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|  | Case3:08-cr-00730-WHA Document2641  MARTIN A. SABELLI (164772)  149 Natoma St., 3rd Floor San Francisco, CA 94105 Tel: (415) 284-9806  Fax: (415) 520-5810  [msabelli@comcast.net](mailto:msabelli@comcast.net)  UNITED STATES D NORTHERN DISTRIC | Filed11/19/10 Page1 of 10  ISTRICT COURT  T OF CALIFORNIA |
|  | UNITED STATES OF AMERICA,  Plaintiff,  vs.  IVAN CERNA, et al.  Defendant. | No. CR-08-00730-WHA  **REPLY RE JOINT DEFENSE MOTION TO EXCLUDE GANG-EXPERT TESTIMONY** |

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1. For months now, this Court has expressed profound doubts regarding the constitutional and
2. practical issues created by the wide-ranging expert testimony which the government proffers
3. through three experts, two of which would testify both as investigators and as experts. In fact, this
4. Court has ruled on this issue repeatedly.
5. Despite the clarity of this Court's rulings and concerns, however, the government offers a
6. Response which does not acknowledge *in any way* any of the doubts expressed, or limitations
7. imposed, by the Court. The government's Response, in essence, approaches the question of gang-
8. expert testimony as if it were proposing to call one expert to present a handful of limited non-
9. controversial opinions in a brief trial. Nothing could be further from the truth.[1](#_bookmark0)

## A. The Government Fails to Address this Court’s Concerns Regarding Dual Role.

1. The Court originally excluded the proposed experts, because their testimony would amount

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to no more than “shortcut proof for key elements” of the offense. (Doc. 1821 at 9 [June 8, 2010

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Order]) Nevertheless, the Court gave the government an opportunity to elicit evidence at an

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1. 1 Given the page limitation, this brief will not address every issue raised in the prior briefing.
2. The F.R.E. 702 issue, for example, is not addressed in this brief. Mr. Herrera submits that it is clear, after the *Daubert* hearings, that the proffered testimony will not assist the trier-of-fact.

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* 1. evidentiary hearing to rebut this conclusion, an opportunity which the government failed to
  2. embrace. The evidentiary hearing demonstrated that the Court was right in the first place. Mssrs.
  3. Molina and McDonnell’s expertise is not MS-13. It is this investigation, these defendants, and their
  4. testimony that will be tantamount in declaring the accused to be guilty.

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In its pleading, the government forgoes another opportunity to address the Court’s concerns.

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It does not even acknowledge the Court’s June 8, 2010 order and offers neither evidence nor

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1. argument to oppose Mr. Montoya’s submission. The government does not dispute that Molina and
2. McDonnell base their expertise almost exclusively on investigation of the 20th Street clique nor
3. does it dispute the almost total overlap between these witnesses’ factual testimony and the bases for
4. their expert opinions. It does not dispute that, if McDonnell and Molina are experts at all, their
5. expertise is not MS-13 in general but these defendants in particular. Instead, it simply points out
6. that the law allows fact witnesses to testify as experts. (Gov’t Response at 6)

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The defense, of course, has never disputed this general legal principle. As the Court

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correctly concluded, the experts in this case must be excluded because, given that their expertise is

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1. the defendants, and their testimony will be little more than an “expert” declaration that the
2. government has met the elements of the charged offenses. In the words of *Mejia*, “[t]he
3. Government cannot satisfy its burden of proof by taking the easy route of calling an ‘expert’ whose
4. expertise happens to be the defendant.” *Mejia*, 545 F.3d at 191.
5. Instead of responding to the Court’s previous order or to Mr. Montoya’s arguments, the
6. government reiterates its suggestion to divide Molina and McDonnell’s expert and fact testimony.
7. (Gov’t Response at 6.) But, as Mr. Montoya pointed out, it makes no difference that Molina and
8. McDonnell will not, in so many words, opine that a particular defendant is a member of MS-13 or
9. that there will be a break between their expert and fact testimony. They will testify that they
10. became experts on MS-13 through their investigation of these defendants. Then they will give their
11. expert opinions on what makes someone a member of MS-13 as well as what sort of violent acts an
12. MS-13 member is likely to commit. No juror could draw any conclusion other than that the

