

# ARTICLE

## Conviction, Confrontation, and *Crawford*: Gang Expert Testimony as Testimonial Hearsay

*Hon. Jack Nevin*<sup>†</sup>

### I. INTRODUCTION

As a sitting trial-court judge in Tacoma, Washington, since 2004, I have seen numerous applications of *Crawford v. Washington*,<sup>1</sup> a case that has changed the application of the Confrontation Clause<sup>2</sup> to “testimonial hearsay.” Federal and state courts use *Crawford*<sup>3</sup> to apply the Confrontation Clause to testimonial hearsay in a variety of contexts, from 911 calls offered under the excited utterance hearsay exception<sup>4</sup> to statements of laboratory analysts.<sup>5</sup> Increasingly, *Crawford* issues arise when prosecutors seek to present gang expert testimony, ostensibly under the provisions of Federal Rule of Evidence (FRE) and Washington Rule of Evidence 703 (collectively ER 703).<sup>6</sup> This trend raises an important ques-

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<sup>†</sup> J.D., M.S., M.B.A., Gonzaga University; B.A., Washington State University; Pierce County, Washington, District Court Judge, 1997–Present; Adjunct Professor, Comprehensive Trial Advocacy and Military Law, Seattle University School of Law; Adjunct Professor, Kessler Edison Trial Techniques Program, Emory University School of Law; Lecturer, U.S. Department of State, U.S. Department of Justice; Lecturer, Humanitarian Law, Catholic University of Lublin, Lublin, Poland; Brigadier General Ret. U.S. Army Reserve Judge Advocate General’s Corps.

1. *Crawford v. Washington*, 541 U.S. 36 (2004).

2. U.S. CONST. amend. VI.

3. Although the Court in *Crawford* generally defined testimonial hearsay, it did not provide a precise definition. *Crawford*, 541 U.S. at 53–56. Instead, it provided examples. *Id.* Doing so was perhaps a recognition of the potential for the wide variety of applications of this concept. This point will be addressed in greater detail *infra* at Part II.

4. WASH. R. EVID. 803.

5. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2551–52 (2009); *State v. Lui*, 153 Wash. App. 304, 317–20, 221 P.3d 948 (2009).

6. FED. R. EVID. 703; WASH. R. EVID. 703.

tion: Should the principles of *Crawford* extend to gang expert testimony?<sup>7</sup>

Crime in America has become more sophisticated in the twenty-first century. Law enforcement, in an effort to keep pace, has developed a number of subspecialties in investigation. These expert subspecialties include accident reconstruction, methamphetamine production, and even drug recognition.<sup>8</sup> As a trial-court judge, I have seen a number of these law enforcement experts testify. While often qualifying as experts under ER 703, they also retain the status of fact witness, typically as the lead investigator. Their dual status creates a natural tension: Are the witnesses rendering fact testimony or are they testifying as experts? Among the blurred areas of factual versus expert testimony is that of gang expert testimony. Here, the police officer often occupies two roles, one as investigator and one as expert. Although the use of gang expert testimony is relatively unique to Washington State,<sup>9</sup> such testimony presents the same “fact witness/expert witness” tension as testimony given by other types of law enforcement experts. Often, testimony from a law enforcement expert contributes to a defendant’s ultimate conviction. I offer the following hypothetical to illuminate the *Crawford* issues presented by gang expert testimony.<sup>10</sup> Both federal and state courts throughout the United States commonly encounter these issues, following the pattern depicted.

For the purposes of this hypothetical, the case name is *State of Washington v. Alexander Morano*. The charge was sale and trafficking of controlled substances under Washington’s Racketeering Influenced and Corrupt Organizations Act.<sup>11</sup> The complaint alleged that as a member of a criminal enterprise, the GD 18 gang, Morano led a criminal organization that distributed drugs, committed car thefts, and bribed public officials. The complaint further alleged that Morano engaged in a large-scale

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7. See generally Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 827 (2008); Patrick Mark Mahoney, Note, *Houses Built on Sand: Police Expert Testimony in California Gang Prosecutions; Did Gardeley Go Too Far?*, 31 HASTINGS CONST. L.Q. 385 (2004). Specifically, expert testimony that includes what would otherwise be considered testimonial hearsay raises *Crawford* implications. Should the fact that testimony is expert testimony remove it from the purview of *Crawford*?

8. *State v. Baity*, 140 Wash. 2d 1, 3–6, 991 P.2d 1151 (2000).

9. To date, only one case has been decided on gang expert testimony and its connection to *Crawford*. *State v. McDaniel*, 155 Wash. App. 829, 230 P.3d 245 (2010).

10. This is a hypothetical scenario based on *United States v. Mejia*, 545 F.3d 179 (2d. Cir. 2008). Nothing in this fictional account is intended to represent any particular known gang organization or ongoing criminal investigation. This fictional account is not intended in any way to disparage any particular ethnic group. The reality of gang sociology in America is that gang membership is often based on common ethnicity among members.

11. WASH. REV. CODE § 9A.82.010 (2008).

operation selling controlled substances with a number of other GD 18 gang members.

In its case-in-chief, the prosecution sought to present Alexander Ortiz as a gang expert to testify about the organizational structure, methods, history, and vocabulary of GD 18, a gang well-known in King County and throughout the State of Washington. In his curriculum vitae, Ortiz revealed that he was an eighteen-year veteran of the Seattle Police Department and had been a narcotics investigator since 2000. Five years before the trial, Ortiz was assigned to the Greater Puget Sound Gang Narcotics Network (GANGNET). He was also the chairman of the Gang/Narcotics Committee of the Washington–Oregon Information Network, an organization comprised of narcotics investigators throughout Washington and Oregon.<sup>12</sup>

In its motions in limine, the defense objected to Ortiz’s proposed testimony, arguing that he would rely on inadmissible testimonial hearsay in reaching his conclusions. The accompanying memorandum of authorities relied in part on the authority of *Crawford*,<sup>13</sup> *Davis v. Washington*,<sup>14</sup> and *State v. Mason*.<sup>15</sup>

During oral argument preceding trial, defense counsel was allowed to voir dire Ortiz. In response to defense counsel’s questioning, Ortiz said he had participated in over 200 GD 18 investigations. As an investigator, he said, he had conducted approximately 100 custodial interrogations of “dozens” of GD 18 members. When asked whether he could distinguish between information learned during custodial interrogations and elsewhere, Ortiz replied that his testimony was “an amalgam of information acquired from numerous sources.” Additionally, he stated that he had attended a dozen separate gang “seminars” sponsored by state and federal law enforcement agencies. During these seminars, gang experts, all of whom were state or federal law enforcement officials, lectured on the dynamics of gang organization.

Ortiz admitted that he had little formal education, other than the police academy and numerous gang seminars. His formal education was limited to one year of community college, during which he took only one class that addressed criminal conduct: sociology. The class did not address gang issues.

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12. To my knowledge, there is no such law enforcement organization in existence. Any similarity to an existing police organization anywhere in the State of Washington is purely coincidental. Police organizations in different jurisdictions often create collaborative organizations known as “networks,” frequently characterized by an acronym containing the letters “NET.”

13. 541 U.S. 36 (2004).

14. 547 U.S. 813 (2006).

15. 127 Wash. App. 554, 126 P.3d 34 (2005); 160 Wash. 2d 910, 162 P.3d 396 (2007).

In response to an inquiry from the court, the government stated that Ortiz would offer, if allowed, an expert opinion that the defendant was a member of GD 18, that his business operations and procedures were consistent with those of GD 18, and that the lexicon of words used in writings seized from his residence during the execution of a search warrant were consistent with those of GD 18. At the conclusion of the hearing, the defense argued that Ortiz was not qualified as an expert. Alternatively, the defense argued that Ortiz's testimony was based in large part on inadmissible hearsay, much of it qualifying as testimonial hearsay barred by *Crawford*.<sup>16</sup> Supplementing this argument, the defense pointed out that, on a practical level, there was nothing to prevent the witness from giving the jury a laundry list of facts and telling the jury what to conclude from them. Specifically, the defense worried the jury would determine that the defendant was a gang member. Because the crimes charged fell within Washington's RICO statute, a finding by the jury that the defendant committed the charged crimes as part of a criminal enterprise would subject him to a longer sentence.<sup>17</sup> Should the court deny its mo-

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16. 541 U.S. 36, 68–69 (2004).

17. The following statutes allow for a sentencing judge to depart from sentencing guidelines and sentence an offender up to the jurisdictional maximum for a given offense: WASH. REV. CODE § 9.94A.535(3)(s) (2008) (“The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.”); *id.* § (3)(z)(ii)(aa) (“The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in [WASH. REV. CODE § 9.94A.030 (2008)], its reputation, influence, or membership.”); WASH. REV. CODE § 9.94A.030(12) (2008) (“‘Criminal street gang’ means any ongoing organization, association, or group of three or more persons, whether formal or informal, having a common name or common identifying sign or symbol, having as one of its primary activities the commission of criminal acts, and whose members or associates individually or collectively engage in or have engaged in a pattern of criminal street gang activity. This definition does not apply to employees engaged in concerted activities for their mutual aid and protection, or to the activities of labor and bona fide nonprofit organizations or their members or agents.”); *id.* § (13) (“‘Criminal street gang associate or member’ means any person who actively participates in any criminal street gang and who intentionally promotes, furthers, or assists in any criminal act by the criminal street gang.”); *id.* § (14) (“‘Criminal street gang-related offense’ means any felony or misdemeanor offense, whether in this state or elsewhere, that is committed for the benefit of, at the direction of, or in association with any criminal street gang, or is committed with the intent to promote, further, or assist in any criminal conduct by the gang, or is committed for one or more of the following reasons: (a) To gain admission, prestige, or promotion within the gang; (b) To increase or maintain the gang’s size, membership, prestige, dominance, or control in any geographical area; (c) To exact revenge or retribution for the gang or any member of the gang; (d) To obstruct justice, or intimidate or eliminate any witness against the gang or any member of the gang; (e) To directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage for the gang, its reputation, influence or membership; or (f) To provide the gang with any advantage in, or any control or dominance over any criminal market sector including, but not limited to, manufacturing, delivering, or selling any controlled substance [WASH. REV. CODE § 69.50]; arson [WASH. REV. CODE § 9A.48]; trafficking in stolen property [WASH. REV. CODE § 9A.82]; promoting prostitution [WASH. REV. CODE

tion, the defense asked that the court limit Ortiz's testimony to those matters that were not hearsay, did not violate the Confrontation Clause, and stayed strictly within the confines of his expertise. The defense explicitly asked the court to exclude from evidence Ortiz's personal opinion as the investigating police officer.

