STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

LEVON LEE BYNUM,

Defendant-Appellee.
_____/

Michigan Supreme Court
No. 147261

Michigan Court of Appeals
No. 307028

Calhoun County Circuit Court
No. 2011-001705-FC

AMICUS CURIAE BRIEF OF

CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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INTEREST OF AMICUS CURIAE

Since its founding in 1976, Criminal Defense Attorneys of Michigan (CDAM) has been the statewide association of criminal defense lawyers in Michigan, representing the interests of the criminal defense bar in a wide array of matters. CDAM has approximately 458 members.

As reflected in its by-laws, CDAM exists in part to "promote expertise in the area of criminal law, constitutional law and procedure and to improve trial, administrative and appellate advocacy," "provide superior training for persons engaged in criminal defense," "educate the bench, bar and public of the need for quality and integrity in defense services and representation," and "guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws." Toward these ends, CDAM regularly conducts training seminars for criminal defense attorneys, publishes a newsletter with articles on various subjects relating to criminal law and procedure, provides relevant information to the state legislature regarding contemplated changes of laws, engages in other educational activities and participates as an amicus curiae in litigation of relevance to the organization's interests. As in this case, CDAM is often invited to file briefs amicus curiae by the Michigan appellate courts.

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STATEMENT OF FACTS

A. The Shooting

On the evening of August 28, 2010, a group of four men, including Larry Carter, were traveling around Battle Creek in a Cadillac Sedan DeVille, stopping at various houses, drinking vodka, and smoking marijuana. When asked how much vodka and marijuana he had consumed, one of the men testified, "Man, it was a bunch," and that he was "definitely" "pretty high" that night. (70a-71a.)

While en route from one house to another, the men passed Sam's Discount Party Store on Dickman Road, where they noticed a group of "[l]ike ten or fifteen" people standing in the parking lot. (72a-73a, 92a.) The men stopped their Cadillac in the street, reversed to the store, pulled into the parking lot, and parked near the crowd of people. (91a.)

According to one of Mr. Carter's companions, the "whole crowd just directed their attention to the vehicle," and "[i]t was lookin like it was fixin to be a altercation." (100a.) "It was some crazy shit . . . ." (76a.)

One person approached the vehicle and "had words" with Mr. Carter. (93a.) Mr. Carter got out of the vehicle and said, "What the fuck you lookin at?"—apparently toward Mr. Bynum, who was among the crowd at the store. Mr. Carter then punched Mr. Bynum, knocking him to the ground. (94a, 105a.) In the ensuing chaos, shots were fired from multiple firearms. (78a, 94a.) Mr. Carter and two of his friends were shot. Mr. Carter died of his injuries.

Mr. Bynum later gave a statement to police in which he admitted involvement in the altercation and shooting. He said he was carrying a firearm "for protection," because "shit be goin crazy. Like it's not safe to walk nowhere . . . ." (187a, 191a.)

Mr. Bynum told police that he did not "know none of them in that car" (188a), and agreed with the statement that Mr. Carter's group appeared to be "looking for trouble" on the night of the shooting:

> All I know is they came off of Dickman . . . and they throw it in reverse so . . . I get to movin out the way . . . .
>
> And they hopped out the car like, "oh, fuck you niggas" . . . so I'm trying-I'm like . . . "Come on, come on." And then after that, I just heard shootin. . . .
>
> They got they hands in their-I don't know what was-everything was movin too fast where I was scared for my life.

(185a.) When asked whether Mr. Carter's group "just . . . ran up, and starting saying that they were gonna blast on you, hands in their pockets . . . ," Mr. Bynum answered, "Pretty much." (188a.) There does not appear to be any dispute that Mr. Carter was the aggressor at the outset of the confrontation. (28b.)

Mr. Bynum said he did not know who started shooting first. He said he "heard shots" and started "shootin in the air . . . like trying to scare em off and tryin to back up. . . . And then I took off runnin." (189a.) He said he shot "[p]robably once or twice . . . [a]nd then everybody got to runnin so I got to runnin." (190a.) Although he was not the only person to fire shots, investigators later concluded that Mr. Bynum was responsible for the 9mm bullet that killed Mr. Carter. (199a-201a.)

Based on these facts, the Michigan Court of Appeals concluded that "there was overwhelming evidence that Bynum participated in the shooting that led to Carter's death and that his self-defense theory was not particularly persuasive." (18a.) Thus, the issue in this case is not whether Mr. Bynum was properly held responsible for the homicide; it is whether he was properly convicted of *first-degree premeditated* murder.

B. The Gang Angle

Much of the trial testimony depicted this shooting as part of a violent rivalry between Mr. Bynum's gang, the Boardman Boys, and its archenemy, M.O.B., and it appears that law enforcement and the prosecution fully embraced this theory at the outset of this case. (301a.)[1] At trial, however, it quickly became clear that neither Mr. Carter nor his entourage were affiliated with the M.O.B. gang, or any gang for that matter. Josh Mitchell and Brandon Davis-both of whom were with Mr. Carter and were shot during the altercation-adamantly denied that the Carter group was "[]ever involved . . . in MOB or anything like that." (87a, 104a.) Even the prosecution's star witness and certified gang expert confirmed that Mr. Carter and his friends had "no affiliation of being part of a . . . gang." (301a.)

In the absence of a gang rivalry, the prosecution settled on a different gang-related motive: Gang members in general, and Mr. Bynum in particular, lack the capacity to endure public signs of disrespect without retaliating violently, usually with firearms. Thus, when Mr. Carter disrespected Mr. Bynum, "[i]t didn't take any more than that. . . . An act of disrespect on your own turf . . . can't be tolerated." (28b.)

In support of this theory, the prosecution relied primarily on expert opinion testimony, as well as an elaborate PowerPoint presentation, by Officer Donald Sutherland, a member of the Battle Creek Police Department's Gang Suppression Unit.[2] Officer Sutherland was qualified as an expert

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[1]At the time of the preliminary examination law enforcement erroneously believed that Mr. Carter's group belonged to the M.O.B. gang. (301a.)

