

19-6956

ORIGINAL

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS OUTLAND-PETITIONER

VS.

STATE OF NEW JERSEY-RESPONDENTS
ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES SUPREME COURT

THOMAS OUTLAND #1043009 SBI#423964B
EAST JERSEY STATE PRISON
LOCK BAG R
RAHWAY, NEW JERSEY 07065

QUESTIONS PRESENTED

1. DID THE NEW JERSEY STATE COURT ENDORSE THE USE OF N.J.R.E. 806 AS A VEHICLE FOR IMPEACHING NON-TESTIFYING CRIMINAL DEFENDANTS WITH THEIR PRIOR CONVICTIONS RISE TO THE LEVEL MAKING THIS CASE OF SUCH IMPERATIVE PUBLIC IMPORTANCE AS TO REQUIRE IMMEDIATE DETERMINATION IN THIS COURT?
2. DID THE DEFENSE'S INTRODUCTION OF EVIDENCE TO DISPROVE THE STATE'S CHIEF WITNESS'S MISLEADING TESTIMONY EQUIVALENT TO THE DEFENDANT TAKING THE STAND UNDER OATH ALLOWING THE STATE INTRODUCTION OF HIS PRIOR CONVICTION FOR IMPEACHMENT PURPOSES?
3. SHOULD A NON-TESTIFYING DEFENDANT BE FORCED TO SACRIFICE AND CHOOSE BETWEEN FORGOING A DEFENSE TO NOT CORRECTING MISLEADING TESTIMONY FROM THE STATE WITNESS AND EXPOSING HIS PRIOR CONVICTIONS TO THE JURY?
4. DID THE TRIAL COURT INSTRUCTIONS TO THE JURY TO USE PETITIONER'S PRIOR CONVICTIONS TO ASSESS "THE DEFENSE'S CASE" CONSTITUTE A VIOLATION OF PETITIONER'S RIGHT TO A FAIR TRIAL?
5. WILL THE APPELLATE DIVISION'S PUBLISHED OPINION ENCOURAGE TRIAL COURTS THROUGHOUT NEW JERSEY AND OTHER STATES TO USE CRIMINAL DEFENDANTS PRIOR CONVICTIONS TO ASSESS IN DETERMINING THE CREDIBILITY OR BELIEVABILITY OF A DEFENDANT'S CASE WHEN EVIDENCE IS PRESENTED TO CONTRADICT A STATE'S WITNESS'S TESTIMONY THAT WAS CRUCIALLY MISLEADING?
6. DID THE TRIAL COURT PROPERLY ALLOWED THE STATE TO PROFFER DEFENDANT'S PRIOR CONVICTIONS TO IMPEACH HIS CREDIBILITY BECAUSE BY PLAYING THE 9-1-1 TAPE TO THE JURY, DEFENDANT AVOIDED THE RISKIER PROCESS OF TESTIFYING, THUS, THE PRIOR CONVICTIONS MAY HAVE AFFECTED THE JURY'S ASSESSMENT OF HIS CREDIBILITY BUT DID NOT OUTWEIGH THE PROBATIVE WORTH OF THE EVIDENCE?

1LIST OF PARTIES

[X] All Parties appear in the caption of the case on the cover page.

[] All Parties Do not appear in the caption of the case on the cover page. A list of all Parties to the proceeding in the Court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW	4
JURISDICTION	5
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	7
STATEMENT OF THE CASE	14
REASONS FOR GRANTING THE WRIT	16
CONCLUSION	17
PROOF OF SERVICE	18

INDEX TO APPENDICES

APPENDIX A New Jersey Appellate Division's decision decided on March 20, 2019.

APPENDIX B New Jersey Supreme Court decision dated October 2, 2019.

TABLE OF AUTHORITIES CITED

CASES

Kaye v. United States, 177 F. 147 (7th Cir. 1910)

McHenry v. Chadwick 896 F.2d 184 (6th Cir. 1990)

McKenna v. City of Phila., 582 F.3d 447, 461 (3d Cir. 2009)

Huddleston v. United States, 485 U.S. 681, 685 (1988)

United States v. Green, 617 F.3d 233, 250 (3d Cir. 2010)

United States v. Davis, 726 F.3d 434, 441 (3d Cir 2013)

United States v. Himelwright, 42 F.3d 777, 782 (3d Cir. 1994)

United States v. Greenidge, 495 F.3d 87(3d Cir. 2007)

United States v. Noble, 754 F.2d 1324 (7th Cir. 1985)

United States v. Uvino, 590 F. Supp. 2d 372 (E.D.N.Y. 2008)

STATUTES AND RULES

Fed. R. Evid 609(a) (1)

Fed. R. Evid 609(a) (2)

Fed. R. Evid. 404(b) (1)

Fed. R. Evid. 404(b) (2)

N.J.R.E. 806; 801(c); & 803(b) (1)

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[] For cases from federal courts:

The opinion of the U.S. court of appeals appears at Appendix A, to the petition and is:

[] reported at _____ ; or

[] has been designated for publication but is not yet reported; or

[] is unpublished.