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1. defendants are MS-13 members who commit acts of violence, and no break in testimony or
2. instruction from the Court can erase that inference.
3. As the Court predicted and as the government fails to contest, Molina and McDonnell’s
4. testimony demonstrates that, as experts, they will do little more than opine that the defendants are
5. members of MS-13 and that the gang has the structure and organization of a RICO enterprise. They
6. would offer their expert opinions that the elements of the charges are satisfied. The Court correctly
7. anticipated this problem, its prediction was borne out in the evidentiary hearing, and the
8. government neglects to address the Court’s concerns. The Court should stand by its earlier ruling
9. and exclude expert testimony by these witnesses on “the structure, organization, and operations of
10. the MS-13 gang.”

## B. An Assertion of “Training and Experience” Does Not Suffice.

1. The government devotes seven pages to the undisputed fact that its experts have long-term
2. experience as police officers. Ignoring the obvious bias inherent in this fact, the government argues
3. that this fact alone supports wide-ranging and controversial expert opinions on fundamental issues.
4. This Court’s June 8, 2010 order, however, explicitly rejected the "training and experience"
5. approach. For example, this Court specifically ruled that -- even with respect to codes -- that “[i]t is not enough to simply say that an officer will explain the codes used by the gang and this will be

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based on his or her training and experience.” (Doc. 1821 at 12 n.7.) Rather, the Court directed the

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government to provide supplemental disclosures according to a precise format:

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With respect to the recording DH999 dated MM-DD-YYYY, Officer XYZ will testify that

1. the word “piece” meant “gun” and the word “item” meant “package of cocaine.” The basis for this opinion is his experience in monitoring drug transactions and in listening to 1600
2. recordings involving the same individuals between 2004 and 2009, many of which used the
3. same terms in the same way.

(Id. at 13.) In the words of the Court, “*[e]ach* opinion and basis must be stated with at least this

1. much *particularity*.” (Id., emphasis in original.)
2. Similarly, in its September 20, 2010 order granting a *Daubert* hearing, the Court
3. stated in no uncertain terms:
4. Specifically, each proffered ‘opinion’ by each expert will be examined to
5. ensure that the opinion is actually based on specialized knowledge that assists the jury, is not being offered as a shortcut for factual evidence, and is
6. not simply a repetition of hearsay.

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* 1. (Doc. 2288 at 1, emphasis added.) Expert testimony based on an assertion of mere “training
  2. and experience” does not meet this standard. (Cf. Doc. 1884, summarizing each officer’s
  3. generalized background.) If this were enough, a *Daubert* hearing would have been
  4. unnecessary from the beginning.
  5. And yet, in neither the supplemental expert disclosures (Doc. 1884), the five days of
  6. *Daubert* hearings, nor the most recent post-hearing brief does the government comply with
  7. this simple request to provide specific bases and a reliable methodology for each opinion.
  8. Instead, the government has asserted broadly that the opinions are based on “training and
  9. experience” and the officers’ “observations” as police. Surprisingly, the government’s most
  10. recent brief fails to examine even a *single individual opinion* in order to demonstrate that
  11. the bases meet this Court's clearly-articulated standards. Rather than engage in fact-specific
  12. analysis, as presented in Guillermo Herrera’s post-hearing brief (Doc. 2591), the government relies on generalities. Because these bases were ruled inadequate under the

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Court’s prior order and insufficient as a matter of law, the opinions should be excluded.[2](#_bookmark1)

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## The Government Fails To Address Both the Extent to Which the Proposed

1. **Testimony Invades the Province of the Jury and the Applicability of F.R.E**
2. **704(b) in the Context of This Case.**
3. Focusing perhaps on choosing the most biting adjective to characterize the defense
4. claims, the government fails to address the extent to which the proffered opinions invade
5. the province of the jury in the manner described in *U.S. v. Mejia*, 545 F.3d 179 (2d Cir.
6. 2008). See (Doc. 2567) (Cruz-Ramirez Memorandum) at 8-9.
7. This omission is significant, because the proffered opinions in this case closely parallel the evidence discussed in *Mejia*. Id. at 192-195. In *Mejia* (as here) the government

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proposed to use its expert to summarize the reason for arresting alleged MS-13 members,

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how guns, ammunition, and other items were seized from MS-13 members, and how these

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1. 2 The Court may not rely on an expert’s general qualifications without requiring the government to explain the expert’s methodology. *United States v. Hermanek*, 289 F.3d 1076, 1093-95 (9th Cir.
2. 2002) (“Neither the government’s offer of proof nor the qualification of Broderick on the stand
3. established that his interpretations of new words and phrases as references to cocaine were supported by reliable methods”). See also *United States v. Decoud*, 456 F.3d at 1013-1014 (admissibility of gang
4. expert testimony upheld, because the district court held a *Daubert* hearing in which the government explained the witness’s experience and methodology for interpreting coded words).

