STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
STEPHEN L. BORRELLO, P.J., MICHAEL J. KELLY and MARK T. BOONSTRA, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LEVON LEE BYNUM,

Defendant-Appellee.

_____/

Supreme Court
No.: 147261

Court of Appeals
No.: 307028

Calhoun Circuit Court
No.: 2011-001705-FC

BRIEF ON APPEAL – APPELLEE

ORAL ARGUMENT REQUESTED

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COUNTER STATEMENT OF JURISDICTION

Defendant-Appellee agrees that this Court has jurisdiction.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

ISSUE ONE

I. WHETHER OFFICER SUTHERLANDS' TESTIMONY REGARDING GANGS, GANG MEMBERSHIP, AND DEFENDANT'S PURPORTED ROLE IN A GANG VIOLATED MRE 403?

The Court of Appeals answered: Yes.

The trial court answered: No.

Plaintiff-Appellant answers: No.

Defendant-Appellee answers: Yes.

ISSUE TWO

II. WHETHER RULES SIMILAR TO THOSE SET FORTH IN *PEOPLE v MURRAY* REGARDING DRUG PROFILE TESTIMONY SHOULD APPLY TO GANG PROFILE TESTIMONY?

The Court of Appeals did not address this issue.

The trial court did not address this issue.

Plaintiff-Appellant answers: No.

Defendant-Appellee answers: Yes.

ISSUE THREE

III. WHETHER DEFENDANT PRESERVED THE EVIDENTIARY ERRORS HE COMPLAINS OF?

The Court of Appeals answered: Yes.

The trial court answered: Yes.

Plaintiff-Appellant answers: No.

Defendant-Appellee answers: Yes.

ISSUE FOUR

IV. WHETHER ERROR COMMITTED BY THE COURT WHEN IT PERMITTED OFFICER SUTHERLAND'S EXPERT TESTIMONY ON GANGS WAS HARMLESS?

The Court of Appeals answered: No.

Plaintiff-Appellant answers: Yes.

Defendant-Appellee answers: No.

SUMMARY OF THE ARGUMENT

This case begins when two groups of men – the Carter group and the Bynum group – happen upon each other outside a party store. Carter initiated an assault on Bynum and was shot; Bynum claimed self-defense. Bynum was tried on murder and related charges, none of which had gang membership as an element. With no evidence to establish premeditation, the prosecution instead gave the jury a vivid 'seminar' on violent street gangs, arguing that Bynum was a gang member, and that gang membership equated with premeditation.

Officer Sutherland told the jury, among other things: That Bynum was a known "hardcore [gang] member," because of "what people have told us he's done" (283a); that Bynum's group "went up there waiting for someone to give them the chance [to assault them]" (293a), and that "a stack of 53 police reports" established that Bynum was involved "in several shootings" (298a). The PowerPoint® presentation the prosecution provided to appellate counsel contains an image from the 1983 film "Scarface" and one of 'gangster rapper' Tupac Shakur (2b).

Appellee submits the following. Under Issue I, any probative value in the gang testimony submitted in the case *sub judice* was outweighed by its unfair prejudice under MRE 403. Under Issues II, a modified version of *People v Murray* should apply before gang testimony of any kind is admitted at any trial in which the charges do not have gang membership as an offense element. Also: (i) The prosecution should be required to show under MRE 401, from admissible evidence *independent from their gang expert*, that the charges arise from gang activity; (ii) The trial court should evaluate the proffered testimony under MRE 403; (iii) A line between fact and expert testimony should be drawn throughout the trial; and (iv) The prohibition against using profile evidence as substantive evidence of guilt should apply. Under Issues III and IV, Appellee shows that his claim of error is preserved and, because the prosecution made 'gang evidence' the center-piece of their case, the error in admitting it cannot be deemed harmless.

COUNTER-STATEMENT OF FACTS

On September 23, 2011, Defendant-Appellee, Levon Bynum, was convicted of premeditated murder in the shooting of Larry Carter. The issue at trial was Bynum's state of mind during the shooting. Carter punched Bynum in his face and there is evidence that Bynum was not the only person firing a gun, and perhaps not the first. Before and during trial, the defense moved to suppress Officer Sutherland's testimony as a "gang expert"; the motion was denied (315a-325a, 244a-252a). Bynum was found guilty of premeditated murder and appealed by right. On April 18, 2013, the Court of Appeals reversed and remanded for a new trial (10a-19a). On November 8, 2013, this Court granted the prosecution leave to appeal (51b).

The Trial

Testimony from Carter's Group

On August 28, 2010, at around 11:00 p.m., Larry Carter, Josh Mitchell, Brandon Davis, and Darese Smith – the Carter group – visited a party store in Battle Creek (71a). A store clerk, Christopher Riley, described all of them as frequent customers (26b). Carter and his group had been smoking marijuana and drinking vodka all day (69a-70a, 89a).[1] Davis parked in front of the store where the Bynum group and others were present (73a). Mitchell and Davis denied being in a gang or any history with Bynum's group (20-23b).

Carter exited the car and, in response to someone asking, "The fuck (sic) you lookin' at," he hit Bynum in the face with his fist (94a, 105a-106a). The details of who fired and who fired first are not entirely clear, but in their closing argument the prosecution conceded that Carter, not Bynum, was the aggressor "in the fist fight" (27b lines 9-11). After the gunfire, Carter's group ran into the store (79a). Three of the four had been shot; Carter died at a hospital (81a-82a, 121a).

[1] The defense called no witnesses. The trial summary is based upon prosecution witnesses alone. Here, the testimony of Mitchell and Davis.

Mitchell and Davis claimed that no one in their group had a weapon (84a, 98a). But store security video admitted at trial contained odd behavior by both after the shooting. Mitchell, just after the shooting, despite being shot through his leg, made his way deeper into the parking lot to interact with an unknown man in a car just outside the camera's view (83a). The car then very quickly left the scene.[2] Darese Smith, who did not testify, is seen inside the store after the shooting. As an officer is about to pat him down, Mitchell, having returned to the store, draws the officer's attention and Smith entirely leaves the scene without being searched.[3] Officer Hug testified that Smith had appeared to be going through Carter's pockets (24-25b).

The Investigation

Police found multiple .380 and .9 mm casings at the scene and concluded that *at least* three guns were fired (200a). From the store security video, police recognized some of the men in Bynum's group (168a-169a). No firearm was found inside or outside the store (167a).

Defendant's Interview

Bynum was interviewed and released on August 29, 2011. On September 1, 2011, officers asked Bynum to visit the police station for a voluntary interview; Bynum agreed and went with police (176a-180a). On this date Bynum was forthcoming as described in the prosecution's brief; he admitted that he fired a gun after Carter punched him, saying he was scared for his life (182a-196a). Bynum told police that he did not know anyone in Carter's group and had recognized only one of them, Brandon Davis (202a). He heard Carter state that he was going to, "Blast on them"

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[2] Nine copies of a CD containing security camera and PowerPoint® exhibits (as provided to the defense by the prosecution during March of 2012) accompany this brief. The exterior camera captured, at normal speeds, the following images at hour/minute/second marks: the Carter group arrives (22:55:38), the shooting (22:56:10), the unknown white car appears (22:56:32), Mitchell leaves the store with his hand in his waist to interact with said car (22:56:50), Mitchell returns as the car quickly drives off (22:57:18). The prosecution contends the car was later *searched* but the page they cite (307a) fails to establish any such thing.

[3] Video from an interior camera includes police entering the store (22:59:46), police beginning to handcuff Smith and Mitchell interjecting (23:00:16). Smith then leaves the scene (*See* TT I 40).

just before he hit Bynum (203a). Bynum said, "You know, he fired on [punched] me on the left side of my face and I was in fear for my life" (204a). He told police that he discharged his firearm only after hearing gunfire *Id.* Bynum believed that he was *returning gun fire* ("I was shootin' in the air") while backing up and fleeing (189a). He conceded that he fired once or twice in Carter's direction (190a).

The Testimony of Officer Bailey

Officer Bailey agreed that after the shooting Mitchell (of Carter's group) is seen on the store video walking to a car partially outside camera range (212a-213a).[4] He confirmed that Darese Smith (of Carter's group) left the scene without being frisked for a weapon (214a). Bynum told him that he thought Carter's group was armed (222a). Bailey testified that, based on his training with the Department of Justice, he had reviewed the store video and came to believe that Bynum's associates (Fields and Young) were also armed (149a-150a), but that no "visual cues" indicated that anyone in Carter's group was armed (TT II 154a158a).[5]

Bailey testified that police recognized Bynum's group as "Boardman Boys gang members" (123a-124a). He testified that the party store was on a "fault line" with a rival – the 'MOB gang'[6] – and that several violent incidents led up to the shooting (125a, 217a). He described one: Bynum's brother, Aaron, also a Boardman Boy, was shot *a year earlier outside a different party store* (223a-224a). Bailey testified that the assailants in that earlier shooting were not part of Carter's group, nor the MOB gang, but were members of the 'CMB gang'[7] (241a). Bailey had no reason to believe that Carter's group was associated with any specific gang, but said they "frequent[ed]" a side of town associated with the MOB (235a).