[2]A second Gang Suppression Unit Officer, James Bailey, also testified that he had a specialized ability to "identify gang members" in the community and "identify[] armed subjects" on surveillance video. (122a, 143a.) Although he used this specialized knowledge in his testimony, Officer Bailey was *not* qualified as an expert witness, but rather provided this testimony only as a

based on his college degree in sociology and psychology, his certifications from "Basic Gang Investigation School" and "several other criminal investigation schools" relating to "gang crime," and his entire law enforcement career "dealing with gang members." (253a-255a, 260a.) As a member of the Gang Suppression Unit, his "main goal is to maintain intelligence" on Battle Creek gangs, which he gathers through surveillance, victim interviews, suspect interviews, and interviews with "citizens that have to live in these neighborhoods where . . . these gangs are very violent, committing crime." (256a.)

For purposes of the argument below, Officer Sutherland's expert opinion testimony is organized into two broad categories: (1) anthropological/sociological evidence, including national and local gang history, organization, behavior, and member profiles, and (2) character evidence, including personality traits of generic gang members as well as individualized testimony about Mr. Bynum's gang membership, motives, and state of mind at the time of the offense.

1. Anthropological Testimony. Officer Sutherland testified that a "nationally recognized" definition for a gang includes a "basic foundation" of certain elements, including "three or more individuals [who] collectively engage in criminal activity," and who "identify themselves by a gang name" and "adopt certain signs and symbols . . . , usually in their tattoos or their graffiti." (265a.) A gang will tend to adopt a certain "type of clothing," a "pattern for us to see them uniting with." (268a.) And a gang is "going to claim a turf" where its members will "commit their crimes." (265a.)

He testified that "identifying a gang member in a gang is very subjective. Because they're always changing what they're doing, but there's still always a pattern, a behavior that's there. It's

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lay witness with specialized training—over defense counsel's objection. (146a-148a.)

a constant behavior that we can always identify in our investigation." (267a.)[3]

Officer Sutherland testified that a gang's "driving force" is "committing crime, violent crime." A gang "may start with a crime of choice, such as drug sales . . . , but then they find out that we can make more money stealing cars or breaking into houses." (267a.) In order to facilitate this type of criminal enterprise, he explained, a gang must be violent. Toward *everyone*:

> Another very key concept . . . is the use of weapons. Driving force behind a gang is, "How do we gain respect?" Through power and fear. The best way to do that is to use a weapon, usually a gun. . . . Because the gun's the best way to, you know, get your message across of, "Hey, we'll kill you, basically, if you don't respect us."
>
> A gang's going to establish rivalries with other gangs. . . . [T]hey're all after the same concept of who's the most powerful. . . .
>
> Now . . . gang crime isn't always committed on just gang members or rival gang members. It's a lot of times committed on citizens, innocent bystanders.

(266a-267a.)

Officer Sutherland testified at length about the history of gang organization in the United States. He explained that the People Nation and Folk Nation are rival gang alliances that originated in Chicago. (275a.) People Nation gangs include the Latin Kings, Vice Lords, and Bloods, among others, and common symbols include the five-pointed star and five-pointed crown. (280a.) Folk Nation gangs include Gangster Disciples and Crips, among others, and common symbols include the six-pointed star and six-pointed crown. (281a.) Members of these rival alliances "hate each other." (281a.)

Officer Sutherland supplemented this testimony with PowerPoint slides containing elaborate definitions of gangs, charts describing gang structures, and photographs of prominent gang symbols,

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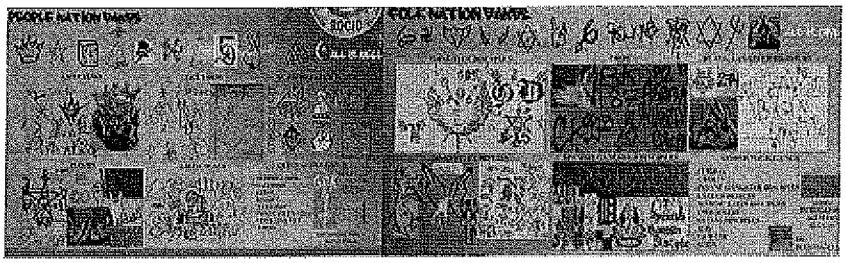
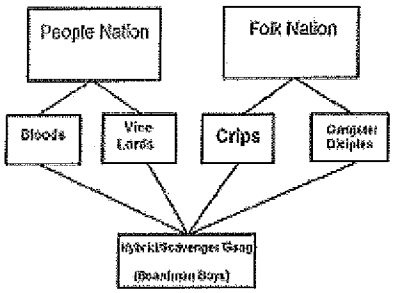
[3]Similarly, Officer Bailey claimed the ability to "identify gang members" in the community based on associations, tattoos, graffiti, and other factors. (122a-123a.)

such as these:





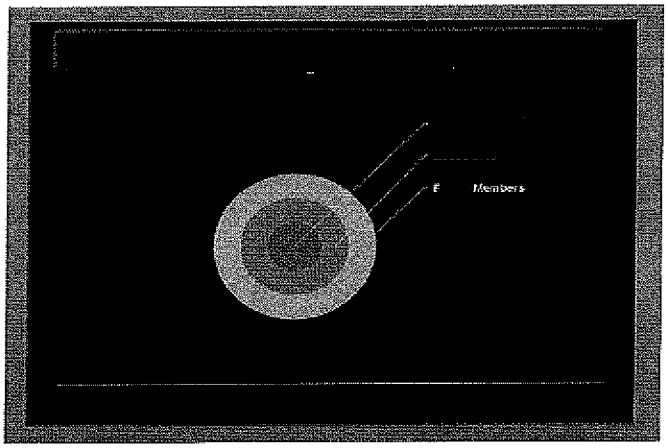
(7b, 9b-10b.)

As shown in the bottom diagram, not all gangs fit neatly within a People/Folk dichotomy. "Hybrid scavenger gangs" are not associated with national gangs and "don't understand this whole history" and don't know where they fit in. "They've just grabbed [signs and symbols] from both nationally recognized gang cultures and made it their own." (282a.)

Officer Sutherland testified that "[a]ll" Battle Creek gangs are classified as hybrid scavenger gangs without direct ties to the People Nation or the Folk Nation. (282a.) As to the Boardman Boys in particular, he testified that they "seem to like the five-pointed star" even though they also share "certain ties" to the Folk Nation as well. (276a, 282a.) The Boardman Boys have "gang tattoos" and use graffiti to "mark[] their turf." (276a, 285a.)

