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Fareed Nassor Hayat

City University of New York (CUNY) School of Law

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PRESERVING DUE PROCESS: REQUIRE THE FRYE AND DAUBERT EXPERT STANDARDS IN STATE GANG CASES

Fareed Nassor Hayat*

ABSTRACT

Police officers are almost universally offered and admitted as experts in state gang prosecutions. Without being subjected to the stringent requirements of Frye and Daubert expert standards, criminal Defendants' due process rights are violated. Once admitted, police officers are permitted to testify to the psychology, customs, motivations, social structures and subjective mental states of individual gang members and gang organizations. Police officers are not scientists and do not use valid scientific methods in forming their opinions, yet they offer sociological and psychological expert testimony against criminal Defendants. Courts frequently refuse to apply Frye or Daubert expert standards to the testimony of police officers in gang cases, though they acknowledge the scientific nature of the testimony. Admission of such testimony results in juries hearing and accepting, unvetted, unreliable and inadmissible junk science. Verdicts based on police officers' junk science testimony denies criminal Defendants' of their Fifth Amendment due process right to a fair trial.

This article advocates for a strict application of the Frye and Daubert expert standards to police officer testimony, when offered as experts in state gang prosecutions. Police gang expert testimony should only be admitted after the underlying criminal matter has been proven beyond a reasonable doubt, and even then, only if the police gang expert testimony abides by clearly defined rules of evidence. Requiring Frye and Daubert expert standards for police officer testimony in state gang cases would comply with constitutional protections and provide consistent application of clearly defined, and normally strictly adhered to rules of evidence. Experts labeled as Drug Recognition Experts (DRE) that testify in driving under the influence cases, experts in civil matters in almost any context, and expert testimony when offered by criminal Defendants in "rape trauma syndrome" and "battering and its effects" cases, all require application and compliance with Frye and Daubert. Requiring identical standards in state gang

* Fareed Nassor Hayat is an associate Professor of Law at the City University of New York (CUNY) School of Law. He teaches criminal law, criminal procedure, trial advocacy and lawyering.

prosecution of criminal Defendants when police officers purport to be experts, ensures fundamental fairness and due process.

This article proceeds in six parts. Part I provides an overview of lay-witness and expert witness admissibility standards, and then describes the development and codification of the Frye and Daubert expert standards in trials. Part II demonstrates that gang expert testimony is “social scientific” in nature and experts must be scrutinized under the Frye or Daubert standard depending on the jurisdiction of the offense. Part III uses a case study to demonstrate the flawed logic courts employ when refusing to apply Frye and Daubert in state gang cases. Part IV demonstrates that the evidence police experts offer in state gang cases is unreliable and would fail a Frye or Daubert test, if applied. Part V explores the impact upon criminal Defendants’ due process rights when admitting gang “expert” testimony in state gang cases. Finally, Part VI explores courts’ treatment of DRE in the context of driving under the influence cases and proposes that like DRE, when police gang experts cannot fulfill the requirements of Frye and Daubert, they must be limited to lay-witness observations or excluded completely.

This is the second article in a three-part series that argues for adherence to evidentiary standards and a commitment to our due process protections for all criminal Defendants, including gang members. The first article contends that the rationale used in Section 1983 Civil Rights Claims of Monell Bifurcation should be applied to state gang cases. Specifically, gang evidence should not be permitted into trial until the trier of fact in criminal trials has found, beyond a reasonable doubt, guilt of the underlying criminal offense. This article supplements the previous article by illuminating a second method of circumventing due process rights of gang members—not requiring Frye and Daubert expert standards for police officers’ “expert” testimony.

State gang statutes, patterned after the Federal Racketeering Influenced and Corrupt Organization Act (RICO), are part of a broader move toward complex criminal liability that deprives criminal Defendants of their due process rights. Like RICO, gang statutes further expand the prison industrial complex and facilitate mass incarceration by circumventing well-established expert standards. Due process protections are eviscerated by state gang statutes when they allow unduly prejudicial speculation, hearsay evidence without exception, and unreliable findings. These state gang statutes have operated to incarcerate poor, young men of color—seasoned gang member, novice gang member, or simply the accused gang member—under a different set of legal standards than the constitution mandates. State gang statutes must be abolished but until then, amended to comply with due process.

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INTRODUCTION

Three days before trial, Detective Phillip Smith began to prepare himself to testify against KJ.¹ KJ was indicted in a 48 co-Defendant, 191 count, state gang statute and conspiracy case in Baltimore City, Maryland. The Baltimore City State's Attorney Office alleged that KJ was a member of the Black Guerrilla Family (BGF).² According to the State's Attorney, BGF dominated and destroyed the Greenmount area of Baltimore City. After reviewing his materials, Detective Smith decided photos of KJ's tattoos were necessary. Detective Smith had no personal contact with KJ, had never arrested him, monitored him or collected any evidence from him, including photos of tattoos. Despite Detective Smith's lack of personal contact with KJ, based on statements of other officers and confidential informants, he believed KJ to be a member of the BGF and as a member, believed he would likely have gang tattoos to prove it. Detective Smith contacted the assigned Assistant State's Attorney and proposed going to the jail, where KJ was housed, to take photos of the presumed tattoos.³ With the approval of the Assistant State's Attorney, Detective Smith, along

1. See *KJ v. Maryland*, No. 113310058, 2019 WL 2929034 (Md. Ct. Spec. App. July 8, 2019). The facts of the case described here and throughout this paper are derived from the personal knowledge of the author, Fareed Hayat, who served as KJ's defense attorney, and the transcripts made available to him. The case, unpublished, is used in this paper to demonstrate the kind of logic that courts apply when determining the admissibility of expert witnesses for gang cases. This case is not precedential and is not cited as precedent in this paper. The client's full name will be withheld for purposes of this article.

2. The Black Guerrilla Family (BGF) was created as an organization meant to revitalize Black communities. LA EUSI JAMAA, *THE BLACK BOOK: EMPOWERING BLACK FAMILIES AND COMMUNITIES*, <https://assets.documentcloud.org/documents/552065/black-guerilla-family-maryland-handbook.pdf> [<https://perma.cc/GV5B-BCM9>]. Authorities have labeled the BGF a gang.

3. The Fourth Amendment of the United States Constitution prohibits the search and seizure of individuals without a warrant being issue by a neutral magistrate upon the finding of probable cause. In KJ's criminal appeal, he argues that the search and collection of photos of his tattoos was a violation of his Fourth Amendment rights. Specifically, he argues that while inmates have a reduce expectation of

with three correctional officers,⁴ forcibly removed KJ from his cell and ordered him to strip. KJ was given the option to submit to the stripping and photography or to be forcibly held down while the photos were taken. Based on coercion,⁵ KJ submitted to the demands.

Those photos, taken over KJ's objection, would become crucial in determining whether KJ was in fact a member of the BGF, and more importantly became the basis of Detective Smith's expertise as it related to KJ's trial. Those photos, clear depictions of purported gang symbols, were unlike any of the thousands of pages previously provided in discovery. Those photos, what they depicted, and Detective Smith's "expert" opinion of what they actually suggested about the psychology, customs, social structures, propensities, thinking, motives and understanding of gang members, became the strongest evidence against KJ and his membership in the BGF. "Expert" opinion, of this kind, predictive and scientific in nature, traditionally requires satisfaction of the stringent *Frye* and *Daubert* standards. Here, Detective Smith's opinion fell far outside the strict requirements of the well-established standard for experts, scientific or otherwise.

Detective Smith initially testified, during his *voir dire* to qualify as an expert, that he in fact was an expert in gang member recognition, gang organizational structure, gang characteristics, and gang activities.⁶ He claimed to possess specialized knowledge and skills that enabled him to provide the jury with insight in determining the ultimate question of KJ's membership in the BGF and guilt of the crimes charged in furtherance of the BGF.⁷ But, after being subjected to a rigorous cross examination, Detective Smith admitted that "[under] the true definition of an expert . . . I would not be an expert. I would be well-versed."⁸ He also stated that it is "impossible" for anyone to be a gang expert.⁹ Detective Smith claimed to have written policies followed by the entire Department of Correction of the State of Maryland.¹⁰ On cross examination, he admitted that he does not remember what year he wrote such policies and whether the policies were provided in written form, published in gang investigation networks,¹¹ or ever published in any academic or peer reviewed journal.¹² He admits that he did not include such policies on his 18 page CV,¹³ and that he would not actually call it a written policy anymore.¹⁴ Detective Smith claimed to have supervised large numbers of gang experts and

privacy, as a pretrial detainee, the Fourth Amendment still provides protection. *KJ*, 2019 WL 2929034, at *4.

4. KJ was housed at the Jessup State Prison in Maryland.

5. Michael J. Zydney Mannheimer, *Coerced Confessions and the Fourth Amendment*, 30 HASTINGS CONST. L. Q. 57, 60 (2002) ("When physical or psychological coercion is used to extract a statement, an unreasonable search and seizure has taken place in violation of the Fourth Amendment, and the statement and its fruit are excludable from trial.").

6. Transcript of Record at 63, *State v. KJ* (Md. Cir. Ct. May 19, 2016) (No. 113310058).

7. *Id.* at 62:112–114.

8. *Id.* at 45:8–22.

9. *Id.*

10. *Id.* at 30:3–15.

11. *Id.*

12. *Id.*

13. *Id.* at 16:22–24, 32–33.

14. *Id.* at 16:36–37.

presented “PowerPoint” materials,¹⁵ but when asked to describe his supervisory role¹⁶ and PowerPoint materials used in the classes he taught,¹⁷ he then admitted that his supervision was “more like conversations” and that he has not provided any such material.¹⁸

Detective Smith claimed to have translated Swahili words and explained that BGF members use the language to disguise its criminal efforts.¹⁹ When asked if he spoke Swahili and if he knew any of the language beyond the five words he claimed to translate, he admitted that he didn’t.²⁰ Detective Smith claimed to have read the major works of the BGF,²¹ its constitution and what he calls the bylaws, but when asked for copies of those documents and whether he has provided them to defense, he responded, “no.”²² He offered an opinion on the significance and purpose of written works, but when asked specific questions beyond his conclusory statements, he admitted that he had read just some of the works and had not documented any of his conclusions.²³ Detective Smith claimed to have validated thousands of gang members,²⁴ including BGF members,²⁵ but when asked if he provided copies of reports made, the rubric used in coming to his conclusions, or samples of methods used to ensure accuracy, he responded “no.”²⁶ Detective Smith testified extensively about the structure of the BGF,²⁷ but did not bring copies of any documentation to support his conclusions about the structure.²⁸ Detective Smith is the quintessential so called “expert”²⁹ in gang cases.

The use of expert testimony like what was provided by Detective Smith in KJ’s trial, is a powerful tool employed by prosecutors. In recognition of the import and impact that expert witnesses such as Detective Smith are given in their testimony, and the weight that jurors give to them—particularly experts that purport to offer scientific testimony—courts have developed admissibility tests to ensure that their testimony is reliable.³⁰ In states that follow the expert witness admissibility test

15. *Id.* at 16:16–18, 37.

16. *Id.* at 16:37.

17. *Id.*

18. *Id.*

19. *Id.* at 16:88–89.

20. *Id.* at 16:44.

21. *Id.* THE BLACK BOOK is a founding work for the Black Guerilla Family. See JAMAA, *supra* note 2.

22. *Id.* at 16:45.

23. *Id.* at 16:44–45.

24. *Id.* at 16:20.

25. *Id.* at 16:24.

26. *Id.* at 16:42, 205–06.

27. *Id.* at 16:172–73, 189.

28. *Id.* at 16:191–92.

29. To avoid confusion, the term “expert” is used in this article to refer to police officers that testify in gang cases and are referred to as experts by the court. However, this article demonstrates that they lack any reliable expertise in gang member identification, culture, sociology, psychology and should not be considered experts at all.

30. See *Reed v. State*, 391 A.2d 364, 385 (Md. 1978) (“Frye was deliberately intended to interpose a substantial obstacle to the unrestrained admission of evidence based upon new scientific principles . . . Lay jurors tend to give considerable weight to ‘scientific’ evidence when presented by ‘experts’ with

laid out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, any proponent of expert testimony must demonstrate the reliability of the evidence before it will be admitted in trial.³¹ In states that continue to follow the admissibility test laid out in *Frye*, proponents of scientific evidence must demonstrate that their positions are accepted in the relevant scientific community.³²

Despite these admissibility standards, numerous courts have permitted police gang experts to deliver opinions about gang sociology and psychology, without applying the *Frye* or *Daubert* standards. By failing to scrutinize expert witnesses as the rules of evidence and case law require, courts allow jurors to hear and accept as true, unvetted, unreliable, junk science that denies criminal Defendants their Fifth Amendment rights to fair trial.

Real social scientists, sociologists, psychologists and anthropologists have studied gangs for over a century.³³ They are deeply interested in the social phenomenon of the gang, and whether its members commit crimes or not. When seeking to define, identify or categorize individuals as gang members, social scientists perform scientific inquiry where: “(1) the issues investigated must be theoretically grounded; (2) the research should be based on empirical observation or be subject to empirical validation . . . ; (3) the research design must be appropriate to the questions asked; and (4) the proposed research must advance our understanding of social processes [or social] structures.”³⁴ Despite their extensive expertise in studying gangs, social scientists are often excluded as experts in gang cases.³⁵

In contrast, police officers have never truly studied gangs from a critical and unbiased position. Police officer designation as “experts” and their study of gangs only date back to the 1980’s with the expansion of the so-called “War on Drugs.”³⁶ In fact, gang “experts” that testify in many state gang trials are simply police officers who investigate, arrest and interact with alleged gang members.

impressive credentials”); *see also* *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 592 (1993) (“Unlike an ordinary witness . . . an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation . . . Presumably, this relaxation of the usual requirement of firsthand knowledge . . . is premised on an assumption that the expert’s opinion will have a reliable basis in the knowledge and experience of his discipline.”).

31. *See generally* *Daubert*, 509 U.S. 579.

32. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

33. Zachariah D. Fudge, *Gang Definitions, How do They Work?: What the Juggalos Teach Us About the Inadequacy of Current Anti-Gang Law*, 97 MARQ. L. REV. 979, 998 (2014). *See also* FREDERICK M. THRASHER, *THE GANG: A STUDY OF 1,313 GANGS IN CHICAGO* (1927).