The court denied the motion, ruling that, under the provisions of ER 703, otherwise inadmissible evidence, including hearsay—even testimonial hearsay—could form the basis for an expert opinion.

At trial, most of Ortiz's testimony concerned the background of GD 18. He testified about its history, presence in the state, and connections with sister criminal organizations around the United States and abroad. He identified the gang's colors, hand signs, graffiti, and tattoos showing affiliation. He explained in detail the sociology of the gang, including formal and informal communication systems, the most common modes of communication, the organizational chain of command, and the rules of leadership. His testimony included descriptions of a gender hierarchy in which women were not allowed affiliation, but were instead relegated to an auxiliary role, not unlike a "support group" for the male gang members.

With regard to the gang's operation in Washington, Ortiz testified that since he began gang investigations some seven years earlier, he had seized approximately forty weapons from GD 18 gang members. Finally, he described in great detail how the gang put a "drug tax" on sales of narcotics at certain bars. Throughout the testimony, he explained how his knowledge, training, and experience led him to conclude that the defendant was not only a member of GD 18, but also a leader.

On cross-examination, the defense focused on the sources of Ortiz's information about the defendant.<sup>18</sup>

Q: You testified that the gang supported itself in its early years by the sale of marijuana imported from Mexico?

A: Yes.

Q: Is it fair to say that someone told you that?

A: Yes. I learned that from numerous custodial interrogations of known and reputed gang members. I have also learned that from other law enforcement members who have conducted numerous GD 18 custodial interrogations.

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§ 9A.88]; human trafficking [WASH. REV. CODE § 9A.40.100]; or promoting pornography [WASH. REV. CODE § 9.68].”).

18. The following section depicting a direct and cross-examination of a gang expert is based on excerpts of the gang expert testimony reported in *United States v. Mejia*, 545 F.3d 187–89 (2d. Cir. 2008).

Q: You also told the jury that gang members placed a tax on narcotics sold in certain bars, isn't that correct? And that your undercover investigation placed the defendant in those same bars on a regular basis?

A: Yes, I learned that in casual conversation with a gang member.

Q: Actually, it was more than causal, wasn't it? In fact, it wasn't a casual conversation at all. It was a custodial interrogation of a gang member, and it took place at the county prosecutor's office?

A: Yes. The gang member I interviewed had been charged but was pending arraignment, and therefore, bail had not yet been set. Members of our regional drug task force escorted him to the prosecutor's office for our conversation.

Q: Why was this person arrested?

A: It was part of the same investigation concerning your client, Mr. Morano.

Q: Is it fair to say that most of what you learned about GD 18, at least as it relates to Mr. Morano, and have expressed here, is a result of your interrogation of multiple suspects in custody?

A: Yes.

Q: How many suspects?

A: Nine.

Q: Of these nine suspects, how many are currently present and available for this trial?

A: Three are still in custody awaiting trial. Six made bail, and of those, two were deported due to a clerical error, two are dead, assassinated by a rival gang, and two are just gone. There are warrants outstanding for the last two and also for the two that were deported, although they are probably still out of the country.

Q: And none of those witnesses were subject to a prior cross-examination by the defendant in this case, correct?

A: Correct.

Following the cross-examination of Ortiz, the defense again asked that his testimony be stricken and that a mistrial be granted. The defense rationale rested on two arguments: first, the officer's testimony relied almost exclusively on testimonial hearsay and therefore violated the

*Crawford* requirements; and second, the officer's alleged expertise in gang matters did not meet the requirements of *Frye v. United States*.<sup>19</sup>

In denying the defense motions, the court first emphasized that it was satisfied that gang expertise was recognized under the applicable "scientific community" defined in *Frye*,<sup>20</sup> and that the requirements of ER 702 were satisfied. As to the *Crawford* argument, the court emphasized two points in its holding. First, *Crawford* did not apply because the information on which the expert based his opinion was not being offered to prove the truth of the matter asserted. Second, so long as an expert relies on hearsay that is regularly relied on by experts in the field, testimonial or otherwise, such reliance does not preclude its admission or violate *Crawford*. Because the evidence presented was beyond the skill and expertise of a lay person and would assist a jury in understanding the evidence, it met the requirements of ER 703.<sup>21</sup> Accordingly, the court admitted the evidence and the defendant was convicted of all counts, including a special finding that he was involved in an organized criminal enterprise, which enhanced his mandatory sentence under Washington law.<sup>22</sup>

This Article will explore the issues raised by this fact pattern. Specifically, this Article will discuss how gang expert reliance on testimonial hearsay violates *Crawford*.<sup>23</sup> Both the spirit and letter of *Crawford* are violated when the information relied on by law enforcement has not passed the "crucible"<sup>24</sup> of pretrial cross-examination mandated by *Crawford* to assure reliability. Moreover, this Article will offer a way to reconcile ER 703 with the requirements of *Crawford*.

Part II of this Article will discuss the history and application of *Crawford* and its expansion into virtually every area of testimonial hearsay. Part III will discuss the evolving and growing area of gang expert

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19. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

20. *Id.*

21. Nothing in ER 703 requires that the facts or data relied on by an expert be admissible as evidence. *City of Bellevue v. Kravik*, 69 Wash. App. 735, 850 P.2d 559 (1993); 5D KARL B. TEGLAND, COURTROOM HANDBOOK ON WASHINGTON EVIDENCE 378 (5th ed. 2010).

22. WASH. REV. CODE § 9.94A.535 (2010); WASH. REV. CODE § 9.94A.030 (2011). In 2010, the Washington Legislature enacted these two statutes that (1) define a gang activity and (2) allow for a sentencing enhancement. WASH. REV. CODE § 9.94A.535(aa) (2010) ("The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership."). This provision makes gang affiliation part of the aggravating circumstances allowed in imposition of an exceptional sentence outside the standard ranges reflected in Wash. Rev. Code § 9.94A et. seq. In this case, the court could, in theory, sentence the defendant up to the statutory maximum sentence of ten years in prison and a ten-thousand-dollar fine. This is the statutory maximum for sale and delivery of controlled substances.

23. *Crawford v. Washington*, 541 U.S. 36 (2004).

24. *Id.*

testimony as a “science.” Part IV will expose the intersection of gang expert testimony and the Confrontation Clause, showing how gang expert testimony can often be based on testimonial hearsay and therefore violate both the spirit and letter of *Crawford*.<sup>25</sup> This Part will show how the growing area of gang expertise and the principles of *Crawford* are on a collision course. The end product of this course is the admission of testimonial hearsay by way of expert testimony, all with a view toward conviction rather than ensuring a defendant’s right to effectively cross-examine the witnesses providing evidence against him. As a result, hundreds, if not thousands, of alleged gang members nationwide have been, and will be, convicted without the benefit of cross-examination and, therefore, a fair trial.<sup>26</sup> Finally, Part V will devise a test for excluding that portion of gang expert testimony that relies on testimonial hearsay derived without the benefit of cross-examination in violation of *Crawford*.

## II. *CRAWFORD V. WASHINGTON* AND THE RIGHT TO CONFRONTATION

The *Crawford* decision was a dramatic departure from traditional Confrontation Clause precedent. Previously, in *Ohio v. Roberts*,<sup>27</sup> the Supreme Court held that the introduction of an unavailable witness’s hearsay statement did not violate the Confrontation Clause of the Sixth Amendment so long as the trial judge found that the hearsay was reliable and trustworthy.<sup>28</sup> In arriving at its conclusion, the *Roberts* Court advocated using the same criteria for Confrontation Clause analysis as for hearsay analysis. The decision charged judges with determining the reliability of testimonial hearsay<sup>29</sup> exclusively from “firmly rooted hearsay exceptions.”<sup>30</sup> If a statement met the criteria of a recognized exception to the hearsay rule, then it met Confrontation Clause requirements as well. In *Crawford*, however, the Court shifted course, changing the criteria for admissibility from an assessment of reliability and trustworthiness of testimonial hearsay to an absolute exclusion of testimonial hearsay from unavailable declarants absent a prior right of cross-examination.<sup>31</sup>

A full appreciation of *Crawford*’s implications requires an understanding of the *Crawford* holding and its interpretations. This Part will provide background on the facts and holding of *Crawford*, along with a discussion of subsequent case law.

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25. *Id.*

26. See generally Seaman, *supra* note 7; Mahoney, *supra* note 7.

27. *Ohio v. Roberts*, 448 U.S. 56 (1980).

28. *Id.* at 72–73.

29. *Id.* at 62–63.

30. *Id.* at 66.

31. *Crawford v. Washington*, 541 U.S. 36, 59 (2004).