Hybrid Scavenger gangs utilize a "bulls eye structure where in the center you have your hardcore members" or "leaders," followed by the "associates" who are "just trying to increase their

status," and then followed on the outside by "your fringe members that are there more for social status." (283a.) Of course, there was a chart for this:



(Appellee's Digital Appendix.)[4]

Officer Sutherland testified that one of the defining characteristics about the Boardman Boys gang is its ongoing rivalry with the M.O.B. gang:

> [O]riginally . . . there was a . . . gang already established, MOB, which is . . . Money Over Bitches . . . . The Boardman Boys all . . . got along at one time until a certain incident happens and all of [a] sudden, there's a dispute. And then they decide, "We're no longer friends with MOB, we're going to form our own gang." And then you have this . . . constant rival.

(277a-278a.)

He told the jury that the Boardman Boys' territory sits "right on the border" of M.O.B. territory. "MOB comes over to [Boardman] turf, commits a crime on them because of disrespect or retaliation, then Boardman will go over into MOB territory and commit crimes on them, back and forth retaliation. . . . [B]ecause their turf is so close, that's why Boardman Boys had a strong, violent

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[4]The PowerPoint slide containing this language is not included in the Appellee's paper appendix, but Amicus understands that it was provided to the Court on in digital format.

rivalry with MOB." (278a.) He testified that Sam's Discount Party Store sits "right on the border" between Boardman Boys territory and M.O.B. territory, making it a likely location for gang-related violence. (279a.) He illustrated this testimony with a PowerPoint slide showing rival territories in different colors and a green arrow indicating the location of Sam's. (Appellee's Digital Appendix.)

But the "biggest thing" Officer Sutherland found "with the Boardman Boys is they were . . . constantly associating with each other while they were committing violent crimes." (269a.) "[Y]ou can't always say the Boardman Boys are always just selling drugs because, as we found through our police investigations, other officers at the police department, they weren't just selling drugs, they were stealing scrap metal, they were breaking into people's houses, they were stealing property from people." (267a.)

2. Character Testimony. In addition the testimony about gangs' collective values and characteristics discussed above, Officer Sutherland spoke at length about the personality traits of individual gang members, including their heightened readiness to commit violent crimes, their "wolf pack mentality" to "travel together" and "look for a reason to show someone how violent they are," and their propensity to resort to violence when confronted. (293a, 294a, 295a.)

He testified that a gang member will employ "kind of a mathematical equation" when responding to signs of disrespect by "one upping whatever that initial sign of disrespect was." (292a.) He told the jury that gang members will "physically assault" people, even unwitting citizens, based on the slightest sign of disrespect:

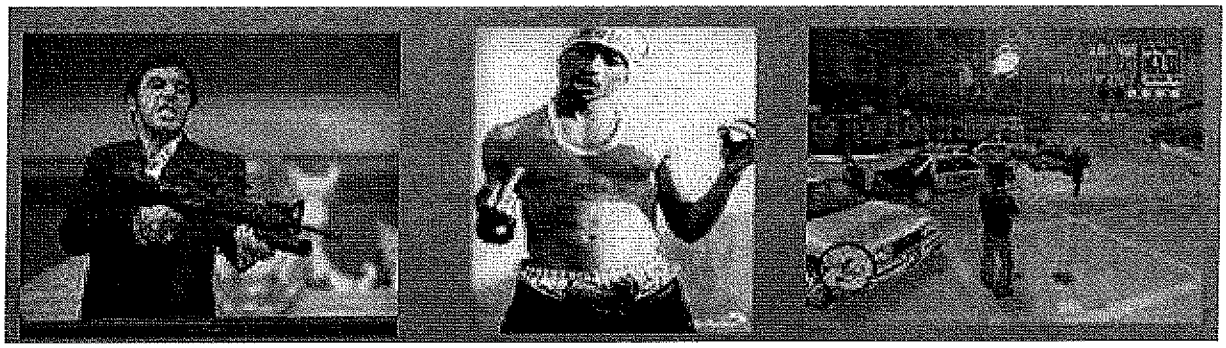
> [Y]ou can have very minor verbal and nonverbal signs that normal citizens do every day to each other and they don't think anything of it. But because a gang member is a creature of opportunity, they prey on the most smallest minor detail of some sign of disrespect.

> An example is simply bumping into them on accident. If they're all [at] a store and you don't want any trouble so you just don't look at them. To them, they can take that as a sign of disrespect. . . . [T]he gang member retaliates . . . .

(291a.)

He explained that "[t]o a gang member, respect is a concept. It's not a feeling. . . . They will take every opportunity they can to force people to respect them, and that's through violence." (290a.) This is one of the characteristics that distinguishes a gang member from "a normal human being." (290a.)

Officer Sutherland elaborated on this theme in his PowerPoint presentation. Several slides entitled "Personality Characteristics of a Gang Member" attribute all gang members with qualities including "Abnormally aggressive," "Irresponsible, Manipulative," "Fatalistic View," and a tendency to view "human beings" as "objects." (Appellee's Digital Appendix.) One slide says that gang members idolize violent fictional characters, offering these lasting images to drive the point home:

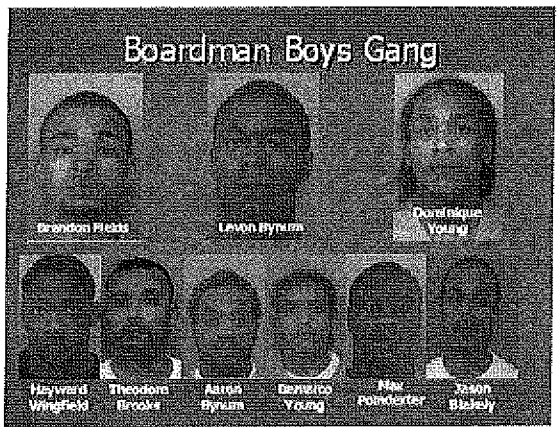


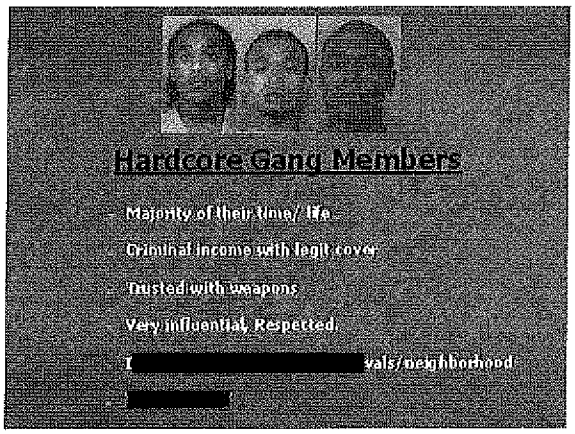
(2b.)