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* 1. alleged members had committed a certain number of murders in the targeted geographical
  2. area. However, the Second Circuit refused to point out the simple truth that: “No expertise
  3. is required to understand any of these facts.” Id. at 194. The Court explained that the
  4. testimony “also addressed matters that the average juror could have understood had such
  5. factual evidence been introduced.” Id. at 194-195. Here, the government proposes to
  6. introduce such evidence and, of course, there is no reason for experts to explain it.
  7. Indeed, notwithstanding this Court’s discussion of the *Mejia* analysis (June 8, 2010
  8. Order, Doc. 1821 at 8-12), the government fails to address either this Court’s analysis or the
  9. Second Circuit’s reasoning in *Mejia*. Clearly, the government has no effective rejoinder to
  10. the argument that the proposed testimony invades the province of jurors who are present for
  11. the purpose of assessing the believability of testimony from percipient witnesses and
  12. arriving at an ultimate decision about the facts of the case.

As for the F.R.E. 704(b) issues presented, it may be an excess of prosecutorial zeal

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that mistakes hyperbole and insults for substantive argument. The Court witnessed in real

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time the paring down of certain opinions when these were read line by line in open court as

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the obvious improprieties leapt from the page. The government, however, continues to

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embrace opinions which clearly cross the line. For example, in Detective Flores’

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disclosure, the government references alleged MS-13 mottos including “to kill,” “to rape,”

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and “to control" and attributes "desire" and "intent" to the "gang" stating that “[t]hese

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mottos manifest the *gang’s desire and intent* to dominate others through violence and

1. intimidation.” (Flores para. 34) (emphasis added). Elsewhere, in paragraph 41, Detective
2. Flores states: “MS-13 members commit acts of violence and other crimes to demonstrate
3. their courage and commitment to the gang. Doing so increases their standing in the gang.”
4. This is tantamount to saying that any alleged MS-13 member has the specific intent
5. required to commit a charged act of violence. The oleaginous nature of these broad
6. assertions will spread over each accused.
7. In this connection, ***recent authority*** in this circuit establishes that “[m]embership in a gang
8. cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or
9. instigation needed to establish aiding and abetting.” Mitchell v. Prunty, 107 F.3d 1337, 1342 (9th

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1 Cir.1997), cert. denied, 522 U.S. 913, 118 S.Ct. 295, 139 L.Ed.2d 227 (1997), overruled in part on

2 other grounds, Santamaria v. Horsley, 133 F.3d 1242 (9th Cir.1998) (en banc). United States v. Garcia, 151 F.3d 1243, 1246 (9th Cir.1998).

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1. All of the experts, including McDonnell, link violence against rivals or anyone else
2. who is perceived to have disrespected the gang as an act that is related to the enhancement
3. of “the reputation of the member committing the act because it makes the gang that much
4. more fearsome and intimidating.” (McDonnell, para. 22.) Molina references killing as an
5. activity that “is expected.” (Molina, para. 5.) This implies in violation of F.R.E. 704(b) that
6. any killing done by an alleged MS-13 member is specifically intended.
7. The government’s rejoinder lists a group of cases that do little to support its point.
8. Indeed, in *United States v. Espinosa*, 827 F.2d 604 (9th Cir. 1987) (Gov’t Response at 4),
9. the Court of Appeals reiterates the prohibition included in F.R.E. 704(b). The *modus*
10. *operandi* information at issue involved a defendant using an apartment as a narcotics stash pad and that he had pay ledgers. This is not the same as asking a law enforcement officer to

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testify in conformity with the opinions suggested here.