The case concerned a defendant, Crawford, who was ultimately convicted of assault.<sup>32</sup> Briefly, the facts were the following: Crawford's wife told him that a mutual friend had sexually assaulted her some weeks earlier.<sup>33</sup> Soon thereafter, Crawford and his wife went to confront the friend.<sup>34</sup> That confrontation culminated in Crawford stabbing the friend.<sup>35</sup> In his statement to police, Crawford insisted that the friend had assaulted his wife only a few hours earlier and had attacked him with a knife, thereby necessitating self-defense.<sup>36</sup> But, in a separate statement, Crawford's wife said that the assault had occurred some weeks earlier, and that although the friend did present a knife, he did so only after Crawford had stabbed him once.<sup>37</sup> Because her statement was at odds with Crawford's self-defense position, Crawford asserted the marital privilege to preclude his wife from testifying.<sup>38</sup> The State moved to admit his wife's two statements as statements against penal interest and, therefore, exceptions to the hearsay rule.<sup>39</sup> The lower court agreed, holding that because the statements were reliable and trustworthy, they not only satisfied the hearsay rule, but also the Confrontation Clause.<sup>40</sup> Although the court of appeals reversed, it did so exclusively on the question of whether the statements of the wife constituted admissible hearsay.<sup>41</sup> The Washington Supreme Court held that while her statements were not "firmly rooted" exceptions to the hearsay rule, they were reliable.<sup>42</sup>

In rejecting the holding of the Washington Supreme Court, the U.S. Supreme Court first reviewed the history of the Confrontation Clause, focusing on the trial of Sir Walter Raleigh.<sup>43</sup> It also criticized the civil law system as the proper mode of criminal prosecution, in that it did not include cross-examination.<sup>44</sup> Instead, the Court referred to cross-

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32. *Id.* at 40.

33. *Id.* at 38.

34. *Id.* at 38–39.

35. *Id.*

36. *Id.* at 38–40.

37. *Id.*

38. *Id.* at 40.

39. *Id.*

40. *Id.*

41. *Id.* at 41.

42. *Id.*

43. *Id.* at 43.

44. *Id.* at 43–47. Most countries in the world are civil law countries. These countries have systems based on codes, such as the Napoleonic Codes, Roman Codes, or in the Middle East, the Hammurabic Code. None of these systems have jury trials. In fact, many are now attempting to integrate jury-trial rights into their codes. Instead of being based on an adversarial truth-seeking model, courts in most countries are inquisitorial. When *Crawford* speaks of the "civil law" system, it is referring to these courts.

examination as the “litmus test” for reliability of testimonial hearsay.<sup>45</sup> The Court concluded that the *Roberts* reliability test, which required the judge to assess reliability, was at best unpredictable.<sup>46</sup> Specifically, the majority held that if a defendant does not have an opportunity to cross-examine a declarant, the defendant’s right to confrontation is violated when an out-of-court testimonial statement is admitted into evidence. This is true even if that statement otherwise falls within a firmly rooted hearsay exception under state law.<sup>47</sup> Justice Scalia, writing for the majority, stated that the drafters of the Sixth Amendment did not envision that the fundamental requirement of cross-examination of a declarant could be dispensed with merely by a showing that a statement was reliable and trustworthy.<sup>48</sup> Although the Court neither precisely nor expansively defined “testimonial,”<sup>49</sup> it did give specific examples and identified three categories of testimonial-type statements.<sup>50</sup> First, testimonial hearsay includes statements characterized as in-court testimony or its functional equivalent.<sup>51</sup> Second, it includes statements referred to as extra-judicial. Third, it includes statements made under circumstances leading an objective witness to reasonably believe that the statement would be available for use later at trial.<sup>52</sup> Specific examples provided by the Court included prior testimony at trial or grand jury, affidavits, custodial examinations, depositions, and any other prior statement that might likely be used at trial.<sup>53</sup> The Court further suggested that any hearsay that could be used in a prosecution of the accused could fit within the definition of “testimoni-

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45. *Id.* at 50.

46. *Id.* at 60 (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

47. *Crawford*, 541 U.S. at 60–64.

48. *Id.* at 50.

49. *Id.* at 68. The Court stated:

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and prior opportunity for cross-examination. *We leave for another day any effort to spell out a comprehensive definition of “testimonial.” Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.*

*Id.* (emphasis added); see also Daniel M. Froehlich, *The Impact of Melendez-Diaz v. Massachusetts on Admissibility of Forensic Test Results at Court-Martial*, ARMY LAW., Feb. 2010, available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/02-2010.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/02-2010.pdf).

50. *Crawford*, 541 U.S. at 51–52.

51. *Id.*

52. *Id.*; Froehlich, *supra* note 49.

53. *Crawford*, 541 U.S. at 51–52.

al.”<sup>54</sup> The Court’s focus was on the government’s role in the procurement of the statement.<sup>55</sup> If the statement was obtained, for example, with a view toward facilitating a criminal prosecution, then it would likely be considered testimonial.<sup>56</sup>

The *Crawford* Court significantly changed the interpretation of the Confrontation Clause in all criminal cases in the United States. Although the exact meaning of “testimonial” remained unclear, the Court did make it clear that, without the crucible of cross-examination, testimonial hearsay is inadmissible.<sup>57</sup> That means that virtually all hearsay statements offered from an unavailable declarant require a *Crawford* analysis.<sup>58</sup> Although *Crawford* redefined the law, it created many more questions than it answered.

Following *Crawford*, the United States Supreme Court considered two consolidated cases dealing with the definition of “testimonial statements” for the purpose of the Sixth Amendment right to confrontation.<sup>59</sup> In *Davis v. Washington*, the Court, again in an opinion authored by Justice Scalia, contrasted two different factual situations involving statements made by witnesses to law enforcement officials.<sup>60</sup>

Scalia’s opinion focused carefully on the specific factual differences between the two situations. In the primary case, *Davis*, the statements at issue were made during a 911 call to an emergency operator regarding an alleged domestic violence situation that was actively occurring at the time the call was made.<sup>61</sup> When the complainant did not appear for trial, the trial judge, over a defense objection, admitted the substance of the call into evidence.<sup>62</sup>

In *Davis*’s companion case, *Hammon v. Indiana*, the statements at issue were made to police officers who were investigating a possible domestic violence situation.<sup>63</sup> The complainant made these statements to the officers when they arrived at the scene, after the complainant was separated from her husband (the defendant in the subsequent prosecution) and questioned by an officer as to what had occurred at the house prior to the arrival of the police.<sup>64</sup> As in *Davis*, the complainant did not appear at trial, and her statement to the officer was read to the jury as an

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54. *Id.*

55. *Id.* at 67–68.

56. *Id.* at 50–51.

57. *Id.* at 61.

58. *Id.*

59. *See Davis v. Washington*, 547 U.S. 813 (2006).

60. *Id.*

61. *Id.* at 817–18.

62. *Id.* at 819.

63. *Id.*

64. *Id.* at 819–20.

excited utterance, over a defense objection to the lack of opportunity for cross-examination.<sup>65</sup> The Court determined that, because the statements were made during a custodial interrogation following proper *Miranda* warnings, the statements were not testimonial.<sup>66</sup> The Court's ruling demonstrates that the factual circumstances of the statement at issue are critical to the determination of whether that statement is testimonial in nature and, therefore, subject to the *Crawford* constitutional requirements.<sup>67</sup> As a result of the *Davis/Hammon* decision, the Court clarified *Crawford* and articulated a narrow exception. When the primary purpose of a statement taken by police during interrogation is to enable police assistance in meeting an ongoing emergency, the statement will not be testimonial nor subject to the Confrontation Clause.

Following *Davis*, in its second major application of *Crawford*, the Court further refined the landscape of Confrontation Clause analysis by determining that even a state-certified forensic analyst's opinion made under oath constituted testimonial hearsay.<sup>68</sup> In *Melendez-Diaz v. Massachusetts*, the defendant was convicted of distributing and trafficking in cocaine.<sup>69</sup> During the arrest, law enforcement agents seized a large quantity of cocaine, packaged for sale.<sup>70</sup>

The police sent the substance to the Massachusetts Department of Health's State Laboratory Institute for testing.<sup>71</sup> The laboratory was regularly used for testing of controlled substances, and the testing was a prerequisite for criminal prosecution.<sup>72</sup> Two state-certified forensic analysts issued opinions supported by certificates that the material seized consisted of controlled substances.<sup>73</sup> These certificates were sworn under oath pursuant to Massachusetts law.<sup>74</sup> Furthermore, under Massachusetts law, these certificates were admissible at trial without the testimony of

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65. *Id.* at 820.

66. *Id.* at 822.

67. *Id.* ("Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.").

68. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009).

69. *Id.* at 2530–31.

70. *Id.* at 2530.

71. *Id.* at 2531.

72. *Id.*

73. *Id.*

74. *Id.*

the analysts,<sup>75</sup> and were admitted without the testimony of the analysts.<sup>76</sup> In his objection, Melendez-Diaz cited to *Crawford* and argued that the statements violated his right of confrontation.<sup>77</sup>

The Court held that the laboratory certificates were testimonial statements and that the affiants were “witnesses” for purposes of the Sixth Amendment.<sup>78</sup> In its ruling, the Court drew on its initial holding in *Crawford*, but also its holding in *Davis*. The Court reasoned that a certificate from a laboratory was an “affidavit” because it was a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”<sup>79</sup> *Davis*, either clarifying or expanding *Crawford*, added an additional factor: the intent of the declarant in making the statement. For example, the court should ask whether the statement was made to assist police in meeting an emergency, or whether it was made to assist them in facilitating an arrest and prosecution. In focusing on the intent of the declarant, the Court used an objective test, concluding that the circumstances of preparation would lead an objective witness to believe that the statement would be available for later use at trial.<sup>80</sup> The Court rejected the argument that these certificates were not from an “accusatory witness,” reasoning that the Sixth Amendment only contemplates two types of evidence: that offered against the accused under the Confrontation Clause and that offered in favor of the accused by the right to Compulsory Process.<sup>81</sup>

*Melendez-Diaz* extended the reach of the Confrontation Clause and the application of *Crawford* to testimonial hearsay.<sup>82</sup> Although *Melendez-Diaz* did not redefine testimonial hearsay, it did expand the scope of evidentiary issues requiring a *Crawford* analysis. After *Melendez-Diaz*, any hearsay offered against an accused with an unavailable declarant and lack of prior cross-examination demands a *Crawford* analysis. The extension of *Crawford* to forensic certificates suggests that there may be no limit to this proposition.<sup>83</sup>

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75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* (citing *Crawford v. Washington*, 541 U.S. 36, 51 (2004)).