Turning to Levon Bynum in particular, Officer Sutherland testified that he knows Mr. Bynum is a member of the Boardman Boys because he has a tattoo of his nickname, "Cannon" on his hand. He acknowledged that Mr. Bynum had no tattoos that "say[] Boardman, no five-pointed crowns or

symbols," or anything else specific to the Boardman Boys, but he nevertheless maintained that the nickname tattoo was enough to confirm Boardman Boys membership. (289a.)[5]

He also relied on statements from other people: "When . . . we would ask someone, 'Hey, who's in the Boardman Boys,?' They would say, 'Well, Guido, Cannon . . . .' That's how people would . . . tell us who they know is a member of the gang." (289a-290a.) In fact, Officer Sutherland opined that Mr. Bynum is a "hardcore member" who was "especially" prone to "commit[] the most violent crime out of all the members in this gang." (284a.) Based on "reports" and "investigations," police have "found that Levon Bynum's a hardcore member because of . . . what people have told us he's done." (283a.) Mr. Bynum and his accomplices "fall[] in this hardcore member because they are the ones in the police reoports . . . that continue to say these three, especially Levon, is out here committing the most violent crime out of all the members in this gang." (284a.) Unsurprisingly, this testimony was supported by a slide:





(3b-4b.)

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[5]Officer James Bailey similarly identified Mr. Bynum as a Boardman boy "who committed various crimes including violent crimes." (124a, 128a-131a.) He provided no basis this testimony.

Officer Sutherland also testified as an expert about Mr. Bynum's state of mind—and specific level of intent—at the time of the crime. He said Mr. Bynum was carrying a gun not for protection but because he was "probably going to run into an opportunity to show how powerful" he was. (295a.) He said Mr. Bynum was "obligated to react" to Mr. Carter's aggression, and to "react violently," because anything less would have "sen[t] a message" to the neighborhood and rival gangs that he is "not tough enough to control or protect" his own turf. (293a-294a.) Mr. Bynum has the personality characteristics of somebody who "is immediately going to take the next step immediate of a gun. Pull a gun out and start shooting." (295a-296a.)

The most unsettling aspect of this testimony was Officer Sutherland's claim that by watching the surveillance video of the events, he could determine—based on his training and expertise—that Mr. Bynum was "posted up" at Sam's Discount Party Store "with a purpose" of inflicting violence on other people. He and his fellow gang members "didn't know who they were going to beat up or shoot, but they went up there waiting for someone to give them the chance." He was "just waiting" for somebody to "show up" and give him an "opportunity to show, 'This is our turf, this is how violent we can be, don't test us . . . . [G]ive me a reason to . . . shoot [you], to fight you, to show how tough we are, the Boardman Boys, on our turf.'" (293a.)

ARGUMENT

In *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999), the Michigan Court of Appeals permitted the use of expert "drug profile" testimony to explain to juries why a defendant's "otherwise innocuous characteristics" might actually be consistent with drug activity. Because of the inherently prejudicial nature of this type of testimony, however, the court prohibited "profile testimony that purports to comment directly or substantively on a defendant's guilt" or "compare the defendant's characteristics to the profile in such a way that guilt is necessarily implied." *Id.* at 56, 57. The test makes sense in the drug context.

The question in this case is whether *Murray*, or some other standard, should govern the admissibility of *gang* expert testimony as well. To an extent, *Murray* fits nicely; just as a "drug profile" can help establish that a defendant is a drug dealer, a "gang profile" can help establish that he is a gang member. And because gang evidence is at least as prejudicial as drug evidence, there is just as great a need for protection. But drug dealing is a crime, whereas gang membership is not. In a typical gang case, the prosecution only wants to prove gang membership as a means of demonstrating a gang-related motive for the crime—a showing that *Murray* does not contemplate.

Because proof of a gang-related motive will sometimes be appropriate through gang expert testimony, CDAM asks the Court to adopt a modified *Murray* standard for gang motive cases. For the first step in the analysis—identifying the defendant as a gang member—*Murray* controls. The prosecution may rely on expert opinion testimony to explain why "otherwise innocuous characteristics" are consistent with gang membership, and may use this evidence to explain *fact* testimony about the defendant's actual characteristics.

For the second step—proof of a gang motive—this Court should permit the use of expert

opinion testimony, but should limit it to general anthropological testimony directly relevant to the particular gang motive at issue. The expert should never opine about the character traits of gang members or comment directly about an individual defendant's gang membership, motive, or state of mind, as any such testimony would violate the rules of evidence and the Confrontation Clause, and would interfere with the jury's responsibility of determining the ultimate issues in the case.

To ensure fairness in the application of this new standard, the Court should require pre-trial hearings outside the presence of a jury as a prerequisite to the admissibility of gang expert testimony. Not only is gang affiliation evidence uniquely prejudicial, but is also uniquely susceptible to erroneous admission to the jury. This is because neither gang profile evidence nor gang motive evidence have any relevance standing alone; they depend on each other for their admissibility. Thus, courts should act as gatekeepers to ensure that juries do not hear evidence about gang affiliation or gang motive unless the prosecution has already established the admissibility of both. At these proceedings, the prosecution should show, by a preponderance of the evidence, both that the defendant is a gang member and that there is a permissible gang-related motive at issue in the case.

Applying this standard to the facts of this case demonstrates that no gang expert testimony should have been admitted at Mr. Bynum's trial. Not only did the prosecution fail to show that Mr. Bynum is a gang member, it failed to establish any gang-related motive to this offense. And even assuming that some level of expert testimony was appropriate to establish a gang motive, the testimony actually introduced did much more: it purported to establish, to a degree of scientific certainty, that Mr. Bynum possessed the mens rea necessary for first degree premeditated murder. Testimony of this nature is never admissible, and it cannot be harmless where it was the *only* basis to support a finding of premeditation.