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[4] The defense argued that, during that six-second window, Mitchell could have been hiding a firearm (30-31b).

[5] Again, the shooting itself occurred off camera

[6] MOB a/k/a Money over Bitches (237a)

[7] CMB a/k/a Cash, Money, Ballers (241a)

The Testimony of Officer Sutherland

Officer Sutherland told the jury that he communicated with "recognized gang experts on a national level"; the trial court allowed him to testify as an expert on street gangs (254a-262a).[8] He propounded his "expert" knowledge of violent street gangs to the jury, purported connections between Bynum and Bynum's family to street gangs, and accusations made by unnamed third-persons regarding Bynum's "violent" behavior. This testimony ranged over 50 transcript pages and will be broadly summarized.

The Boardman Boys were, "[C]onstantly associating with each other *while they were committing violent crimes*" (269a). He discussed gang tattoos, signs, graffiti, and clothing in general and as regards to the Boardman Boys (271a-277a). He told the jury that gang affiliations are handed down through families, and that *Archie Bynum*, a member of Defendant Bynum's family, began a local "South Lords" gang (273a-274a). He told the jury that gangs are like a family and "They don't view anyone else as a human being, they're an object" (282a). He discussed gang "turf" (277a).

Through the colorful PowerPoint® presentation filed with this brief (black-and-white portions of which are included in Bynum's appendix), Sutherland implied, without asserting, that local Battle Creek gangs are connected to the violent national gangs he described – 'The Folk Nation,' 'The People Nation,' etcetera (279a-281a). The PowerPoint® contained diagrams that indicate connections between those organizations and the Boardman Boys. But no evidence of such connections (if it exists) was placed into the record; and, when asked, Sutherland testified that Battle Creek has no national street gangs only, "A hybrid of scavenger gangs" (264a).

Officer Sutherland told the jury that Bynum was a "hardcore member [of the Boardman Boy's] because of what he's done, *what people have told us he's done*" (283a, *See also* 284a).

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[8] Officers Bailey and Sutherland were part of a local Gang Suppression Unit (122a, 254a).

He told the jury that street graffiti near Bynum's home showed that Bynum was a violent gang member (285a-286a). He described defendant's brother, Aaron, as a gang member. *Id.* He testified that the phrase, "What the fuck you looking at" was a statement of "disrespect" which alone can lead to a violent response (290a).

Officer Sutherland told the jury that the "Boardman gang" had to react to Carter's behavior on that night to maintain their status (293a-294a). In a case where premeditation was at issue, he told the jury:

> So when I see that incident, when I watch the video, they are all posted up at the store with a purpose. When they went to the store that day, they 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 (293a).

Officer Sutherland referenced the shooting that occurred a year earlier at a different party store involving different people (294a-295a). He discussed the "wolf pack mentality" and told the jury that he could discern from the video that Bynum had that mentality (296a). He testified that identifying gang membership is, "always a subjective evaluation" (297a).

Referencing anonymous accusations made against Bynum, upon which he based his expert opinion, Sutherland told the jury:

> A: I have a stack of 53 police reports that - - leading up to this homicide...
> Q: Okay.
> A: ...at the convenience store, Dominique...
> Q: Alright.
> A: ...Young, Levon Bynum were involved in...
> Q: You answered...
> A: ... in several shootings.
> Q: My question (298a).

As noted in the prosecution's brief, Officer Sutherland did opine that Mitchell and Davis (of Carter's group) belonged to the MOB gang; after first denying it (300a). But when confronted with a prior inconsistent statement he made on that subject, Sutherland changed his testimony to instead say that Mitchell and Davis merely 'hung-out' with members of the MOB gang and other

gangs throughout the City of Battle Creek without explaining what formed the basis of the modified assertion (301a, 304a). He told the jury that Carter's group associated with street gangs for "self-preservation" in Battle Creek and opined that they were unarmed on the night in question, but then conceded that he did not know what Mitchell was doing off camera after the shooting near said white car (306a-307a).

Conclusion

On September 23, 2011, Bynum was found guilty of first-degree premeditated murder[9] and related charges. On October 24, 2011, he was sentenced. Bynum requested the appointment of appellate counsel. On December 5, 2011, the undersigned was appointed. On March 23, 2012, the defense filed a motion for new trial before the Calhoun County Circuit Court arguing that the gang testimony used at trial violated MRE 403, constituted improper propensity and opinion of guilt testimony, and at certain points violated the Confrontation Clause.

During a May 14, 2012, hearing on said motion both the prosecution *and the trial court* found that every evidentiary error alleged in said motion *was preserved by trial counsel* (See "Issue III). The trial court then denied the motion. Defendant appealed by right. On April 18, 2013, the Court of Appeals reversed and remanded for a new trial holding:

> The trial court erred when it permitted [police officer] Sutherland to offer expert testimony on gangs that amounted to improper propensity testimony and erred when it permitted him to testify that Bynum and his accomplices acted with premeditation. Because these errors warrant relief, we reverse Bynum's convictions and remand for a new trial [10a-19a].

On November 8, 2013, this court granted leave to the prosecution on the four issues addressed in this brief.[10] Defendant now responds to Plaintiff-Appellant's brief and the four issues set forth by the Court in said order.

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[9] MCL 750.316a

[10] The prosecution chose to not include the Power Point® images or the transcript of the May 14, 2012, hearing in what might have been a Joint Appendix. So, a defense appendix accompanies this filing with those documents and others.

ARGUMENT

ISSUE ONE

I. THE PROSECUTION CALLED A POLICE "GANG EXPERT" IN ORDER TO PUT ANONYMOUS ACCUSATIONS AND PROPENSITY TOWARD VIOLENCE EVIDENCE TO THE JURY. TESTIMONY OF THIS TYPE IS UNFAIRLY PREJUDICIAL. IN THE CASE *SUB JUDICE*, ANY PROBITY IN THE EVIDENCE WAS FAR OUTWEIGHED BY THE UNFAIR PREJUDICE UNDER MRE 403. A NEW TRIAL IS WARRANTED. US CONST. AM. V, VI, XIV; MICH. CONST. ART. I, §§ 17, 20.

Standard of Review. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion.[11] But where a preliminary question of law is involved, such as whether a rule precludes admissibility, review is de novo.[12] Consequently, there is an "abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law."[13]

I. Introduction

> 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. Guilt by association is a genuine concern whenever gang evidence is admitted [*United States v Irvin,* 87 F3d 860, 864 (7th Cir. 1996)].

Appellee has never argued that gang evidence is per se inadmissible at every criminal trial. That is a mischaracterization of Appellee's position. In fact, Appellee's argument has always been focused on the specific testimony of Officer Sutherland, not challenging gang evidence per se. It is true that Appellee has argued that expert testimony can pose a danger to the traditional role of juries – fact finding. Juries presented with the testimony of a credible expert opining on ultimate issues at trial, as occurred here, can be left with no real facts to find.[14] The appellate courts of Michigan long ago made the same observation.[15]

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[11] *People v Lukity,* 460 Mich 484, 488; 596 NW2d 607 (1999)
[12] *People v Washington,* 468 Mich 667, 670-71; 664 NW2d 203 (2003)
[13] *People v Katt,* 468 Mich 272, 278; 662 NW2d 12 (2003)
[14] See *United States v Dukagjini,* 326 F3d 45, 53 (2d Cir. 2002) (noting that a case agent acting as expert witness has "unmerited credibility" in the eyes of jurors).
[15] *See e.g., People v Hubbard,* 209 Mich App 234; 530 NW2d 130 (1995)

In Section II, Appellee makes some general remarks on the nature of gang testimony. In Section III, testimony representative of Sutherland's time on the witness stand is summarized. In Section IV, the probity versus unfair prejudice test of MRE 403 is analyzed. In Section V, Appellee considers four tools the trial court could have used to correct the imbalance of probity and unfair prejudice under MRE 403. None were applied at Bynum's trial.

II. Gang Evidence

In violent felony cases, especially murder cases, prosecutors can be expected to demonize the accused in order to evoke fear in the minds of jurors. When the accused can be identified with a street gang, the task is easy. A street gang researcher has noted that the media has reinforced a "folkloric myth" concerning gangs, in which gangs have been given: "[D]emonic qualities. For gangs ultimately are depicted as not only physically threatening to average, law-abiding citizens, but also as undermining the morals and values of the society as a whole. They are carriers of moral disease within the social body."[16]

A revealing monograph published by the American Prosecutors Research Institute ("APRI") acknowledges that, "Few things evoke fear in a community like the incursion of gang activity."[17] The monograph instructs that gang testimony can provide, "...rich color to an otherwise pale fact pattern" and can be used to "explain the inexplicable."[18] The last phrase is a telling-one. Officer Sutherland essentially told the jury that Bynum, as a gang member, awakes every morning with a premeditated intent to kill – the 'inexplicable' question of how Bynum premeditated a murder of Carter was thereby answered.

