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**Gang Expert Testimony and the Applicability of *Crawford***  
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by Martin Antonio Sabelli and Jeff Chorney

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**Introduction**

In *Crawford v. Washington* [(2004) 541 U.S. 36], the United States Supreme Court reaffirmed the vitality of the Confrontation Clause in an age of legislative and judicial attempts to admit "reliable" hearsay at trial. Rejecting the emphasis on evidentiary reliability adopted in *Ohio v. Roberts* [(1980) 448 U.S. 56], *Crawford* returned the focus of the Sixth Amendment's Confrontation Clause to the procedural right to reveal truth through cross-examination. The confusion engendered by the need for a before-the-fact judicial determination of reliability was thereby rejected in favor of a much simpler "bright-line" rule of procedure. This was expressed in the unyielding language of Justice Antonin Scalia: the Confrontation Clause requires exclusion of any "testimonial" statement unless the declarant is unavailable and has been subjected to cross-examination.

Since *Crawford* was decided, criminal defense attorneys have invoked this bright-line rule in a variety of contexts, and courts have often responded by narrowing the definition of "testimonial" and thereby limiting the impact of *Crawford*. Similarly, courts have limited the impact of *Crawford* by refusing to apply *Crawford's* bright line rule to the hearsay bases of expert testimony on the ground that such hearsay is offered not for the truth but in support of an opinion.

This article addresses the second limitation described above and in one context in particular: the use of hearsay as the basis for gang expert testimony in criminal cases. More than any other form of expert testimony, gang expert testimony is based upon hearsay which, on every level, seems to be at odds with the fundamental principle embodied in *Crawford*. Gang expert testimony is, in fact, almost exclusively based on out-of-court testimonial statements vulnerable to cross-examination by impeachment of every kind. Gang expert testimony, and in particular gang expert opinions related to motive, often relies on testimonial statements attributed to declarants whose pedigree is unknown or suspect. In fact, gang expert testimony is fundamentally different from other expert testimony in that gang experts often testify to statements made to fellow officers by "suspected gang

members'' in the context of custodial interrogations in which suspects trade ''information'' for immediate release or a substantial reduction in criminal exposure. Equally as important, the vast majority of these statements are unrecorded. Despite the lack of success in applying *Crawford's* rule to the hearsay bases of gang expert testimony, defense counsel should not surrender on this point. Counsel should press courts to apply the letter and spirit of *Crawford* to gang expert testimony because, on a daily basis, gang experts testify to unfair, unreliable, and unverifiable testimonial hearsay under the pretext that it is offered not for the truth but to substantiate the expert opinion.

In *People v. Thomas* [(2005) 130 Cal. App. 4th 1202], the lead post-*Crawford* case on this issue, the Fourth Appellate District, Division Two rejected just such a challenge. There, the court reasoned that the out-of-court statements at issue were admissible as bases for the gang expert opinion because they were *not being offered for the truth of the matter asserted*. The flaw in this argument is obvious: if the statements were not proffered as true, they could not logically support an opinion proffered as true. It would not be logical, or constitutional, to allow experts to base an opinion on evidence which the experts -- or the proffering party -- did not assert to be true.

### The Flaw in *Thomas*

In considering the defendant's *Crawford* challenge to the gang expert testimony, the *Thomas* court latched onto an exception to the high Court's new emphasis on the Confrontation Clause: ''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 [*Ohio v. Roberts* [(1980) 448 U.S. 56], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. . . . We leave for another day any effort to spell out a comprehensive definition of 'testimonial.''' [*Crawford v. Washington* (2004) 541 U.S. 36, 68 (emphasis added)].

The *Thomas* court then quoted *People v. Gardeley* [(1996) 14 Cal. 4th 605] and Evid. Code § 801(b), for the proposition that gang experts can relate to the jury information which they used to form their opinions, including otherwise inadmissible hearsay. The court also cited *People v. Vy* [(2004) 122 Cal. App. 4th 1209], which held that such hearsay can include statements elicited during police conversations with gang members and with the defendant.

The *Thomas* court stated that *Crawford* does not undermine gang expert testimony because the ''expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion. *Crawford* itself states that the confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the

truth of the matter asserted.'''

The *Thomas* court essentially held that gang expert opinion that relies upon another person's statement does not present a *Crawford* problem because the out-of-court statements are not offered for the truth of the matter asserted and therefore are not "hearsay." In this way, *Thomas* shifted the focus from a determination of whether the statement is "testimonial," that is, the circumstances under which a statement was made, instead into the purpose of offering the statement at trial. This shift subverts the spirit of *Crawford* and insulates the *Thomas* holding from further developments in the law, including, most significantly, more precise definitions of "testimonial." According to the logic of *Thomas*, even if the basis of the expert testimony is a statement obtained during a custodial police interrogation, it still would not offend *Crawford* because it would not be offered for its truth.