34. Div. of Soc. and Econ. Scis., *Funding: Sociology*, NAT’L SCI. FOUND., https://www.nsf.gov/funding/pgm_summ.jsp?pims_id=5369 (alteration in original) [<https://perma.cc/5A82-8FU2>].

35. *See* Christopher McGinnis & Sarah Eisenhart, *Interrogation is not Ethnography: The Irrational Admission of Gang Cops as Experts in the Field of Sociology*, 7 HASTINGS RACE & POVERTY L.J. 111, 125 (2010) (“According to some sociologists, these universal assertions gang experts make are questionable: ‘[b]y relying on other law enforcement agencies’ criteria for identifying gang members, research indicating that individual gangs can be, and often are, quite unique has been ignored.’ Several criminal Defendants have offered Malcolm Klein, a sociologist who studies gangs, as an expert in the area of gangs (his services have never been sought by a prosecutor). Klein’s testimony is often excluded on the grounds that it is irrelevant because he does not have experience with the gang at bar. In other words, many courts consider his testimony irrelevant because it is too universal.”).

36. *See infra* note 39 and accompanying text.

Rather than having a neutral, scientific, interest in gangs that produces unbiased opinions, police gang experts are concerned only with “criminal” or “delinquent” gangs³⁷ and prosecution. They collect names, photos, interview individuals (presumed gang members and informants) and identify what they believe to be membership, psychology, customs, policies and structures of street gangs. In this process, police gang experts often fabricate their investigation and falsely identify individuals as gang members, when they are not.³⁸ Police officer “experts” in gang cases offer testimony that is sociological and psychological in nature, including testimony about indicators that an individual is in a gang and testimony about gang members likely reaction to certain events.³⁹ Yet their “expertise” is not based on any principles of psychology or sociology, but rather their time on the streets interacting—as law enforcement officials sent to make arrests, not neutral observers—with those individuals they believe to be gang members.⁴⁰ Rather than

37. Fudge, *supra* note 33.

38. See, e.g., Kevin Rector, Richard Winton & Ben Poston, *Three More LAPD Officers Charged With Falsifying Information in Gang Labeling Scandal*, THE L.A. TIMES (Oct. 2, 2020), <https://www.latimes.com/california/story/2020-10-02/three-more-lapd-officers-charged-with-falsifying-information-in-gang-labeling-scandal> [<https://perma.cc/6LZV-CXXW>] (examining how three Los Angeles police officers face charges for allegedly falsely identifying people as gang members or associates); *3 LAPD Officers Charged With Falsifying Information on Gang Affiliation*, L.A. DAILY NEWS (Jul. 10, 2020), <https://www.dailynews.com/2020/07/10/3-lapd-officers-charged-with-falsifying-information-on-gang-affiliation/> [<https://perma.cc/WE2L-GQNZ>] (examining how officers Braxton Shaw, Michael Coblentz and Nicolas Martinez each face one count of conspiracy to obstruct justice, and multiple counts of filing false police reports and preparing false documentary evidence).

39. See, e.g., *Utz v. Commonwealth*, 505 S.E.2d 380, 387–388 (Va. Ct. App. 1998) (allowing gang expert testimony by an officer that defines a gang based on factors similar to those in *K.J.*); *United States v. Robinson*, 978 F.2d 1554, 1564–65 (10th Cir. 1992) (allowing police officer to testify to the philosophy of gang membership); *People v. Valdez*, 68 Cal. Rptr. 2d 135, 139–141 (Ct. App. 1997) (demonstrating that, in general, where a gang enhancement is alleged, expert testimony concerning the culture, habits, and psychology of gangs is permissible); *People v. Olguin*, 37 Cal. Rptr. 2d 596, 601 (Ct. App. 1995) (allowing police officer expert testimony based on their personal observations and discussions, including testimony regarding gang psychology and likely reactions to certain events); *People v. Gamez*, 286 Cal. Rptr. 894, 896, 899 (Ct. App. 1991) (featuring police officers’ expert testimony that attempted murder was retaliation for prior shooting, and that they determined suspect to be a gang member based on a hand symbol and “writings”); *People v. McDaniels*, 166 Cal. Rptr. 12, 14 (Ct. App. 1980) (involving police officer testimony to the customs and practices of gangs, and testimony as to the type of fight that would occur if a gang member traveled to a rival gang’s territory).

40. See, e.g., *People v. Gardeley*, 927 P.2d 713, 717 (Cal. 1996) (“[I]nvestigations of hundreds of gang-related offenses, conversations with defendants and other Family Crip members, as well as information from fellow officers, and various law enforcement agencies” was sufficient to prove that the primary purpose of the Family Crip gang was to sell narcotics); *People v. Hill*, 120 Cal. Rptr. 3d 251, 264 (Ct. App. 2011) (“Chaplin testified he had been a police officer for about 15 years and had been assigned to the San Francisco Police Department’s gang task force for approximately six years. As a gang task force inspector, he patrolled gang neighborhoods, made contact with gang members whenever possible, and investigated hundreds of gang crimes including shootings, attempted murders, assaults, and narcotics sales Chaplin received on-the-job training from other police officers regarding Bayview street gangs, including information about investigating gang crime in the Bayview. Chaplin also routinely talked to officers at the Bayview police station about current trends, ‘things that are going on’ with African–American gangs and graffiti the officers had seen. In the past six years Chaplin had become familiar with Bayview gang-related graffiti and tattoos, and had spoken with members of West Mob and Big Block.”); *People v. Barajas*, 749 N.E.2d 1047, 1056–57 (Ill. App. Ct. 2001) (“Echeverria’s testimony was based on over eight years of interviewing citizens, gang members, and police officers.”).

using a verifiable scientific method or established standards for statistical analysis, they use “factor tests”⁴¹ or simply state conclusions that are sociological and psychological in nature and, often times, are fabricated or simply wrong.⁴² Their methods and conclusions lack reliability, reproducibility, and acceptance in the relevant scientific community.

Police gang experts, quite frankly, are not experts at all. What they offer by way of opinion testimony in state gang criminal trials is the equivalent of modern day “armchair” anthropology—pseudo-science⁴³—that amounts to violations of criminal Defendants’ due process rights to fair trials.

This article proposes that even after substantive criminal matters have been resolved by a guilty finding, police gang “expert” testimony should be required to abide by well-established rules of evidence to ensure criminal Defendants’ due process of law. This article builds on arguments made in an earlier article in this series, contending that the rationale used in Section 1983 Civil Rights claims applying *Monell* bifurcation, should be adopted in state gang cases. Specifically, gang evidence, and expert testimony should not be permitted before the jury in criminal trials until guilt of the substantive criminal offense has been found by the trier of fact, beyond a reasonable doubt.⁴⁴

This article proceeds in six parts. Part I provides an overview of lay-witness and expert witness admissibility standards, then describes the development and codification of the *Frye* and *Daubert* expert standards. Part II demonstrates that gang expert testimony is “social science” in nature and gang experts must be scrutinized under *Frye* and *Daubert* standards. Part III uses a case study, *People v. Hill*, to demonstrate the flawed logic courts employ when refusing to apply *Frye* and *Daubert* in state gang case prosecutions. Part IV demonstrates that the evidence police experts offer in state gang cases is unreliable and would fail a *Frye* or *Daubert* test, if applied. Part V explores the impact upon criminal Defendants’ due process rights when admitting gang “expert” testimony in state gang case prosecutions.

41. See, e.g., *Hill*, 120 Cal. Rptr. 3d at 260 (“[The gang expert] explained the 11 criteria formulated by the San Francisco District Attorney’s Office and the San Francisco Police Department to determine whether a person is a member of a Bayview African-American gang. [The gang expert] said a person must meet two or more of those criteria to be listed as a gang member.” (alteration in original)); see also excerpt from KJ’s trial *infra* Section IV.

42. See, e.g., Stella Chan, *Prosecutors Say Three LAPD Officers Falsified Gang Information*, CNN (Jul. 10, 2020), <https://www.cnn.com/2020/07/10/us/los-angeles-police-officers-charged/index.html> [<https://perma.cc/R9PZ-JT5B>] (“In some instances, the defendants are accused of writing on the card that a person admitted to being a gang member even though body-worn camera video showed the defendants never asked the individual about their gang membership,” the statement says, while in other instances, ‘the defendants allegedly wrote on the card that a person admitted to being a gang member despite the fact the person interviewed denied a gang affiliation.’”).

43. Pseudo-scientific anthropology and other false sciences were widespread in the 19th and early 20th century. Largely, Europeans would formalize opinions based on the personal ethnocentric opinions of native peoples across the world. These opinions would be used to justify racist policies and colonialism that devalued native cultures and people. With the advent of real social sciences, pseudo-sciences were debunked and dismissed from critical thought. See generally KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010) (detailing the evolution in scientific understanding of Blackness and criminality over time).

44. Fareed Nassor Hayat, *Preserving Due Process: Applying the Monell Bifurcation to State Gang Cases*, 88 UNIV. OF CINCINNATI L. REV. 129, 136 (2019).

Finally, Part VI explores courts' treatment of Drug Recognition Experts (DRE) and proposes that like DRE, police gang experts whose testimony cannot fulfill the requirements of *Frye* or *Daubert* must be limited to lay-witness observations or excluded completely.

THE BROADER POLITICAL AND RACIAL CONTEXT

This article focuses specifically on the due process violations of criminal Defendants accused under state gang statutes when police officers testify as experts at their trials. This is not an isolated issue, but rather part of a broad practice by courts, legislators and prosecutors in denying due process of law to criminal Defendants, especially Black men and other disenfranchised groups.

Many scholars have highlighted how courts fail to apply proper admissibility standards for expert witnesses in criminal cases generally, and in particular where the Defendants are members of a minority group. For example, Jennifer D. Oliva and Valena E. Beety recently condemned the admission of junk "bite mark" science against criminal Defendants, especially lesbians and other sexual minorities.⁴⁵ Oliva and Beety noted in their paper that while the evidentiary rules for forensic evidence in civil and criminal cases are identical "judges presiding over criminal cases routinely admit unreliable forensic expert evidence that fails to comport with the applicable evidentiary rules and that those very same judges reject in civil cases."⁴⁶ Professor Ion Meyn has argued, with significant empirical evidence, that the growing divide between the rules applied in civil cases compared to application of procedural rules in criminal cases, are intentional and rooted in Jim Crow politics rendering Black Defendants vulnerable to state oppression.⁴⁷

Other scholars have specifically explored the leniency that is given to police officers who testify as experts in criminal trials on other topics, as well as the widespread failure to apply *Frye* and *Daubert* to police officer testimony generally.⁴⁸ In addition, a number of articles have been written connecting the political motivations relating to the so-called War on Drugs with the increasing use of police

45. See generally Jennifer D. Oliva & Valena E. Beety, *Regulating Bite Mark Evidence: Lesbian Vampires and Other Myths of Forensic Odontology*, 94 WASH. L. REV. 1769 (2019).

46. *Id.* at 1771.

47. Ion Meyn, *Constructing Separate and Unequal Courtrooms* 45 (Univ. of Wis. Legal Studies Research Paper No. 1600), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3657250&download=yes [<https://perma.cc/D65J-W7KK>]; see also Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697 (2017).

48. See, e.g., Henry F. Fradella, *The Impact of Daubert on the Admissibility of Behavioral Science Testimony*, 30 PEPP. L. REV. 403, 444 (2003) (finding that law enforcement officer testimony is the one area in which *Daubert* is not being rigorously applied to behavioral science testimony); Brian R. Gallini, *To Serve and Protect? Officers as Expert Witnesses in Federal Drug Prosecutions*, 19 GEO. MASON L. REV. 363 (2012) (finding that when law enforcement officers are qualified as expert witnesses in federal drug prosecutions, it results in the jury hearing unreliable evidence); Wes R. Porter, *Repeating, yet Evading Review: Admitting Reliable Expert Testimony in Criminal Cases Still Depends Upon who is Asking* 36 RUTGERS L. REC. 48, 49 (noting that some trial courts still exclude experts with reliable information while allowing police office testimony that is irrelevant, unhelpful, and unfairly prejudicial); D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?* 64 ALB. L. REV. 99 (finding a large disparity between rejection of defense experts versus police officers testifying for the prosecution).

officer “experts” in criminal cases.⁴⁹ Prominent scholars have demonstrated that the so-called War on Drugs has largely eviscerated Fourth Amendment protections for Black men and other men of color, resulting in the United States’ alarmingly high prison rates.⁵⁰

This article asserts that the failure to apply the well-established rules of evidence to gang experts in criminal trials continues the evisceration of other constitutional rights, supports the prison industrial complex and facilitates the mass incarceration of Black men. The willingness of judges, legislators and prosecutors to ignore constitutional protections, principles of justice and any semblance of equality, continues to demonstrate that “Black Lives” don’t “Matter.” Failure to equally follow the rules of evidence in all criminal and civil matters delegitimizes the criminal justice system and provides tangible basis for the movements to defund police, prisons and abolish the system as we know it.

Thus, while presented under a due process framework, this paper highlights a significant equal protection violation. The people charged under state gang statutes are disproportionately African American.⁵¹ These Defendants—who the Equal Protection Clause of the Fourteenth Amendment was designed to protect—are being denied the trial rights guaranteed to other Defendants both in criminal and civil cases. This paper acknowledges the existence of an equal protection violation, but does not follow an equal protection analysis given the barrier that the Supreme Court erected to bringing equal protection claims in *Washington v. Davis*, which has been critiqued by other scholars.⁵²

Within the broader contexts of mass incarceration of young men of color and the unequal application of the rules of evidence to certain parties, this paper highlights one more way in which the due process rights of Black men are routinely denied, with devastating consequences.