The prosecution embraces this theory on appeal. Empirical research, however, indicates that said theory is meritless: gangs, especially youth gangs, drift in and out of crime and members

[16] Martin S. Jankowski, *Islands in the Street: Gangs and American Urban Society* 308 (1991)
[17] Alan Jackson, APRI, *Prosecuting Gang Cases: What Local Prosecutors Need to Know* (2004), available at https://www.ncjrs.gov/App/publications/abstract.aspx?ID=206322 (checked 2/8/14)
[18] *Id.* note 3 at 7, and 9-10

drift in and out of gangs.[19] No evidence supports the prosecution's claim – their central claim on the subject of premeditation – that 'gang membership' inherently transforms gang members into 24/7 premeditated killers.

Trials are about competing stories and prosecutors are allowed to paint pictures of good and evil. But when "gang-experts" provide a missing link between a homicide and the prosecution's theory, and serve as platforms for anonymous accusations, any hope of a fair trial is lost. Without standards governing the admissibility of expert testimony on gangs, gang testimony threatens the constitutional right to a fair trial including the presumption of innocence. Officer-experts should not be allowed to convey they have considered and thought about on a subject regardless of its admissibility, or tell the jury what to decide.

III. The Challenged Testimony

Contrary to the prosecution's brief, co-defendant Fields had a *separate trial*, and the transcript of that trial is not part of this record. Nor does the *Fields* opinion indicate that Officer Sutherland testified in the same manner at both trials, only that he testified as a "gang expert" at both. Nor does any authority hold that the affirmation of a co-defendant's conviction somehow immunizes the defendant's trial from appellate review.[20]

In *Bynum's* trial, Officer Bailey referenced violent incidents leading up to this shooting based on the allegations of anonymous persons (216a-217a). Sutherland testified: "[**The Boardman Boys] were constantly associating with each other while they were committing violent crimes**" (269a); That Bynum's family was connected to gangs (273a-274a, 282a); That the local

[19] Craig Haney, *The Social Context of Capital Murder*, 35 Santa Clara L. Rev. 547, 589 (1995)

[20] If the prosecution is suggesting that the *Bynum* panel 'forgot about' *Field's* appeal, it should be said that both Judges Borrello and Boonstra served on both panels. During the first case called on the day of Bynum's oral argument, *People v Patterson*, the Bynum panel discussed *Field's*, decided about two months earlier, and expressed their concern that the same Calhoun County trial prosecutor in all three cases was one of a very small number of trial prosecutors repeatedly involved in inappropriate behavior at trials they had reviewed.

gangs were linked to violent national organizations (279a-281a), and that gang members "[D]on't view anyone else as a human being" (282a). He told the jury that he knew Bynum was a "hardcore member," because of, "...**what people have told us he's done**" (283a lines 14-16). And:

> So we have Dominique Young, Levon Bynum [defendant], and Brandon Fields all falling in this [sic] hardcore member because they are the ones in the police reports – **it's not just my opinion—police reports, people in the neighborhood, that continue to say these things, especially Levon [defendant], is out here committing the most violent crime of all the members in this gang** [284a].

Sutherland told the jury that he *knew* that Bynum was at the party store *to find someone to assault* – premeditation:

> So when I see that incident, when I watch the video, they are all posted up at the store with a purpose. When they went to that store that day, they 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** [293a].

Officer Sutherland went on to imply, without explaining, a purported connection between the shooting of a year prior and the shooting of Mr. Carter (294a-295a). He described perceiving a "wolf pack mentality" among Bynum's group (296a) and he gave a 50 transcript page seminar on street gangs – including violent national-level gangs he conceded were not operating within Battle Creek (264a lines 1-2). During cross examination, Sutherland returned to the anonymous accusations against Bynum:

> Q. [If] I understood your testimony correctly, if this – this—for lack of a better work [sic], this feuding that's going –that goes back and forth, the last—if you want to say the last side that got there—the last side that was on the receiving end of the shooting, the fighting, whatever—got—again—the worse of it, would have been—would have been Dominique Young if I understood that correctly, right?
> A. The last one that was shot at...
> Q. From a year ...
> A. ...or involved in a shooting?
> Q. ...well, you said from a year – about a year earlier?
> A. Oh, no. **I have a stack of 53 police reports that – leading up to this homicide...**
> Q. Okay.

A. ...**at the convenience store, Dominique**...
Q. All right.
A. **Young, Levon Bynum were involved in** ...
Q. You answered ...
A. ...**in several shootings.**
Q. ...my question [TT III 297a-298a][21]

Officer Sutherland testified as a "gang expert." He was an aggressive advocate of guilt. No line between fact testimony and expert testimony was ever drawn. Sutherland's entire testimony amounted to a pseudo-biography of Bynum as a violent, reprehensible person born from a gang-related family, such that the jury was implored to make a leap of faith, in the absence of proof, to conclude that somewhere, unrevealed but nonetheless present, was a motive, even premeditation. On whether this evidence was unfairly prejudicial under MRE 403 – the testimony of Sutherland and Bailey was designed to be unfairly prejudicial.

IV. MRE 403

Because street gang testimony connotes fearful images for a typical juror, expert testimony on this subject should always require the trial court to weigh probity versus unfair prejudice under MRE 403.[22] But before MRE 403 is considered, the evidence must first satisfy MRE 401 and 402.[23] MRE 401 states:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

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[21] The Court of Appeals dissent acknowledged that this testimony was improper but found that it was error "invited" by the defense. Respectfully, that is belied by the record. Officer Sutherland first mentioned the police reports during his direct examination (284a; See page 11 of this brief where it is quoted). The police reports were referenced even earlier than that during his direct examination (256a-257a, 271a line 13). Moreover, the questioning by trial defense counsel did not 'invite' the testimony.

[22] An exception would be cases in which the accused is *charged* with being a gang member. A hearing on a charge of gang membership might occur in a prison disciplinary or juvenile delinquency proceeding, in adult probation or parole hearings, or under 'gang injunction' statutes if Michigan were to enact one. In such cases, the *Murray* decision (discussed below) would be very analogous and several of the concerns raised in this appeal would not apply.

[23] *People v Layher,* 464 Mich 756, 761; 631 NW2d 281 (2001)

On appeal, the prosecution appears to concede that gang evidence is relevant only when other evidence indicates *that the crime was gang-related.*[24] At Bynum's trial, the prosecution had three weak theories (discussed below) on how Carter's shooting was gang related. The prosecution's three theories were not supported by any evidence independent from the testimony of Officers Bailey and Sutherland. That is why the gang evidence failed MRE 401.[25] But even if MRE 401 was met, the testimony fails MRE 403. In short, where the theory of relevance is weak under MRE 401, its probative value is weak under MRE 403. At the same time, the unfair prejudice of the same testimony was high.

MRE 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[26]

On Probative Value

Because the prosecution's theory of relevance for the gang testimony is weak, the probative value of the testimony is weak under MRE 403. The prosecution floats three theories in support of their claim that the testimony was probative on the issue of premeditation.

One, that the shooting occurred on a "fault line" between the 'Boardman Boys' (Bynum's group) and the MOB gang (124a-125a). The suggestion here is that Carter's group offended the Bynum group by wandering onto their "turf." This theory is contradicted by the store clerk who testified that Carter's group frequented the store (26b); and it is rebutted by the absence of any evidence in this record that Bynum or his group: (1) Knew where Carter or his group spent their time, or (2) Had any reason to associate the Carter group with the MOB gang or any other gang,

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[24] Opposing brief at 12 citing *Gutierrez v State*, 423 Md 476, 491; 32 A3d 2 (2011)
[25] We return to this under "Issue II."
[26] See also, *Waknin v Chamberlain*, 467 Mich 329, 334 n. 3; 653 NW2d 176 (2002), *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002)

or (3) Had any previous contact with Carter or his group. This theory establishes (at best) a very low level of relevance/probity between gang activity or gang motivations and the shooting of Mr. Carter.

In their second theory, Officer Bailey referred to several shootings that led up to the shooting of Carter (216a-217a). Only one was described: Bynum's brother was shot a year earlier outside a different party store *Id.* Police concluded that the CMB gang was responsible, not the MOB gang (241a). In fact, there is an absence of evidence in this record to indicate that Carter's group or the MOB played any role in that earlier shooting, or that Bynum *mistakenly* believed that either had been involved, or that the CMB and MOB gangs were ever allied – they appear to be rivals. This theory also fails to establish any substantial relevance/probity between gang activity and Carter's shooting.