The opinion of the U.S. District Court appears at Appendix B, to the petition and is:

[] reported at _____ ; or

[] has been designated for publication but is not yet reported; or

[] is unpublished.

☒ For cases from State courts:

The opinion of the highest state court to review the merits appears at **Appendix A** to the petition and is:

☒ reported at 2019 N.J. Super. LEXIS 34 ; or

☐ has been designated for publication but is not yet reported; or

☐ is unpublished.

The opinion of the Appellate Division Court appears at Appendix A to the petition and is:

☐ reported at ; or

☒ has been designated for publication but is not yet reported; or

☐ is unpublished.

JURISDICTION

☐ For cases from federal courts:

The date on which the U.S. Court of Appeals decided my case was

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the U.S. Court of Appeals on the following date, and a copy of the order denying rehearing appears at Appendix

☐ An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application No.

The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

☒ For cases from state courts:

The date on which the highest state court decided my case was **March 20, 2019**. A copy of that decision appears at **Appendix A**.

☒ A timely petition for rehearing was thereafter denied on the following date: **October 2, 2019**, and a copy of the order denying rehearing appears at **Appendix B**.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including (date)
on (date) in Application No. A-

The Jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rules of Evidence Rule 806 provides that when a hearsay statement has been admitted into evidence, the credibility of the declarant may be attacked by evidence "which would be admissible for those purposes if declarant had testified as a witness." The Advisory Committee Notes to the proposed rule state that: "the declarant of a hearsay statement which is admitted into evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified. See *Rules 608 and 609*. . . ." *Federal Rule of Evidence 609(a)(2)* provides for the admission of a prior conviction involving a false statement:

"For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime . . . (2) involved a dishonest or false statement, regardless of the punishment." The notes of the Conference Committee defines "dishonesty and false statement" to mean "crimes such as perjury or subordination of perjury, false statement, criminal fraud, embezzlement, or false pretenses, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." *Conf. Rep. No. 1597, 93rd*

Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 7098, 7103. Counterfeiting is an offense in the nature of *crimen falsi*. See *Black's Law Dictionary* (5th ed. 1979); see also, Kaye v. United States, 177 F. 147 (7th Cir. 1910).

Federal Rule of Evidence 609(a)(1) allows the admission of evidence of a witness's prior conviction to impeach that witness if the crime was punishable by a sentence of greater than one year and if the probative value of the evidence outweighs its prejudicial effect. FRE 609(a)(1). Where the crime "involved dishonesty or false statement, regardless of the punishment," Rule 609 admits evidence of the conviction without any balancing test. FRE 609(a)(2). In McHenry v. Chadwick 896 F.2d 184 (6th Cir. 1990), the court explained that, under Rule 609(a)(2), "[a]lthough evidentiary issues are generally within the broad discretion of the trial judge, the admission of prior convictions involving dishonesty is not," even if the conviction was for a misdemeanor.

Rule 609 sets forth several exceptions to this general rule, permitting evidence of prior criminal convictions to be admitted for impeachment purposes. Fed. R. Evid. 609. Under Rule 609(a), evidence of a prior criminal conviction may be admitted "to attack a witness's character for truthfulness" in several circumstances. Fed. R. Evid. 609(a)(1). If the witness was convicted of a crime that "was punishable by death or by

imprisonment for more than one year," then the conviction "must be admitted, subject to Rule 403, in a civil case" *Fed. R. Evid. 609(a)(1)(A) (citing Fed. R. Evid. 403)*.

The court can exclude relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Fed. R. Evid. 403*. A trial court is afforded substantial discretion when striking a Rule 403 balance with respect to proffered evidence. *McKenna v. City of Phila.*, 582 F.3d 447, 461 (3d Cir. 2009) (noting that "a trial judge's decision to admit or exclude evidence under *Fed. R. Evid. 403* may not be reversed unless it is arbitrary and irrational"). As the Court of Appeals for the Third Circuit articulated in *United States v. Greenidge*, 495 F.3d 85 (3d Cir. 2007), the district court must weigh the conviction's probative value against its prejudicial effect. *Id.* at 97. In so doing, the court should consider four factors: (1) the kind of crime involved; (2) when the conviction occurred; (3) the importance of the witness's testimony to the case; and (4) the importance of the credibility of the witness.

In this current matter the New Jersey Appellate Division utilized *United States v. Greenidge*, 495 F.3d 85 (3d Cir. 2007), to validate its admission of Petitioner's prior criminal

convictionsto attack his credibility due to the defense's admission of an audio of a 911 call. The call was admitted to contradict the state's witness's testimony that she did not see him make the call.