### The Importance of "Testimonial"

To be able to assert *Crawford*, a defendant must show that the statement is being offered for the truth of the matter asserted. Once that is established, the focus can then shift to what is "testimonial."

The high Court did not precisely define "testimonial" in *Crawford*. Nevertheless, Justice Scalia offered guidance on this point noting three potential formulations for determining whether a specific statement is "testimonial": (1) "'ex parte in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,'" (2) "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,'" and (3) "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial'" [*Crawford v. Washington* (2004) 541 U.S. 36, 51-52]. Whatever the standard, according to the opinion, "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." In referring to "police interrogations," the court "use[d] the term 'interrogation' in its colloquial, rather than any technical legal, sense" [*Crawford v. Washington* (2004) 541 U.S. 36, 51-52, 53 n.4].

The high Court emphasized that the definition of "testimonial" statements cannot be answered merely by looking at the purpose behind offering the statement, but by closely examining the *circumstances* under which the statement was made.

*Thomas*, however, avoids this inquiry altogether, by characterizing the statements made by others, as recited in gang expert opinion testimony, as simply not being offered for the truth of the matter asserted. *Thomas* does so by citing footnote 9 of the *Crawford* opinion.

*Thomas'* reasoning demonstrates why it is so important for the defense to develop the gang expert's testimony. Through careful examination, defense attorneys can try to root out the exact bases of the expert opinion. This is particularly important if the prosecution tries to sneak in intent evidence under the auspices of testimony about gang membership. Membership can be proved by nonhearsay material, such as graffiti, visual observations, tattoos, etc. But if statements are used, the prosecution will often try to show the jury a glimpse inside the defendant's head. Although much of this material will get in, defense attorneys should prepare to argue that the statements are indeed being offered for the truth of the matter asserted and are therefore subject to *Crawford*.

To try to reap the benefits of *Crawford*, defense attorneys should also raise hearsay objections at preliminary examinations, evidence hearings, and at trial, as well as try to get experts to admit they spoke to gang members under arrest-like circumstances. Although the answer may be a string of "I-don't-remember," any smidgen of detail will help later appellate arguments regarding what is "testimonial," once defense counsel can get past the truth-of-the-matter-asserted hurdle. With thorough records that contain nit-picked hearsay bases, courts will have a difficult time doing the kind of outcome-determinative analysis found in *Thomas*. The defense should strive to clearly show how the statements are indeed hearsay, as well as that the statements were obtained during arrests, custodial interrogations, and other circumstances that are rife with the coercion that makes these statements so dangerous to put in front of juries in the first place. That will eventually force courts to determine "testimonial," by looking at the circumstances of the interview and not just the proffer. On a more practical level, that kind of close questioning can also help at trial to demonstrate to the jury the expert's unreliability.

At least one California court has gotten the "testimonial" analysis right, at least in a case where the statement was clearly being offered for the truth of the matter asserted. In *People v. Pirwani* [(2004) 119 Cal. App. 4th 770], the Sixth Appellate District Court ruled unconstitutional Evid. Code § 1380, which had granted a hearsay exception in criminal prosecutions under Penal Code § 368, the elder and dependent adult abuse statute. The declarant, an alleged victim of elder abuse, gave a videotaped statement to police that was introduced at trial. Although the declarant was unavailable because she had died, the court found *Crawford* made the hearsay otherwise inadmissible because the declarant was not cross-examined. The *Pirwani* court focused on the circumstances of the police interview with the declarant. In *Crawford*, the court allowed in a statement given by the defendant's wife to police while she was under arrest and a suspect in the same crime her husband was eventually convicted of committing. In *Pirwani*, the statement at issue was given to police by the alleged crime victim. Even so, the *Pirwani* court still found the statement to be "testimonial" and thus inadmissible because the declarant was unavailable and had not been cross-examined.

*Pirwani* was a favorable decision for the defense, but other *Crawford* challenges to hearsay exceptions have not gone as well. In *People v. Monterroso* [(2004) 34 Cal. 4th 743, 764], the California Supreme Court rejected a similar challenge to dying declarations. And in *People v. Rincon* [(2005) 129 Cal. App. 4th 738, 742], the Second Appellate District, Division Four rejected a *Crawford* challenge to the spontaneous statement hearsay exception. The California Supreme Court has also accepted cases to determine whether statements obtained during police field questioning are "testimonial"; these undoubtedly will now need to reflect the more recent United States Supreme Court decision in *Davis v. Washington* [(2006) 165 L. Ed. 2d 224] on this subject. If the California Supreme Court focuses on how the statements are obtained, rather than what they are used for at trial, then a defense-favorable decision could help advance the argument that gang expert testimony of statements from other persons is actually being offered for the truth of the matter asserted, and is therefore hearsay subject to *Crawford*.