A third theory, articulated by Officer Sutherland, is repeatedly cited by the prosecution in their brief. It is the true reason gang evidence was deployed at trial: as a replacement for the absence of evidence showing premeditation. This third theory is based on the long discredited propensity or character-to-conduct argument. It reasons: 'We have no evidence on premeditation, but based on Bynum being a bad man you should infer that he premeditated.' Gang membership is equated with premeditation. This is plainly using character as an intermediate inference to reach conduct and as such it is not allowed.[27]

In *People v VanderVliet*,[28] this Court considered the 'probity versus unfair prejudice test' of MRE 403 as a required component of any analysis under MRE 404(b). In *VanderVliet*, this Court held that evidence of other bad acts may not be introduced to encourage jurors to conclude that the accused had a bad character and therefore committed the charged conduct.[29] The Court called

[27] *People v VanderVliet*, 444 Mich 52, 64-65; 508 NW2d 114 (1993)
[28] *Id.* at 52
[29] *Id.* at 63

this a "forbidden theory of relevance" because the use of subjective character to prove conduct creates "a substantial danger that jurors will overestimate the probative value of the evidence."[30] The guilt or innocence of an accused cannot be established by showing that the accused had engaged in other acts of wrong doing or had bad character.[31]

In *People v Crawford,*[32] this Court re-stated the underlying premise of the prohibition against propensity evidence:

> The character evidence prohibition is deeply rooted in our jurisprudence. Far from being a mere technicality, the rule reflects and gives meaning to the central precept of our system of criminal justice, the presumption of innocence. ... Underlying the rule is the fear that the jury will convict the defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged, *Id.* at 384.

On Unfair Prejudice

While the probative value of the gang testimony was weak, the unfair prejudice was high. The prosecution concedes that they needed the gang evidence to get them past a void of case specific evidence on premeditation. Indeed, any jury would view street gangs as inherently violent and threatening to society. Officer Sutherland's testimony on street gangs which are national in scale is one example. Such testimony will always import those extraneous issues into any trial. This does not support the prosecution's use of such evidence to 'prove' premeditation. Rather, it explains why such testimony should *not* be allowed to serve as a replacement for case-specific facts on the issue of premeditation.

This analyses of probity versus unfair prejudice under MRE 403 applies to the entirety of the prosecution's gang evidence. That evidence falls into three broad categories.

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[30] *Id.* See also *Michelson v United States,* 335 US 469, 475-476; 69 SCt 213; 93 LEd 168 (1948)(character evidence is said to "weigh too much with the jury")
[31] 1A J. Wigmore, Wigmore on Evidence, § 58.2, 1212-1213 (3d Ed Tiller 1983)
[32] *People v Crawford,* 458 Mich 878; 582 NW2d 785 (1998), See also *People v Sabin* (After Remand), 463 Mich 43, 56; 614 NW2d 888 (2000)

(1) The general gang testimony.

Officer Sutherland told the jury that because Bynum was a gang member (a Boardman Boy) he was premeditating murder when he awoke the day of the shooting. During oral argument before the Court of Appeals the prosecution was asked whether they had "any other" evidence on premeditation and they indicated "no," saying that was why Officer Sutherland's testimony was important. That was the only candid answer they could give. Considered objectively, however, the gang evidence did not prove premeditation – it is only an improper substitute for the missing evidence of premeditation. The only properly admitted evidence on a motive for the shooting was supplied by the prosecution's witness, Mr. Davis of Carter's group, who testified that he observed Carter hit Bynum just before the gunfire (94a).

(2) The Specific Hearsay of Neighbors

Officer Sutherland made prodigious use of unattributed hearsay that alleged Bynum had been involved in other violent acts. As examples, he referenced, "...people in the neighborhood, that continue to say [that Bynum] is out here committing the most violent crime of all the members in this gang" (284a) and "a stack of 53 police reports" that accuse Bynum of involvement in *other* shootings (298a). The "neighbors" were unnamed, never called, never subjected to cross-examination. This testimony violated Michigan's Rules of Evidence and, for that reason among others, was *unfairly* prejudicial under MRE 403.

The same testimony violated the Sixth Amendment Confrontation Clause. Leave has not yet been granted on this issue as an independent claim in Appellee's cross appeal, but a violation of a constitutional right is relevant to whether testimony is *unfairly* prejudicial under MRE 403.[33]

[33] The government bears the burden of proving the constitutional admissibility of a statement in response to a Confrontation Clause challenge, *Idaho v Wright,* 497 US 805, 816; 110 SCt 3139, 3147; 111 LEd2d 638, 652-53 (1990)

Expert testimony on gangs can all too easily violate the Confrontation Clause.[34] In *Crawford v Washington,*[35] the United States Supreme Court held that the Confrontation Clause bars admission at a criminal trial of (1) testimonial statements of a witness, (2) who did not appear at trial, unless (3) the witness was unavailable and defendant had a prior opportunity to cross-examine.[36] A testimonial statement is one whose "...primary purpose [is] to establish or prove past events potentially relevant to a later criminal prosecution."[37] In the case *sub judice*, all three elements of a Confrontation Clause violation are met.

The Court of Appeals dissent found that the Confrontation Clause was not violated because the 53 police reports were not cited for the truth of the matter asserted (27a-28a). That is, respectfully, not supported by the record, nor does it explain why the reports were cited. If the theory is that the reports 'merely' explain why Sutherland believed Bynum premeditated murder, that as a gang member Bynum *ipso facto* premeditated murder, this is a propensity argument of the worst kind and the violation of the Confrontation Clause to accomplish it adds to the unfair prejudice under MRE 403.

(3) The PowerPoint® Images

In his PowerPoint® presentation, Officer Sutherland showed the jury diagrams which indicate a connection existed between 'The Boardman Boys' and the many violent nationwide gangs that Sutherland described. But no evidence connected Bynum to those gangs, such as any contact by Bynum with them or Bynum spray painting their logos. Again, the probity of the evidence is

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[34] *See* Dripps, *On Reach and Grasp in Criminal Procedure: Crawford in California*, 37 N.C.J. Int'l L. & Com. Reg. 349 (2012), Robert K. Kry, *Confrontation at a Crossroads*, 6 Charleston L. Rev. 49 (2011), Jihan Younis, *Agent-Experts in Criminal Trials: The Ultimate Issue Rule as a Defense to the Imprimatur Problem*, 47 Cal. W. L. Rev. 213 (2010), Julie A. Seaman, *Triangular Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 Geo. L.J. 827 (2008)

[35] *Crawford v Washington,* 541 US 36, 53-54; 124 SCt 1354; 158 LEd2d 177 (2004)

[36] *Id.*

[37] See *Davis v Washington*, 126 SCt 2266; 165 LEd2d 224; 547 US 813, 822 (2006) and *Melendez-Diaz v Massachusetts*, 557 US 305; 129 SCt 2527; 174 LEd2nd 314 (2009)

weak but the unfair prejudice high. And as bizarre as it seems, these images include photos of Al Pacino's character Tony Montana, an ultra-violent member of the Cuban mafia in the 1983 film classic Scarface© by Martin Scorsese, of 'gangster-rapper' Tupac Shakur who was notoriously gunned-down in public in Las Vegas in 1996, and what appears to be a screen shot from a video game (2b).

The prosecution was asked about the first two images during oral argument before the Court of Appeals. They had no explanation for their presence in the PowerPoint®. Despite all the talk of the PowerPoint® in their brief, nothing from it is included in their appendix. One might conclude that these images formed the nadir of their case. We would respectfully suggest that they are typical of how the case was tried.

V. Correcting the Unfair Prejudice under MRE 403

If gang evidence was to be admitted at trial, there were at least four actions that could have been taken to adjust the imbalance under MRE 403 between probity and unfair prejudice. None of the four occurred at Bynum's trial.

First, the trial court should have instructed the jury that the gang evidence could not be used as substantive evidence of guilt.[38] Principles similar to those set forth in *People v Murray*,[39] a drug case, should apply. In *Murray*, the Court of Appeals held: (1) a drug profile expert may not "opine that the defendant is guilty merely because he fits the drug profile,"[40] (2) the expert should not "expressly compare the defendant's characteristics to the profile in such a way that guilt is necessarily implied,"[41] and (3) "[a]ttorneys and courts must clearly maintain the distinction between the profile and the substantive evidence" including by utilizing a cautionary

[38] See Bynum's Brief before Court of Appeals at 17-18
[39] *People v Murray*, 234 Mich App 46; 593 NW2d 690 (1999)
[40] *Id.* at 54
[41] *Id.* at 57

instruction.[42] These same concepts should apply to gang evidence in general.[43]

Next, the trial court should not have allowed Officer Sutherland to opine before the jury that Bynum was guilty, as in:

> So when I see that incident, when I watch the video, they are all posted up at the store with a purpose. When they went to that store that day, they 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 [293a][44]

This is not a novel proposition. There is a long-standing prohibition in Michigan law against witnesses expressing opinions on the guilt or innocence of an accused.[45] This is an egregious form of error because determining guilt or innocence is a function solely within the province of the jury.[46] This prohibition was recently reaffirmed by this Court in *People v Musser*,[47] where the Court stated:

> [I]t is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial. Such comments have no probative value, because "they do nothing to assist the jury in assessing witness credibility in its fact-finding mission and in determining the ultimate issue of guilt or innocence."[48]

Next, a clear line between fact and expert testimony should have been observed throughout the trial, but was not. In *United States v Lopez-Medina*,[49] the United States Court of Appeals for the Sixth Circuit held that a general cautionary instruction is insufficient to guard against the risk

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[42] *Id.*

[43] Appellee has never argued that *Murray*, a drug-profile case, was strictly applicable. In fact, we cited *by analogy* not *Murray* but *People v Hubbard*, 209 Mich App 234 (1995), where the Court of Appeals found danger in the "aura of special reliability and trustworthiness" jurors are likely to give law enforcement officials testifying as experts.