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## The Relevance of the Case Law Cited by the Government as Categorically

1. **Allowing “Gang Experts” Has Been Rejected by This Court Orders.** [3](#_bookmark2)
2. The government criticizes the defense for ignoring *United States v. Hankey*, 203 F.3d 1160
3. (9th Cir. 2000), ignoring, in turn, the fact that *Hankey* has been thoroughly briefed in this case by
4. various defendants.[4](#_bookmark3)

In fact, the Court has already definitively ruled on the applicability of *Hankey*.

1. (Doc. 1821, p. 10) ("In each of the cases relied upon by the government, however, such expert
2. testimony was allowed only as rebuttal testimony and for the limited purpose of impeaching a

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25 3 As reflected in this discussion, the government’s brief violates Local Rule 7-9, in that it (again) improperly seeks reconsideration of an existing Order (Doc. 1821).

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1. 4 See Doc. 1717 at 5 (government); Doc. 1731 at 3-4 (government); Doc. 1751 at 5 (Guillermo Herrera); Doc. 1752 at 7 (Cruz-Ramirez); Doc. 1758 at 4-5 (government); Doc. 1912 at 4-5 (Luis
2. Herrera); Doc. 1978 at 4-5 (Cesar Alvarado); Doc. 1963 at 6-7 (Cruz-Ramirez); Doc. 2159 at 4 (Luis Herrera).

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* 1. defense witness.") The dead *Hankey* horse has been beaten too long. The same is true for the
  2. majority of the case law cited in the government’s brief. [5](#_bookmark4)
  3. The government also cites a handful of district court orders (presented previously in its

4 August 12 and 23, 2010 briefs) to argue that gang expert testimony like that proffered here should

5 be admitted. Each case is distinguishable. In *United States v. Slocum*, 02-CR-938-DOC (C.D.C.A.

6 February 6, 2007) (attached as Exhibit E to Doc. 2092), for example, the government expert had

1. already testified in the separate trial of two co-defendants. Thus, the parties and the Court had the
2. benefit of knowing the expert’s opinions and the bases thereof, and could use the prior testimony
3. “to define generally what testimony will and will not be admissible in this trial.” (See Order at 3.) [6](#_bookmark5)

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1. 5 In its June 8, 2010 Order, the Court directly addressed many of these cases and concluded they were not controlling. For example, the Court noted that the unpublished Ninth Circuit case
2. *United States v. Chong*, 2005 WL 3989495 at \*2 (9th Cir. Aug. 18, 2005) did not reach the
3. evidentiary issue presented here and was not a RICO prosecution. Similarly, the Court found two Northern District cases non-dispositive: *United States v. Cyrus*, 05-CR-0324-MMC (N.D.C.A.

14 March 25-26, 2009 Transcript) (no opinion or explanation as to how the evidence was used in the case-in-chief); *United States v. McIntosh*, 2008 WL 4754763 at \*1-4 (C.D.C.A. March 14, 2008)

15 (after conducting a *Daubert* hearing, the Court allowed gang expert testimony only for opinions shown to be supported by facts and a reliable methodology). The Court further dispensed with

16 *United States v. Locascio*, 6 F.3d 924, 936 (2d Cir. 1993). (Doc. 1821 at 11-12).

The remainder of the cases -- while not explicitly addressed in the order – were,

1. nonetheless, presented to the Court prior to the June 8, 2010 order. See, e.g., *United States v.*
2. *Freeman*, 498 F.3d 893, 901 (9th Cir. 2007) (presented by the government at Doc. 1752 at 8; see also Montoya brief, Doc. 2580 at 8, noting that *Freeman* warns that a government agent who acts as
3. both fact and expert witness “receives ‘unmerited credibility’ for lay testimony”); *United States v. Matera*, 489 F.3d 115 (2d Cir. 2007) (presented by the government at Doc. 1731 at 7, and later at
4. Doc. 2090 at 15); *United States v. Amuso*, 21 F.3d 1251, 1263-64 (2d Cir. 1994) (presented by the government at Doc. 1731 at 7, and later at Doc. 2090 at 15; see also Guillermo Herrera brief, Doc.
5. 1751 at 6-7, noting that reliance on *Amuso* is misplaced as the court explicitly condemned the
6. admission of police expert testimony that is cumulative of testimony supplied by fact witnesses).