80. *Melendez-Diaz*, 129 S. Ct. at 2532.

81. *Id.* at 2533–34.

82. Froehlich, *supra* note 49.

83. One state taking issue with the breadth of *Crawford*'s application to all testimonial hearsay is New Mexico. In September of 2010, the U.S. Supreme Court accepted a writ of certiorari in the case of *Donald Bullcoming v. New Mexico*, 189 P.3d 679 (N.M. 2008), *cert. granted*, 131 S. Ct. 62 (2010). The question posed for certiorari in *Bullcoming* was “[w]hether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the

## III. EMERGENCE OF THE OFFICER/EXPERT

An analysis of the emergence of the gang expert and dealing with expert testimony must begin with a discussion of ER 702 and ER 703. While unique in the specific issues they present, gang experts are in some respects similar to any other expert, so their testimony must be analyzed under the same framework.

A. *The Scope of Rules 702 and 703*

At both the federal and state level, ER 702 allows for the admission of scientific, testimonial, or specialized evidence that will assist the trier of fact.<sup>84</sup> Evidence offered under ER 702 may be provided by a witness who is qualified by virtue of training, experience, or formal education on the topic.<sup>85</sup> Under the federal rule, however, and in most states, expert testimony must be based on sufficient facts and data, and be the product of reliable principles and methods.<sup>86</sup> Moreover, the expert must have applied those principles and methods reliably to the facts of the case.<sup>87</sup> In Washington, the expert may rely on facts or data made known to the expert at or before the hearing.<sup>88</sup> Those facts or data need not be admissible as evidence, so long as they are of a type reasonably relied on by experts to form opinions in the particular field.<sup>89</sup> But, in a criminal case, an expert's testimony cannot exceed the limits of the underlying science or art. If the expert opinion is based on a scientific theory or method, the theory or method should be one that is generally accepted in the scientific community.<sup>90</sup>

At both the federal and state level, ER 703 has a broad spectrum. It is not limited to scientific information, but rather extends to technical or specialized knowledge.<sup>91</sup> Therefore, a witness's expertise need not be based on academic credentials, but instead can be based on training or

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laboratory analysis described in the statements." Petition for Writ of Certiorari, *Bullcoming*, No. 09-10876, 2010 WL 3761875, at \*1. *Bullcoming* seemingly asks the Court to reexamine its holding in *Melendez-Diaz*, at least as it relates to testimonial hearsay offered under the business-records exception to the hearsay rule. At the very least, it asks the Court to clarify whether the *Melendez-Diaz* analysis should extend to cases in which an expert witness testifies about forensic certificates he did not prepare. At least one Washington court has addressed this issue and held that such expert testimony does not violate *Melendez-Diaz*. *State v. Lui*, 153 Wash. App. 304, 221 P.3d 948 (2009).

84. FED. R. EVID. 702, 703; WASH. R. EVID. 702, 703.

85. FED. R. EVID. 702, 703; WASH. R. EVID. 702, 703.

86. FED. R. EVID. 702, 703; WASH. R. EVID. 702, 703.

87. FED. R. EVID. 702, 703.

88. WASH. R. EVID. 703; *State v. Roberts*, 142 Wash. 2d 471, 14 P.3d 713 (2000).

89. WASH. R. EVID. 702, 703.

90. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *State v. Baity*, 140 Wash. 2d 1, 991 P.2d 1151 (2000).

91. FED. R. EVID. 703; WASH. R. EVID. 703.

experience. Expert witnesses come from a host of skills arenas, including law enforcement.<sup>92</sup> In the final analysis, the test is whether that expertise falls outside the understanding and skill of the trier of fact and would assist the trier of fact in understanding the evidence.<sup>93</sup>

The party calling an expert must show that the expert possesses scientific, technical, or other specialized knowledge.<sup>94</sup> Whether the witness is sufficiently qualified as an expert is a matter to be decided by the court, although the court may permit a voir dire examination of the expert's qualifications to express a particular opinion.<sup>95</sup> Where the court finds the witness unqualified, the witness may be excused before presenting an opinion to the jury.<sup>96</sup> It is preferable that the court not advise the jury of its determination if it decides that the witness is qualified as an expert on the particular subject matter.<sup>97</sup> Doing so could give the expert added credibility in the eyes of the jury. A witness may be qualified as an expert by reason of knowledge, skill, experience, training, or education. Under Rule 703, a witness may be qualified as an expert by virtue of any one such factor, or on a combination of any of the factors.<sup>98</sup> Specific degrees, certificates of training, or membership in a professional organization are not required.

Washington law generally accords with federal law, with two exceptions. First, FRE 702 was amended in 2000 to add new requirements regarding expert testimony.<sup>99</sup> Second, also in 2000, FRE 703 was amended by adding language addressing whether the basis for an ex-

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92. *State v. McPherson*, 111 Wash. App. 747, 761–62, 46 P.3d 284 (2002).

93. Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418–19 (1952).

94. WASH. R. EVID. 702; *Sehlin v. Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 38 Wash. App. 125, 686 P.2d 492 (1984).

95. FED. R. EVID. 104(a).

96. After a voir dire by the opposing counsel, the court may, in its discretion, either limit or refuse the expert testimony. FED. R. EVID. 103. Typically, this ruling is made when the proponent has failed to show that the expert's training, education, or experience meets a level of expertise in the subject matter that will aid the trier of fact in its evaluation of the evidence.

97. 3 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 702:2 (6th ed. 2010).

98. *Id.*

99. Until 2000, an expert could not explain the basis for his opinion. After the 2000 changes, at least at the federal level, an expert could explain the basis for his opinion at the court's discretion. This change creates a problem when the opinion is based on inadmissible evidence. This change highlighted a problem with post-*Crawford* expert-testimony issues. While a jury could better weigh an expert's testimony with an explanation, that explanation could expose the jury to inadmissible evidence. Some courts have used FRE 403 as a means to effect a balance between the jury's right to know and potential prejudice. Under FRE 403, if the prejudicial effect substantially outweighs the probative value, then the basis for the opinion is not admitted. While Washington did not adopt this change, it is an important point for practitioners in federal courts and those states that did adopt the change. See generally Jennifer L. Mnookin, *Expert Evidence and Confrontation Clause After Crawford v. Washington*, 15 J.L. & POL'Y 791 (2007).

pert's opinion should be disclosed to the jury.<sup>100</sup> No corresponding changes have been made to Washington's rules.<sup>101</sup> While the federal rules allow an expert to explain the basis for his opinion and the Washington rules do not, that distinction is of little significance when confronting *Crawford* issues. A federal court judge's discretion might allow for the expert to explain the basis for his opinion, but doing so creates a substantial risk. Although the jury is entitled to weigh the expert's credibility, it often needs to understand how the expert arrived at his conclusions to effectively weigh that credibility. Giving the jury access to information about how the expert arrived at his conclusions might allow the jury to hear evidence that is otherwise inadmissible under *Crawford*. Although the amended federal rules do recognize the jury's need to fully understand the quality of the evidence it receives, the rules create a significant risk that the jury will hear evidence that can taint its perspective. While FRE 702 and 703 may allow this, FRE 403 precludes the admission of the basis for the expert opinion when the evidence is substantially more prejudicial than probative.<sup>102</sup> As a result, federal courts are reluctant to admit the basis for an expert opinion as evidence. This reluctance highlights the problems created when an expert's testimony is based on otherwise inadmissible testimonial hearsay. If a court permits an expert to explain the basis of his opinion, it permits admission of testimonial hearsay in direct violation of *Crawford*.

### B. The Rise of the Gang Expert

As organized crime became more sophisticated in its operations and gangs became more involved in organized criminal enterprises, it was inevitable that law enforcement would develop skills devoted to these changes. In the 1980s, a new type of "skilled witness" emerged: the law enforcement officer.<sup>103</sup> In criminal cases, typically at the federal level, prosecutors began calling law enforcement officers to testify as experts on "the nature and structure of organized crime families."<sup>104</sup> For instance, in *United States v. Ardito*, the government called an FBI agent to testify as an expert about terms such as "captain," "capo," "regime," and "crew."<sup>105</sup> The Second Circuit Court of Appeals upheld the admission of that expert testimony because it "aided the jury in its understanding of"

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100. TEGLAND, *supra* note 21, at 368.

101. *Id.* at 360.

102. FED. R. EVID. 403; WASH. R. EVID. 403.

103. *United States v. Mejia*, 545 F.3d 179, 189 (2d Cir. 2008).

104. *Id.* (quoting *United States v. Daly*, 842 F.2d 1380, 1388 (2d Cir. 1988)).