I. AN OVERVIEW OF EXPERT WITNESSES AND THE FRYE AND DAUBERT EXPERT STANDARDS

The Federal Rules of Evidence (FRE) make an important distinction between lay and expert witnesses. Under FRE Rule 701, a lay-witness is limited to testimony that is based on their actual perception of an event (i.e. witnessing through

49. See, e.g., Michael D. Blanchard & Gabriel J. Chin, *Identifying the Enemy in the War on Drugs: A Critique of the Developing Rule Permitting Visual Identification of Indescribable White Power in Narcotics Prosecutions*, 47 AM. U. L. REV. 557 (1998); Joelle A. Moreno, *Strategies for Challenging Police Drug Jargon Testimony*, 20 CRIM. JUST. 28 (2006); Zach Goldstein, *Expert Witnesses in Illegal Drug Distribution Charges*, GOLDSTEIN MEHTA LLC (Feb. 10, 2018), <https://goldsteinmehta.com/blog/expert-witnesses-drug-cases> [https://perma.cc/DR5F-GQ3X].

50. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (2012) (detailing in great depth the racial disparities in policing and incarceration in the United States).

51. Jordan Blair Woods, *Systemic Racial Bias and RICO’s Application to Criminal Street and Prison Gangs*, 17 MICH. J. RACE & L. 303, 329–30 (2012).

52. *Washington v. Davis*, 426 U.S. 229, 239 (1976). For a critique of the “intent” requirement, see Angela Onwuachi-Willig’s article *From Loving v. Virginia to Washington v. Davis: The Erosion of the Supreme Court’s Equal Protection Intent Analysis*, 25 VA. J. SOC. POL’Y & L. 303, 307 (2018) (“*Washington v. Davis* dealt a devastating blow to the future of civil rights litigation: its intent requirement essentially made it impossible for plaintiffs to prove an equal protection violation.”).

the five senses).⁵³ In contrast, FRE Rule 702 states that a witness qualified as an expert may offer testimony in the form of opinion.⁵⁴ However, the rule further states that—for all experts—the testimony must be based on sufficient facts or data; the testimony must be the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the facts of the case. Different states have adopted their own versions of the Federal Rules of Evidence. These rules have corollaries in the different state rules of evidence, which reflect similar principles.⁵⁵ If a person does not meet the qualifications of an expert witness, they may testify only as a lay-witness, and thus testify only about events that they personally perceived, without offering an opinion about those events. In *Frye* and *Daubert* the D.C. Court of Appeals and U.S. Supreme Court, respectively, placed further limits on the admission of expert testimony by requiring a certain standard of scientific acceptability and reliability.

Frye applies to scientific expert evidence specifically. Scientific evidence refers to opinion testimony based on generally accepted scientific methods.⁵⁶ Scientific method refers to a process where a phenomenon is observed, theories are then posed to explain the phenomenon, and lastly theories continuously undergo testing.⁵⁷ *Frye* requires that the proponent of scientific expert testimony prove that the testimony is based in scientific processes and methodologies that are “generally accepted” within specific scientific communities.⁵⁸ “Generally accepted” refers to the scientific communities’ acceptance of the method and processes as both having reliability and validity.⁵⁹ Reliability refers to the scientific theories’ “consistency, or reproducibility.”⁶⁰ Validity refers to “the extent to which something measures what it purports to measure.”⁶¹ Without general acceptance of the scientific method, the evidence is not found credible, and thus is excluded.⁶²

53. FED. R. EVID. 701 (“If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”).

54. FED. R. EVID. 702 (“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.”).

55. The jurisdictions discussed in this paper have adopted rules of evidence regarding lay and expert witnesses that are very similar to the Federal Rules of Evidence. See also CAL. EVID. CODE § 800–01 (West 2009); MD. R. EVID. 5-701–02.

56. *Blackwell v. Wyeth*, 971 A.2d 235, 238 (2009) (“We must address the application of *Frye-Reed* to theories proffered as science and alleged to have been premised on scientifically accepted methodologies.”).

57. *Id.* at 239 (citing DAVID L. FAIGMAN, MICHAEL J. SAKS, JOSEPH SANDERS & EDWARD K. CHENG, 1 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 263-64 (2008)).

58. *Id.* at 241–42.

59. *Id.* at 240.

60. *Id.* at 241 (“If each time a person steps on to a bathroom scale it gives a different reading (while the person’s weight has not changed), then the scale is said to lack reliability.”).

61. *Id.* at 240.

62. *Reed v. State*, 391 A.2d 364, 368 (1978) (excluding voice analysis software due to unreliability).

A separate admissibility test referred to as the “*Daubert*” standard comes from the Supreme Court case *Daubert v. Merrell Dow Pharm, Inc.*, 509 U.S. 579 (1993). *Daubert* derives from FRE 702, which *Daubert* held superseded the *Frye* test in the federal context.⁶³ FRE 702 and *Daubert* require that the scientific evidence be “reliable.”⁶⁴ “Reliable” scientific evidence refers to the “trustworthiness” of the evidence,⁶⁵ which the judge determines considering the following factors: (1) “whether [the] theory or technique . . . can be (and has been) tested;”⁶⁶ (2) “whether the theory or technique has been subjected to peer review and publication;”⁶⁷ (3) “the known or potential rate of error;”⁶⁸ (4) “the existence and maintenance of standards controlling the technique’s operation;”⁶⁹ and, (5) “general acceptance” within the relevant scientific community.⁷⁰ The test is considered flexible.⁷¹ Where the judge finds the evidence lacks “reliability” the judge may deny the admission of the evidence.⁷² Unlike *Frye*, the admissibility of the evidence is not contingent on the scientific communities’ acceptance of the evidence. Rather, under *Daubert* the judge’s determination of the “reliability” dictates whether the evidence is admissible.⁷³

In *Kumho Tire Co., Ltd. v. Carmichael*⁷⁴ the Supreme Court expanded *Daubert*’s reach significantly, holding that the reliability standard applies not just to scientific testimony but all expert testimony.⁷⁵ Specifically, the *Kumho Tire* Court opined:

63. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993) (“Petitioners’ primary attack, however, is not on the content but on the continuing authority of the rule. They contend that the *Frye* test was superseded by the adoption of the Federal Rules of Evidence. We agree.”).

64. *Id.* at 589 (“[U]nder the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”).

65. *Id.* at 590 n.9 (“We note that scientists typically distinguish between ‘validity’ (does the principle support what it purports to show?) and ‘reliability’ (does application of the principle produce consistent results?) . . . [O]ur reference here is to evidentiary reliability—that is, trustworthiness.”).

66. *Id.* at 593.

67. *Id.*

68. *Id.* at 594.

69. *Id.*

70. *Id.*

71. *Id.* (“The inquiry envisioned by Rule 702 is, we emphasize, a flexible one.”); *see also* *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1384 (4th Cir. 1995) (“*Daubert* clearly vests the district courts with discretion to determine the admissibility of expert testimony.”).

72. *See* *Cavallo v. Star Enter.*, 100 F.3d 1150, 1153 (4th Cir. 1996) (quoting *Benedi*, 66 F.3d at 1384).

73. Robert J. Goodwin, *Fifty Years of Frye in Alabama: The Continuing Debate over Adopting the Test Established in Daubert v. Merrell Dow Pharmaceuticals, Inc.* 35 CUMB. L. REV. 231, 233–34 (2004) (contrasting *Frye*’s approach to scientific evidence with the *Daubert* test).

74. 526 U.S. 137, 147 (1999) (“In *Daubert*, this Court held that Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to ‘ensure that any and all scientific testimony . . . is not only relevant, but reliable.’ The initial question before us is whether this basic gatekeeping obligation applies only to ‘scientific’ testimony or to all expert testimony. We, like the parties, believe that it applies to all expert testimony.”).

75. *Id.* (“To say this is not to deny the importance of *Daubert*’s gatekeeping requirement. The objective of that requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. Nor do we deny that, as stated in *Daubert*, the particular questions that it mentioned

We conclude that *Daubert*'s general principles apply to the expert matters described in Rule 702. The Rule, in respect to all such matters, "establishes a standard of evidentiary reliability." It "requires a valid . . . connection to the pertinent inquiry as a precondition to admissibility." And where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question . . . the trial judge must determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline."⁷⁶

In short, after *Kumho Tire*, all experts, including gang experts, must have a reliable basis upon which to form their opinion.

Despite the ruling in *Daubert*, and extension in *Kumho Tire*, states remain divided over the applicability of *Frye*'s "generally accepted standard" and *Daubert*'s "reliability" standard.⁷⁷ Most states follow *Daubert*.⁷⁸ Others continue to apply *Frye*, including California and Illinois, and until recently Maryland.⁷⁹ Those jurisdictions that follow *Frye*, in particular California, are given specific emphasis in this paper because unlike states that follow *Daubert* and *Kumho Tire*, these states continue to treat scientific expert testimony differently than non-scientific expert testimony. For these states it is particularly important to understand why gang expert testimony is scientific in nature. This is discussed in more detail below. A handful of states employ a hybrid of both, or have developed their own test.⁸⁰

II. THE APPLICABILITY OF FRYE AND DAUBERT TO GANG EVIDENCE: GANG EVIDENCE AS SCIENCE

The substance and methodology of gang expert testimony in state gang prosecutions is social scientific in nature and thus, should be subjected to the stringent requirements of *Frye*⁸¹ and *Daubert*.⁸² State prosecutors' use and State Court's admission of gang expert testimony does not comply with *Frye*, and results in: (1) diminished expert evidentiary standards; (2) unreliable gang expert findings;

will often be appropriate for use in determining the reliability of challenged expert testimony. Rather, we conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.").

76. *Id.*

77. Michael Morganstern, *Daubert v. Frye: A State by State Comparison*, THE EXPERT INST., <https://www.expertinstitute.com/resources/insights/daubert-v-frye-a-state-by-state-comparison/> (last updated Sept. 2, 2020).

78. Alice B. Lustre, *Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R. 5th 453, 453 (2001).

79. *Rochkind v. Stevenson*, 471 Md. 1, 236 A.3d 630 (2020), *reconsideration denied* (Sept. 25, 2020) (holding that pretrial hearing under principles set forth under *Daubert* was required for court to consider whether expert used reliable methodology in forming her causation opinion; overruling *Reed v. State*, 283 Md. 374, 382, 391 A.2d 364).

80. *Id.*

81. *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).

82. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

and (3) limitations on criminal Defendants' ability to effectively confront and challenge a gang expert's impact.

Following the decision in *Kumho*, all expert testimony is subject to the *Daubert* test.⁸³ Thus, in the 25 states that follow *Daubert*,⁸⁴ all police officers admitted as "gang experts" must show that their methods of gang identification are reliable under the test laid out in *Daubert*.

For states that follow *Frye*, the issue becomes whether gang evidence is science. The Supreme Court has stated that science is distinguished from other fields based on the use of the scientific method, which is based on generating hypotheses and testing them empirically to see if they can be falsified.⁸⁵ Gang expert testimony fits squarely within this definition. Police officer experts use certain criteria to determine whether a person is in a gang, and these criteria can be falsified depending on whether people who meet these criteria are always gang members.⁸⁶ As described in Part II, police officers in gang cases offer testimony about the general sociology of gangs and use their observations to form specific conclusions about members' mental state and rationale for taking particular action as it relates to gang crime.⁸⁷

Social scientists have been studying gangs for years.⁸⁸ Social science as a discipline demonstrates that the study and understanding of gang culture is science. Social scientists who study gangs use ethnography—a tool of study, which relies on interviews and observations—to determine how gangs live, function, and practice.⁸⁹ Most importantly, social scientists study gangs not from the vernacular of police officers—the most common "gang experts"—but from a scientific viewpoint that is based on testing of theories, objective observation, and grounded in years of study and research.⁹⁰ Social scientists' study of gangs includes theories relating to what

83. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

84. See Alice B. Lustre, Annotation, *Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R. 5th 453 § 2 (2001).

85. *Daubert*, 509 U.S. at 593.

86. See Rector et al. *supra* note 38; L.A. DAILY NEWS, *supra* note 38; Chan, *supra* note 42.

87. See, e.g., *People v. Gamez*, 286 Cal. Rptr. 894, 896, (Cal. Ct. App. 1991) (describing police officer testimony regarding the structures of gangs and that the attempted murder was committed in retaliation for a prior shooting); *People v. Valdez*, 68 Cal. Rptr. 2d 135, 140 (Cal. Ct. App. 1997) (describing police officer testimony that at scene of a fight, each person was there to support other gang members and was acting for the benefit of the gang.).

88. See McGinnis & Eisenhart, *supra* note 35, at 128–29 ("The gang expert's testimony on culture and social relationships purports to have the authority of sociology, a field that tests hypotheses."); Fudge, *supra* note 33, at 989 ("Social scientists have studied gangs for over a century . . .").

89. Durán, Robert J., *Ethnography and the Study of Gangs*, in OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE (Henry Pontell ed., 2018) ("The study of gangs has emerged alongside the use of a research methodology known as ethnography. Ethnography is based on participant observation and interviews to provide a detailed description of a wide variety of social groups and settings.")

90. McGinnis & Eisenhart, *supra* note 35, at 129 ("Sociology is recognized as a field in which the scientific method operates. The National Science Foundation funds sociological research and holds those projects it funds to high standards familiar to other areas of scientific inquiry: '1) [t]he issues investigated must be theoretically grounded; 2) [t]he research should be based on empirical observation or be subject to empirical validation; 3) [t]he research design must be appropriate to the questions asked; 4) [t]he proposed research must advance our understanding of social processes or social structures.'" (quoting NAT'L SCI. FOUND., SOCIOLOGY PROGRAM – DOCTORAL DISSERTATION RESEARCH IMPROVEMENT

constitute a gang, what are the normative behaviors of the gang, and what are identifying features of the gang and gang members.⁹¹ Even as they decline to apply the *Frye* test, some courts have explicitly recognized that gang evidence is rooted in sociology and psychology,⁹² which are both social sciences.⁹³

In *People v. Hill*, the California Court of Appeals offered an in-depth analysis of the scientific nature of gang expert testimony. The court conceded that the police officer's testimony regarding the Defendant's alleged gang membership, gang culture, and the gang motivation to kill police officers and rival gang members was considered gang "sociology and psychology."⁹⁴ The court went on to compare gang testimony to the socio-scientific evidence that courts have considered in cases involving "rape trauma syndrome" and "battering and its effects."⁹⁵

"Rape trauma syndrome" includes the observation of response patterns which are incongruous with the behavior in the general public perception concerning rape.⁹⁶ This phenomena has led to the scientific theory—"rape trauma syndrome"—that theorizes that despite the rape survivors "incongruous" behavior, the behavior is still consistent with the behavior of a victim of rape.⁹⁷ "Battering and its effects" includes observation of spousal abusers' repeated "battering cycles" that leaves the abused spouse more sensitive over time to the violence and eventually unable to cope with the abuse resulting in the abused spouse's violence against the abuser.⁹⁸ The

AWARDS (SOC-DDRI): PROGRAM SOLICITATION, NSF 14-604 (2014), <https://www.nsf.gov/pubs/2014/nsf14604/nsf14604.pdf> [<https://perma.cc/77PM-L3FH>].