### **Truth of the Matter Asserted**

As noted above, persuading courts to examine the circumstances under which the hearsay statements were given is only half the battle -- the second half of the battle. The first half of the battle is still the issue of convincing courts that the statement being admitted is being offered for the truth of the matter asserted. In *Crawford* and *Pirwani*, the statements were offered for the truth of the matter asserted. When a gang expert testifies, on the other hand, courts do not view the statement as being offered for the truth of the matter asserted. Rather, courts view it merely as being offered in support of the expert's opinion.

That, of course, is the more significant problem with *Thomas'* reasoning: the court's rejection of the *Crawford* challenge is a done deal from the beginning, because the court takes at face value the proposition that the bases of the gang expert's opinion are neither offered nor accepted for their truth. But simply saying something is not so does not necessarily make it not so. A gang expert's opinion must be actively analyzed, especially in light of *Crawford's* shift away from standard notions of reliability toward the Confrontation Clause. It is not enough to merely plug *Crawford* into our old rules and exceptions and call that analysis.

Convincing courts that gang expert testimony of a statement is indeed offered for the truth of the matter asserted is going to be a tough hill to climb. Courts believe they already adequately deal with that potential problem with limiting instructions. But what actually happens is that jurors hear this material and its credibility is amplified as it passes through the lips of someone the court calls "expert." Why shouldn't they consider it for the truth?

One way to win this argument is to do what has already been advised: show the courts the true source of this information by bringing out the coercive bases of the statement by cross-

examining the expert. In addition, *Crawford* can be used to undermine the legal foundation supporting the idea that a statement testified to by a gang expert is not offered for its truth.

On a practical level, it is important to understand -- and to point out to courts -- how gang experts are different from other experts. Most glaringly, they are hopelessly conflicted. It is not uncommon for the prosecution to call one of the investigators that worked on the case as the gang expert. Such a witness has too strong of an investment in the outcome to be trusted with such potentially prejudicial and unreliable material. Courts have gotten around this problem by giving the same justification used for other expert testimony: the statement is admissible because other experts in the field reasonably rely upon it. But with gang expert testimony, the other experts are also working police officers, so of course they are going to rely on it. Most other experts come from fields where empirical research and certifications help bolster the expert's credentials. Not so with police officer gang experts. Although they receive specialized training, their craft is not subject to the rigorous academic and peer review that helps to create doctors and engineers, nor to the type of scientific experimentation that bolsters forensic experts.

Just as courts subject scientific and medical experts to the *Kelly-Frye* standard, gang experts who rely on interrogations with known and suspected criminals should be subject to the *Crawford* standard. That is, just as other experts are scrutinized to make sure the basis of their testimony is reliable enough to be in front of the jury, so should gang experts. The difference is that now that reliability can only be satisfied one way: cross-examination of the declarant, and only if that declarant is available.

Of course, simply pointing out that juries accept gang expert hearsay for the truth of the matter asserted is not going to convince anyone. To do that, we have to look back at the cases that allowed these damaging statements to be introduced in the first place. What we find are courts confusing the issues without ever truly resolving the key question: aside from the fiction of limiting instructions, how is gang expert testimony of a statement made by another out of court not offered for its truth? California courts have never adequately addressed that question. In fact, they have frequently analyzed the testimony as though it were being offered for the truth.

*Thomas* relies upon one of the seminal gang expert cases in California, *People v. Gardeley* [(1996) 14 Cal. 4th 605]. In *Gardeley*, the California Supreme Court considered a gang expert's opinion that was based at least in part on out-of-court interviews with the defendant and co-defendant, in which they admitted to gang membership. The expert's opinion was also based on his personal investigations along with information from other law enforcement sources.

The *Gardeley* court accepted the gang expert's material -- including the statements that were testified to in front of the jury -- only after conducting a reliability analysis. But why

analyze reliability if the statement is not offered for its truth? If the statement was truly offered for a non-hearsay purpose -- i.e., not for the truth of the matter asserted -- then reliability would not be a factor, at least not as to the issue of admissibility. *Gardeley* did not pose that exact issue. For such an analysis, we go to another gang expert case cited by *Gardeley*, *People v. Gamez* [(1991) 235 Cal. App. 3d 957]. Although *Gardeley* overruled *Gamez* on other grounds, the *Gamez* analysis is useful because the defense attorney argued that the gang expert's opinions "were no more than a vehicle for the introduction into evidence of hearsay to prove facts that could not lawfully be proven by the prosecution."