105. *United States v. Ardito*, 782 F.2d 358, 363 (2d Cir. 1986).



recorded conversations between the two defendants.<sup>106</sup> Subsequent cases in the Second Circuit also upheld the admission of expert testimony by a law enforcement officer on the related matter of the meaning of messages written in code.<sup>107</sup>

As law enforcement expertise evolved, courts approved new and unique uses of gang experts, including testimony on increasingly broad ranges of issues. This included testimony on the unique characteristics of particular crime families in the United States.<sup>108</sup> Despite the expanding breadth, courts allowed gang expert testimony based on a fairly simplistic analysis of FRE 703; the expert testimony fell outside the understanding of a typical juror and was, therefore, helpful and admissible under the rule.<sup>109</sup> Just as an anthropologist could testify to the organization and social mores of a particular culture, so too could the gang expert testify based on his education about and experience with the social mores of a particular gang.<sup>110</sup> Moreover, allowing law enforcement to testify to these aspects of gang culture was an acknowledgement of legislative intent of statutes designed to address unique issues associated with organized criminal enterprises.<sup>111</sup>

### *C. The Trouble with Gang Expert Testimony*

Although there is no doubt that gang expert testimony has utility in the criminal justice system, unchecked, it can be used to unfairly disadvantage the defendant and even to threaten the constitutional right to a

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106. *Id.*

107. *United States v. Levasseur*, 816 F.2d 37, 45 (2d Cir. 1987).

108. *See generally United States v. Daly*, 842 F.2d 1380 (2d Cir. 1988) (testimony on the Gambino crime family). For example, in *Daly*, an FBI agent's expert testimony "identified the five organized crime families that operate in the New York area" and "described their requirements for membership, their rules of conduct and code of silence, and the meaning of certain jargon." *Id.* at 1388.

109. *Id.* *See generally Levasseur*, 816 F.2d at 45.

110. *United States v. Mejia*, 545 F.3d 179, 190 (2d Cir. 2008) (citing *Dang Vang v. Toyed*, 944 F.2d 476, 481–82 (9th Cir. 1991) (upholding the district court's admission of expert testimony on Hmong culture)). The court explained:

[L]aw enforcement officers may be equipped by experience and training to speak to the operation, symbols, jargon, and internal structure of criminal organizations. Officers interact with members of the organization, study its operations, and exchange information with other officers. As a result, they are able to break through the group's antipathy toward outsiders and gain valuable knowledge about its parochial practices and insular lexicon. Allowing law enforcement officers to act as experts in cases involving these often-impenetrable criminal organizations thus responds to the same concerns that animated the enactment of the criminal laws that such organizations (and their members) are typically charged with violating, such as the Racketeer Influenced and Corrupt Organizations Act and the more recent Violent Crimes in Aid of Racketeering Act.

*Id.* (citations omitted).

111. *Id.*

fair trial.<sup>112</sup> This is harmful to both a defendant and to the criminal justice system. When a gang expert police officer's testimony is unchecked, there is a real risk that the expert officer may incorporate inadmissible evidence into his opinion. Such testimony circumvents the rules of evidence that would otherwise preclude the admission of that evidence. The defendant is then placed in the untenable position of having to defend against inadmissible evidence. If the defendant attempts to discredit that evidence, he runs the risk of emphasizing it to the jury. If, however, he fails to address the evidence, then it is considered by the jury, its credibility uncontested. When defendants are placed in this untenable position, it not only harms them, but it also damages the fundamental tenets of the criminal justice system, not the least of which is the presumption of innocence.

Although sociological and anthropological knowledge is important in understanding gang organization, an officer should never be allowed to substitute his expert opinion for facts derived from his criminal investigation of the accused. Gang expert testimony presents the real possibility of such a substitution occurring. If the officer expert goes beyond the limits of his expertise, he loses his status as "anthropologist/sociologist" and becomes, simply, a fact witness who includes all evidence he considered, regardless of its admissibility.<sup>113</sup> The expert no longer helps the jury understand. Rather, the expert tells the jury what to decide.<sup>114</sup>

In the introductory hypothetical, Ortiz could render an expert opinion based on experience and study, but *not* on a factual opinion regarding the defendant's criminal liability. For example, Ortiz could offer an expert opinion that GD 18 members wear red clothes to signify their membership in the gang based on his experience talking to members of that gang. But he could not use that same information garnered from gang members to offer a factual opinion that the defendant was a member of the GD 18 gang because he was wearing a red shirt when apprehended. In such a scenario, Ortiz's opinion is harmful to the defendant. The factual opinion places the defendant in a position where he must be able to confront those who (1) said he was wearing a red shirt, and (2) said he was a member of GD 18. On the other hand, it seems less likely that the defendant would want to confront those who said GD 18 members wear red. If that fact is not true, the defendant's attorney could raise doubts about the expert's methods and sources of information during cross-examination. The attorney could even bring in a real GD 18 member to testify that GD 18 members wear all colors or don't wear red at all.

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112. *Id.*

113. *Id.* at 196.

114. *See generally id.* at 190-91.

Typically, allowing the gang expert to testify as a fact witness has the effect of corroborating other factual testimony in the case and providing an “expert” summary of what the jury has heard from other fact witnesses. The gang expert’s dual role was never contemplated by the rules of evidence, let alone the Anglo-American common law.<sup>115</sup> “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.”<sup>116</sup> When the officer expert comes to court and simply disgorges his factual knowledge to the jury, the expert is no longer aiding the jury in its fact finding; he is instructing the jury on the existence of the facts needed to satisfy the elements of the charged offense.<sup>117</sup>

Today, gang expert testimony has become a cottage industry. One need only search Google to find hundreds of references to individuals marketing themselves as gang experts.<sup>118</sup> Although some of these experts come from academia, the large majority of those advertising are former or retired members of law enforcement.<sup>119</sup> Add to those numbers the growing number of gang experts active in law enforcement, and you have a large and growing, yet seemingly unregulated, body of expertise. Because ER 703 does not necessarily require education or certification of expertise, there is, apparently, no objective means of regulating or certifying gang experts.<sup>120</sup>

I do not intend to criticize the evolving area of gang expertise. The evolution of gangs in the United States and their increasing role in organized crime make it necessary for the nation’s law enforcement commu-

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115. MARTIN ANTONIO SABELLI & JEFF CHORNEY, OFFICE OF DEFENDER SERV. TRAINING BRANCH, GANG EXPERT TESTIMONY AND THE APPLICABILITY OF *CRAWFORD*, [http://www.fd.org/pdf\\_lib/MT07\\_CrossExamination.pdf](http://www.fd.org/pdf_lib/MT07_CrossExamination.pdf) (last visited Feb. 28, 2011).

116. *Id.*

117. *United States v. Nersesian*, 824 F.2d 1294, 1308 (2d Cir. 1987).

118. Search Results for “Gang Expert Witnesses,” GOOGLE, <http://www.google.com> (search for “gang expert witnesses,” then follow search hyperlink, approximately 224,000 results) (last visited Feb. 2, 2011).

119. Search Results for “Gang Expert Witnesses for Hire,” GOOGLE, <http://www.google.com> (search for “gang expert witnesses for hire,” then follow search hyperlink, approximately 46,500 results) (last visited Feb. 2, 2011). Experts advertising their services were typically members of law enforcement or academia.

120. While a particular police organization might require some training of its gang experts, rarely is that an objective training or certification process. Instead, it is police officers regulating the skills and training of other police officers. Certainly, this is not an inappropriate approach for most police training. But the area of gang expertise has such an extraordinary impact on case disposition that it cries out for an objective and neutral certification standard. Currently, trial judges are left to regulate the nature and scope of this testimony, thereby standing between the testimony and the sanctity of the jury’s fact-finding role. *See generally* WASH. R. EVID. 103, 104; *United States v. Lombardozi*, 491 F.3d 61 (2d Cir. 2007); *United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008); *United States v. Dukagjini*, 326 F.3d 45 (2d Cir. 2003).

nity to marshal as many resources as possible to fight gang crime. Yet, as is often the case, unbridled law enforcement activity can sometimes, perhaps even unintentionally, conflict with fundamental constitutional principles of due process, evidence rules, and case law interpreting our rules of evidence. Such is the case with gang expert testimony. The relatively lax standards of ER 702 and 703, coupled with the standards set forth in both *Daubert v. Merrell Dow Pharmaceuticals*<sup>121</sup> and *Frye*,<sup>122</sup> cast the judge in the role of “gatekeeper,” tasked with ensuring that expert testimony does not traverse the boundary of “expertise,” straying into “fact” and invading the province of the jury. Accordingly, courts must recognize this potential invasion and adopt procedures to ensure that experts do not exceed the bounds of their expertise.

#### IV. THE INTERSECTION OF GANG EXPERT TESTIMONY AND THE REQUIREMENTS OF *CRAWFORD V. WASHINGTON*

The issues presented by *Crawford* call for a methodology for trial-court judges to employ in order to best ensure that gang experts do not exceed the bounds of their expertise. To arrive at a model methodology requires the trial-court judge to first consider the implications of *Crawford* and the cases following it. The judge must then compare those implications with the authority of ER 702 and 703. On a case-by-case basis, the court must have a method to reconcile the implications of *Crawford*

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121. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993). *Daubert* sets out a twelve-step approach for the analysis of “scientific evidence.” Ultimately, it is the judge who decides the relative reliability of the proffered evidence that can take the form of processes as well as substantive evidence. *Daubert*’s holding was extended to nonscientific evidence in *Kumho Tire Co. v. Carmichael*, 526 U.S. 139 (1999). Currently, thirty states and the federal courts accept *Daubert*, fourteen states reject it, and seven states neither reject nor accept *Daubert*. Washington State is one of the fourteen states that have totally rejected the *Daubert* standard in favor of the *Frye* standard. Martin S. Kaufman, *The Status of Daubert in State Courts*, ATL. LEGAL FOUND. (Mar. 2006), <http://www.atlanticlegal.org/daubertreport.pdf>.

122. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The *Frye* standard is the older and more conservative standard used under FRE 702 for the evaluation of both scientific and nonscientific yet technical evidence. Under *Frye*, an expert’s testimony cannot exceed the underlying scientific or technical understanding. It must be accepted in the scientific community. Because *Frye* is not limited to purely scientific evidence, the “scientific” community for *Frye* necessarily includes law enforcement. In *State v. Baity*, 140 Wash. 2d 1, 11–13, 991 P.2d 1151 (2000), the Washington State Supreme Court reaffirmed that *Frye* would continue to be the Washington standard for acceptance of scientific or technical evidence. *Baity* concerned the acceptance of a drug recognition protocol used in the enforcement of drunk driving laws. *Id.* at 3–7. As in the case of gang experts, the police officer is proffered as the expert witness in the drug recognition protocol. *Id.* at 6. Application of the *Frye* standard is relatively simple. TEGLAND, *supra* note 21, at 364–67. If the science or technique used by the expert is accepted in the relative scientific community, then it comports with the *Frye* standard. The scientific community can include those charged with implementing the technique. While not yet litigated in Washington State, it seems likely that the applicable scientific community for evaluating the validity of gang expert testimony will be the law enforcement community. *Baity*, 140 Wash. 2d at 12.

and the applicable evidentiary rules. As a first step, the judge must determine whether *Crawford* applies at all. On a threshold level, this means determining whether the declarant is unavailable and whether there was a prior opportunity for cross-examination.

The next step in the analysis requires looking to the circumstances surrounding the statement. The judge should answer the following questions: Who took the statement? What questions were posed, and what was the intent in posing the questions? What was done with the information obtained? When were the questions posed in relation to the alleged criminal conduct? The judge must answer these questions before making a reasoned decision on the apparent purpose of the statement at the time it was made.<sup>123</sup>

Next, the judge must establish regular procedures for evaluating such issues at trial. Two points are clear from *Melendez-Diaz*. First, testimonial hearsay is not limited to the core examples stated in *Crawford*. Second, the objective intent analysis of *Davis* is a solid, albeit non-exclusive, criterion in determining whether a given statement is testimonial. Therefore, at trial, the proponent of the evidence must first establish that she can meet the foundation for admission of the evidence under a recognized exception to the hearsay rule.<sup>124</sup> Only after establishing that foundation does the proponent advance to a *Crawford* analysis. Lawyers—through ignorance, inadvertence, or even design—often attempt to meld the issues of hearsay and the Confrontation Clause. But these two areas are separate and must be treated accordingly. Either analysis can be done first. Given the holding in *Melendez-Diaz*,<sup>125</sup> any admissible hearsay falling within a recognized hearsay exception will be subject to this sequence. Currently, the Washington Rules of Evidence recognize twenty-seven hearsay exceptions, any of which could conceivably apply in a given criminal case.<sup>126</sup>

In one respect, *Crawford* gave trial-court judges a level of clarity and certainty to Confrontation Clause analysis.<sup>127</sup> Certainly, *Crawford* affords greater clarity than *Roberts*, which left the Confrontation Clause analysis exclusively to the trial-court judge.<sup>128</sup> Now, instead of answering questions of reliability and trustworthiness under the *Roberts* standard, trial-court judges must “only” answer the question of whether the prof-

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123. See generally Mnookin, *supra* note 99.

124. Jack Nevin, Pierce Cnty. Dist. Court Judge, Presentation to the Washington Association of Prosecuting Attorneys (June 2, 2010). Note that under the prior criteria of *Ohio v. Roberts*, 448 U.S. 56 (1980), the analysis would, in most instances, stop here.

125. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

126. TEGLAND, *supra* note 21, at 401–70.

127. See generally Mnookin, *supra* note 99.

128. *Crawford v. Washington*, 541 U.S. 36, 60 (2004).

ferred hearsay is “testimonial.”<sup>129</sup> Admittedly, determining whether hearsay is testimonial is a more finite question than under prior law, but it is still by no means a simple determination.<sup>130</sup> In allowing that single criterion, *Crawford* may have created more questions than it answered.<sup>131</sup>

There are three methods a prosecutor can use to offer gang expert testimony, all of which raise *Crawford* issues. First, the expert’s report can be offered under the business-records exception to the hearsay rule.<sup>132</sup> Under *Melendez-Diaz*, *Crawford* applies to the expert’s reports, including laboratory analysis, because the expert’s opinion is testimonial and deserving of cross-examination.<sup>133</sup> Second, the expert can testify about another expert’s results and analysis through the business-records exception to the hearsay rule. In this instance, the person who did the laboratory work is not present but another expert is there to testify to the first expert’s opinion and its accuracy. At least one court in Washington has allowed this kind of testimony.<sup>134</sup> The third method occurs when an expert uses witness interviews as a basis for his expert opinion. Invariably, those witnesses, often informants, are unavailable for trial.<sup>135</sup> Because the expert, often a gang expert, is offering his testimony under ER 703, he is allowed to base his opinion on otherwise inadmissible hearsay.<sup>136</sup> Only one case in Washington State has addressed this issue, holding that an expert’s testimony based on testimonial hearsay violates the Confrontation Clause.<sup>137</sup>

It is this third area that places gang expert testimony and the principles of *Crawford* on a collision course. In this area, the police officer

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129. *Id.*

130. *Id.* at 64.

131. For example, considering the important questions presented by *Davis*, whose intent should the court look to in determining whether the evidence is testimonial? If we can look to intent, then should it be a subjective intent? If it is subjective intent, should that be the intent of the declarant? How will a declarant’s subjective intent be determined when the declarant is unavailable (after all, if the declarant is available, then a *Crawford* analysis will not occur)? What if the declarant is a child? Should we look to see if the declarant was attempting to assist police in effecting a strong prosecution? If the analysis is subjective intent, should we look at the intent of the police officer? If we do that, what are the consequences to our system of justice? Will there ever be a situation where the officer will not be considering a successful apprehension despite seeking information for another purpose? Perhaps the so-called “objective” standard is the better approach. Under the objective standard, the court asks two questions: First, what would a reasonable person intend by such a statement? Second, is it used, or could it reasonably be used, to effect a criminal prosecution? *See generally* *State v. Shafer*, 156 Wash. 2d 381, 128 P.3d 87 (2006) (declarant’s state of mind); *State v. Mason*, 160 Wash. 2d 910, 162 P.3d 396 (2007) (so-called “objective” test).

132. WASH. REV. CODE § 5.45 (1947); WASH. R. EVID. 803(a)(6).

133. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

134. *State v. Lui*, 153 Wash. App. 304, 221 P.3d 948 (2009).

135. *United States v. Dukagjini*, 326 F.3d 45, 53 (2d. Cir. 2003).

136. *City of Bellevue v. Kravik*, 69 Wash. App. 735, 850 P.2d 559 (1993).

137. *State v. McDaniel*, 83 Wash. App. 179, 920 P.2d 1218 (1996).

occupies two roles: a fact witness as a lead investigator and an expert witness as a gang expert. Under ER 703, an expert may rely on evidence that is otherwise inadmissible.<sup>138</sup> Although the 2000 amendments to the federal rules allow the expert to share the basis for his opinion, doing so allows him to become a conduit for the admission of inadmissible evidence.<sup>139</sup> Courts probably allow experts to rely on inadmissible evidence due to historical deference to their expertise. If the expert says that he must consider inadmissible evidence, and that his professional peer group considers such evidence, and he otherwise qualifies as an expert under ER 703, should he be allowed to do so? Should the jury have access to this information? How can the court guard against the real possibility that the jury will accept this background information for its truth, even though it is only offered as a basis for the expert's opinion? A limiting instruction requiring jurors to accept the evidence for a narrow purpose will only emphasize that evidence to jurors. Human nature makes it difficult for jurors to bifurcate their understanding of testimonial hearsay, regardless of why it is offered. On the one hand, understanding the basis for the expert's opinion allows the jury to adequately weigh the expert's opinion. On the other, receiving that evidence allows juror's access to information that is otherwise inadmissible. This forces the court to choose between allowing the witness to disclose the information, thereby tainting the jury, and precluding jurors from effectively weighing the merits of the expert's conclusions.<sup>140</sup>

This conflict within the evidence rules is not new. Since the passage of the modern Federal Rules of Evidence, expert testimony has allowed for the inclusion of hearsay.<sup>141</sup> Historically, the only basis for objecting came under FRE 403. If the evidence was substantially, and therefore unfairly, more prejudicial than probative, it would not be admitted.<sup>142</sup> The 2000 changes have made the nondisclosure of the expert's basis the rule, although it is still within the judge's discretion.<sup>143</sup> The fact that Washington has not adopted the 2000 changes does not shield Washington from the problem. If jurors hear the inadmissible evidence forming the basis for the expert opinion, the evidence will likely prejudice them. If they do not hear the basis for the opinion, but the expert opinion is still expressed to them, they end up at the same place, hearing inadmissible

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138. *Bellevue*, 69 Wash. App. at 738.

139. *Dukagjini*, 326 F.3d at 53. See generally *United States v. Rivera*, 22 F.3d 230 (2d Cir. 1994); FED. R. EVID. 703, 704.

140. As a practical matter, a limiting instruction does little more than emphasize the evidence the jury should not have heard.