See also, United States v. Willock, 696 F.Supp.2d 536, 548 (D. Md. 2010) (presented at Doc.

1. 1731 at 4 and Doc. 1758 at 5, and later at Doc. 2090 at 14); United States v. Prisco, 08-CR-885 (NRB) (S.D.N.Y. April 14, 2009) (presented at Doc. 1758 at 5, and later at Doc. 2090 at 15); United States v.
2. Umana, 2010 WL 1439111, at \*1-2 (W.D.N.C. April 9, 2010) (presented at Doc. 1731 at 4 and Doc. 1758 at 5, and later at Doc. 2090 at 5, 7, 14); United States v. Uvino, 07-CR-725-JBW (E.D.N.Y.

25 December 3, 2008) (presented at Doc. 1758 at 6, and later at Doc. 2090 at 15).

1. 6 Likewise, in *United States v. Alfaro*, 09-CR-466-R (C.D.C.A. May 13, 2010) (attached as Exhibit H to Doc. 2092), the order states only that the Court found the expert qualified to testify
2. following an evidentiary hearing “for reasons as stated on the record,” but does not describe what
3. those reasons were. Such an order does not support an assertion that unspecified, un-tethered “training and experience” sufficed in that case, or that it should suffice here.

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* 1. Finally, with regard to the retrials of the *Mejia* defendants, the government cites several
  2. district court rulings from the Eastern District of New York. The first, *United States v. Vasquez*,
  3. 03-CR-851-ADS (E.D.N.Y. May 20, 2009) (attached as Exhibit D to Doc. 2092), did not find that
  4. based on the government’s generalized descriptions of “training and experience,” the proposed
  5. gang-expert evidence was admissible at trial. Rather, the district court held only that the
  6. government disclosures were “sufficient to give Castro a fair and adequate opportunity to challenge
  7. Tariche’s expert testimony in a *Daubert* motion. 509 U.S. 579 (1993).” (Order at 14.) Moreover, as
  8. the government again failed to mention, the district court later *did* schedule “a *Daubert* hearing to
  9. address Castro’s concerns with respect to the proposed testimony of Special Agent Tariche.” (See

10 October 3, 2009 Order at 7, attached as Exhibit A to Doc. 2154.) In the other two cases tried by the

1. same judicial officer -- *United States v. Rubi-Gonzales*, 03-CR-851-ADS (E.D.N.Y. July 16, 2009)
2. at 14, 102-137 (attached as Exhibit K to Doc. 2092) and *United States v. Castro*, 03-CR-851-ADS (E.D.N.Y. Sept. 29, 2009) at 333, 341-365 (attached as Exhibits L and M to Doc. 2092) -- the Court

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stressed that courts must be very careful with this kind of “gang expert” (Exhibit L at 24-27), and

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noted that the FBI Agent Tariche was able to completely set aside in-custody interviews, any

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information he obtained from the defendants, and did not rely on the previous agent who testified in

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the case (id. at 30).

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## This Court Should Not Be Distracted by Government Hyperbole from Examining the

1. **Proffered Experts’ Qualifications.**
2. Despite the fact that two of the three “experts” have never been qualified in federal court,
3. that none have any academic experience, that Molina only read part of one book and one article
4. regarding gangs, and admitted for the first time on cross-examination that he had virtually nothing
5. to do with MS-13 after October of 2008 (without clarifying this in the expert disclosures), the
6. government calls the defense’s argument highlighting these deficiencies “ridiculous.” (Doc. 2619 at
7. 16-17.) This hyperbole should not distract the Court from its critical gatekeeping function.
8. *United States v. Patterson,* 819 F.2d 1495 (9th Cir. 1987) -- cited by the government (Doc.
9. 2619 at 14) -- does not support the theory that experience alone establishes the adequacy of the
10. proffered “experts’” qualifications here. First, *Patterson* did not involve a RICO conspiracy.
11. Second and moreover, the *Patterson* court found an officer’s experience with a small, drug-dealing