91. Fudge, *supra* note 33, at 990–91 ("While twenty-first century gangs differ in some respects from the gangs of pre-war Chicago, contemporary sociologists largely continue to define gangs along similar lines. Gang definitions are highly variable and often fairly complex."); K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 620, 622 (2011) ("While legal academics have left the intersection of gang policing and the criminal justice system largely unexplored, social scientists and sociologists have long focused on the nature of gangs, the different levels of affiliation, and the difficulty of defining both 'gangs' and 'membership' in a gang.")

92. *People v. Gonzales*, 135 P.3d 649, 657 (Cal. 2006) (upholding police officer testimony that gang members would definitely intimidate a witness called to testify, finding that the testimony was "quite typical of the kind of expert testimony regarding gang culture and psychology that a court has discretion to admit"); *People v. Olguin*, 37 Cal. Rptr. 2d 596, 602 (Cal. Ct. App. 1994) ("The use of expert testimony in the area of gang sociology and psychology is well established."); *People v. Gardeley*, 927 P.2d 713, 726 (Cal. 1996) (first citing *Olguin*, 37 Cal. Rptr. 2d at 602; then citing *People v. Gamez*, 235 Cal. App. 3d 957, 966 (noting that case law has upheld expert police officer testimony in the field of gang sociology and psychology); and then citing *People v. McDaniels*, 166 Cal. Rptr. 12, 15, 107 Cal. App. 3d 898, 903 (Cal. Ct. App. 1980) (referring to police officer's testimony in gang cases "relating to the sociology and psychology of gangs")); *see also supra* note 39 and accompanying text.

93. *See generally What Is Sociology?* UNIV. OF N.C. AT CHAPEL HILL (2020), <https://sociology.unc.edu/undergraduate-program/sociology-major/what-is-sociology/> [<https://perma.cc/QX3G-X9Q3>]; Saul McLeod, *What is Psychology?* SIMPLY PSYCH. (2019), <https://www.simplypsychology.org/whatispsychology.html> [<https://perma.cc/E7QU-RUV3>].

94. *People v. Hill*, 120 Cal. Rptr. 3d 251, 265 (Cal. Ct. App. 2011).

95. This is sometimes referred to in case-law and literature as Battered Woman Syndrome. *See, e.g.*, Jessica Savage, *Battered Woman Syndrome*, 7 GEO. J. GENDER & L. 761 (2006).

96. *See* 12 AM. JUR. PROOF OF FACTS 3d §§ 3, 5 (1991) (explaining rape trauma syndrome).

97. *See generally State v. Smullen*, 844 A.2d 429, 440, 441 (2004) (explaining the syndrome of battering and its effects). Courts have applied *Frye* or similar admissibility standards to "battering and its effects." *Id.*

98. *Id.* 441–42.

observation of this phenomena has led to the scientific theory—“battering and its effects”—that is used to explain why the abused spouse “eventually react[s] by killing [their] spouse.”⁹⁹ Courts have routinely applied *Frye* or similar admissibility criteria to expert testimony on “battering and its effects” and “rape trauma syndrome,” though they may diverge on whether the theory had gained the requisite general acceptance in the relevant field.¹⁰⁰

Police gang expert testimony, like “battering and its effects” and “rape trauma syndrome,” is social scientific evidence because gang expert testimony, like the syndromes, relies on the expert’s observation that are later used to construct a theory, which might explain the Defendant’s behavior. Specifically, like the observation of “response patterns” and the “cycle of violence” in “battering and its effects,” the police gang experts testimony is based on observations of gang activity that occurs during the investigation, arrests, and interviews for suspected gang related offenses.¹⁰¹ For example, during KJ’s case, Detective Smith testified that he had interacted with over 300 BGF members, read BGF bylaws and constitutions, and conducted surveillance on areas where the gang was suspected.¹⁰² Likewise, in *Hill* the gang expert’s evidence was based on “contact with gang members” made through patrol work, investigation, and conversation with other officers.¹⁰³

99. *Id.* at 442 (“One aspect of this was the attempt by criminal defense lawyers to offer this syndrome in support of a self-defense argument when the woman eventually reacted by killing her abuser, and one finds a burgeoning plethora of cases in the 1980’s and 1990’s in which courts were required to deal with the issue.”).

100. *See, e.g.,* *Ibn-Tamas v. United States*, 407 A.2d 626, 637–39 (D.C. 1979) (applying *Frye* to battered woman syndrome); *State v. Hennem*, 441 N.W.2d 793, 797–99 (Minn. 1989) (acknowledging that battered woman syndrome has gained sufficient scientific acceptance to warrant admissibility), *abrogated on other grounds by State v. Glowacki*, 630 N.W.2d 392 (Minn. 2001); *State v. Grecinger* 569 N.W.2d 189, 194, 196 (Minn. 1997) (admitting expert testimony on battered woman syndrome based on the finding that it had gained sufficient acceptance in the scientific community); *State v. Marks*, 647 P.2d 1292, 1299 (Kan. 1982) (applying *Frye* to Rape Trauma Syndrome); *People v. Bledsoe* 681 P.2d 291, 297–301 (Cal. 1984) (excluding evidence of rape trauma syndrome based on the finding that it was not generally accepted in its scientific community for the specific purpose it was being offered); *Henson v. State*, 535 N.E.2d 1189, 1193–94 (Ind. 1989) (admitting evidence of rape trauma syndrome based on prior finding of general acceptance in the relevant scientific community).

101. *People v. Hill*, 120 Cal. Rptr. 3d 251, 264 (Ct. App. 2011) (“Chaplin testified he had been a police officer for about 15 years and had been assigned to the San Francisco Police Department’s gang task force for approximately six years. As a gang task force inspector, he patrolled gang neighborhoods, made contact with gang members whenever possible, and investigated hundreds of gang crimes including shootings, attempted murders, assaults, and narcotics sales . . . Chaplin received on-the-job training from other police officers regarding Bayview street gangs, including information about investigating gang crime in the Bayview. Chaplin also routinely talked to officers at the Bayview police station about current trends, ‘things that are going on’ with African-American gangs and graffiti the officers had seen. In the past six years Chaplin had become familiar with Bayview gang-related graffiti and tattoos, and had spoken with members of West Mob and Big Block.”); *People v. Gardeley*, 927 P.2d 713, 717, 726 (Cal. 1996) (deeming expert testimony based on “investigation of hundreds of gang-related offenses, conversations with defendants and other Family Crip members, as well as information from fellow officers, and various law enforcement agencies,” sufficient to prove that the primary purpose of the Family Crip gang was to sell narcotics); *People v. Barajas*, 749 N.E.2d 1047, 1056–57 (Ill. App. Ct. 2001) (“Echeverria’s testimony was based on over eight years of interviewing citizens, gang members, and police officers.”).

102. Transcript of Record, *supra* note 6, at 16:11–18:85.

103. *Hill*, 120 Cal. Rptr. 3d at 264.

Police gang experts, like psychologists studying syndromes, then use their observation to develop theories based on patterns or frequencies they observed in the form of identifying whether an individual is a gang member, whether a group of individuals are a gang, and what norms, including criminal activity, the gang embraces.¹⁰⁴ Just as syndrome evidence is based off observing “response patterns” and “cycles of violence,” police gang experts base their testimony on their experience in investigating gang crime in creating theories of gang membership, structure, and norms.¹⁰⁵ In KJ’s case, Detective Smith used a list of 12 factors, allegedly made through his study of BGF, that would determine who was a gang member.¹⁰⁶ Likewise in *Hill* a similar list of factors was used to determine whether the Defendant was a “West Mob” member.¹⁰⁷ In *Utz v. Commonwealth*,¹⁰⁸ the police officers explained that they defined a gang based not on 12 factors, but on five criteria, including having five or more people, a unique name, hand symbols, graffiti, claiming some type of turf, meeting on a regular basis, and being involved in some type of illegal activity.

Police officer gang “experts” also use their observations to form specific hypotheses that purport to allow them into the mind of the suspected gang member. They use these hypotheses to explain the members’ rationale and thinking for taking part in particular gang crimes. The police officer gang “expert” testifies about the Defendant’s potential mindset at the time of the crime, as a psychologist might use observations about the effects of a syndrome to explain a Defendant’s behavior. For example, in *People v. Gamez*, three police officers testified as experts that the attempted murder was committed as retaliation for a prior shooting, based on their observations of gang behavior and the observations of other officers in the department.¹⁰⁹ The officers concluded that the Defendant was a gang member based on similar factors to those used in the KJ case and *Hill*. In *People v. Valez*, the police officer expert opined that at the scene of the fight, each member was there to support and back up the other members.¹¹⁰ The police expert was permitted to testify to more

104. See *Burris v. State*, 78 A.3d 371, 373–74 (Md. 2013) (“The State moved, prior to trial, to introduce the testimony of Sergeant Dennis Workley of the Baltimore City Police Department, proffered as a gang expert, who would identify Burris as a member of BGF, and testify that BGF was a ‘violent’ gang that would commit murder on the basis of a debt owed to one of its members” (footnote omitted)); *People v. Sanchez*, 374 P.3d 320, 325 (Cal. 2016) (“Stow testified generally about gang culture, how one joins a gang, and about the Delhi gang in particular. Gangs have defined territories or turf that they control through intimidation.”); *Ayala v. State*, 923 A.2d 952, 957 (Md. Ct. Spec. App. 2007) (“Photographs seized from Ayala’s home were admitted into evidence through Detective McDonald, who executed the search warrant on the home. The photographs depicted blue and white clothing with the number 13 on it, various persons, including Ayala making hand signals and gang-related tattoos on various persons, including Ayala. Subsequently, the prosecutor showed the photographs to Detective Porter while he was on the stand. In response to the prosecutor’s questioning, Detective Porter expressed his opinion that Ayala was a member of MS-13.”).

105. See *Burris*, 78 A.3d at 373–74; *Sanchez*, 374 P.3d at 325; *Ayala*, 923 A.2d at 956–57.

106. Transcript of Record, *supra* note 6, at 16:39 (such factors included “self-admission,” “guilty by association, hanging with other gang members, tattoos, clothing, language, other law enforcement information, documentation, paperwork, pictures, [and] social media.”).

107. *Hill*, 120 Cal. Rptr. 3d at 260.

108. 505 S.E.2d 380, 387–88 (Va. Ct. App. 1998).

109. 286 Cal. Rptr. 894, 896 (Ct. App. 1991).

110. 68 Cal. Rptr. 2d 135, 140 (Ct. App. 1997).

than what he observed, which would have been limited to stating that he saw multiple members on the scene during the altercation. He was permitted to give opinion testimony that required him to go inside the members' minds and explain the psychology of the members on the scene to the jury—specifically why each member of the caravan acted for the benefit of a street gang during the crime.¹¹¹ Similarly in *People v. Gardeley*, “the gang expert’s testimony alone, based on ‘investigation of hundreds of gang-related offenses, conversations with defendants and other Family Crip members, as well as information from fellow officers, and various law enforcement agencies,’ was deemed sufficient to prove that the primary purpose of the Family Crip gang was to sell narcotics.”¹¹²

Accordingly, based on the similarity between recognized syndromes (i.e. the ability to enter the Defendant’s mind, understand their thinking, and then present their thinking and corresponding actions in a purported credible way), gang expert testimony is a social science, similar in form and structure to “battering and its effects” and “rape trauma syndrome.” Because gang evidence is a science, specifically a social science, *Frye* and *Daubert* must apply. However, courts routinely decline to extend *Frye* and *Daubert* to police officer gang expert testimony, instead allowing the testimony under the federal or state rules of evidence on the basis that the testimony is relevant and helpful in illuminating points to the jury.¹¹³ Though relevance is the basic requirement for all evidence, expert testimony, especially that which is based in science, requires a further showing of reliability.

III. UNVETTED SCIENCE: THE CURRENT STANDARD FOR GANG EXPERT TESTIMONY

Unfortunately for criminal Defendants, when it comes to gang expert testimony, courts continuously admit gang evidence through police officers qualified as experts without applying *Daubert* or *Frye*.

Prior to the Supreme Court decision in *Kumho Tire*, courts avoided *Daubert* by finding that gang expert testimony was specialized knowledge rather than scientific testimony.¹¹⁴ This logic is problematic because it ignores the sociological element of testimony regarding the structure of street gangs, and the psychological element of testifying regarding the psychology of gang members. Additionally, following *Kumho Tire*, which held that *Daubert* was applicable to all expert testimony, including specialized knowledge, this rationale is no longer viable.

Courts considering police officer gang expert testimony have also circumvented the *Daubert* requirement by misconstruing the *Daubert* decision language regarding the “flexibility” of the test¹¹⁵ and looking only at the officer’s credentials and personal knowledge without examining his methodology at all. For

111. *Id.*

112. McGinnis & Eisenhart, *supra* note 35, at 118.

113. In *People v. Hill*, 120 Cal. Rptr. 3d 251, 282 (Cal. Ct. App. 2011), the court declines to apply *Daubert* to gang expert testimony and concludes that testimony is admissible because it “was directly relevant to establish the gang purpose alleged in count 4.”

114. See, e.g., *Torres v. State*, 962 P.2d 3, 21–22 (Okla. Crim. App. 1998) (“*Taylor* and *Daubert* are not applicable to non-scientific evidence, including testimony on the nature and structure of street gangs.”).

115. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 594–95 (1993).

example, in *U.S. v. Hankey*, the Ninth Circuit considered a *Daubert* challenge to gang expert testimony. In that case, police officers had offered testimony that “gangs enforce a code of silence among their members that any affiliated gang member would be subject to violent retribution if one gang member testified against another” and that “if a member of one of the affiliated gangs in the area testified against another member, the witness would be beaten or killed.”¹¹⁶ The court found that “The *Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable to this kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it.”¹¹⁷ After determining that the *Daubert* factors were inapplicable, the court affirmed the trial court’s admission of the officer’s testimony based on his years of experience as a police officer and his particular focus on gangs.¹¹⁸ The court never evaluated whether, in all his years as a police officer studying gangs, this expert had been employing reliable methods to come to sociological conclusions regarding gang structure or the likely motives of individual members. Similarly, in *Nenno v. State*, the Texas Court of Appeals surveyed other court decisions and found agreement that “the four factors listed in *Daubert* do not necessarily apply outside of the hard science context; instead methods of proving reliability will vary, depending upon the field of expertise.”¹¹⁹

This deference to police officer experts fundamentally misconstrues the test envisioned by *Daubert*. The “flexibility” language in *Daubert* does not mean that courts can avoid examining the reliability of experts by deferring entirely to their years of experience and personal observations. In fact, the full text of *Daubert*’s discussion of “flexibility” explicitly stated that:

The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific *validity*—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on *principles and methodology*, not on the conclusions that they generate.¹²⁰

In *Kumho Tire*, the court confirmed that “Some of [the *Daubert*] factors may be helpful in evaluating the reliability even of experience-based expert testimony.”¹²¹ Even assuming, *arguendo*, that the specific factors of peer review and error rate may be applied with lower rigor to behavioral science, the general requirement of reliability is inflexible. Certainly the “flexibility” allowed by *Daubert* does not allow courts to avoid a reliability analysis altogether simply because of an expert’s background. The fact that an expert has been a police officer for many years, or has worked with gangs, or personally knows a Defendant, does not establish reliability of methods, in particular when the expert’s career is centered around

116. 203 F.3d 1160, 1166 (9th Cir. 2000).

117. *Id.* at 1169.

118. *Id.* at 1169–70.

119. 970 S.W.2d 549, 561 (Tex. Crim. App. 1998) (citation omitted), *overruled on other grounds by* State v. Terrazas, 4 S.W.3d 720 (Tex. Crim. App. 1999).

120. *Daubert*, 509 U.S. at 594–95 (emphasis added).

121. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 138 (1999).

arresting people like the Defendant.¹²² Significantly, an extensive survey of case law found that law enforcement testimony was the “one area in which *Daubert* [was] not being rigorously applied to behavioral science testimony.”¹²³

In states that follow *Frye*, state prosecutors have successfully circumvented the *Frye* requirements by asserting that gang expert testimony is not a science, thus not required to abide by the stringent standards of *Frye*. This is concerning because, as outlined in the previous section of this paper, gang expert testimony is scientific in nature and depends on psychology and sociology of gang members. Some scholars have also argued that there is a “soft science” exemption for *Frye* and that it need not be applied to testimony that is psychological in nature.¹²⁴ One of the often cited cases for this argument is *People v. McDonald*.¹²⁵ In *McDonald*, the California Supreme Court declined to apply *Frye* to expert testimony on eyewitness identification.¹²⁶ The court found that the risk *Frye* is meant to address, namely that jurors may give undue weight to scientific testimony, is particularly present when the evidence is produced by a *machine*.¹²⁷ In contrast, when a witness gives his opinion on the stand, the jury will be naturally more skeptical.¹²⁸ However, in that same paragraph the court lists the types of novel processes that should be subject to *Frye*, and includes “rape trauma syndrome” in that list—a clearly socio-scientific phenomenon like gang member psychology.

Furthermore, courts should keep sight of the purpose of expert witness admissibility tests and use them to ensure that the jury is not hearing unsound evidence that is socio-scientific in nature. The court in *People v. McDonald* further emphasizes that the ultimate goal of *Frye* is to prevent the jury from being misled by unproven and ultimately unsound scientific methods.¹²⁹ This purpose is not served when sociological and psychological evidence that is clearly based on unreliable methods is the offered testimony. As Professor Edward J. Imwinkelried argues in his paper *The Importance of Daubert in Frye Jurisdictions*:

[I]t is one thing to say that in a *Frye* jurisdiction, the proponent need not make any showing that the expert’s theory or methodology is empirically valid. However, it is quite another matter to say that the testimony should be admitted despite a showing by the opponent demonstrating the empirical invalidity of

122. There is an inherent risk of bias in the testimony from experts whose careers depend on the outcome of their analyses. For further discussion of this risk, see Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245 (2017).

123. Henry F. Fradella, Adam Fogarty & Lauren O’Neill, *The Impact of Daubert on the Admissibility of Behavioral Science Testimony*, 30 PEPP. L. REV. 403, 444 (2003).

124. See, e.g., Edward J. Imwinkelried, *The Escape Hatches from Frye and Daubert: Sometimes You Don’t Need to Lay Either Foundation in Order to Introduce Expert Testimony!* 23 AM. J. TRIAL ADVOC. 1, 6–7 (1999).

125. 690 P.2d 709, 723–24 (Cal. 1984), *overruled on other grounds by* *People v. Mendoza*, 4 P.3d 265 (Cal. 2000).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 373.

the theory or methodology. The *Frye* test should be conceived as merely a means to the end of ensuring the reliability of the testimony submitted to the trier of fact; and in exceptional cases, in which the opponent can present substantial evidence of the empirical invalidity of the expert's theory or technique, it does not serve that end objective to admit the expert testimony.¹³⁰

As described above, the argument that *Frye* does not apply to soft sciences is not firmly established and does not exempt behavioral science from a reliability examination. However, even assuming, *arguendo*, that courts have flexibility around the application of *Frye* to soft sciences, this flexibility should not be employed to allow the jury to hear clearly unreliable sociological and psychological evidence.

Even worse, some courts have recognized that the testimony may be scientific and still declined to apply *Frye* based on the flawed logic that prior courts also did not apply *Frye*.¹³¹ Courts have consistently accepted this view—a close survey of gang case prosecution reveals that despite the scientific nature of the evidence presented and courts recognition, *Frye* has never been applied to gang expert testimony. However, the testimony is not correspondingly limited: police officers are still referred to as experts and are allowed to present their “12 factor method” as a reliable scientific method to the jury, without ever being required to acknowledge that the process is in fact unscientific and unreliable. *People v. Hill* is illustrative of this point,¹³² where the Court addressed head-on a challenge to the admission of gang expert testimony under *Frye*.¹³³ *Hill* is instructive in explaining the court's ability to bypass the application of *Frye* even as they recognize that the testimony rests on scientific conclusions.

A. *People v. Hill*: Factual Background

In *People v. Hill*,¹³⁴ the Defendant was charged with, among other things, first degree murder and participation in a criminal street gang in San Francisco, California.¹³⁵ The decedent was a police officer that was working in an unmarked cruiser and in plain-clothes capacity the day of the incident.¹³⁶ The decedent followed the Defendant first by foot and then in his unmarked cruiser.¹³⁷ The State argued that the decedent had identified himself as a police officer to the Defendant.¹³⁸ The defense argued that the Defendant was not aware that the plain-clothes officer was

130. Edward J. Imwinkelried, *The Importance of Daubert in Frye Jurisdictions*, 42 No. 2 CRIM. L. BULL. ART 5 (2006).

131. See, e.g., *People v. Hill*, 120 Cal. Rptr. 3d 251, 256 (Ct. App. 2011) (discussed below).

132. *Id.* at 268.

133. *Id.*

134. *Id.* at 256.

135. *Id.* at 257 n.2.

136. *Id.* at 257.

137. *Id.*

138. *Id.*

indeed a police officer.¹³⁹ Ultimately, the Defendant shot the officer causing his death.¹⁴⁰

Despite the fact that there is no mention of any gang epithets yelled during the shooting, the State was permitted to call a gang expert to testify,¹⁴¹ because the court found that such evidence was relevant to establishing the gang's purpose.¹⁴² The "expert" was a San Francisco police officer who did not possess a degree in social science.¹⁴³ Based on criteria created by the "San Francisco District Attorney's Office and the San Francisco Police Department," the expert identified the Defendant as part of "West Mob" gang,¹⁴⁴ which was in rivalry with "Big Block" gang.¹⁴⁵ The expert further testified that the Defendant, as a member of West Mob, was motivated to commit the crime because "[r]etaliating against a [rival] gang member sends a message to other gang members, but the murder of a police officer sends a message to the community, 'Hey, even your protectors can be touched.'"¹⁴⁶ Further, the expert testified that it was "'looked down upon'" to cooperate with the State and that such conduct was considered "snitching," that the area where the shooting occurred was an "area where one 'would not ever expect to see somebody from West Mob . . . for any reason other than a gang reason, a shooting or a killing,'" and that if the intended target, i.e. the rival gang member, for a shooting is not present, then "you're not just going to turn and run out."¹⁴⁷ The expert posed a "hypothetical" that the Defendant as a member of the West Mob gang was intending to commit a shooting that day in order to retaliate against Big Block for a series of murders of West Mob members.¹⁴⁸ Notably, the expert's "hypothetical" revealed that the Defendant was not intending to shoot an officer but specifically a Big Block member named Ronnie Allen who had committed a series of shootings of West Mob members.¹⁴⁹ In closing, the State argued that the Defendant intended to kill the rival gang member, Ronnie Allen, but killed the decedent officer because he did not want to be arrested for carrying the assault rifle—the weapon the State argued that the Defendant intended to use on Allen.¹⁵⁰

The defense challenged the admissibility of the expert witness' testimony in arguing that the "[s]treet experience and police workshops on investigation techniques [does not] transform officers into behavioral scientists" and that police

139. *Id.* at 256.

140. *Id.* at 257–58.

141. *Id.* at 259–260.

142. *Id.* at 282.

143. *Id.* at 264 (listing the officer's qualification with no mention of degree in sociology or psychology).

144. *Id.* at 260 ("Chaplin explained the 11 criteria formulated by the San Francisco District Attorney's Office and the San Francisco Police Department to determine whether a person is a member of a Bayview African-American gang. Chaplin said a person must meet two or more of those criteria to be listed as a gang member.")

145. *Id.*

146. *Id.*

147. *Id.* at 265.

148. *Id.* at 260–61.

149. *Id.* (emphasis added) ("Chaplin opined that appellant's actions on the night of the April 10 shooting were consistent with a West Mob member retaliating *against a Big Block member . . .*").

150. *Id.* at 262.

experience “does not translate into sociological or psychological expertise on gang members’ intentions, motivations, and actions under specified circumstances.”¹⁵¹ The *Hill* court dismissed any challenges to credibility of the evidence in stating that the officers “experience and training demonstrated the special knowledge, skill, experience and training sufficient to qualify him as an expert in these areas.”¹⁵² *Hill* further declined to apply *Frye*, discussed *infra*.¹⁵³

B. *People v. Hill*: The Expert Testimony Was “Science” Yet The Court Did Not Apply *Frye*

As explained above, there is little doubt that the police officer’s testimony regarding the Defendant’s alleged gang membership, gang culture, and the gang motivation to kill police officers and rival gang members, was science—the court in *Hill* conceded that the testimony was categorized as “[g]ang sociology and psychology”¹⁵⁴ The court further admitted that gang experts opine on the mental state of the Defendant, including “motivation for a particular crime” and “whether and how a crime was committed to benefit or promote a gang.”¹⁵⁵

Hills’ reasoning for not applying *Frye* was perfunctory. The court rejected the application of *Frye* in stating that the Defendant “has cited no California authority for the proposition that a gang expert’s opinion is subject to the *Kelly* test” (*Kelly* is the case which adopted *Frye* in California)¹⁵⁶ “and[] generally speaking, *Kelly* does not apply to the type of expert testimony provided by [the gang expert].”¹⁵⁷ *Hill* did not elaborate on why *Frye*, which applies “not only to the more obvious polygraph, voice print, and blood-typing techniques but also to scientific processes based on purely psychological evidence,”¹⁵⁸ such as hypnosis,¹⁵⁹ rape trauma syndrome,¹⁶⁰ and child sexual abuse accommodation syndrome,¹⁶¹ did not likewise apply to gang

151. *Id.* at 265.

152. *Id.* at 265–69 (citing *People v. Gonzalez*, 135 P.3d 649 (Cal. 2006)).

153. *Id.* at 259.

154. *Id.* at 265 (alteration added) (quoting *People v. Gonzalez*, 25 Cal. Rptr. 3d 124, 132 (Ct. App. 2005)).

155. *Id.* (quoting *People v. Killebrew*, 126 Cal Rptr. 2d 876, 885 (Ct. App. 2002)).

156. *Kelly* is the case that adopted *Frye* in California. See *In re Amber B.*, 236 Cal. Rptr. 623, 628 (Ct. App. 1987) (referring to the test as a “*Kelly-Frye*” test).

157. *Hill*, 120 Cal. Rptr. at 268.

158. *People v. Bowker*, 203 Cal. App. 3d 385, 391, 249 Cal. Rptr. 886, 889 (Ct. App. 1988) (citing *People v. Shirley*, 723 P.2d 1354 (Cal. 1982)). In *Bowker*, the court concluded that Dr. Murphy constructed a “scientific” framework “into which the jury could pigeonhole [sic] the facts of the case. Thus, even though he was precluded from using CSAAS as a predictor of child abuse, the jury was free to superimpose these children on the same theory and conclude abuse had occurred. The prosecution was not circumspect in using syndrome evidence as shown by the colloquy between the prosecutor and Dr. Murphy” *Id.* at 892.

159. See *Shirley*, 723 P.2d at 1374 (determining whether hypnotically recalled testimony is subject to the California version of the *Frye* rule).

160. *People v. Bledsoe*, 681 P.2d 291, 301 (Cal. 1984) (“[Rape trauma syndrome does not meet *Frye*] because the literature does not even purport to claim that the syndrome is a scientifically reliable means of proving that a rape occurred”).