[44] See Bynum's Brief before Court of Appeals at 15-16

[45] *E.g., People v Row*, 135 Mich 505; 507 (1904); *People v McGillen* #2, 392 Mich 278, 285 (1974), *People v Buckey*, 424 Mich. 1, 17 (1985), *People v Peterson,* 450 Mich 349, 352; 537 NW2d 837 (1995)

[46] *People v Clark,* 340 Mich 411, 65 NW2d 716 (1954)

[47] *People v Musser*, __ Mich ___; ___ NW2d ___ (Issued July 12, 2013)

[48] *Id.* slip opinion at 12-13 (internal citation omitted)

[49] *United States v Lopez-Medina*, 461 F3d 724, 743 (6th Cir. 2006); See also *United States v Nixon*, 694 F3d 623, 629 (6th Cir. 2012). In Michigan, *Lopez-Medina* has been cited in eleven cases from the Court of Appeals since 2009, all unpublished and all but one a criminal case.

of confusion inherent when one law enforcement agent testifies as both a fact and expert witness at the same trial.[50] The Court distinguished the facts before it from those in prior decisions where it found a cautionary instruction to be important, writing that in those cases the prosecution had throughout the trial delineated expert testimony from fact testimony.[51]

Demarcation of fact and expert testimony throughout trial is particularly needed when police testify as experts in their own investigations, as occurred here. Although the Sixth Circuit has not categorically prohibited this practice (nor did the Court of Appeals in the case *sub judice*), such a rule has merit. A dual role for a gang expert was never contemplated by the rules of evidence, let alone the common law. An officer-expert too easily transforms into the hub of a case, giving the government an additional summation by interpreting facts they were involved in 'uncovering' and thereby usurping the role of the jury.[52]

VI. The Court of Appeals' Opinion

The prosecution has not alleged one improper factual premise or misstatement of law within the Court of Appeals opinion in this matter. The Opinion's holding should not be lost: Expert testimony on street gangs can be used at criminal trials in Michigan, but not as a mere platform upon which to introduce "improper propensity evidence and transform the theme of the trial into one of guilt by association" (16a).[53] The Opinion then sets forth how that happened at this trial through the testimony offered on street gangs.

The dissent acknowledges, "...that evidence of gang affiliation sometimes has been treated cautiously because of its inherently prejudicial nature."[54] But then complains that it cannot

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[50] *Id.* at 745
[51] *Id.* at 744-745
[52] *United States v Lopez-Medina, supra., See also United States v Baptiste*, 596 F3d 214, 224 (4th Cir. 2010)(No error where adequate steps were taken throughout the trial)
[53] Citing *States v Roark*, 924 F2d 1426 (8th Cir. 1991)
[54] Citing *People v Wells*, 102 Mich App 122, 129; 302 NW2d 196 (1981)(admission of gang testimony violated MRE 403 where no gang expert was called); Dissent at 2.

"perceive the line" being drawn between admissible and inadmissible testimony.[55] We would respectfully submit that Michigan law has never allowed a police witness to tell a jury that, based on their own expertise and the anonymous accusations of unnamed people, that an accused is guilty of premeditating a murder.

VII. Conclusion

Gang evidence in a murder trial does not have the same degree of relevance as drug profile evidence in a drug case, or testimony from an organized crime expert in a corrupt enterprise case.[56] Bynum was not charged with being a gang member and gang membership was not an element of his charges. But whereas the relevance/probity of the evidence is low, the risk of unfair prejudice inherent in gang testimony is high. Moreover, allowing the prosecution to use gang testimony as substantive evidence of premeditation in this murder trial comes at a high price. The prosecution is asking this Court to carve-out a 'gang exception' to MRE 403 and to the general prohibition against propensity arguments.

We ask that the Court deny that request. No persuasive argument has been made on why this Court should create a special rule for the introduction of gang testimony at a criminal prosecution. Case law and legal commentators seem to indicate that gang evidence has a greater potential for abuse than drug profile evidence. Therefore, the long standing prohibition against propensity (character to conduct) arguments, against the use of anonymous accusations at trial, and against witnesses opining on guilt or innocence should be maintained. Bynum has consistently maintained that he did not premeditate murder. He was entitled to a fair trial and the Court of Appeals should be affirmed.[57]

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[55] *Id.*
[56] Such as under MCL 750.159i
[57] US Const V, XIV; Mich Const 1963, art 1, § 17

ISSUE TWO

II. *PEOPLE v MURRAY* REGARDS DRUG PROFILES BUT ILLUMINATES A DANGER INHERENT IN GANG PROFILES. GANG PROFILES SHOULD NOT BE ADMITTED. GANG TESTIMONY SHOULD NOT BE USED AS SUBSTANTIVE EVIDENCE OF GUILT. THAT AN OFFENSE IS GANG RELATED SHOULD BE SUPPORTED BY TESTIMONY INDEPENDENT OF A GANG EXPERT, BUT OTHER STANDARDS SIMILAR TO THOSE SET FORTH IN *PEOPLE v MURRAY* SHOULD APPLY.

Standard of Review. The prosecution mischaracterizes the nature of this appeal beginning in its standard of review section. Appellee has never argued that gang evidence is inherently inadmissible or that *People v Murray*[58] strictly applies. Rather, Appellee argued that gang profile evidence "is similar to drug dealer profile evidence."[59] Our understanding is that this Court is interested in how the principles in *Murray* might be applied to gang evidence. The issue is one of law and as such it is reviewed de novo.[60]

Introduction

Ultimately, we conclude that if gang profile evidence is to be admitted at criminal trials in Michigan, than something similar to *Murray* should apply. However, because no evidentiary hearing was held under MRE 702, gang profile evidence (as opposed to non-profile forms of gang evidence) should not be deemed admissible at this time.[61]

Appellee contends that the Court of Appeals should be affirmed because the gang testimony violated MRE 403. The *Murray* decision itself acknowledges the primacy of MRE 401 – 403.[62] In future cases, however, when a prosecutor wants to use gang evidence, *Murray*-type standards should apply. In Section I, Appellee discusses how drug profile evidence is different from street

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[58] *People v Murray,* 234 Mich App 46; 593 NW2d 690 (1999)
[59] Bynum's Brief on Appeal before Court of Appeals, pp. 16-17
[60] *Id.* and *People v Jackson,* 483 Mich 271, 277, 769 NW2d 630 (2009)
[61] *Daubert v Merrell Dow Pharmaceuticals., Inc.*, 509 US 579; 113 SCt 2786; 125 LEd2d 469 (1993); *Gilbert v DaimlerChrysler*, 470 Mich 749; 685 NW2d 391 (2004)
[62] *Murray* at FN 3 states: "Obviously, even where testimony regarding a profile is determined to be probative as background or modus operandi evidence, it must still be relevant to the case under MRE 401 and comply with the balancing test of MRE 403."

gang evidence. Section II contends that, as other courts have already held, a prosecutor should be required to show through evidence *independent of their expert* that the charged offense was gang related. Section III argues that gang evidence of any kind should not be used as substantive evidence of guilt. Section IV addresses other features of *Murray* which should be made applicable to gang evidence. In Section V Appellee summarizes proposed rules for the admission of gang evidence.

I. The Nexus between Offense and Profile

In *People v Murray* (1999), the Court of Appeals considered the use of drug profiles in drug cases. Drug-profiles are an informal compilation of characteristics displayed by drug traffickers which are inherently prejudicial because they can suggest that innocuous items evidence criminal activity.[63] The Court held that, "...drug-profile evidence is inadmissible as substantive evidence of guilt, because 'proof' of crime based wholly or mainly on these innocuous characteristics could potentially convict innocent people."[64] Police can, however, "...explain the significance of items seized and the circumstances obtaining during the investigation of criminal activity."[65]

The nexus between drug profiles and drug trafficking is missing between gang evidence and any offense in which gang membership is not an element. One need not be a gang member to commit homicide. Unless circumscribed by rules similar to those in *Murray*, gang evidence will operate as the prohibited intermediate inference of character to conduct.[66] Because of the missing nexus between gang evidence and offenses where gang membership is not an offense element, the prosecution, under MRE 401, should be required to prove that the offense was gang related from evidence independent of their expert witness.