Three factors convinced the *Gamez* court to expressly rebuff the defendant's Confrontation Clause challenge: (1) Evid. Code § 801 permits an expert to rely on otherwise inadmissible evidence if it is "of a type that reasonably may be relied upon by an expert," (2) the statements of gang members were only a "portion of the foundation for the . . . opinions," as the officers also made personal observations, and (3) "[w]e fail to see how the officers could proffer an opinion about gangs . . . without reference to conversations with gang members." *Gamez* said the statements were not offered for the truth but instead were "generally related as one of the bases for the officers' expert opinions."

Like *Gardeley*, the *Gamez* court fixates on reliability, and also throws in necessity as a policy justification. But both reliability and necessity are only needed to justify hearsay exceptions -- not non-hearsay. That indicates that although the courts might want to shove gang expert hearsay into the non-hearsay box, there is no good argument for doing so. If the hearsay at issue in *Gamez* was offered for anything *but* the truth, the argument justifying its inclusion falls apart. Why would a gang expert rely upon hearsay if it wasn't true? And why, if the expert relies on it for the truth, should not we expect the jury to do the same?

*Crawford* recognizes that reliability games are not useful and can no longer stand -- it expressly abandoned the *Ohio v. Roberts* reliability inquiries and instead focused on a statement being "testimonial." Under *Crawford*, there is only way to validate a "testimonial" statement that is hearsay before bringing it before a jury: the declarant must be unavailable and must have been cross-examined.

### **Courts are Already Moving in the Right Direction**

California should look to the federal courts for guidance. Fed. Rules of Evid., Rules 702 and 703, like California's Evid. Code § 801, allow police gang experts to testify and to rely on hearsay. Although the Ninth Circuit rejected a *Crawford* challenge to gang expert evidence that relied on hearsay, the court said that only a "generalized description of the practice of the gangs" was permissible under *Crawford* [*United States v. Chong* (9th Cir. 2005) 178 Fed. Appx. 626, 628]. More specific evidence implicating the defendant by name as a gang leader "may have

constituted testimonial hearsay'' and thus should not have been admitted, but even if the evidence did run afoul of *Crawford*, the admission constituted harmless error. More recently, a district judge in San Francisco denied another *Crawford* challenge to gang experts relying on hearsay [*United States v. Diaz* (U.S. Dist. Ct., N.D. Cal. 2006) 2006 U.S. Dist. LEXIS 71123]. In denying the challenge, the district judge cited a Tenth Circuit case, *United States v. Magallanez* [(10th Cir. 2005) 408 F.3d 672, 679]. However, *Magallanez* rests on very shaky ground. It hinges on the fact that the court could not characterize any of the out-of-court statements as ''testimonial.'' If that were to change, then federal judges would have to revise their analyses.

### Conclusion

Commentators have quickly realized the implications of *Crawford* on gang expert testimony.<sup>1</sup> At this point, defense attorneys must not yield to the temptation to let the *Thomas* fiction lie. Counsel should take heart in the sea of change implied by *Crawford* and continue to develop legal arguments to convince courts to reevaluate gang expert testimony. Most importantly, counsel should develop the record at every trial to bring these issues to light at the appellate level and to demonstrate the power - the constitutionally corrupt power -- of unopposed gang expert hearsay.

*Thomas* demonstrates why it is imperative to convince courts to take a fresh look at exactly what is going on when prosecutors put a gang expert on the stand. Its flaws undercut its holding. If *Crawford* is to have any meaning, courts must reject the fiction embodied in *Thomas*. If one reads *Thomas* with a practitioner's jaundiced eye, it will be apparent that the defense arguments were not fully appreciated by that court nor presented before *Crawford's* import was established. *Thomas* simply did not give this issue the consideration and attention that it deserves. In particular, *Thomas* did not evaluate the magnifying effect of the expert: that is, that the statements, rather than being limited because they are not offered for the truth, carry more impact because they are accepted and endorsed (implicitly and explicitly) by an ''expert.'' The constitutional injury is therefore aggravated.

Using *Crawford* to limit gang expert testimony would not strip the expert of the ability to offer an opinion. Instead, experts would not be able to do so based on testimonial statements made without a prior opportunity to cross-examine. For

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<sup>1</sup> Patrick Mark Mahoney, *Houses Built on Sand: Police Expert Testimony in California Gang Prosecutions; Did Gardeley Go Too Far?*, 31 *Hastings Const. L.Q.* 385 (2004); Ross Andrew Oliver, *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 (2004).

example, gang experts could testify based on graffiti, tattoos, and transcripts of testimony. The result would be fairness and not an evisceration of gang expert testimony.

Besides striving to give the California Supreme Court an opportunity to disapprove *Thomas*, defense counsel should also use *Crawford* as an excuse fully to cross-examine gang experts, even before the expert appears in front of the jury. Only by understanding the bases of the expert opinion can defense counsel develop strategies to assert confrontation rights in connection with those bases. Even if *Thomas* is not disapproved, gang expertise will hopefully become more reliable and less damaging to defendants.