The state's witness testimony was crucial because it was presented to indicate Petitioner did not make the call because he was actually involved in the robbery and deliberately did not make the call in effort to buy time for his companions to evade capture. The Appellate Division determined the following:

Federal Rule of Evidence 806 precedes and is the prototype for N.J.R.E. 806, upon which the trial judge properly relied. Ibid. Under Federal Rule of Evidence 806, federal courts have allowed the admission of prior convictions to impeach the credibility of a hearsay declarant. In *United States v. Greenidge*, the Third Circuit held the trial court appropriately admitted the non-testifying defendant's prior convictions to impeach his credibility after he offered his own out-of-court statements as evidence. 495 F.3d 87, 97-98 (3d Cir. 2007). The Third Circuit also ruled the district court had appropriately weighed the probative value of the prior convictions against the prejudicial effect, as required by Federal Rule of Evidence 609. Id. at 97-98.

Similarly, in *United States v. Noble*, the court allowed the prosecution to move into evidence the non-testifying defendant's prior conviction to impeach his statements on a recorded conversation between him and an agent. 754 F.2d 1324, 1335-36 (7th Cir. 1985). The court stated that by introducing the tape, defense counsel "opened the door for the government to introduce his prior conviction under [Federal Rules of Evidence] 806 and 609(a)(2)." Id. at 1336; see also

United States v. Uvino, 590 F. Supp. 2d 372 (E.D.N.Y. 2008) (permitting defendants to introduce prior dishonest acts of hearsay declarants to impeach exclamations they made on a taped recording while they were being assaulted and robbed).

Other state courts have permitted prosecutors to impeach the credibility of hearsay declarants through prior convictions. For example, in State v. Hernandez, the prosecutor sought to admit the defendant's prior convictions to impeach the excited utterances the defendant made on a 9-1-1 call. 191 Ariz. 553, 959 P.2d 810, 813-17 (Ariz. Ct. App. 1998). After committing murder, the defendant called 9-1-1 and turned himself in. Id. at 813. The defendant did not testify at trial; however, he admitted the 9-1-1 tape into evidence to prove that the murder was not premeditated. Ibid. The court ruled that the prior convictions were appropriately admitted because "[a]dvising the jurors of the declarant's prior felony convictions aids them in assessing the trustworthiness of the declarant's statement." Id. at 814. It was immaterial that the declarant was the defendant himself. Id. at 815-17.

More recently, in State v. Mohamed, the Supreme Court of Washington permitted a non-testifying defendant to be impeached through his prior convictions where his out-of-court statements were relayed through the defendant's expert witness' testimony. 186 Wn.2d 235, 375 P.3d 1068, 1072 (Wash. 2016). This is because "[t]he record shows that the defendant's statements were not offered solely for the nonhearsay purpose of providing the factual basis for [the witness's] expert opinion; they were also offered for the hearsay purpose of proving their truth." Ibid. (emphasis in original); see also Mathis v. State, 135 So. 3d 484, 485 (Fla. Dist. Ct. App. 2014); People v. Jacobs, 78 Cal. App. 4th 1444, 1449, 93 Cal. Rptr. 2d 783 (Ct. App. 2000); State v.

Dishman, 148 Ore. App. 404, 939 P.2d 1172, 1174 (Or. Ct. App. 1997).

The comment following N.J.R.E. 806 embodies the prevailing view. In evaluating the credibility of hearsay, a jury should be entitled to hear the same impeaching evidence as if the declarant had testified. The trial court did not err by allowing the State to proffer defendant's prior convictions in order to impeach his credibility. [App. Div. Opin.¹ at 10-13]

Pursuant to *Fed. R. Evid. 404(b)(1)*, "evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."

Pursuant to *Fed. R. Evid. 404(b)(1)*, "evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Such evidence may be admissible for another relevant purpose, "such as proving motive, opportunity, intent, preparation, plan knowledge, identity, absence of mistake, or lack of accident." *Fed. R. Evid. 404(b)(2)*.

Parties may not introduce "evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity or knowledge." *Huddleston v. United States*, 485 U.S. 681, 685 (1988). As noted above, "one proper purpose under

¹ Appellate Division opinion dated March 20, 2019

404(b) is supplying helpful background information to the factfinder." United States v. Green, 617 F.3d 233, 250 (3d Cir. 2010). Under Rule 404(b), "prior act evidence is admissible only if it is (1) offered for a proper purpose under Rule 404(b)(2); (2) relevant to that purpose; (3) sufficiently probative under the Rule 403 balancing requirement, and (4) be accompanied by a limiting instruction, if requested." United States v. Davis, 726 F.3d 434, 441 (3d Cir 2013). The proffered evidence must fit "into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged." United States v. Himelwright, 42 F.3d 777, 782 (3d Cir. 1994).