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[63] *Id.* at 52-53
[64] *Id.* at 53; see also *id.* at 54
[65] *Id.* at 53
[66] In that context Bynum cited *People v Hubbard*, 209 Mich App 234; 530 NW2d 130 (1995), Defendant's Court of Appeals brief at 17, trial court brief at 11

II. The Threshold Question: Relevance

As a preliminary question of law, before gang evidence is admitted, the prosecution should be required under MRE 401 to establish through admissible evidence *independent of their gang expert* that the charge is gang related. This requirement is consistent with what other courts have held including (discussed below) the principle case relied upon in the prosecution brief. This is nothing more than a refined requirement under MRE 401.

The prosecution may have conceded this point at page 12 of their brief where they cite a case from the United States Court of Appeals for the Second Circuit, *Gutierrez v State.*[67] In *Gutierrez,* the Court acknowledged the growing acceptance of expert testimony regarding gang methods, then held:

> Analysis of this trend reveals a common, albeit frequently unacknowledged, thread among those cases where gang expert testimony was deemed admissible. Generally, a gang expert's testimony is relevant and not unduly prejudicial when other evidence demonstrates that the crime was gang-related.[68]

The Court observed that gang evidence is in "tension with the rule against prior bad acts," and that its proposed rule somewhat addresses that tension.[69] In *Gutierrez*, unlike the case at hand, such evidence existed. Witnesses to a shooting testified that, just before the shooting, four assailants approached and one shouted "Mara Salvatrucha" (a reference to the MS–13 street gang), they asked for the gang affiliation of the victims, shots were fired when a victim insulted MS–13.[70] The prosecution also introduced pictures from defendant's MySpace® webpage that indicated gang affiliation, and defendant's companion testified for the State that the shooting was part of an MS–13 initiation.[71]

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[67] *Gutierrez v State*, 423 Md 476, 491; 32 A3d 2 (2011)
[68] *Id.* 32 A3d at 11 [Emphasis added]
[69] *Id.* 32 A3d at 10
[70] *Id.* 32 A3d at 6-7
[71] *Id.* 32 A3d at 8

The *Gutierrez* court required a prosecutor to demonstrate through evidence independent of the gang expert that the offense was gang related and opined that this is consistent with other jurisdictions.[72] We believe that a review of the case law supports this finding: that the trend is to require the prosecution to demonstrate, through evidence independent of the gang expert, that the offense was gang related. The *Gutierrez* Court cited authority from a variety of state and federal courts.[73] The Court ended its analysis by holding, "In adopting this threshold requirement, we are simply saying that a defendant's membership in a gang, in and of itself, is not enough."[74] In the case *sub judice*, the gang expert proved nothing greater than gang affiliation (if that) and no evidence independent of opinion testimony demonstrated the shooting was gang related.

III. Murray's Rule on Substantive Evidence

In *Murray*, the Court held:

> [W]hen the testimony at issue is a drug profile, the expert may not move beyond an explanation of the typical characteristics of drug dealing -- in an effort to provide context for the jury in assessing an alleged episode of drug dealing -- and opine that the defendant is guilty merely because he fits the drug profile. Such testimony is inherently prejudicial and constitutes an inappropriate use of the profile as substantive evidence of guilt.[75]

The prohibition in *Murray* against using drug profile evidence as substantive evidence of guilt should be extended to gang evidence in general. The inference of guilt by association is too great. *Murray* has held for over 14 years that drug profile evidence cannot serve as substantive evidence of guilt; a witness cannot opine that an accused is guilty because he fits a police profile of a drug dealer. Gang evidence is more problematic than drug profile evidence – due to the problems discussed above.

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[72] *Id.* 32 A3d at 10
[73] *Id.* 32 A3d at 11-13 (cases from other jurisdictions applying this rule); *See generally* John E. Theuman, Annotation, *Admissibility of Evidence of Accused's Membership in Gang,* 39 A.L.R.4th 775 (2010)
[74] *Id.* 32 A3d at 14
[75] *Murray, supra.* at 693

IV. Other Features of Murray

The *Murray* Court acknowledged that a "very fine line" sometimes separates the probative use of drug profile evidence from an improper use as substantive evidence of guilt.[76] The Court described four items trial courts might examine to distinguish appropriate from inappropriate uses of drug profile evidence:

First, the profile testimony must be admitted for a proper purpose. From *Murray*: "Attorneys and courts must clearly maintain the distinction between the profile and the substantive evidence, and the former should not argue that the profile has any value in itself; it is only an aid for the jury."[77] This factor should apply to gang evidence and gang profiles. The prosecution cannot concede this factor should apply without confessing reversible error at Bynum's trial.

Second, the profile, without more, should not enable a jury to infer guilt. From *Murray*: "In other words, the pieces of the drug profile by themselves should not be used to establish the link between innocuous evidence and guilt."[78] Again, the wisdom found in *Murray* should apply to gang or gang profile evidence. The prosecution cannot concede this factor without confessing reversible error at Bynum's trial.

Third, courts must make clear what is and what is not an appropriate use of profile evidence. From *Murray*: "Thus, it is usually necessary for the court to instruct the jury with regard to the proper and limited use of profile testimony."[79] The Court held that a failure to properly instruct a jury to consider profile testimony only as background information supports the conclusion that it was admitted as substantive evidence of guilt.[80] If gang profiles are to be used, this factor should apply. No such instruction was ever given to Bynum's jury. The prosecution cannot concede this

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[76] *Id.* at 694
[77] *Id.*
[78] *Id.*
[79] *Id.* at 695
[80] *Id.* at 695 citing *Hubbard, supra* at 242, 530 NW2d 130

factor without confessing reversible error.

Fourth, an expert witness should not express his opinion, based on gang evidence of any kind, that a defendant is guilty, nor expressly compare a defendant's characteristics to a profile in such a way that guilt is necessarily implied.[81] Again, the voice of Officer Sutherland, "When they went to that store that day, they 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" (293a). We would adopt this factor. It is a variation on the prohibition against opinion evidence recently reaffirmed by this Court in *People v Musser*.[82] The prosecution cannot concede this factor without confessing reversible error at Bynum's trial.

There is at least one aspect of *Murray* that does not fit gang evidence. The *Murray* opinion uses the phrase "modus operandi" as in 'the modus operandi of drug traffickers.'[83] Courts have consistently found that drug traffickers have modus operandi in their way of doing business. No similar phenomena has been established with street gangs. It is not clear what the phrase 'modus operandi' would have in this context. The difference arises from the absence of a nexus between profile and offense, discussed in Section I. If in future cases prosecutors intend to argue modus operandi they would need to satisfy MRE 702 – 705.

V. A Proposed Set of Standards

In summary, Appellee contends that, before gang or gang profile evidence is used in a case in which gang membership is not an offense element the prosecution should be required to demonstrate through evidence *independent of their gang expert* that a charged offense is gang related. This is a necessary threshold matter under MRE 401. Next, as described under 'Issue One,' the trial court should weigh the evidence under MRE 403.

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[81] *Id.*
[82] *People v Musser*, __ Mich ___; ___ NW2d ___ (Issued July 12, 2013)
[83] *Id.*

Next, *Murray's* prohibition against using profile evidence as substantive evidence of guilt should be extended to gang evidence, as should these concepts from *Murray*:

> (1) a gang profile expert may not "opine that the defendant is guilty merely because he fits a [gang] profile," (2) the expert should not "expressly compare the defendant's characteristics to the profile in such a way that guilt is necessarily implied," and (3) "[a]ttorneys and courts must clearly maintain the distinction between the profile and the substantive evidence" including by utilizing a cautionary instructions.

Also, something like the four factors *Murray* sets out to help trial courts determine whether evidence is being used correctly should be applied to gang evidence.

Next, as discussed earlier, the holding in *Lopez-Medina* should be adopted; the line between fact and expert testimony should be demarcated throughout the trial, not merely in an instruction. Finally, although not prohibited in *Lopez-Medina*, in gang cases one person should not testify as both a fact and expert witness to a jury. Gangs typically connote more threatening images than drug dealers – public violence by groups v. private acts by individuals. The problem of confusion for a jury is greater and the nexus between the crime and any profile is absent.

VI. Conclusion

When *Murray* was issued it was not seen as a 'win' for the defense and the validity of drug profiles continues to be debated. But *Murray* is consistent with other jurisdictions regarding drug profile evidence. Trial courts must ensure that expert testimony is relevant and reliable. Failure to do so can deny the accused a fair trial.[84] If gang evidence in general and gang profiles in particular are to be admissible at a criminal trial, they should not serve as substantive proof of guilt. An expert witness should not be allowed to testify that, based on a profile, the accused is guilty or to "compare the defendant's characteristics to the profile in a way that implies that the defendant is guilty."[85] Officer Sutherland did both and a new trial is warranted.

