gang testimony has no particularized guarantee of trustworthiness.

VIII. Police Experts

Many police departments now have specialized prosecutorial and police gang units. Prosecutors increasingly rely on "gang experts" to present information to the jury about gang membership, signs and activities. These "experts" are generally police officers whose expertise derives from their experience working in the gang unit.[212] However, it is important to remember that just because an officer has been assigned to the gang unit or has made gang-related arrests does

207. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

208. CAL. EVID. CODE § 802 (West 2003).

209. People v. Gardeley, 14 Cal. 4th 605, 618 (1997).

210. 109 Cal. 673, 679 (1895).

211. *Id.*

212. Burrell, *supra* note 109, at 770.

not necessarily qualify that officer as an expert.[213] California Evidence Code section 720(a) requires that an expert possess "special knowledge, skill, experience, training or education" in the subject to which his testimony relates.[214] Street experience does not transform officers into behavioral scientists who can predict individual or group behavior.[215] If challenged, these qualifications must be demonstrated before the witness may testify as an expert.[216] As one commentator points out, "[r]epeated observations of an event without inquiry, analysis, or experiment does not turn the mere observer into an expert."[217]

When police officers testify as experts there exists a special danger of prejudice to a defendant.[218] Many jurors believe that police officers possess an "aura of special reliability and trustworthiness."[219] The jury may believe that the officer knows information that supports his testimony that is not presented to the jury.[220] The police officer's expert testimony then may be given more credence than is warranted.[221] However, as one commentator notes, it is important to remember "that an officer's expertise lies in determining when a search or arrest is justified, not in determining when a defendant should be convicted."[222] A jury may misuse an officer's opinion that the defendant was engaging in criminal behavior as substantive evidence of the defendant's guilt.[223]

Like Detective Boyd's testimony, gang evidence contained in police reports and gathered by police experts is often based on rumor or multi-level hearsay.[224] "Information entered in official gang files may sound unimpeachable, yet mistakes are often made."[225] As

213. *Id.*

214. CAL. EVID. CODE § 720(a) (West 2003).

215. Burrell, *supra* note 109, at 771 (quoting People v. Sergill, 138 Cal. App. 3d 34 (1982)).

216. CAL. EVID. CODE § 720(a).

217. Burrell, *supra* note 109, at 770; *see* People v. Hogan, 31 Cal. 3d 815, 852-53 (1982).

218. Deon J. Nossel, Note, *The Admissibility of Ultimate Issue Testimony By Law Enforcement Officers in Criminal Trials*, 93 COLUM. L. REV. 231, 245-49 (1993).

219. *Id.* at 246 (quoting United States v. Young, 745 F.2d 733, 765-66 (2d Cir. 1984)).

220. *Id.* at 245.

221. Nossel, *supra* note 218, at 245.

222. *Id.* at 246-47.

223. *Id.* at 247.

224. Burrell, *supra* note 109, at 767.

225. *Id.* at 751 (quoting a Los Angeles police detective who said, "So many people have the same monikers that not only do you have to know the moniker, but what gang

defense counsel, it is important to determine the source of any conclusory statements concerning gang membership and to move for exclusion of testimony that is not based on personal knowledge.[226]

Detective Boyd based his opinion on custodial interviews with the defendants, their co-conspirators, other gang members and fellow officers.[227] There is nothing inherently reliable about interviews with suspected gang members that have been arrested. It is these types of custodial interviews that should be viewed skeptically under the Confrontation Clause. An experienced officer like Detective Boyd may convince a jury of the truth of his testimony based solely on his aura of trustworthiness if the jury has no chance to judge the credibility of the out-of-court declarant. If examined under the Confrontation Clause, it is unlikely that such testimony would satisfy the reliability prong.

IX. Inadequacy of Limiting Instructions

The problems of police expert testimony cannot be eliminated through judicial limiting instructions. Judge Learned Hand once wrote that limiting instructions are "a mental gymnastic which is beyond, not only [the jury's] power, but anybody's else."[228] It is dangerous to assume that jurors can properly limit their consideration of hearsay evidence to assess *only* the quality or basis of the expert's opinion. Even if a trial judge correctly admonishes the jury that they should not consider the basis of an expert's testimony as substantive evidence, studies have shown that this might cause the jury to give such evidence more weight than if they had not been instructed at all.[229] Empirical studies demonstrate that juries use background hearsay to reach decisions, despite judicial limiting instructions.[230] "Limiting instructions do not seem to prevent jurors from using inadmissible hearsay for the truth of the hearsay assertions and may

---

and what clique within the gang .... You can't arbitrarily go after Gumby unless you know what Gumby you are looking for because there might be a few Gumbies." Paul Feldman, *Gang Nicknames: Sometimes It Gets to Be Too Insane*, L.A. TIMES, Oct. 15, 1985, at II-3.).

226. *Id.* at 767.

227. People v. Gardeley, 36 Cal. Rptr. 2d 136, 139 (Cal. Ct. App. 1994).

228. Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).

229. Lisa Eichhorn, *Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence*, 42 LAW & CONTEMP. PROBS. 341, 344 (1989).

230. Carlson, *supra* note 141, at 734-36.

even highlight the inadmissible material."[231] Even the California Supreme Court recognizes that in "aggravated situations" a limiting instruction may not be an effective remedy.[232] This danger of prejudice caused by misuse is unacceptable.

Even the commentators who argue that the underlying data of an expert's opinion should be admitted for the purpose of showing the jury the basis of the expert's opinion recognize that limiting instructions under these circumstances are "pure fiction."[233] Professor Rice states that "instructing the jury not to accept the recited facts as true (even though the expert did) . . ." is absurd.[234] Further, the Advisory Committee to the Federal Rules of Evidence acknowledged that this distinction is one "most unlikely to be made by juries."[235] Since limiting instructions are ineffective in preventing a jury from using the underlying bases of an expert's opinion as substantive evidence, the better approach is to exclude such testimony of any underlying data not independently admissible.[236]

X. Conclusion

In *Gardeley*, the California Supreme Court missed a critical opportunity to emphasize the trial court's gatekeeping role to vigorously screen expert testimony and exclude those opinions that are unreliable. The court allowed the hearsay basis of a police officer's expert opinion to be used as substantive evidence to convict Rochelle Gardeley. This evidence would arguably have been excluded if challenged under either Federal Rule of Evidence 703 or the Sixth Amendment's Confrontation Clause. California should use the recent revision of Rule 703 as an opportunity to reaffirm its own restrictive attitude toward police expert testimony.

Until California courts mandate a more active judicial gatekeeping role, it is critically important that defense attorneys challenge all such police expert testimony. "The burden of calling attention to an expert's flawed bases falls squarely on trial lawyers who must make astute and incisive decisions."[237] Defense counsel

231. Carlson, *supra* note 87, at 485; *see also* Regina A. Schuller, *Expert Evidence and Hearsay*, 19 LAW & HUM. BEHAV. 345 (1995).

232. People v. Coleman, 38 Cal. 3d 69, 92 (1985).

233. Rice, *supra* note 169, at 585-86.

234. *Id.* at 585.

235. FED. R. EVID. 803(4) advisory committee's note.

236. Buratti, *supra* note 92, at 541.

237. Carlson, *supra* note 87, at 481.

should continue to demand proof by sufficient and competent evidence of an expert's qualifications and opinions.[238] The ultimate goal of the criminal justice system is defeated if judgments are founded on a partial and speculative presentation of the facts.[239]

238. Burrell, *supra* note 109, at 772-73.

239. Comparet-Cassani, *supra* note 145, at 1189.

* * *