In this instant case the reviewing court erroneously allowed Petitioner's prior convictions to be presented before the jury because he entered an audio that rebutted the state's witness's testimony that she did not see him make the call. That testimony was presented to draw inference that Petitioner was involved in the robbery and did not call the authorities to report the crime.

The defense should not have been forced to sacrifice the Petitioner's prior criminal convictions to disprove the state's witness claims that, she did not see Petitioner make the call, indicating his possible involvement based on her not seeing him make the 911 call.

This was a violation of Petitioner's Constitutional Rights to a fair trial and this Court should intervene to remedy this fundamental injustice.

STATEMENT OF THE CASE

Mr. Thomas Outland, Petitioner was deprived of a fair trial when the trial court improperly applied N.J.R.E. 806, allowing the prosecution to present Petitioner's, a non-testifying defendant's prior convictions, attacking his credibility, as proof that the defendant likely conspired to commit robbery.

The issue at trial was whether Petitioner conspired with two masked individuals to rob a check-cashing establishment. An employee testified as the State's primary witness that immediately after the robbery, she told the Petitioner to call 911, but did not see him make the call. To refute the State's presentation that Petitioner was perhaps involved and did not call 911, to allow his suspected associates time to evade capture, the defense presented a recording of the 911 call Petitioner in fact made shortly after the robbery.

Because the defense introduced Petitioner's 911 call, the trial court granted the prosecution's motion under N.J.R.E. 806 to inform the jury that Petitioner had four prior convictions

and had already consumed substantial prison time in the past. The 911 call were not offered to prove the truth of the matter asserted, it was offered to rebut the prosecution witness's testimony suggesting that Petitioner did not make the 911 call, thus inferring that he may have been involved in the heist.

The trial court drastically stretched the definition of hearsay to allow the prosecution to attack Petitioner's credibility under N.J.R.E. 806 with his four prior convictions, despite the fact he did not elect to testify.

The introduction of the testimony from the State's witness, that she did not see Petitioner call 911 after she told him to immediately after the robbery was misleading. The defense had an obligation to rebut the testimony to prove that Petitioner did in fact call 911. The trial judge's interpretation of why the 911 call was offered by the defense was flawed because the 911 call was offered to rebut the inculpatory suggestion that Petitioner never made the call, which prompted the presentation of the call to disprove the proposition that Petitioner did not make the call for the reason that he was involved.

The Appellate Division's endorsement of the Petitioner's prior convictions evidence is predicated on a radical expansion of the definition of hearsay. In its attempt to justify the introduction of the prior convictions the Appellate Division relied on Federal Rules of Evidence that does not apply to this


instant matter. This matter is of public importance and should be grounds for granting certiorari to protect future non-testifying criminal defendants from having their prior convictions presented to the jury when evidence is offered to disprove the state's chief witness.

REASONS FOR GRANTING THE PETITION

There are four main reasons for granting this instant petition. (1) The New Jersey Appellate Division approved of the admission of Petitioner's prior convictions evidence was based on an expansion of the definition of hearsay. (2) The ruling in this matter infringes on the Federal Rules of Evidence 404(b), because it allows the use of prior convictions with no probative value except to show propensity to commit bad acts. (3) The ruling approved the use of Federal Rules of Evidence 806 is unharmonious with Federal Rules of Evidence 403 because the prior convictions prejudice outweighed any probative value. (4) Finally, the Appellate Division's opinion encourages trial courts throughout New Jersey to adopt its interpretation that prior convictions evidence can be used by the jury in its determination of the credibility or believability of the "defendant's case" oppose to the defendant's credibility. This case was subsequently approved for publication by the New Jersey Appellate Division, and has the potential to affect future criminal defendants presented with similar circumstances.

CONCLUSION

The Petition for a Writ of Certiorari should be granted based on the arguments presented in this petition. This matter should be remanded back to the trial court with the appropriate instructions to vacate conviction and order a new trial.

A handwritten signature in black ink, appearing to read "Thomas Outland", with a stylized flourish extending from the end.

Respectfully submitted,

Thomas Outland

Date: November 26, 2019

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS OUTLAND-PETITIONER,

V.

STATE OF NEW JERSEY, -RESPONDENT,

PROOF OF SERVICE

I, Thomas Outland, do swear or declare that on this date,
November 22, 2019, as required by Supreme Court Rule 39, under


12.2. I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI. An inmate confined in an institution, if proceeding *in forma pauperis* and not represented by counsel, need file only an original petition and motion. Petitioner mailed the required documents to be served, by depositing an envelope containing the above documents in the United States Mail properly addressed to each of them with first-class postage prepaid.

The names and addresses of those served are as follows:

Scott S. Harris, Clerk
U.S. Supreme Court Bldg.,
1 First Street N.E.,
Washington, DC 20543

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 26, 2019


Thomas Outland

Appendix A