141. FED. R. EVID. 703.

142. FED. R. EVID. 403; WASH. R. EVID. 403. See generally Mnookin, *supra* note 99.

143. WASH. R. EVID. 702, 703; Mnookin, *supra* note 99.

evidence. In either situation, the jury is being provided, either directly or indirectly, inadmissible testimony. As the 2000 changes were not implemented by Washington, it would seem the only standard by which to regulate the admission of testimonial hearsay, short of applying *Crawford* principles, is ER 403.<sup>144</sup> Although scholars may debate its propriety, the law today is clear: So long as it is reasonably relied on by experts in the field, an expert witness may rely on inadmissible hearsay to formulate his opinion.<sup>145</sup>

As problematic as the current law may be, it still does not address the more serious question of the admissibility of testimony based not only on hearsay, but also on testimonial hearsay in violation of *Crawford*.<sup>146</sup> Although this issue can present itself in any expert witness's testimony, gang expert testimony particularly lends itself to the potential for the admission of testimonial hearsay. There are two areas where a gang expert will often base an opinion on testimonial hearsay. One is where he is testifying about someone else's findings, often another expert. The second occurs when he is relying on statements he heard during his own investigation.<sup>147</sup>

Police officers testifying as investigators and experts risk violating *Crawford* and preventing the defendant from receiving a fair trial. As an investigator, the gang expert police officer is likely to have conducted interviews of known gang members. It is inevitable that he will have conducted numerous interviews while investigating his case. Additionally, as an investigator, he is a fact witness. His dual status compounds the

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144. TEGLAND, *supra* note 21, at 229–36.

145. After having tried and presided over hundreds of trials, I took pause to reflect on why the issue of hearsay as a basis for expert opinion has not been the subject of more litigation at the appellate court level. The answer perhaps lies in the number of exceptions to the hearsay rule: twenty-seven in Washington State. Add to that the instances in which a court finds that the evidence was not admitted to prove the truth of the matter. Coupled with the ever-present option of limiting instructions to a jury, one can conclude that, as a practical matter, these issues simply do not present themselves often enough outside of scholarship. WASH. R. EVID. 702, 703, 801, 807; *City of Bellevue v. Kravik*, 69 Wash. App. 735, 850 P.2d 559 (1993).

146. WASH. R. EVID. 703; *Crawford v. Washington*, 541 U.S. 36 (2004); *Kravik*, 69 Wash. App. at 735.

147. Mnookin, *supra* note 99, at 805. Gang expert witnesses typically represent two groups. The first group is made up of those scholars and former members of law enforcement who, through either their study or experience, now market themselves as expert witnesses. Some truly are experts in every sense of the word. The expertise of others is open to debate. The relaxed requirements of ER 703 in most instances allow the jury to decide the nature and extent of that expertise. The second group of experts is made up of those who are active members of law enforcement actually investigating the case. They may qualify as experts under ER 703, but they also wear a second hat, that of an investigating police officer. This second category of gang expert is the most problematic for purposes of *Crawford*. Distinguishing the experts' fact testimony from their expert testimony is virtually impossible. Accordingly, the potential for circumventing *Crawford* is greatest with this kind of witness. *United States v. Dukagjini*, 326 F.3d 45, 53–54 (2d. Cir. 2003).



problem and creates the great risk that the expert and fact witness testimony will meld. When faced with a gang expert investigating officer, the trial court must determine how to distinguish the witness's fact testimony from his expert testimony, and also deal with the possibility that the officer may rely on testimonial hearsay.

At this point in the analysis, an inevitable question arises: How can we maintain both the vitality of ER 703 and the science of gang expertise? Is there a means of allowing this testimony while still embracing the requirements of *Crawford*? A gang expert, whether a consultant or an investigating officer, should be allowed to express opinions based on a neutral analysis of the facts. These opinions should be based on the expert's skill, training, and education.<sup>148</sup> For example, testimony regarding gang culture, organization, and social mores based on the expert's study is appropriate. But what of the situation where the expert bases his opinions on statements of now unavailable witnesses who have not been subject to cross-examination? Is this a violation of *Crawford*?<sup>149</sup> Should it be? In the instance of the police investigator expert, the *Davis* criterion is most helpful: "Would the information reasonably be expected to be used in a criminal prosecution?"<sup>150</sup> If the answer is yes, then (assuming the other requirements are satisfied) *Crawford* should apply.

Despite these concerns, I do not argue that gang expert testimony should be entirely eliminated. Rather, we must determine how to implement ER 703 in a way that does not violate the tenets of *Crawford*.

Courts rejecting the argument that *Crawford* applies to expert testimony use outdated arguments to support their position.<sup>151</sup> Most cases cited by the government in support of admission of testimonial hearsay through expert witnesses rely on cases decided prior to *Crawford*.<sup>152</sup> Understandably, those courts used the reliability requirement of *Roberts*, the only standard at the time. With *Roberts* as their only guidance, pre-*Crawford* decisions on the admissibility of testimonial hearsay simply

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148. FED. R. EVID. 703; WASH. R. EVID. 703.

149. *Crawford*, 541 U.S. at 36.

150. *United States v. Mejia*, 545 F.3d 179, 198–99 (2d Cir. 2008).

151. See generally Mnookin, *supra* note 99.

152. See generally *United States v. Castillo*, 924 F.2d 1227, 1232 (2d Cir. 1991); *United States v. Tapia-Ortiz*, 23 F.3d 738, 740 (2d Cir. 1994); *United States v. Alvarez*, 837 F.2d 1024, 1030 (11th Cir. 1988); *United States v. Dukagjini*, 326 F.3d 45, 55 (2d Cir. 2003); *United States v. Lombardozzi*, 491 F.3d 61, 78 (2d Cir. 2007); *United States v. Borrone-Iglar*, 468 F.2d 419, 421 (2d Cir. 1972) (meaning of gang jargon); *United States v. Theodoropoulos*, 866 F.2d 587, 590–91 (3d Cir. 1989) (meaning of coded conversations); *United States v. Daly*, 842 F.2d 1380, 1387–88 (2d Cir. 1988) (organizational structure of Gambino crime family); *United States v. Locascio*, 6 F.3d 924, 937–38 (2d Cir. 1993) (procedures for operations within crime families); *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 481–82 (9th Cir. 1991) (expert testimony on Hmong culture as it related to Asian gangs).

hold that if the evidence is not offered for the truth of the matter, then it is admissible under ER 703.<sup>153</sup>

Yet, despite the government's urgings, *Roberts* is no longer the law. If prior cross-examination is truly the crucible<sup>154</sup> for determining reliability, how can that standard be reconciled with the seemingly relaxed standard of ER 703?<sup>155</sup> The answer to this question is that the two *can* be reconciled, but only by a process recognizing the applicability of *Crawford* to expert testimony in general, and gang expert testimony in particular.

The foundation of ER 703 still includes reliability.<sup>156</sup> The reliability determination necessarily includes asking whether the evidence constitutes testimonial hearsay. Reliability, as defined by *Roberts*, can no longer be the touchstone. Under *Roberts*, if evidence passed a hearsay exception, then it was admissible under the Confrontation Clause. Under *Crawford*, unless there was a prior right of confrontation, testimonial hearsay is inadmissible even if it falls under a recognized exception.<sup>157</sup> Stated simply, *Crawford* added another layer of requirements. *Crawford* rejected the idea that a judge could make a threshold decision on whether evidence is reliable. The problem with *Roberts* was well-characterized by *Crawford* when the Court stated that the *Roberts* decision allowed a jury to hear evidence untested by the adversarial process based merely on judicial determination.<sup>158</sup> The problem, however, is that the current state of the law in Washington allows the jury to do just that, in the context of ER 703.<sup>159</sup>

Cases following *Crawford* have taken a more nuanced approach, balancing the prohibition of testimonial hearsay with the integrity of ER 703.<sup>160</sup> These cases recognize that expert witnesses play an important role in the criminal justice system by assisting triers of fact in under-

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153. See generally *Castillo*, 924 F.2d at 1232; *Tapia-Ortiz*, 23 F.3d at 740; *Alvarez*, 837 F.2d at 1030; *Dukagjini*, 326 F.3d at 55; *Lombardozi*, 491 F.3d at 78; *Borrone-Iglar*, 468 F.2d at 421 (meaning of gang jargon); *Theodoropoulos*, 866 F.2d at 590–91 (meaning of coded conversations); *Daly*, 842 F.2d at 1387–88 (organizational structure of Gambino crime family); *Locascio*, 6 F.3d at 937–38 (procedures for operations within crime families); *Dang Vang*, 944 F.2d at 481–82 (expert testimony on Hmong culture as it related to Asian gangs).

154. *Crawford*, 541 U.S. at 61.

155. TEGLAND, *supra* note 21, at 376–79.

156. *State v. Nation*, 110 Wash. App. 651, 41 P.3d 1204 (2002); *State v. Russell*, 125 Wash. 2d 24, 882 P.2d 747 (1994).

157. *Crawford*, 541 U.S. at 61–62.

158. *Id.* at 61.

159. While one case has considered the issue, *State v. McDaniel*, 155 Wash. App. 829, 230 P.3d 245 (2010), this area of the law is hardly settled in Washington State. While the *McDaniel* court found error in the admission of testimonial hearsay, there is no other authority in the state addressing this issue. Moreover, ER 703 continues to allow the admission of otherwise inadmissible evidence so long as it is reasonably relied on by experts in the field.

160. See generally Mnookin, *supra* note 99.

standing and evaluating evidence. Experts should, therefore, be able to rely on inadmissible evidence.<sup>161</sup> But these cases also recognize that an expert cannot be a “transmitter” of testimonial hearsay.<sup>162</sup> The trial judge is responsible for ensuring that such abuses do not occur.<sup>163</sup> In order to live up to this responsibility, the trial judge must determine the degree to which the witness is relying on testimonial hearsay. This, in turn, requires an evaluation of the entire context of the witness’s testimony.<sup>164</sup> Among the questions the court must consider is whether the witness used his independent judgment in rendering his opinion or whether, instead, his opinion is based exclusively on the testimonial statements of others. The court should also look to whether the expert is applying independent expertise to the information received and whether that expertise was gained over an extended period of time.<sup>165</sup> If the court determines that the expert is merely parroting the testimony of an unavailable witness, then the court should eliminate that portion of the expert testimony.