I. The admission of any type of gang evidence should be subject to heavy judicial scrutiny

There is little question that gang experts can be useful. "[J]ust as an anthropologist might be equipped by education and fieldwork to testify to the cultural mores of a particular social group, law enforcement officers may be equipped by experience and training to speak to the operation, symbols, jargon, and internal structure of criminal organizations." *United States v Mejia*, 545 F3d 179, 190 (CA 2, 2008) (internal citation omitted).

But gang evidence poses serious problems, the most obvious of which is that "gangs suffer from poor public relations." *United States v Lewis*, 910 F2d 1367, 1372 (CA7, 1990). Gang evidence "deflects a jury's attention from the immediate charges and causes it to prejudge a person with a disreputable past, thereby denying that person a fair opportunity to defend against the offense that is charged." *United States v Roark*, 924 F2d 1426, 1434 (CA8, 1991) (citing *Michelson v United States*, 335 US 469, 476 (1948)). "Gangs generally arouse negative connotations and often invoke images of criminal activity and deviant behavior. There is therefore always the possibility that a jury will attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury's negative feelings toward gangs will influence its verdict." *United States v Irvin*, 87 F3d 860, 865 (CA7, 1996). Put differently, gang evidence smacks of "guilt by association." *United States v Santiago*, 643 F3d 1007, 1011 (CA 7, 2011).

The introduction of gang affiliation evidence through an expert witness exacerbates these concerns. Gang experts are "usually . . . police officers," giving rise to a risk that their "testimony may have an 'aura of special reliability and trustworthiness,'" and that "a jury may accept a law enforcement officer's testimony that the defendant was engaging in criminal behavior as substantive

evidence of the defendant's guilt." *Murray*, *supra*, at 55 (discussing drug expert testimony) (quoting *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995); Note, *The admissibility of ultimate issue expert testimony by law enforcement officers in criminal trials*, 93 Colum L R 231, 246-247 (1993)).

One particular problem is that gang expert testimony can create a back door for introduction of inadmissible hearsay evidence, because gang experts often rely on statements from cooperating witnesses, co-defendants, and police reports as the basis for their testimony. Very little of this hearsay would fit within any recognized exception. See Hon. Jack Nevin, *Conviction, Confrontation, and Crawford: Gang Expert Testimony As Testimonial Hearsay*, 34 Seattle U L Rev 857, 877–78 (2011) (discussing hearsay exceptions under the Washington Rules of Evidence and how they relate to gang expert testimony). Although expert witnesses may generally base their opinions on hearsay, the police officer expert often testifies as *both* fact witness and expert, giving rise to a substantial risk that the line between these roles will blur in the eyes of the jury. *Id.* at 878–79. An officer may not "simply summariz[e] an investigation by others . . . and present[] it in the guise of expert opinion" without running afoul of the hearsay rule. *Mejia*, *supra*, at 199.

Even if an out-of-court statement satisfies one of the myriad exceptions to the hearsay rule, it may still violate the Sixth Amendment's Confrontation Clause, which precludes the admission a non-testifying declarant's out-of-court testimonial statements in the absence of a prior opportunity for cross-examination. See *Crawford v Washington*, 541 US 36 (2004). Custodial interrogations, police phone calls, and police reports are among the many sources gang experts rely upon—sources rife with testimonial statements. See Nevin, *supra*, at 878–81. Consequently, the basis of the gang expert's opinion will often run afoul of the Sixth Amendment. See, e.g., *Mejia*, *supra*, at 198-99.

What is more, gang experts may interfere with the jury's role as factfinder, since expert testimony often verges on or speaks directly to the ultimate issues in a case. *State v DeShay*, 669 N.W.2d 878, 885 (Minn, 2003) ("We have consistently expressed our concern that expert testimony be carefully monitored in criminal cases so that a jury is not dissuaded from exercising its own independent judgment."). Courts should never allow a police officer expert "to substitute his expert opinion for facts derived from his criminal investigation of the accused." Nevin, *supra*, at 874. When an expert offers his opinions on substantive issues, he "no longer helps the jury understand," but "tells the jury what to decide." *Id.* When he interprets the prosecution's evidence of guilt, his testimony becomes nothing less than a bonus closing argument for the prosecution. *United States v Nersesian*, 824 F.2d 1294, 1308 (CA 2, 1987). The expert "displace[s] the jury by connecting and combining all other testimony and physical evidence into a coherent, discernible, internally consistent picture of the defendant's guilt." Nevin, *supra*, at 875 (internal citations omitted).

Because gang expert testimony is so problematic, this Court should adopt a new standard to referee the bounds of admissibility. The court should hold that gang expert testimony is only admissible for purposes of general "anthropological" and "sociological" testimony, *Mejia*, supra,at 190, such as gang profile testimony and motive testimony. It may never be used to opine on gang member character traits or the gang membership, motive, or state of mind of the accused. The Court should adopt new standards to govern the admissibility of gang expert testimony.

II. *Murray* controls the introduction of expert opinion testimony to show that a defendant meets the profile of a gang member

As a prerequisite to introducing any evidence about a gang motive, the prosecution must show that the defendant is a gang member or otherwise ascribes to the gang motive at issue.[6] E.g., *People v Wells*, 102 Mich App 122, 129; 302 NW2d 196 (1980) (rejecting "the admission of evidence of past episodes of motorcycle gang rivalry to prove defendant's motive for the murders" because of the "lack of evidence that defendant was a member of any of the gangs involved"); *United States v Hamilton*, 723 F3d 542, 546 (CA5, 2013) (trial court erred by admitting gang evidence because the prosecution had not shown that the defendant was in a gang at the time of the offense); *State v Ra*, 175 P3d 609, 615 (Wash App, 2008) (same).

The prosecution will often rely on "gang profile" testimony to make this showing. Michigan law already provides a useful standard for the use of profile testimony.