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[84] *Daubert v Merrell Dow Pharm. Inc.*, 509 US 579; 113 SCt 2786; 125 LEd2d 469 (1993)
[85] *People v Williams*, 240 Mich App 316; 614 NW2d 647, 650 (2000)

ISSUE THREE

III. BEFORE AND DURING TRIAL THE DEFENSE OBJECTED TO THE GANG EVIDENCE UNDER MRE 403. THE PROSECUTION SHOULD NOT BE HEARD TO CLAIM OTHERWISE WHEN THEY CONCEDED ON THE TRIAL COURT'S RECORD AND ON APPEAL THAT AN OBJECTION UNDER MRE 403 WAS PRESERVED. THE PRESIDING TRIAL JUDGE FOUND THAT EACH ISSUE RAISED ON APPEAL WAS PRESERVED.

Standard of Review. The question of whether an issue is preserved would appear to be a mixed question of fact and law.[86]

I. Discussion

The general rule is that to preserve an issue the appellant must challenge it before the trial court.[87] In the case *sub judice*, the trial court found that all the issues raised in defendant's motion for new trial (including an MRE 403 claim) were preserved by trial counsel.[88] The prosecution's position is incoherent. Under 'Issue Three,' they argue that the only objection made at trial was to PowerPoint® images and Officer Sutherland's credentials. But before the trial court, the Court of Appeals, and in their discussion of "Issue One" in the brief filed before this Court they effectively concede that an MRE 403 objection was preserved.

There, they argue that the trial court carefully weighed Officer Sutherland's **testimony** on street gangs under MRE 403:

> The trial court considered the pros and cons of admitting Sutherland's **testimony** on the subject of gangs, gang membership, and gang behavior.
>
> ***
>
> The People offered Sutherland's **testimony** as proof of Defendant's motive, his level of premeditation, and also more generally to explain the behavior of the people involved in the situation. The trial judge questioned the prosecutor to make sure that he understood the People's theory. Having duly considered **the testimony** offered by the People, and the theories under which it was admitted, the trial court ruled that Sutherland's **testimony** was admissible as evidence of Defendant's motive. Although the trial court did not say so explicitly, it also

[86] *People v Vaughn*, 491 Mich 642; 821 NW2d 288 (2012)
[87] *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2012)
[88] T. 5/4/12 Hrg. 22

> admitted **Sutherland's expert testimony** to help the jurors understand the behaviors of the people involved in the incident that led to the murder...The trial court **also admitted** the demonstrative evidence intended to accompany the testimony ....**Later** the trial court considered and overruled Defendant's objection to the qualification of Sutherland as an expert witness." [Prosecution's brief pp. 17-18; citations omitted].

Appellee agrees with the trial court that trial counsel objected to the testimony on gangs under MRE 403. When defendant requested a *Ginther* hearing and new trial the prosecution argued *and prevailed on* its (then) position that trial counsel *did* object under MRE 403. They made the same concession before the Court of Appeals.[89] The prosecution should be estopped from now arguing otherwise. Judicial estoppel is an equitable doctrine which prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.[90] The doctrine "...preserve[s] the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship."[91]

II. Background

Trial began on September 20, 2011. On September 12, 2011, a mere eight days before trial, the prosecution filed a "Motion in Limine to Allow Gang Power Point Presentation" (65a-66a). One should pause to consider that *the prosecution* writes in their brief: "Despite its title, the People's motion actually refers to the **underlying evidence** providing the basis for the presentation."[92]

On September 13, 2011, the defense filed a "bare bones" and apparently hurried answer given

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[89] *See* Prosecution's Court of Appeals brief at 10 ("trial counsel's objection regarding whether or not the evidence was more probative than prejudicial"). At pp. 9-10, they imply that defendant's argument changed on appeal. That is false. At pp. 12-13 of his brief in support of his motion for new trial, defendant argued MRE 403 spending less time on it than his other issues because it did appear to be preserved. They implied below that the defense, on appeal, argued that trial counsel did not object "hard enough." The defense has never used that expression; the prosecution did in their brief in opposition to a motion for new trial.

[90] *Morales v State Farm Mut. Ins. Co.*, 279 Mich App 720; 761 NW2d 454, 464 (2008)

[91] *White v Wyndham Vacation Ownership, Inc.*, 617 F3d 472, 476 (6th Cir. 2010)

[92] Prosecution Brief at 26

said time frames (67a-68a). But if one reads the second paragraph it directly quotes MRE 403: "That this presentation's potential prejudicial impact far and away outweighs whatever trivial probative value it may possess." That is the same claim raised on appeal. The prosecution now tries to insensibly argue that the word "presentation" can refer only to a PowerPoint® and not to testimony.

During the September 19, 2011, hearing on the prosecution's motion, the trial court stated: "I've read Mr. Pichlik's [defense counsel's] answer" and "I understand Mr. Pichlik's opposition to it" (325a).[93] The Court then took the matter under advisement.

On the third day of trial, argument on the motion continued (244a-252a). Significantly, *the trial court* makes reference to an off-record discussion with counsel (for both sides) that occurred at the end of the previous trial day: "...when we concluded proceedings yesterday" (244a). Trial counsel argued: "I am still objecting to the use of essentially **most of this testimony** on the basis that it is **more prejudicial than probative** (244a). Trial counsel argued, "It's not particularly relevant as it relates to this particular defendant, whether he is in a gang or not. It seems to be getting a little far afield" (244a).

Moving forward to the May 14, 2012, hearing on defendant's new trial motion, the *trial court* found that the issues before it were preserved. The same issues, resting on the same portions of the record, were later presented on appeal. During said hearing, the prosecution *and* trial court explained that said off-record conversation covered Sutherland's *testimony* and gave meaning to the trial ruling; the ruling covered Officer Sutherland's testimony (34-35b)

Prior to then, there was an ambiguity in the record. Appellate counsel had no involvement in this case until after sentencing. The trial court's explanation was new information appellate counsel was processing on May 14, 2012, hearing. The trial court and prosecution explained:

[93] T. 9/19/2011 Hrg. p. 12, line 7, p. 13 line 16

> THE COURT: Now let me interrupt. I have not received the trial transcripts for review so I haven't reviewed it. But my recollection is there was [sic] specific objection by defense counsel to the presentation of **this whole range of evidence**.
>
> Now if you don't have the whole transcript, obviously, we need to cure that. If my recollection is erroneous then I'll have to go to the trial transcript.
>
> Do you have – have you reviewed the transcripts [the prosecution] Mr. Kabot?
>
> [THE PROSECUTION]: I have, Judge, and you're right. The motion in limine was obviously done before trial commenced. Your Honor withheld ruling on the exhibits and the **testimony** regarding Officer Sutherland.
>
> In the midst of trial, we actually had a break. I advised the Court that I was at the point in time in the trial where I was going to propose – or I was going to present Officer Sutherland's **testimony**, in **addition with** the demonstrative exhibits that went with Officer Sutherland's testimony.
>
> And at that point in time, your Honor took up additional arguments by defense counsel about why the **testimony** of Officer Sutherland and the exhibits should not be – should not be admitted. And then if I have a clear recollection, one of those was that it was **more prejudicial than probative under Michigan Rule of Evidence 403**. And I'm trying to recall the other grounds.
>
> But there were numerous grounds upon which Mr. Pichlik based objections. And the Court having heard all the objections that Mr. Pichlik presented then decided that the evidence was relevant, that the evidence went to motive, and that the motive was certainly proper to be put before the jury and ruled that it was going to be admissible. [34-35b; Emphasis added].

A break was then taken for the prosecution to obtain transcripts (36b). Appellee, perhaps out of an overabundance of caution, preserved an objection on grounds of ineffective assistance (36-37b). The trial court then ruled:

> THE COURT: Well, Mr. Kabot, Mr. Faraone and I frankly disagree on the extent of the objections [37-38b].
>
> ***
>
> THE COURT: Well, again, I haven't examined specifically all – all parts of the transcripts, but I – from the – from a trial court's perspective I am satisfied that Mr. Pitchlik's objections do preserve the issues raised by Mr. Faraone in this motion at least. I don't know what may be subsequently raised in the Court of Appeals, but if they are similar to this motion – if they are similar issues to this motion, I'm satisfied that there is sufficient preservation of those issues that Defendant is not faced with a claim that the Defendant – defend—defense counsel did not object" [22-23b]

It should be noted that the prosecution ultimately refused to commit to its position; which might explain why the defense continued to argue the ineffective assistance claim (38b line 4).

III. Further Discussion

This Court's issue preservation jurisprudence has focused on the *trial court* and what the preservation requirement facilitates the *trial court* in doing. This Court has held that the purpose of the preservation requirement is to assure that objections are raised, "...at a time when the *trial court* has an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant's constitutional and nonconstitutional rights."[94]

A scenario in which a prosecutor prevails on an argument that a *Ginther* hearing on a failure-to-object claim is unwarranted because trial counsel objected, only to then argue and prevail on a claim before a higher court that no objection occurred on the same grounds they earlier conceded an objection was made under, is absurd. And it fails the guiding purpose of preservation jurisprudence, to encourage the raising of objections when the trial court has an opportunity to correct the error. The prosecution's position will only encourage parties to play games with preservation issue which in turn will cause the expenditure of more judicial resources, not less.