#### V. A FORMULA RECONCILING GANG EXPERT TESTIMONY WITH *CRAWFORD V. WASHINGTON*

Gang expertise is a critical tool for the law enforcement community, particularly in investigating and solving crimes committed by gang organizations.<sup>166</sup> The sophistication of gang organizations in recent years has inhibited law enforcement’s ability to effectively collect admissible evidence.<sup>167</sup> Furthermore, officers’ knowledge of the sociology, organizational structure, jargon, and lifestyle of gang members is especially critical to criminal investigations.<sup>168</sup> Irrespective of the importance of gang experts, gang expert testimony must still comply with *Crawford*. And although state and federal courts accept this proposition, no bright-line rule exists for reconciling *Crawford* principles with ER 703, the evidence rule designed to assist the trier of fact in answering complex ques-

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161. *See generally* United States v. Johnson, 587 F.3d 625 (4th Cir. 2009).

162. United States v. Lombardozi, 491 F.3d 61, 72 (2d Cir. 2007).

163. *Johnson*, 587 F.3d at 635.

164. Ross Andrew Oliver, Note, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington*, 55 HASTINGS L.J. 1539, 1560 (2004).

165. United States v. Dukagjini, 326 F.3d 45, 55–58 (2d Cir. 2003); United States v. Ayala, 601 F.3d 256, 275 (4th Cir. 2010); United States v. Mejia, 545 F.3d 179, 193–94 (2d Cir. 2008); United States v. Matera, 489 F.3d 115, 122 (2d Cir. 2007).

166. Particularly crimes committed under the Racketeer Influenced and Corrupt Organization Act and Violent Crime in Aid of Racketeering Act, 18 U.S.C §§ 1961–68 (2006); 18 U.S.C. § 1959 (1994). *See generally* *Mejia*, 545 F.3d at 179.

167. *See generally* *Mejia*, 545 F.3d at 179.

168. *Id.*

tions based on skill and experience beyond the lay understanding.<sup>169</sup> An officer should be allowed to explain an organizational hierarchy of a gang; however, he should not be allowed to express his personal opinion.<sup>170</sup> Doing so takes the officer out of the expert role and places him in the police officer role. An expert should aid the understanding of facts, not summarize the factual conclusions a jury should draw.

The State of Washington is not immune to the sophisticated evolution of gang operations in America. Accordingly, Washington courts recognize that gang status is relevant and, therefore, admissible.<sup>171</sup> Yet, how can gang status be admissible without running afoul of *Crawford*? Although certificates and lab reports prepared exclusively for prosecution are relatively easy to characterize as testimonial in view of the holding of *Melendez-Diaz*,<sup>172</sup> gang expert testimony is not so simple. Even though the gang expert has admissible evidence to offer, when the Washington gang expert begins discussing the particular gang on trial, the admissibility of the information becomes unclear. Discussing the gang at trial, the expert may incorporate information gleaned from informants, other gang members, police officers who have interviewed other gang members, and other gang intelligence that violates *Crawford*. If the expert is an investigating officer in the case at trial, the problem is compounded. An investigating officer often obtains information from a number of sources and extends that information to the case facts. It is impossible to discern the point at which a testifying officer leaves the area of expert analysis and begins telling the jury his opinion on the culpability of the defendant. Reliance on testimonial hearsay is certain to bring about such an occasion.

The solution to this problem is not so much a formula as a process for judges to follow in confirming and eliminating portions of an expert's testimony based on testimonial hearsay. Just as the trial court under *Roberts* decided the question of reliability and trustworthiness,<sup>173</sup> so too will the trial-court judge decide what information proffered by the witness exceeds the bounds of expert testimony and violates *Crawford*.

Case law at the federal level provides good guidance for all Washington state trial-court judges to follow. Federal courts have approved the admission of expert testimony when it is generally limited to the compo-

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169. *Id.*

170. WASH. R. EVID. 702, 703; TEGLAND, *supra* note 21, at 366–67.

171. *See generally* State v. Saenz, 156 Wash. App. 866, 234 P.3d 336 (2010); State v. Asaeli, 150 Wash. App. 543, 208 P.3d 1136 (2009); State v. Scott, 151 Wash. App. 520, 213 P.3d 71 (2009); State v. Yarbrough, 151 Wash. App. 66, 210 P.3d 1029 (2009); State v. Ra, 144 Wash. App. 688, 175 P.3d 609 (2008).

172. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

173. *Ohio v. Roberts*, 448 U.S. 56 (1980).

sition and structure of organized crime families.<sup>174</sup> This testimony can serve to explain the operation, structure, membership, and terminology of gang cultures.<sup>175</sup> Federal courts have also recognized the importance of limiting that expertise, ensuring that the expert witness does not become a fact witness and the conduit through which testimonial hearsay is delivered to the jury. In *United States v. Mejia*, the Second Circuit, while reaffirming the admissibility of expert testimony in organized crime cases, placed certain limitations on expert testimony by law enforcement agents.<sup>176</sup> The *Mejia* court observed that:

Our decision to permit such expert testimony reflects our understanding that, just 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. Officers interact with members of the organization, study its operations, and exchange information with other officers. As a result, they are able to break through the group's antipathy towards outsiders and gain valuable knowledge about its parochial practices and insular lexicon. Allowing law enforcement officers to act as experts in cases involving these oft-impenetrable criminal organizations thus responds to the same concerns that animated the enactment of the criminal laws that such organizations (and their members) are typically charged with violating, such as [the racketeering statutes].<sup>177</sup>

Given the need to reconcile *Crawford* with the utility of gang expert testimony, I offer the following suggestions to Washington's trial judges:

1. Determine the scope of the witness's expertise and how the witness acquired the expertise. Consider education and training, as well as actual experience.

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174. See generally *United States v. Matera*, 489 F.3d 115 (2d Cir. 2007).

175. *Id.* at 121; *United States v. Boyle*, No. 08 CR 523(CM), 2010 WL 286624, at \*2 (S.D.N.Y. Jan. 15, 2010).

176. *United States v. Mejia*, 545 F.3d 179, 191 (2d Cir. 2008).

177. *Id.* at 190 (internal citations omitted). The court further held that "despite the utility of, and need for, expertise of this sort, its use must be limited to those issues where sociological knowledge is appropriate." *Id.* The court explained that problems arise where officers become—rather than sociologists describing the inner workings of a closed community—chroniclers of the recent past whose pronouncements on elements of the charged offense serve as shortcuts to proving guilt. 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 witnesses, and more like a summary of the facts than an aid to understanding them. *Id.*

2. Assess whether the expert is arriving at an independent judgment, applying the expert's experience and training to the facts of the case.
3. Allow testimony to be admitted at trial concerning the operation, structure, membership, and terminology of the gang.<sup>178</sup>
4. Limit the expert's testimony to the scope of the expert's expertise and the government's offer of proof. Place the order to that effect in writing to reduce the possibility of ambiguity. Ensure that the witness is aware of the order and, preferably, enable the witness to see the order.
5. Prohibit any testimony about the meaning or substance of conversations with witnesses not available for cross-examination. The existence and meaning of code words, if within the area of expertise, may be allowed.<sup>179</sup>
6. Prohibit the interpretation of ambiguous slang terms or other words unique to the particular case. Overall knowledge of the use of slang terms, however, may be admitted.
7. Require the government to identify all out-of-court statements it expects to be part of the expert testimony.
8. Require that any recitation of out-of-court statements be accompanied by an application of the expertise and synthesis or analysis of the statement. Prohibit any out-of-court statements that are seemingly offered only for their truth without any synthesis or analysis in the form of an expert opinion.<sup>180</sup>
9. Extract from the government a commitment that the expert will rely on out-of-court statements as only one of many bases for the expert's opinion, analysis, and conclusion.<sup>181</sup> Include this commitment in a pretrial order.
10. Forbid the verbatim repetition of any statement by an expert as well as the presentment of any statement as if it were the expert's own testimony.
11. Distinguish experts who are "consultants" from those who are the investigating officer on the case at trial. An expert who is also an investigating officer has a greater potential to deviate from the scope of expertise and effectively become a fact wit-

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178. See *Matera*, 489 F.3d at 121; *United States v. Feliciano*, 223 F.3d 102, 109 (2d Cir. 2000).

179. *United States v. Locascio*, 6 F.3d 924, 936 (2d Cir. 1993); *United States v. Feliciano* 223 F.3d 102, 109 (2d Cir. 2000).

180. *United States v. Dukagjini*, 326 F.3d 45, 57–58 (2d Cir. 2003).

181. *Id.*; *United States v. Daly*, 842 F.2d 1380, 1387–88 (2d Cir. 1988).

ness. Ensure that the government is aware of your concern that this deviation not occur.<sup>182</sup>

#### VI. CONCLUSION

*Crawford* has created a new standard for reliability and, with that, new responsibility for trial-court judges. Judges now face the difficult prospect of applying *Crawford* criteria to a rule that predates *Crawford*. The rule has never been changed, although arguably there is a basis for doing so. Until that time, judges must be vigilant, particularly in regards to gang expert testimony, to ensure that the letter and spirit of *Crawford* are not violated. At the same time, courts must continue to recognize that expert witnesses do play an important role in educating juries on the unique aspects of what has now become a highly sophisticated area of crime. Unless and until ER 703 is changed, judges must make these important decisions on a case-by-case basis. Potential *Crawford* violations will always be a matter of degree,<sup>183</sup> requiring judges to explore the unique circumstances of each new case.

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182. *Dukagjini*, 326 F.3d at 53–54.

183. *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009).