A. To prove gang membership with expert testimony, the prosecution must follow the *Murray* standard, which permits gang profile testimony to aid the jury's assessment of fact testimony about the defendant's actual characteristics, but does not allow the expert state a conclusion about the defendant's gang membership

One way of proving gang membership is through gang profile evidence. A "gang profile" is a collection of innocuous characteristics, such as a specific tattoo, specific clothing, or a specific

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[6]There may be instances in which the defendant was not, strictly speaking, a member of the gang at the time of the offense, but was nevertheless related in a way that establishes motive. For instance, if the prosecution could show that a crime represented a gang initiation ritual, it would likely to satisfy this element. See *Payne v Commonwealth*, 357 SE2d 500, 503 (1987) (evidence showed defendant's "desire to be feared as a killer in order to join the local chapter of the 'Pagans'" motorcycle group). The New Mexico Supreme Court's decision in *State v Torrez*, 210 P3d 228, 236 (NM, 2009), appears to leave room for this application by requiring the prosecution to show "that Defendant was in fact a gang member at the time of the shooting or that the shooting was somehow related to gang rituals, rivalries, procedures, or other aspects of gang culture."

hand gesture. When considered individually and without any context, these characteristics might mean little to a jury. But when explained by a gang expert witness, they may help prove the gang membership of a person who is known (based on other evidence) to exhibit those characteristics.

Although Michigan courts have not addressed the use of *gang* profile testimony in this manner, they have addressed an analogous context. Drug profile testimony is a means of proving that conduct that might appear innocent to the untrained eye—such as carrying razor blades and lighters—is actually indicative of drug trafficking because these tools are used for packaging cocaine. *Murray*, *supra*, at 52–53. Expert testimony of this nature "may be valuable to the jury," *id.* at 54 (quoting *United States v Espinosa*, 827 F2d 604, 612 (CA 9, 1987)), but it is also "inherently prejudicial to the defendant because the profile may suggest that innocuous events indicate criminal activity." *United States v Lim*, 984 F2d 331, 334–335 (CA 9, 1993). There is a risk that "these characteristics could apply equally to innocent individuals as well as to drug dealers." *Murray*, supra,at 53. Indeed, profile evidence is particularly prejudicial because it is typically introduced through the testimony of a police officer expert, whose testimony will carry an through the testimony of an officer-expert whose testimony may be given heightened weight. *Id.*

In *Murray*, the Court of Appeals addressed these concerns with a set of four principles to ensure that drug profile evidence does not unduly prejudice the defendant. First, profile testimony is only appropriate "to assist the jury as background or modus operandi explanation." *Id.* at 56. Second, the profile alone should "not normally enable a jury to infer" that the defendant fits the profile; there must be "some additional evidence from the case" that allows the jury to make the connection. *Id.* at 57. Third, the court must instruct the jury about the limited use of profile testimony, namely that it is not enough to establish guilt. *Id.* Finally, the expert may not express an

opinion that the defendant fits the profile, "nor should he expressly compare the defendant's characteristics to the profile in such a way that guilt is necessarily implied." *Id.*

These factors should apply equally to gang profile testimony, which, as fully explained above, gives rise to at least as much risk of unfair prejudice as drug profile evidence. Accordingly, when faced with the prospect of gang profile evidence, trial courts should abide by the same standards that govern in the drug profile context: the profile testimony may "assist the jury as background" but should not "enable a jury to infer" that the defendant is a gang member in the absence of "some additional evidence from the case" tying him to the profile. *Murray, supra,* at 56-57. Judges should instruct juries that profile evidence cannot, alone, establish guilt. *Id.* at 57. And most importantly, the gang expert may not express any opinions about the defendant individually, and may not "compare the defendant's characteristics to the profile in such a way that guilt is necessarily implied." See *id.*

With these principles in mind, gang profile evidence can fill an important role at trials. But its limitations should be respected. While an expert witness may provide the profile testimony necessary to connect a defendant to a gang, the expert cannot simply opine that the defendant is a gang member. That is for the prosecution to argue and the jury to decide. See *State v Torrez*, 210 P3d 228, 237 (NM, 2009) (finding gang testimony irrelevant even though the detective stated that the defendant was a member of a gang because there were no other facts that established that the defendant was in the gang at the time of the crime).

B. In this case, the prosecution failed to satisfy the *Murray* standard for establishing gang membership because no admissible fact testimony linked Mr. Bynum to the gang member profile and because the expert witness impermissibly drew the ultimate conclusion

In Levon Bynum's trial, Officer Sutherland told the jury that gang members can be identified on the basis of common criminal activity, identification by gang names, the use of certain symbols in tattoos and graffiti, certain clothing, and presence in certain neighborhoods. He said the Boardman Boys in particular can be identified by their penchant to commit all sorts of crimes together, their use of the name Boardman Boys on tattoos and graffiti, their fondness for the five-pointed star, and their geographic neighborhood. While less specific than one might hope, this profile testimony was appropriate.

What was not appropriate was for Officer Sutherland *himself* to connect Mr. Bynum to the Boardman Boys profile—and to do so on the basis of inadmissible hearsay and utter fabrication rather than facts. There was no evidence that Mr. Bynum has ever used graffiti to claim allegiance to the Boardman Boys or the five-pointed star. The only evidence that Mr. Bynum has engaged in criminal activity with other Boardman Boys was rank hearsay: based on "what people have told [them] he's done" and what "people in the neighborhood . . . continue to say," the police "found that Levon Bynum's a hardcore member" of the Boardman Boys. (283a, 284a.) "When . . . we would ask someone, 'Hey, who's in the Boardman Boys,?' They would say, 'Well, Guido, Cannon . . . .' That's how people would . . . tell us who they know is a member of the gang." (289a-290a.) Perhaps the most incredible basis for determining Mr. Bynum's gang membership was the tattoo on his hand, which has nothing whatsoever to do with the Boardman Boys but simply contains his nickname, "Cannon." (289a.)

Because none of this testimony appropriately connects Mr. Bynum to the Boardman Boys profile under *Murray*, the prosecution should not have presented any further evidence about Mr. Bynum's gang membership or gang-related motive for the offense.