Further, counsel has found no support for asking this Court to overrule the trial court's ruling on the preservation issue. This is important because trial courts will sometimes base their rulings, advertently or inadvertently, in part on argument made off the record at bench conferences or conferences in chambers. The trial court below said that occurred here, and the defense on appeal had no way of knowing that until the trial court articulated it.[95]

Finally, the distinction the prosecution attempts to make between Sutherland's *testimony* and the PowerPoint® *images* is false. The images were never intended to be watched in silence. The

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[94] *People v Grant,* 445 Mich 535, 551; 520 NW2d 123 (1994)(Emphasis added), See also *People v Carines,* 460 Mich 750, 762, 765; 597 NW2d 130 (1999)(Emphasis added)

[95] The undersigned could not learn this from trial counsel. The circuit court record should reveal that trial counsel was not cooperative, even refusing to provide copies of the PowerPoint® images which the prosecution insisted that he had, and took the unusual step of filing a motion to quash a subpoena asking that they be produced under MCR 6.005(H)(5) at the May 14, 2012, hearing.

prosecution itself writes, regarding their pre-trial motion on the PowerPoint®: "Despite its title, the People's motion actually refers to the underlying evidence providing the basis for the presentation."[96]

The 53 Police Reports

A special preservation issue arises regarding Officer Sutherland's reference to the "53 police reports." As noted above, the dissent below acknowledged that this testimony was improper but found that it was error "invited" by the defense. That is not accurate.[97]

IV. The "Murray Objection"

It is true that no analogy was made to *Murray* or *Hubbard* until post-conviction proceedings. But *Murray* and *Hubbard* arise from MRE 702[98] and the prosecution concedes that during the testimony of Sutherland the defense objected to "...Sutherland's qualification as an expert...,"[99] a reference to MRE 702. And, trial counsel made a "general objection" to the gang evidence in addition to an objection under MRE 403. Under the preservation analyses applied in a case the prosecution cites favorably, *Gutierrez v State*,[100] that objection would preserve the error.

V. Conclusion

The claim that the MRE 403 issue as to Officer Sutherland's testimony was not preserved has no merit. The claim that a "Murray objection" was not preserved is nonsensical, in that *Murray* has not yet been applied to gang evidence. Moreover, the objection counsel did make was sufficient to alert the trial court to the problems discussed in *Murray*.

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[96] Prosecution Brief on Appeal at 26
[97] See FN 21 *supra.* noting the police reports were raised in direct at (256a-257a, 271a line 13)
[98] *People v Murray*, 593 NW2d at 693 (1999)
[99] Prosecution Brief at 27
[100] *Gutierrez v State*, 32 A3d at 9 (2011); See Prosecution brief at p. 12

ISSUE FOUR

IV. DEFENDANT WAS FOUND GUILTY OF PREMEDITATED MURDER. THE PROSECUTION HAS REPEATEDLY CONCEDED THAT OFFICER SUTHERLAND'S GANG TESTIMONY CONSTITUTED THEIR EVIDENCE ON PREMEDITATION. THE EVIDENCE WAS THE HEART OF THEIR CASE. THEREFORE, IF THE EVIDENCE WAS ADMITTED IN ERROR IT CANNOT BE HARMLESS. NOR WAS THE ERROR HARMLESS IN ITS IMPACT UPON DEFENDANT'S CLAIM OF SELF DEFENSE.

Standard of Review. There is no standard of review for harmless error. It is a judicial doctrine, not a claim of error being reviewed.

Discussion

I. MRE 403

The prosecution has conceded that Officer Sutherland's testimony was all they had to offer on premeditation – an essential element of first-degree premeditated murder. The prosecution writes: "...Sutherland's testimony provided the lion's share of the evidence regarding his mental state of premeditation for first degree murder."[101] And it was, "...the most important evidence of Defendant's level [sic] of premeditation in killing Carter."[102]

Now, in an attempt to step back from that admission they unpersuasively argue that, rather than being their "evidence" of premeditation, Sutherland's testimony was not so important after all. On other acts of wrong doing, the United States Supreme Court has said, "[t]he inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury."[103] If the gang testimony at issue in this appeal was admitted in error, then it cannot be plausibly argued that it was 'harmless.'

Realistically, gang evidence "illuminated" this shooting only via the impermissible guilt by propensity and guilt by association inferences. The error was not harmless. It is true that

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[101] Prosecution's brief at 29
[102] Prosecution's brief at 33
[103] *Michelson v United States,* 335 US 469, 475-476; 69 SCt 213; 93 LEd 168 (1948), See also 1A J. Wigmore, Wigmore on Evidence, § 58.2, 1212-1213 (3d Ed Tiller 1983)

overwhelming evidence existed to show that Bynum fired a gun on the night in question; and considerable evidence indicates that at least one of his rounds hit Carter. To prove first-degree premeditated murder, however, the prosecution needed to prove premeditation. The question of premeditation was actively contested by the defense.

Carter initiated the physical altercation by hitting Bynum (94a, 105a-106a). In their closing, the prosecution conceded that Carter was the aggressor (27b). Bynum argued that he discharged a firearm in what he believed to be self-defense. Regardless of whether the prosecution agreed, it was a viable claim. Multiple guns were fired and that one may have been held by Carter's group finds some support in the security camera video.[104] The defense had the right to a fair trial without the inflammatory and unfairly prejudicial gang testimony. The prosecution's request for a second-degree murder finding is meritless; the claim of self defense applied to the second-degree charge as well as the first-degree charge.

II. *People v Murray*

In *Murray*, the Court cited three factors to help in determining whether drug profile evidence was used as substantive evidence of guilt at trial. As applied to the gang testimony, all three are present in this record. First, whether the prosecutor argued that the evidence was admissible to explain why the accused acted as they did.[105] Here, the prosecutor repeatedly told the trial court at a preliminary hearing that the gang evidence would be used to show motive and propensity to commit crimes (315a, 322a). They have conceded this in their brief.

Second, whether the prosecutor argued to the jury that the profile was circumstantial evidence of defendant's guilt.[106] Here, the prosecution used the gang evidence as substantive evidence of guilt throughout the trial and in their closing argument (27-29b). They even used it sarcastically

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[104] *See* page three above
[105] *Id.* at 695 citing *Hubbard* at 242, 530 NW2d 130
[106] *Id.* citing *Hubbard* at 242-243, 530 NW2d 130

during their rebuttal closing argument: "That's right. Levon Bynum is the gentle misunderstood gang member" (32-33b). Again, this is conceded in their brief.

Third, whether the trial court failed to give the jury a cautionary instruction limiting the use of the profile evidence.[107] The court gave a generic instruction on prior bad acts (310a). The jury was never told that they could not use the gang profile evidence as substantive evidence of guilt.

III. Conclusion

Gang testimony, like drug profile testimony, should not be used in a manner which proposes to answer the question of defendant's guilt by itself. Here, the police-expert directly tied the gang testimony to defendant's actions and characteristics in a manner that implied defendant's guilt merely because of that connection, i.e., gang membership was equated premeditation. They even directly opined that on the basis of such characteristics Bynum was guilty. The use of expert testimony was improper and it was important to the prosecution's case, and not harmless.

The defense concedes that Bynum might be guilty of something – there is no evidence that he had a license to carry a weapon, if nothing else. The prosecution refuses to give any ground. They appear to argue that it was appropriate for Officer Sutherland to tell the jury that other people (anonymous to them) had purportedly accused Bynum of other violent acts, to offer his "expert opinion" that Bynum was guilty, to opine that Bynum awoke on the day of the shooting premeditating a murder, to show them the picture from Scarface© and all the other antics. This is a strong indication that they are willing to do this again. That is another reason to not give them a second-degree murder conviction, but to instead remand the matter for a new trial that complies with the rules.

[107] *Id.* citing *Hubbard* at 243, 530 NW2d 130

ORAL ARGUMENT REQUESTED

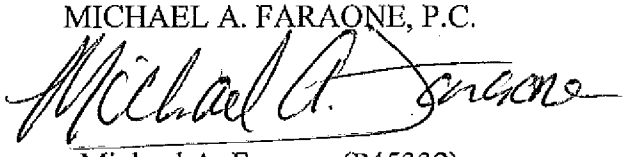
Defendant-Appellant, Levon Lee Bynum, through appellate counsel, respectfully requests that this Honorable Court either grant oral argument or, in the alternative, affirm the Court of Appeals decision in this matter without oral argument and remand for a re-trial, US Const. Am V, VI, XIV; Const. 1963, art 1, §§ 17, 20.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Defendant-Appellant, Levon Lee Bynum, thanks this Court for its time and consideration, and asks that this Honorable Court affirm the Court of Appeals decision in this matter and remand for a re-trial.

Respectfully submitted,

MICHAEL A. FARAONE, P.C.



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