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1. operation in one housing project in Oakland to be sufficient to allow him to testify about the
2. structure of that ring’s drug enterprise as proof of its *modus operandi*. But here, the government
3. seeks to allow the experts to provide *dozens* of far broader opinions about *almost every purported*
4. *aspect* of MS-13’s operations - locally, regionally, nationally, and internationally. *Patterson* simply
5. does not provide precedent for qualification of the “experts” here.
6. For example, Detective Flores knows nothing about MS-13 in San Francisco or about the
7. 20th Street clique. The government *wholly ignores* this damaging reality and glosses over defendant
8. Velasquez’s assertion that it *has not provided the Court with evidence upon which it could conclude*
9. *that knowledge about L.A.’s MS-13 translates to San Francisco’s MS-13* by insisting that since
10. Flores has significant gang experience in L.A. and previously testified in federal court, he should
11. testify in this case. (Doc. 2619 at 7-8.) This position should be rejected.
12. The government similarly disregards the fact that neither McDonnell nor Molina have qualified to testify in federal court and inadvertently misleads the Court about the fact that almost

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all of Molina’s testimony has been in juvenile court without a jury. (R.T. at 10:11-13; 12: 4-8.)

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State testimony regarding gang activity differs significantly from that which a federal court will

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allow, because under California law, a gang expert in state court is called to interpret and apply

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Penal Code section 186.22, which is specifically defined in the statute as the definition of “gang

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member.” Here, the experts will be called to show that MS-13 is a RICO enterprise, that all

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members are necessarily participants in the enterprise, and that the goal of the enterprise is the

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commission of violent acts.

## F. The Government Apparently Concedes That Mr. Molina Should Not Be Able To

1. **Testify About, or Based Upon, Any Gang-Related Events (or Evidence Thereof) That Took Place After October 2008.**

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Based on testimony elicited during the *Daubert* hearing on November 5, 2010, defendant

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Velasquez argued that since Molina admitted he had significantly diminished gang contacts after

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October 2008 (when the “take down” occurred), he should not be able to give opinions about or

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based on events taking place after that time. (Doc. 2586 at 11:1-21). The government did not

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address this argument in its response.

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## 1 G. The Government Fails to Address the Fact that *Crawford* Bars the Presentation of Testimonial Statements in the Guise of Expert Opinion.

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1. The government correctly suggests that experts are permitted to rely upon hearsay. The
2. government simply does not address the limitations imposed by F.R.E. 702 which requires that this
3. hearsay be reliable. More importantly, the government ignores the limitations imposed by
4. *Crawford* on the prosecution's use of inculpatory hearsay statements not subject to confrontation.
5. These statements, obviously, raise profound concerns -- concerns which are heightened in the
6. context of gang expert testimony based upon informant statements, particularly in-custody
7. statements of unknown informants faced with great incentives to fabricate or exaggerate. With the
8. exception of *Mejia* and *Diaz,* the government cites obsolete pre-*Crawford* case law. *Mejia*, of
9. course, supports the defense objection. *Diaz*, as this Court knows, concerned much, much more limited testimony than the testimony offered here.[7](#_bookmark6)

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1. The government recognizes that expert witnesses “testify beyond their proper bounds when they simply recite unvarnished hearsay statements” and that having an expert who “essentially
2. summarized the results of the Task Force investigation” exceeded the boundaries of expert
3. testimony.” The government claims it “does not intend to cross this line.” The government’s
4. description of its proposed expert testimony, however, does exactly that. In this RICO case where
5. MS-13 is charged as the enterprise, the government seeks to introduce un-confrontable testimony
6. about: “MS-13’s origins, development, and evolution in Los Angeles and its spread to other Locations” and “MS-13’s rise in the San Francisco Bay Area, how it established itself and claimed

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territory in the Mission District around 20th Street, and the territories claimed by the various gangs

20 of San Francisco.” This summarization of the investigation is exactly what *Mejia* forbids.

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Dated: November 19, 2010 Respectfully Submitted,

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/s/

1. MARTIN SABELLI
2. Attorney for Guillermo Herrera

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7 The use of “expert” testimony to establish the RICO enterprise is several steps beyond the

1. use of expert testimony to translate street jargon that this Court allowed in *United States v. Diaz*, 2006 WL 2699042. Moreover in *Diaz*, the government was ordered to provide the specific police
2. reports on which the experts’ opinions were based. Here, the hearings establish that the opinions
3. are based upon the impressionistic result of many interviews, experience, and training.