161. See *Bowker*, Cal. Rptr. at 890–91 (applying *Frye* to child sexual abuse accommodation syndrome).

expert testimony that was admittedly “scientific.” In sum, the court in *Hill* admitted that the police officer’s testimony was scientific, but then chose to bypass the *Frye* test by treating the gang expert as a non-scientific expert.¹⁶²

This paper does not conclude that police officers, without sociological or psychological educational backgrounds, creditable methodologies and verifiable conclusions *are* scientific experts, but rather that the *testimony* proffered is scientific, or at the bare minimum requires a scientific framework. *Hill* does little to refute the claim that the gang expert is scientific: providing no analysis distinguishing gang evidence from “scientific evidence,” the court simply concluded that *Frye* did not apply because the Defendant had not cited to an authority that applies *Frye* to gang evidence.¹⁶³ Such reasoning is contrary to the holding in the namesake for *Frye*, which applied the *Frye* requirements to the introduction of a lie detector test despite a lack of precedent for doing so. In fact *Frye*, like *Hill*, explained that though there was no precedent on the admissibility of lie detector tests, a relatively novel and emerging science at the time, the evidence still needed to show “general acceptance.”¹⁶⁴ Thus, the decision in *Hill* to not apply the *Frye* standard is simply a refusal to apply the appropriate standard for scientific evidence without legal basis.

Hill is not unique. In a number of cases, the court has explicitly recognized that police officer expert testimony is sociological or psychological in nature, yet this has not led to the application of *Frye* or *Daubert*.¹⁶⁵

As explained in the next section, the lack of *Frye* and *Daubert* for gang expert testimony is particularly troubling given that the particular testimony offered by these purported efforts would almost certainly fail both a *Daubert* reliability test and a *Frye* general acceptance test.

IV. GANG EVIDENCE LACKS RELIABILITY AND VALIDITY AND FAILS FRYE AND DAUBERT

The below quoted section of Detective Smith’s cross examination in KJ’s trial demonstrates that gang expert testimony lacks the reliability required by the rules of evidence, *Frye*, and *Daubert*. When challenged, Detective Smith’s methodology for determining gang membership falls apart.

Detective Smith: I see a lot of guys throwing up the peace sign. That, in some cases could be an indicator . . . that they’re a part of BGF.

Counsel: So, my question again for you is, is throwing up a peace sign an indicator that you’re BGF?

162. *Hill*, 120 Cal. Rptr. 3d at 268 (“[G]enerally speaking, *Kelly* does not apply to the type of expert testimony provided by [the gang expert].”).

163. *Id.*

164. *Frye v. U.S.*, 293 F. 1013, 1014 (D.C. Cir. 1923).

165. *Supra* note 92.

Detective Smith: It could be an indicator but that alone will not identify an individual as being BGF.

Counsel: So what about the peace sign makes it an indicator of BGF?

Detective Smith: It's an indicator because everyone that's a part of that group wants to use that particular sign

Counsel: You said that if they had maybe two of these common identifiers you could validate them as a BGF member, right?

Detective Smith: Correct.

Counsel: So if they're associated with BGF members and throw up a peace sign, you would validate that person as BGF.

Detective Smith: . . . I wouldn't use . . . that's not strong. I wouldn't validate them for just throwing a peace sign and associating with BGF members

Counsel: You said two or more indicators.

Detective Smith: I would not use those two as validating or labeling a person as a gang member.

Counsel: So there's . . . certain indicators that don't add up to BGF, right?

Detective Smith: In my personal opinion, yes.¹⁶⁶

Detective Smith testified that if a person satisfied two of his 12 indicators, he would validate them as a BGF member. Yet when given a scenario where a suspected BGF member fulfilled two of his indicators (hand signal and association), he then concedes that those two indicators would not be sufficient to validate the suspect as a BGF member. As discussed further below, this is an unreliable and unverifiable method and fails the *Frye* and *Daubert* admissibility tests.

A. Gang expert testimony lacks general acceptance in the relevant scientific communities

In order for a gang expert to form a basis and methodology to be accepted under *Frye*, it must be "sufficiently established to have gained general acceptance in the particular field in which it belongs."¹⁶⁷ Defining the particular field to which the evidence belongs is key. "General scientific recognition may not be established without the testimony of disinterested experts whose livelihood is not intimately

166. Transcript of Record, *supra* note 6, at 16:204–206.

167. *Reed v. State*, 391 A.2d 364, 368 (Md. 1978).

connected with the program.”¹⁶⁸ General acceptance of gang recognition methods among police officers is not sufficient to establish general acceptance under *Frye*—rather, the methods must be accepted by scientists who study and define gangs from a neutral, non-prosecutorial standpoint. In the KJ trial, the state could not show that the gang expert’s testimony was based on reliable evidence and methods. There was no indication that police officer gang expert testimony had ever been accepted by disinterested scientists that were not proponents of the program, such as independent sociologists, psychologists, anthropologists, or other social or behavioral scientists.

B. Gang Expert Testimony Lacks a Credible Factual Basis

Courts have held that an expert’s reasoning and methodology must be connected to their conclusions, have an adequate factual basis, and be generally accepted within the relevant scientific community.¹⁶⁹ In addition, the “[r]equirement of an adequate factual basis for expert testimony consists of two distinct sub-factors: (1) it is first required that the expert have available an adequate supply of data with which to work, and (2) it is then required that the expert employ a reliable methodology in analyzing that data.”¹⁷⁰ “A factual basis sufficient to support an expert witnesses’ opinion testimony may arise from a number of sources, such as facts obtained from the expert’s first-hand knowledge, facts obtained from the testimony of others, and facts related to an expert through the use of hypothetical questions.”¹⁷¹

Here, the gang expert in KJ’s trial failed to provide a credible factual basis for his testimony.¹⁷² The gang expert was never a member of the Black Guerrilla Family and the factual basis he provided for his opinion was based on information from self-interested parties—the witnesses that he interviewed were either current or ex-criminals with severely compromised credibility.¹⁷³ Furthermore, the gang expert failed to provide copies of the interviews, substance of his investigation, materials gathered and methodology used in his investigation.¹⁷⁴ Such failures prevented KJ from effectively challenging the conclusions reached by the gang expert and did not provide an adequate or credible factual basis.

168. *People v. Barbara*, 400 Mich. 352, 376, 255 N.W.2d 171, 180 (Mich. 1977).

169. *Blackwell v. Wyeth*, 971 A.2d 235, 253–55 (Md. 2009); *see also Roy v. Dackman*, 124 A.3d 169, 172 (Md. 2015), *reconsideration granted* (Nov. 24, 2015) (holding that testimony must constitute more than mere speculation or conjecture); *Giant Good, Inc. v. Booker*, 831 A.2d 481, 490 (Md. 2003) (citing *Uhlik v. Kopec*, 314 A.2d 732 (1974), *cert. denied*, 271 Md. 739 (1974)) (“An expert’s opinion testimony must be based on a [sic] adequate factual basis so that it does not amount to ‘conjecture, speculation, or incompetent evidence.’”).

170. *Dackman*, 124 A.3d at 170. FRE 702(b) also requires that the testimony be “based on sufficient facts or data.”

171. *Sippio v. State*, 714 A.2d 864, 874 (Md. 1998).

172. Transcript of Record, *supra* note 6, at 16:42–44.

173. *Id.* at 16:22:6–14.

174. *Id.* at 16:42–44.

C. Gang Expert Testimony Lacks Reliability and Validity

Under *Frye*, the testimony offered in the KJ trial would lack “reliability” and “validity.”¹⁷⁵ Reliability refers to the ability to reproduce consistent results: “if each time a person steps on to a bathroom scale it gives a different reading (while the person’s weight has not changed), then the scale is said to lack reliability.”¹⁷⁶ Validity refers to “the extent to which something measures what it purports to measure,” or, in other words, “the accuracy of a test, the degree to which a test or technique provides a true measurement of the phenomenon being assessed.”¹⁷⁷

In KJ’s case, Detective Smith failed to specify the methodology he used to analyze the data collected from those he interviewed. Moreover, the State did not show both what Detective Smith’s methodology was and why that methodology was reliable, in order to admit him as an expert witness.¹⁷⁸

Reliability of the rubric used to determine gang membership would mean that “each time a person” met two or more factors, then the individual would be a BGF member. But in KJ’s case, Detective Smith admitted that even if two factors were present, the person may not be a member.¹⁷⁹ In other words, the evidence showed “a lack of reliability” in that when two factors were presented, the results were different than what was expected.¹⁸⁰ The evidence also lacked validity for the same reason—the factors that Detective Smith used were meant to measure gang membership, yet an individual can show two factors—thus satisfying the criteria—and still *not* be a BGF member.

Additionally, Detective Smith himself was not qualified to offer reliable testimony—he testified to attending training sessions for his knowledge of gang expertise but did not specify where, with who or what specific materials were covered.¹⁸¹ The testimony offered by these purported experts would certainly fail both a *Daubert* reliability test and a *Frye* general acceptance test.

D. Drug Recognition Experts: A Model Analysis of Police Officers Offering Unreliable Science

As described above, courts have repeatedly declined to conduct *Frye* and *Daubert* analysis of police officer experts, thus no case exists that is illustrative of a proper analysis of gang expert testimony. However, court decisions regarding Drug Recognition Expert (DRE) testimony can be used to demonstrate the type of

175. *Chesson v. Montgomery Mut. Ins. Co.*, 75 A.3d 932, 936 (Md. 2013) (“[V]alidity, having been defined as ‘the extent to which something measures what it purports to measure,’ and reliability, characterized as ‘the ability of a measure to produce the same result each time it is applied to the same thing . . . consistency or reproducibility.’”).

176. *Blackwell v. Wyeth*, 971 A.2d 235, 241 (Md. 2009).

177. *Chesson*, 75 A.3d at 936; David Medoff, *The Scientific Basis of Psychological Testing Considerations Following Daubert, Kumho, & Joiner*, 41 FAM. CT. REV. 199, 200 (2003) (“[T]he accuracy with which a measuring spoon truly measures one teaspoon of vanilla extract reflects its validity.”).

178. See MD Rule 4-263(d)(8); MD Rule 5-702.

179. Transcript of Record, *supra* note 6 at 16:204–206.

180. *Id.* at 16:37–38.

181. *Id.* at 16:58–59.

behavioral science evidence that fails *Frye* and *Daubert* and should therefore be excluded or limited. In the field of DRE's, police officers use a number of factors to determine whether a person is under the influence of drugs or alcohol. The reasoning behind a court's exclusion of this testimony mirrors the problems with admitting police officer expert testimony in gang cases.

In *Maryland v. Brightful*,¹⁸² the court applied a *Frye* test to the protocol used by DREs to determine whether a person is impaired by a drug. This test, described in detail in *Brightful*, is a 12-step process in which law enforcement perform a series of examinations on a person such as a breath alcohol test, an eye examination, an examination of vital signs, and an interview.¹⁸³ The *Brightful* court found that the testimony being offered was scientific in nature because officers must rule out certain medical diagnoses in order to find drug impairment.¹⁸⁴ Despite the scientific nature of the test, the people conducting the test had no formal medical or scientific training and their only preparation was a 72-hour training course given by other police officers.¹⁸⁵ Furthermore, the test did not follow the scientific method—there “is no set number of . . . [required] indicators in order to find someone impaired,”¹⁸⁶ no way to distinguish between competing causes of the same result,¹⁸⁷ no standardization such that the test can be used multiple times by multiple people and provide the same result,¹⁸⁸ and no peer reviewed studies.¹⁸⁹ The *Brightful* court concluded that based on these failings, the DRE protocol failed to produce accurate and reliable determinations and the police officer's training “does not enable DREs to accurately observe the signs and symptoms of drug impairment, therefore, police officers are not able to reach accurate and reliable conclusions’ [sic] regarding what drug may be causing impairment.”¹⁹⁰ Furthermore, the court found that the test is not accepted by the relevant medical community, which must be defined as disinterested scientists (such as doctors, ophthalmologists, and toxicologists) and not proponents of the program such as law enforcement agencies.¹⁹¹

As with DRE protocol, the testimony offered by gang “experts” is scientific in nature, as described above. Yet, the police officers administering, investigating, evaluating or testifying, do not have formal training in sociology, psychology, anthropology, or other social or behavioral sciences. Furthermore, a gang expert's process does not follow the credible scientific method—it is not reliable or replicable; the same result would not be achieved if the test was done multiple times or by different people; there is no way to rule out competing reasons for the same result; and there are no peer reviewed studies.

An example of this lack of reliability occurred in KJ's trial, quoted above, where the expert stated that he would use “two or more” factors to determine whether

182. 2012 Md. Cir. Ct. LEXIS 1 (Mar. 5, 2012).

183. *Id.* at *2–5.

184. *See id.* at *6–7, *9–10, *15–16.

185. *See id.* at *2, *5–6, *8.

186. *Id.* at *5, *11.

187. *See id.* at *20, *22.

188. *See id.* at *22–23.

189. *Id.* at *21.

190. *Id.* at *39.

191. *Id.* at *32.

an individual is a BGF member.¹⁹² The two factors used during cross-examination were the use of hand signs and association with known BGF members.¹⁹³ When asked on cross-examination whether the use of a peace sign, i.e. a hand sign, and association with BGF members, would make an individual a suspected BGF member, the expert stated “no,”¹⁹⁴ essentially proving the unreliability of the method employed.

V. THE DUE PROCESS IMPLICATIONS OF FAILING TO APPLY FRYE AND DAUBERT

Courts’ refusal to apply *Frye* and *Daubert* to police officer gang expert testimony is concerning given the rationale behind the admissibility tests and the impact on criminal Defendants’ due process rights. The concern relating to the *Frye* “general acceptance” test is twofold. First, courts emphasize that “Lay jurors tend to give considerable weight to ‘scientific’ evidence when presented by ‘experts’ [sic] with impressive credentials.”¹⁹⁵ Given this tendency, it is critical that the expert present a methodology that is generally accepted, rather than assuming the jury will assess its validity for themselves.¹⁹⁶ Second, courts note the importance for both parties that there be “a minimal reserve of experts [who] exist [that] can critically examine the validity of a scientific determination in a particular case” as “[t]he ability to produce rebuttal experts, equally conversant with the mechanics and methods of a particular technique, may prove to be essential.”¹⁹⁷

Similarly, the Supreme Court in *Daubert* emphasized that experts are allowed to testify to issues about which they lack firsthand knowledge because of the “assumption that the expert’s opinion will have a reliable basis in the knowledge and experience of his/[her] discipline.”¹⁹⁸ By refusing to apply *Frye* and *Daubert* courts deny the “fundamental fairness” that *Frye* and *Daubert* were intended to ensure.¹⁹⁹

A refusal to apply *Frye* to state gang case prosecutions, deprives criminal Defendants charged as gang members of the fundamental fairness of “requir[ing] that before the results of a [s]cientific process can be used against him, he is entitled to a [s]cientific judgment on the reliability of that process.”²⁰⁰ In *Reed*, the first case applying the *Frye* standard in Maryland, the court adopted the reasoning of *Frye*, noting that juries have a tendency to weigh scientific evidence more heavily because of “mystic infallibility in the eyes of a jury” that science carries.²⁰¹ Because of jurors

192. Transcript of Record, *supra* note 6, at 16:39–40.

193. *Id.*

194. *Id.* at 16:205.