III. A new standard is necessary to govern the use of gang expert testimony to prove that a defendant had a gang-related motive for an offense

A. Under MRE 403, the prosecution may present general anthropological gang expert testimony limited to the particular gang motive at issue, but may never present expert testimony about character traits of gang members or the gang membership, motive, or state of mind of the defendant in particular

Courts have permitted gang expert testimony as proof of motive in a variety of different settings.[7] A relevant gang motive may be specific to a particular gang, such as where a gang is known to harbor racial prejudices and the prosecution must prove the specific intent of a hate crime. See *United States v Skillman*, 922 F2d 1370 (CA 9, 1990) (evidence that the defendant was a skinhead was relevant to prove that he "interfer[ed] with a person's housing rights on account of 'race' or 'color'" as required by 42 USC § 3631). Or it may be a motive that would apply across all criminal gangs, such as retaliatory violence against a rival gang member. See, e.g., *State v McDaniel*, 777 NW2d 739, 748 (Minn, 2010). Other examples might include the enforcement of internal gang rules or the intimidation of witnesses against a gang or its members, see *People v Gonzalez*, 135 P3d 649,

[7]There may also be cases in which gang membership is essential to prove an element of the offense. For example, if a charged offense contains an element of gang membership or motivation, expert witnesses could explain any circumstances that are consistent with gang activity. See *State v Jackson*, 714 NW2d 681, 692 (Minn, 2006) (expert's testimony about a gang's activities was admissible to establish that it meets the statutory definition of a "criminal gang" and that the defendant committed murder "for the benefit of a gang" under Minn. Stat. § 609.229). The same would be true when the prosecution must prove that the defendant was engaged in a criminal conspiracy or enterprise with a gang. See, e.g., *United States v Mansoori*, 304 F3d 635, 654 (CA 7, 2002); *United States v Robinson*, 978 F2d 1554, 1564 (CA 10, 1992).

657 (Cal, 2006), or the desire to "advance in rank by committing violent crimes." *Willoughby v State*, 626 SE2d 112, 114 (Ga, 2006). A defendant's tactical choices and defenses might also open the door to gang testimony. *United States v Sparks*, 949 F.2d 1023, 1025-26 (CA 8, 1991) (gang evidence admissible where defendant testified that he and his co-defendant were only casual friends).

Not every crime by a gang member is gang-motivated, however. There must be a proper "fit" between the offense and the alleged gang motive. In *People v Blackmon*, No 219350; 2001 Mich App LEXIS 2569, *5-6; 2001 WL 1081603 (Mich App Sept 14, 2001) (unpublished), the Court of Appeals "reject[ed] the prosecution's argument that evidence of defendant's membership in the Schoolcraft Gang was relevant to establish motive." *Id.* The prosecution theorized that the defendant fired shots into a crowd after he "came to the aid of a fellow gang member, Jimmy Crost." *Id.* But the evidence "suggest[ed] that the altercation resulted from a domestic situation"—Crost was discovered cavorting with another man's girlfriend. *Id.* "Although the evidence showed a connection between defendant and Crost which would explain defendant's presence at the scene to assist Crost, the record is void of any evidence that the shooting was in any way gang related." *Id.*

Similarly, in *Irvin*, the government introduced evidence that suggested that the defendant was a member of a motorcycle gang in order to prove that the defendants were involved in a joint venture to distribute drugs. *Irvin*, *supra*, at 864. The Seventh Circuit acknowledged that evidence of the gang membership might be relevant to prove that the defendants were involved in drug trafficking, but determined that the gang affiliation evidence was more prejudicial than probative because the government failed to make "that critical connection linking the motorcycle gang with drug trafficking, or any criminal activity for that matter." *Id.* Absent a meaningful link between the gang and the charged crime, the probative value of the evidence of the defendants' gang membership "was

minimal at best." *Id.* at 865.

An even closer analogy to this case is *State v Torrez*, 146 NM 331, 338, 210 P3d 228, 235-236 (NM, 2009), which involved a shooting after a group of men confronted and threatened the defendant. The prosecution proved motive by showing that "gang members retaliate in violent ways when disrespected"—and relied on testimony bearing an uncanny resemblance to Officer Sutherland's testimony in the instant case:

> Detective Martinez testified that respect is the most important value in gang culture. He testified that gang members gain respect through fear, intimidation, violence, and by controlling the drug trafficking trade. He also stated that gang members are governed by "the code of the street" and are motivated by "retribution," "an eye for an eye," with "[n]o assault go[ing] unanswered." He stated that in his expert opinion, once a gang member has been disrespected, he or she must retaliate with "retribution that . . . is always done through violence."
>
> Detective Martinez explained that gang members can be disrespected in a number of ways . . . [and] that disrespecting a gang member in front of other people demands retribution, especially if the member is disrespected in front of members of his or her own gang. Additionally, Detective Martinez repeatedly referred to gangs as "criminal" . . . .

Id. at 335. Although the court found that this evidence was reliable and "proved what it was offered to prove," *id.* at 338, it reversed the conviction in part because "there was no evidence presented at trial that . . . the party was a 'gang party,' or the shooting was in any way gang-related." *Id.*

Even where the prosecution has shown gang membership and a gang motive, it may not stray beyond areas that are helpful to understand the motive. "[T]he allegation that a defendant is in a gang ought not serve as a justification for extensive expert testimony regarding criminal gangs." *DeShay*, *supra*, at 887. See also *Mejia*, *supra*, at 195. Rather, an expert witness should limit her testimony to those specific gang practices that may be difficult for the jury to understand without a sociological description about a gang's history or operation. *Id.* at 191–92. Depending on the facts of a particular

case, sociological evidence may include the meaning of certain jargon a gang uses, *United States v Ardito*, 782 F2d 358, 363 (CA 2, 1986), the history or organizational hierarchy of a gang, *United States v Locascio*, 6 F3d 924, 936 (CA 2, 1993), or the particular method a gang uses to kill enemies, *Mejia*, *supra*, at 196. Other permissible uses of anthropological evidence are not difficult to imagine.

But testimony about these matters will only be admissible when it relates to the prosecution's theory of motive. Thus, for example, where the prosecution alleges that a crime was motivated by the enforcement of internal gang rules against a fellow gang member, testimony about organization and discipline may be relevant but testimony about rivalries or unrelated crimes would not likely have any bearing on the case (in the absence of some unique connection). In the absence of a connection between the evidence and the theory of motive, expert testimony will lack relevance and be impermissible under both MRE 402 and MRE 403.