195. *Reed v. State*, 391 A.2d 364, 386 (Md. 1978).

196. *Id.* at 371.

197. *Id.* at 370 (quoting *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 174)).

198. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 592 (1993).

199. *Reed*, 391 A.2d at 369–70 (“[F]airness to a litigant would seem to require that before the results of a Scientific process can be used against him, he is entitled to a Scientific judgment on the reliability of that process.”).

200. *Id.*

201. *Id.* at 370.

tendencies to weigh science more heavily, *Reed* warned that the general acceptability standard was required to prevent parties from introducing evidence that lacked reliability and validity, i.e. junk science, to sway the decision-making process of the jury.²⁰² Without requiring police officer gang experts to demonstrate reliability and validity of their process, the very safeguards *Frye* provides are abandoned. As a result, juries hear and are persuaded or confused by unreliable evidence. Allowing juries to rely on unreliable science deprives Defendants of fundamental fairness because the jury is permitted to place substantial weight on evidence that appears conclusive but is unreliable.²⁰³

The concerns that motivated the decisions in *Frye*, *Reed*, *Kelly* and *Daubert* are equally applicable in the context of gang experts. There are also three particular aspects of gang evidence that make it particularly important to apply an admissibility test. First, gang evidence is generally recognized as highly incendiary.²⁰⁴ Gang experts, then, present prejudicial evidence with an unearned aura of reliability. By allowing an expert to testify about gang membership, evidence that is already inflammatory, carries increased influence upon the jury. Second, beyond the regular tendency to over-credit an expert, juries may credit the testimony of a police officer gang expert in particular based on their status as a police officer. This increases the likelihood that the jury will see the evidence as “conclusive” or “infallible” based on who it is coming from, rather than the reliability or validity of the evidence.²⁰⁵ Third, gang expert evidence does not simply lack general acceptance—it lacks virtually any acceptance at all among scientists, placing it most appropriately in the category of

202. Indeed, *Frye*, the namesake of the test, prevented the admission of lie detector. And, while *Frye*, did not address the effect of lie detector on juries, later cases involving lie detectors warned that jurors would treat lie-detectors as “conclusive” despite the lack of reliability. *Id.*

203. *Id.* at 369–70 (“[F]airness to a litigant would seem to require that before the results of a Scientific process can be used against him, he is entitled to a Scientific judgment on the reliability of that process.”); *Wilson v. State*, 803 A.2d 1034, 1046 (Md. 2002) (“The case sub judice was based entirely on circumstantial evidence. In light of the role the statistics, and particularly the product rule, played in the expert’s testimony, we are unable ‘to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.’”).

204. For example, *see* *Gutierrez v. State*, 32 A.3d 2, 13 (Md. 2011) (“[W]e remain ever-cognizant of the highly incendiary nature of gang evidence and the possibility that a jury may determine guilt by association rather than by its belief that the defendant committed the criminal acts.” However, the court ultimately found that the Defendant’s membership in MS-13 was more relevant to the motive of the murder than prejudicial.); *see also* *State v. Torrez*, 2009-NMSC-029, ¶ 24, 146 N.M. 331, 210 P.3d 228 (“[T]o be sure, evidence of gang affiliation could be used improperly as a backdoor means of introducing character evidence by associating the defendant with the gang and describing the gang’s bad act . . . [However,] Defendant does not dispute that the expert’s testimony was offered to rebut his claim of self-defense, and therefore went to his motive for shooting at the house . . . [thus,] the expert’s testimony was not impermissible”); *see also* *People v. Olguin*, 37 Cal. Rptr. 2d 596, 601 (Cal. Ct. App. 1994) (“[T]estimony [of an argument related to defacement of gang graffiti] was relevant to explain the Defendants’ desire to discover who crossed out their graffiti and their violent reaction when Ramirez appeared and began yelling, ‘Shelley Street.’ It was highly probative on the issues of intent and motive. While Defendants’ gang membership and their gang activities was prejudicial to a certain degree, the evidence was highly relevant to the prosecution’s theory of how and why Ramirez was killed.”).

205. *United States v. Archuleta*, 737 F.3d 1287, 1303 (10th Cir. 2013) (Holloway, J., dissenting) (“[The testimony] represented the authoritative word of a law-enforcement officer, one who lived in the same community as the jurors and who was presented to them as a well-qualified expert in gang matters.”).

“junk science.” A University of Chicago study on gangs,²⁰⁶ which is the “most extensive review of literature on gangs to date” found that there are “few reliable research sources” provided to form a basis for gang expert testimony.²⁰⁷ Even *Hill* acknowledged unreliability of gang evidence in stating that the “credibility of individual gang members,” the very source of the testimony, are “questionable.”²⁰⁸ Thus, the very reasoning behind *Frye*—the need to provide a Defendant with a fair trial—illustrates the harm caused when courts refuse to apply *Frye*.

A secondary reason for *Frye* and *Daubert* is that there is concern that expert witnesses may be biased in favor of the party calling the expert.²⁰⁹ Because an attorney has an ethical “duty to zealously advocate” for the client, then logically the attorney will hire an expert who favors and agrees with the theory of the prosecution and would not call an expert who would hurt the party.²¹⁰ Simply put, there is no obligation that the attorney call an expert who will provide a balanced or neutral opinion but rather the “duty to zealous advoca[cy]” can encourage party to seek experts to testify to science that is not generally accepted simply to support the prosecution’s case.²¹¹

Within the context of gangs, bias is a serious concern because police are an integral arm of the prosecutor’s office. Judge Holloway in a dissenting opinion summarized the situation as follows:

[Office Lujan’s testimony] represented the authoritative word of a law-enforcement officer, one who lived in the same community as the jurors and who was presented to them as a well-qualified expert

206. Irving Spergel, *Youth Gangs: Problem and Response: A Review of the Literature* (Assessment; Part I), (National Youth Gang Suppression and Intervention Project, A Cooperative Project with the Office of Juvenile Justice and Delinquency Planning, U.S. Department of Justice, and the School of Social Service Administration, University of Chicago, at 3-5 (Apr. 1990)) [hereinafter Irving Spergel and hereinafter The University of Chicago study.]

207. Such unreliability come from “a number of reasons: (1) gang members themselves are unreliable sources of information, (2) the media exaggerates or sensationalizes gang problems, (3) political motivations cause prosecution, probation, corrections, public service, and nonprofit agencies to minimize as well as to exaggerate the extent of gang problems, (4) there has not been a consistent method of data collection for law enforcement of social agencies serving gang clients, (5) a variety of theoretical and methodological problems have hindered the development of adequate knowledge about gangs, (6) an adequate empirical data base has not existed, and (7) the ‘[v]ariations among gangs across neighborhoods, cities, and countries, and probably across schools, prisons, and other institutional contexts have often been disregarded.’” Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 771–72 (1990).

208. *People v. Hill*, 120 Cal. Rptr.3d 251, 269 (Cal. Ct. App. 2011).

209. *Blackwell v. Wyth*, 971 A.2d 235, 245 (Md. 2009).

210. *Id.* at 245–46 (“There is no reason to hire an expert, for example, who will tell the jury that a client’s losses are worth \$150,000 if an attorney can find an equally credible expert willing to testify that the true figure is \$300,000. Moreover, there is no ethical obligation on attorneys to hire mainstream experts. Indeed, their duty to zealously advocate for their clients may *require* them to hire outliers if it would help their client’s case.”).

211. *Id.* Additionally, for example, in *Blackwell*, the Plaintiff sued the a vaccine company alleging that a mercury substance in the vaccine caused her son to develop autism and in support of the claim hired an expert who would testify to the effects of vaccine on the development of autism. The expert’s testimony concerning the effect of vaccines of autism was not generally accepted and was barred under *Frye* and the Court noted that “duty to zealously advocate” encourages the party’s to hire “outliers” or experts who are not generally accepted to further the party’s case.

in gang matters. Officer Lujan's testimony was calibrated to obtain a conviction, and that is precisely the problem. He did not know Mr. Archuleta, but he told the jury that he knew what a Sureño was like. And they were all pretty much the same, and they were all pretty evil. That, in a nutshell, was Officer Lujan's expert testimony. Its purpose seems largely to have been to instill fear and loathing in the jury.²¹²

As Judge Holloway emphasized, police officers are far from disinterested experts. An "[o]fficer[']s testimony [is] calibrated to obtain a conviction" and to assist in convicting the Defendant.²¹³ Moreover, given that the criminal prosecution is a process by which "advocates for each side present evidence in the light most favorable to their case,"²¹⁴ and is adversarial in nature, the state's job is to present the best evidence for their case, not the most neutral or reliable. Without the application of *Frye* or *Daubert*, the jury is permitted to hear testimony from a police officer gang expert that seems "conclusive" and "infallible" even when clear issues of bias are present.

In jurisdictions following *Daubert*, all expert opinion, including police gang expert testimony should be required to abide by *Daubert* in applicable jurisdictions because following the decision in *Kumho*, all expert testimony is subject to the *Daubert* test.²¹⁵ Thus, in the 29 states that follow *Daubert*,²¹⁶ all police officers admitted as "gang experts" must show that their methods of gang identification are reliable under the test laid out in *Daubert*. In jurisdictions following *Frye*, a test always applies when testimony is scientific. Even if courts determine that testimony is not scientific in nature, it still must be reliable under the state's rules of evidence for expert witnesses.

VI. PROPOSAL: REQUIRE GANG EXPERTS TO FULFILL SAME FRYE AND DAUBERT STANDARD AS DRE

In order to create some semblance of justice and provide due process to those charged under state gang statutes, courts must ensure that gang expert testimony is reliable. Without reliability, expert testimony should be excluded and limited to its appropriate weight.

Recent developments in Drug Recognition Expert testimony are illustrative of this point. Like the 12 factors used by gang "experts," the DRE uses a 12 factor protocol that was developed by law enforcement agencies that allow police officers to form opinions through non-scientific and scientific observations, to determine whether a person is under the influence of drugs or alcohol.²¹⁷

212. *United States v. Archuleta*, 737 F.3d 1287, 1303 (10th Cir. 2013) (Holloway, J., dissenting).

213. *Id.*

214. *Blackwell*, 971 A.2d at 239 ("By contrast, attorneys can seek expert witnesses who will parrot the attorneys' line, and, indeed, implicitly 'bribe' them to do so.")

215. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

216. Alice B. Lustre, Annotation, *Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R.5th 453 (2001).

217. For a full description of the DRE test, see *State v. Sampson*, 6 P.3d 543, 548 (Or. Ct. App. 2000).

While the use of gang expert testimony is a relatively new phenomena, the use of DRE's dates back 50 years. Unlike gang experts, many courts have subjected DRE expert testimony to the *Frye* or *Daubert* standards for admissibility. Other courts have determined that DRE testimony is not scientific and *Frye* and *Daubert* do not apply. In those cases, the courts have limited the testimony to personal observations and prohibited the expert from offering scientific conclusions. The evolution of prosecuting DUI cases demonstrates that the type of factor tests used by gang experts can be placed under the purview of *Frye* and *Daubert*. Requiring DRE experts to abide by *Frye* and *Daubert* or be limited in their testimony ensures that any scientific evidence offered follows a methodology that can be tested by others in the field, creating reliability and verification. Requiring *Frye* and *Daubert* protects the due process rights of criminal Defendants and the fundamental fairness of trial. Gang experts, like DRE experts, offer scientific testimony. Gang expert testimony should be similarly subject to *Frye* or *Daubert* and courts should correspondingly admit, exclude, or limit the evidence as mandated by the appropriate standard.

A. What Courts Considering Gang Experts Can Learn from Treatment of Drug Recognition Experts

This section proceeds in three parts (a) explaining what Drug Recognition Experts are; (b) categorizing DRE testimony as scientific or non-scientific and detailing the corresponding treatment of each form of testimony; and (c) proposing that courts similarly apply *Frye* and *Daubert* to gang experts or limit their testimony to personal observations.

1. What are drug recognition experts?

In the mid-1900s, in response to the increase in automobile accidents and a need to respond to alarming rates of death from drinking and driving, states began prioritizing drunk driving prosecutions.²¹⁸ While drunk driving legislation was passed in the early 1900s, early laws did not have a specific measure of intoxication. Until the 1970s, prosecutions for drunk driving were generally based on the subjective views of a police officer, without any clear methodology.²¹⁹ Starting in the 1970s, the Los Angeles Police Department developed the concept of a Drug Recognition Expert protocol, which was meant to provide a standardized method to determine whether a person was driving under the influence of drugs or a mix of alcohol and drugs.²²⁰ Officers who are trained as Drug Recognition Experts follow a

218. See generally BARRON H. LERNER, ONE FOR THE ROAD: DRUNK DRIVING SINCE 1900 (2011).

219. *The Evolution of the DRE Officer and Program*, L.A. POLICE DEP'T, http://www.lapdonline.org/special_operations_support_division/content_basic_view/1038 [https://perma.cc/BUW9-BUDL]; see also LERNER, *supra* note 218.

220. See generally Gregory T. Seiders, *Call in the Experts: The Drug Recognition Expert Protocol and its Role in Effectively Prosecuting Drugged Drivers*, 26 WIDENER L.J. 229–75 (2017). See also *Drug Recognition Experts*, THE INT'L ASS'N OF CHIEFS OF POLICE (IACP), <https://www.theiacp.org/drug-recognition-experts-dres> [https://perma.cc/T7U6-W4WY] (LAPD consulted with various medical doctors, research psychologists, and other medical professionals to develop a simple, standardized procedure for recognizing drug influence and impairment. Their efforts culminated in the development of a multi-step protocol and the first DRE program).