Moreover, under MRE 403 and MRE 404(a), an expert may not testify about the character and personality characteristics of gang members. Rule 404(a) prohibits parties from using "[e]vidence of a person's character or a trait of character . . . for the purpose of proving" that the defendant acted in conformity with that trait. Painting gang members are aggressive, belligerent, disrespectful, violent, or even inhuman will serve no purpose beyond prejudicing the jury and demonstrating evil intent. See *United States v Farmer*, 583 F3d 131, 146–47 (CA 2, 2009) (the prosecutor's frequent and gratuitous invocation of the defendant's nickname "Murder" invited the jurors to infer that the defendant had a proclivity for committing murder—the very type of inference FRE 404(a) seeks to prevent).

Finally, and most importantly, a gang expert may not make "sweeping conclusions" about an individual defendant, *Mejia*, *supra*, at 192—particularly his gang membership, motive, or state

of mind at the time of the offense. "[D]espite the utility of, and need for, expertise [about gang practices], its use must be limited to those issues where sociological knowledge is appropriate." *Id.* at 190. Although an "increasingly thinning line" distinguishes appropriate expert testimony from inappropriate expert testimony, *id.*, there should be no question that individualized commentary about a particular defendant's guilt falls well out of bounds:

> As the officer's purported expertise narrows from "organized crime" to "this particular gang," from the meaning of "capo" to the criminality of the defendant, the officer's testimony becomes more central to the case, more corroborative of the fact witnesses, and thus more like a summary of the facts than an aide in understanding them. The officer expert transforms into the hub of the case, displacing the jury by connecting and combining all other testimony and physical evidence into a coherent, discernible, internally consistent picture of the defendant's guilt.

Id. at 190-91. "The Government cannot satisfy its burden of proof by taking the easy route of calling an 'expert' whose expertise happens to be the defendant." *Id.* at 191.

B. In this case, the gang expert testimony was improper under MRE 403 because it went far beyond the motive theory in this case and commented extensively about gang member character traits and directly about Mr. Bynum's gang membership, motive, and premeditation

Officer Sutherland's testimony was improper for several reasons. First, it was far too broad, extensively covering gang matters that have nothing whatsoever to do with any permissible theory of motive. Although it is unclear whether the prosecution actually had a theory of motive (besides simply, "Gang members are evil"), the one theory that arguably might have justified gang expert testimony is that gang members must not tolerate disrespect in public for fear of losing control of their ability to conduct a successful criminal enterprise. Assuming that this was the prosecution's theory, and assuming that it would be a valid basis to introduce expert testimony, almost none of the gang evidence had any relevance in this case. The evidence included extensive expert testimony

about Battle Creek gang history and organization, the rivalry between the Boardman Boys and M.O.B., the criminal origins of two dominant national gang organizations (with which Battle Creek gangs are unaffiliated), common types of gang criminal activity, and national gang symbolism. None of this testimony had anything to do with a theory of disrespect. It was entirely irrelevant, yet was a source of extreme unfair prejudice.

Second, Officer Sutherland testified at length about gang member personality characteristics, including propensities toward violence, abnormal aggressiveness, manipulation, irresponsibility, and an inability to feel respect for other human beings. He characterized gang members as animals. This testimony was irrelevant and prejudicial to an extent seldom seen in criminal trials.

Finally, and most importantly, Officer Sutherland provided expert opinion testimony that Mr. Bynum was a member of the Boardman Boys, had a strong motive to kill Mr. Carter, and surely did commit premeditated murder. He said Mr. Bynum was carrying a gun not for protection but because he was planning to shoot somebody. He said Mr. Bynum felt "obligated to react" when confronted, and to "react violently." He even claimed the expert (perhaps psychic) ability to know precisely what was going on in Mr. Bynum's mind at the time of the offense—simply by watching a surveillance video. He told the jury that Mr. Bynum was "posted up" "with a purpose" of inflicting violence on other people. In short and in truth, he told the jury that Mr. Bynum committed premeditated murder.

Officer Sutherland testimony was nothing short of an advance closing argument for the prosecution—albeit given by somebody with the authority of a police officer and an "expertise" in the sociology and history of gangs. The prosecution did not even attempt to hide its improper use of Officer Sutherland, at one point projecting a PowerPoint slide that looked like an *outline* of the closing argument, including the prosecutor's favorite line: "Gang Membership gave them the motive,

means, opportunity." (Appellee's Digital Appendix, Slide 46.)

On the issue of premeditation, the prosecution "satisf[ied] its burden of proof by taking the easy route of calling an 'expert' whose expertise happens to be the defendant." *Mejia*, *supra*, at 191. Given that there was *nothing* beyond Officer Sutherland's improper testimony to support a finding of premeditation, prejudice is obvious.

IV. This Court should require that the prosecution prove, by a preponderance of the evidence, that the defendant was in a crime and that there is a "link" between the crime charged and a gang-motive in a pre-trial hearing outside the presence of the jury

To protect against the risks inherent in this type of evidence, this Court should require that any proceedings pertaining to the admissibility of gang expert testimony take place "out of the hearing of the jury" pursuant to MRE 104(c).[8] See *DeShay*, *supra*, at 888 (trial courts "should scrutinize proffered gang expert testimony, preferably outside the presence of the jury"). A preponderance standard of review should govern these proceedings just as it does when courts determine whether evidence is admissible under one of the other rules of evidence. See, e.g., *Bourjaily v United States*, 483 US 171, 175-76 (1987) (courts must find that a statement is from a co-conspirator by a preponderance of the evidence before it is admissible under Federal Rule of Evidence 801(d)(2)(E)); *Lego v Twomey*, 404 US 477, 488 (1972) (preponderance of the evidence standard governs admissibility of confessions). A preponderance of the evidence standard "ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the . . . Rules of Evidence have been afforded due consideration." *Bourjaily*, *supra*, at 175-76.

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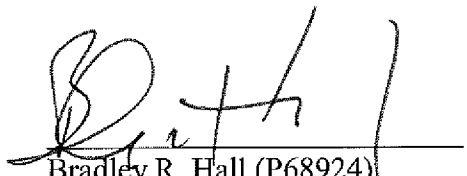
[8]These hearings would be in addition to—or perhaps consolidated with—any pretrial hearings related to the admissibility of expert opinion testimony pursuant to MRE 702.

CONCLUSION AND RELIEF REQUESTED

For the reasons discussed above, this Court should affirm the decision of the Court of Appeals and should establish appropriate new standards for the admission of gang expert testimony in criminal trials.

Respectfully submitted,



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Dated: March 21, 2014