12-step protocol.²²¹ The formalization of the Drug Recognition Expert protocol created a standard for assessing whether someone was driving under the influence, and limited the officers who offer testimony that is scientific in nature. Furthermore, the publication of clear standards allowed courts to evaluate the testimony for its admissibility, limit its admissibility according to its reliability, and offer the criminal Defendant and their lawyers an opportunity to critique the methodology used, data acquired, and the validity of opinions formed in a transparent manner. These requirements provide a means to ensure due process and the fulfillment of the Sixth Amendment right to adequate counsel and confrontation.

2. *The current standards for drug recognition experts*

Today, courts are divided on whether Drug Recognition Experts offer scientific evidence and should be subject to the corresponding admissibility test.²²² Some courts have found that the evidence is scientific, and thus have subjected it to *Daubert*, *Frye*, or the state's admissibility test.²²³ Other courts have found that the evidence is not scientific and therefore can be allowed in under the state's rule for expert evidence without further testing.²²⁴ Notably, where drug recognition and field sobriety tests are either deemed unscientific (and not subject to *Frye* and *Daubert*), or deemed scientific but fail *Frye* and *Daubert*, the expert is significantly limited in his or her testimony and may be required to offer only observations without conclusions about whether the Defendant is under the influence of drugs or alcohol. This approach represents a way forward for the treatment of gang experts.

i. Limits on police expert testimony in cases where DRE is scientific evidence

A number of cases have found that DRE testimony *is* scientific, at least in part, and have thus subjected the testimony to *Frye* and *Daubert*. In some cases, courts have found that this testimony fails *Frye* or *Daubert*.

Where courts have found that DRE testimony is scientific but fails *Frye* or *Daubert*, such testimony is deemed inadmissible or is limited. For example, in *State v. Brightful*, the court determined that DRE testimony is scientific because the DRE officers were applying a 12-step DRE protocol and based on the results of the exam, determining that the individual was impaired due to drugs rather than medical conditions.²²⁵ In coming to this conclusion that the individual condition was due to

221. Seiders, *supra* note 220 at 235–38 (the 12 steps include Breath Alcohol Test; Interview with Arresting Officer; Preliminary Examination; Eye Examination; Field Sobriety Test; Vital Signs; Darkroom Examination; Physical Examination; DRE Opinion; Injection Sites Check; Post *Miranda* Interrogation; Toxicological Examination).

222. *See generally id.* *See also* chart in Appendix of United States v. Horn, 185 F. Supp. 2d 530 (D. Md. 2002).

223. *See, e.g.,* State v. Chitwood, 879 N.W.2d 786, 796–800 (Wis. Ct. Ap. 2016); State v. Daly, 775 N.W.2d 47, 58–62 (Neb. 2009); State v. Sampson, 6 P.3d 543, 552–54 (Or. Ct. App. 2000); State v. Baity, 991 P.2d 1151 (Wash 2000). *See also* chart in Appendix of United States v. Horn, 185 F. Supp. 2d 530 (D. Md. 2002).

224. Many of these decisions occurred before the decision in *Kumho Tire*, which, as described in this paper, requires that *Daubert* be applied to all expert testimony.

225. State v. Brightful, 2012 Md. Cir. Ct. LEXIS 1 at *6–7, 9–10, 15–16.

drug impairment rather than a medical condition, the DRE officer was functionally making a medical diagnosis that would normally involve a physician's judgment.²²⁶ Because the officer is making a medical diagnosis, the testimony is scientific in nature and subject to *Frye*.²²⁷ The court found that the test failed *Frye* because it did not follow the scientific method and was not accepted in the relevant scientific community.²²⁸ Based on that finding, the court granted the Defendant's motion to exclude the drug recognition expert protocol and drug recognition expert opinions.²²⁹

Likewise, in *U.S. v. Horn*,²³⁰ the court found that the DRE testimony was scientific, but that it failed *Daubert*, therefore the DRE expert needed to be correspondingly limited in their testimony to the trier of fact. The court specifically took issue with one of the factors used in the DRE protocol— Horizontal Gaze Nystagmus (HGN). The court held that HGN had not been shown to produce reliable results and was not generally accepted within an unbiased scientific or technical community.²³¹ Because the test did not reliably rule out competing causes of the same possible result (i.e. that HGN might be caused by something other than intoxication), the court found that police presenting HGN factors of the DRE protocol must present it as *circumstantial* rather than *direct* evidence of alcohol consumption, and cannot use this evidence alone to establish intoxication.²³² For example, the expert could not cite to HGN as the sole basis for believing the individual was under the influence of alcohol nor could the police officer state that the results provided proof of a specific blood alcohol content.²³³ The court further explained, adopting the reasoning of *State v. Meador*,²³⁴ that where a test is not reliable, the testimony must be limited to the officer's observations without an "attempt to attach significance" to the Defendant's performance on the test or use of the words "pass," "fail," or "points."²³⁵ Further, *Horn* cautioned that allowing conclusory language (such as allowing the DRE officer to testify to a specific blood alcohol content finding based on the HGN test) where the test itself is unreliable, can be "misleading to the jury" and "creates a potential for enhancing the significance of the observations in relationship to the ultimate determination of impairment, as such terms give these layperson observations an aura of scientific validity."²³⁶

ii. Limits on police expert testimony in cases where DRE evidence is considered non-scientific

In other cases, the court has found that DRE testimony is not scientific and therefore is not subject to *Frye* or *Daubert*. It is precisely because DRE testimony is *not* considered "scientific" that courts limit the testimony and scope from passing or

226. *Id.*

227. *Id.*

228. *Id.* at *37.

229. *Id.* at *40.

230. *United States v. Horn*, 185 F. Supp. 2d 530 (D. Md. 2002).

231. *Id.* at 549, 557.

232. *Id.* at 555–56.

233. *Id.*

234. *State v. Meador*, 674 So.2d 826 (Fla. Dist. Ct. App. 1996):

235. *Horn*, 185 F. Supp. 2d at 559

236. *Id.*

allowing the state to elude to the evidence as scientific. For example, in *U.S. v. Everett* the court found that DRE was not scientific, and that based on this “the DRE can testify to the probabilities, based upon his or her observations and clinical findings, but cannot testify, by way of scientific opinion, that the conclusion is an established fact by any reasonable scientific standard.”²³⁷ Similarly in *State v. Klawitter* the court found that the DRE protocol was not scientific and therefore the state could not “attempt to exaggerate the officer’s credentials by referring to the officer as a ‘Drug Recognition Expert’” or “unfairly suggest that the officer’s opinion is entitled to greater weight than it deserves.”²³⁸ Likewise, the court in *Williams v. State* followed this line of reasoning, holding that the evidence could be allowed in but it is “somewhat misleading for the State to present the officer as ‘Drug Recognition Expert’” and that “the State must lay a proper predicate before referring to a DRE as anything other than a Drug Recognition Evaluator or Examiner.”²³⁹

B. Requiring Frye and Daubert DRE standards on gang experts

The courts’ treatment of the DRE testimony over the last 50 years demonstrates the importance of identifying the testimony as scientific, determining whether it is generally accepted within the applicable scientific field, and limiting it where it is not. Gang expert testimony should be limited the same way. Gang experts use a similar factor-based protocol to the DRE protocol. Gang experts, like DRE experts, base their findings on observations and interviews with the individual, and physical examinations: psychological (for gang experts) and physiological (for DRE). DRE physical examinations include the observation of physical signs of drug use, like needle marks and bloodshot eyes,²⁴⁰ while gang expert observations include gang insignia, hand symbols, and tattoos.²⁴¹ DRE protocols require the officer to offer an opinion on the physiological effect of drugs or alcohol on the Defendant. Similarly, gang experts are required to form opinions on the psychology of gang members and explain their actions in conformity with those opinions. The DRE protocol was developed by police officers to answer the ultimate question: is the Defendant under the influence of drugs or alcohol and what is the level of impairment? The gang expert’s 12 factor test poses an analogous question: is the Defendant a member of a gang and were his actions gang related?

Accordingly, I propose that gang experts, like Drug Recognition Experts, be subjected to the appropriate admissibility test (*Daubert*, *Frye*, or the state’s equivalent). If their testimony fails the test as in *Horne* and *Brightful*, then gang expert testimony should be excluded or treated as lay-witness testimony and limited to observations only. Although this paper argues that gang evidence is social science, in cases where the court does not find that gang evidence is science the court has a duty, as in *Everette* and *Klawitter*, to ensure that the jury is not swayed by the title of “expert” and provide instructions that limit the purported accolades and conclusions of the “expert.” Limiting the testimony ensures that unduly prejudicial

237. *U.S. v. Everett*, 972 F. Supp. 1313, 1320 (D. Nev. 1997).

238. *State v. Klawitter*, 518 N.W.2d 577, 586 (Minn. 1994).

239. *Williams v. State*, 710 So.2d 24, n.23 (Fla. Dist. Ct. App. 1998).

240. *State v. Sampson*, 6 P.3d 543, 548–49 (Or. Ct. App. 2000).

241. See discussion *supra* Introduction, and discussion *supra* Part II.

and unreliable junk science does not unduly persuade and confuse the jury. Like DRE experts, if a gang “expert” cannot prove the reliability of his or her methods, the officer’s testimony must be treated as lay testimony, and only allowed if the officer has personal knowledge of the facts of the case. Nothing else should be permitted to sway the jury. In KJ’s case, where Detective Smith had no personal knowledge of KJ and no verifiable data to support his conclusions, the testimony should have been excluded altogether.

C. The Real-Life Reason for Using Gang Statutes and Police Gang Experts

Alan Jackson, in his article *Prosecuting Gang Cases: What Local Prosecutors Need to Know*, understood it and got it right, when he said: “The easiest way to get gang evidence admitted in trial is by filing a substantive gang crime or gang enhancement allegation . . . Once that charge or enhancement is filed, everything the gang expert says becomes relevant to the gang charge.”²⁴² Jackson’s point is clear, though arrogant: no matter the reliability, truthfulness, or relevance to the actual crime charged, gang allegations are a sure-fire way to win over juries and convict criminal Defendants even where actual evidence of guilt is lacking. Such blatant manipulation of community sentiments, real fear of violence, real pain, real loss, and real systematic oppression, clothed under a call for “Law and Order” that subjugates the same people who have always been subjugated in this country, is fundamentally un-American. Or maybe it is exactly American, (a badge of slavery and a means of mass incarceration) yet it stands at odds against the constitutional principles bestowed upon Black people and all others, through the ratification of the Fourteenth Amendment and the incorporation of due process to the States.

No longer should there exist a space in American jurisprudence where, as Pacido G. Gomez wrote in his article *It Is Not So Simply Because an Expert Says It Is So: The Reliability of Gang Expert Testimony Regarding Membership in Criminal Street Gangs*:

Not only does the police officer gang expert support the gang allegation, the gang expert can provide juries with a motive for the crime underlying the gang charge, define the meaning of obscure graffiti to show identity and an admission of crime, explain why a prosecution does not have any credible witnesses to support their theory of the case, and explain why a witness would say the Defendant was not where the police say he was. The gang expert’s opinion enables a prosecutor to cast a wide net to establish criminal liability for seemingly innocent behaviors that are not obviously related to the alleged crime. Police officer gang experts can do all this because they purport to understand gang culture.²⁴³

242. Alan Jackson, *Prosecuting Gang Cases: What Local Prosecutors Need to Know*, 42-JUN PROSECUTOR 32, 37–38 (2008). Jackson suggested to prosecutors that it is not only acceptable but actually a *preferable* approach use gang allegations, gang experts, and fear of the gang as a means to convict where there is insufficient evidence. *Id.*

243. Christopher McGinnis & Sarah Eisenhart, *Interrogation is Not Ethnography: The Irrational Admission of Gang Cops and Experts in the Field of Sociology*, 7 HASTINGS RACE & POVERTY L.J. 111, 126 (2010).

Gang expert testimony can no longer be allowed to usurp the rules of evidence, reject traditional rules of criminal procedure, replace investigations, do away with the need for creditable evidence, and abandon the age-old American concept of innocent until proven guilty, in constructing the prosecution's case. If due process means anything, it is that a person's liberty cannot be taken away based on one expert's unreliable opinion.

CONCLUSION

Police gang expert testimony relies on the scientific method and is social scientific in its predictive nature. Thus, it must abide by the requirements of *Frye* in jurisdictions where applicable. In jurisdictions that follow *Daubert*, gang expert testimony must be subject to the same reliability requirements as all expert testimony, scientific or not. Gang expert testimony that is scientific in nature and cannot overcome *Daubert* or *Frye*'s stringent requirements must be excluded outright. Gang evidence, similar to DUI evidence, should be limited in scope to testimony that complies with these clearly established expert testimony rules. If gang expert testimony is going to be admissible, like DRE, a well-defined methodology must be established. If a court determines that a gang expert's testimony is not scientific, it should be limited to firsthand, lay-witness testimony, where their conclusions of law, conjecture, and predictions are excluded. Only their tangible investigations, recovery of evidence and observations should be admissible where relevant. Requiring such limitations on gang expert testimony is the only way to ensure a fairer trial for criminal Defendants charged in state gang cases. It is no accident that criminal Defendants like KJ, from communities like Greenmount (subjected to inadequate housing, educational resources and healthcare), have their due process and equal protection rights disregarded in this manner. Their constitutional rights are trampled for a perceived greater good—taking allegedly violent individuals off the streets and destroying the criminal organization that supports them. The truly American thing to do, when attempting to move toward a true greater good, is to provide the highest level of protection to those most despised, vulnerable and policed. Applying the same rules of expert testimony that civil litigants receive when money is on the line and corporate interest is at hand, embodies a true expression of Due Process, Equal Protection and justice for all. Abiding by clearly established evidentiary rules, even when prosecuting gang members, will lessen the power of the carceral state, and is a step in the direction of abolishing practices that are fundamentally unfair. This will hopefully focus resources on funding efforts to improve communities like Greenmount rather than simply locking up its inhabitant people—people like KJ.