

MAR 06 2023

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NO 22-7085

IN THE
SUPREME COURT of the UNITED STATES

RODOLFO GODINEZ,

Appellant,

-against-

ADMINISTRATOR, New Jersey State Prison;
NEW JERSEY ATTORNEY GENERAL

Appellees

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Mr. Rodolfo Godinez
#661467 / 474889-C
New Jersey State Prison
P.O. Box 861
Trenton, New Jersey 08625
Appellant, Pro-se

ORIGINAL

QUESTIONS PRESENTED

1. Whether the Appellant's Pre-Miranda Statements was obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966)?
2. Whether the prosecutor's summation exceeded the standards enunciated in *Darden v. Wainwright*, 477 U.S. 168 (1986) and whether this summation violated Appellant's due process right to a fair trial
3. Whether the district court's decision on ineffective assistance of counsel claims contrary to *Strickland v. Washington*, 466 U.S. 668 (1984) and whether the Appellant's rights were violated by this
4. Whether the district court failure to utilize the *Jackson v. Virginia*, 443 U.S. 307 (1979) standard in analyzing Appellant's insufficient evidence claim a violation of Appellant's right to a fair trial
5. Whether the testimony of the state's gang expert witness (and testimony of gang affiliation) violated Appellant's due process right to a fair trial and whether the district court erred in denying this issue
6. Whether the district court decision contrary to Appellant's sixth amendment right to a fair trial when the state was allowed to introduced testimony/ evidence of an uncharged crime?
7. Whether the Extensive Media Exposure and Publicity impacted the fairness of the trial and whether district court decision was contrary to *Shepard v. Maxwell*, 384 U.S. 333 (1966) and *Irvin v. Dowd*, 366 U.S. 717 (1961)?

PARTIES

The Appellant is Rodolfo Godinez a prisoner at New Jersey State Prison, P.O. Box 861, Trenton, New Jersey.

The Appellees are the New Jersey Attorney General at Richard J. Hughes Justice Complex, P.O. Box 085, Trenton, New Jersey, 08625 and the Administrator of New Jersey State Prison located at P.O. Box 861, Trenton, New Jersey 08625.

CORPORATE DISCLOSURE

There are no corporate entities involved in this case.

RELATED CASES

Godinez v. Administrator, et al, C.A. No: 22-2338, (3rd Cir. January 4, 2023) Order of the United States Court of Appeals for the Third Circuit denying Petition for Rehearing and Rehearing en Banc,

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State v. Godinez, A-6205-09T4; 2014 N.J. Super. Unpub. *LEXIS* 729 (App. Div. April 2, 2014) Opinion of the Superior Court of New Jersey, Appellate Division on Direct Appeal

State v. Godinez, Indictment No: 08-09-02688-I (Law Div. January 5, 2010) Opinion of the Superior Court of New Jersey, Essex County Decision on Motion to Suppress Statement

State v. Godinez, Indictment No: 08-09-02688-I, (Law Div. March 15, 2010) Opinion of the Superior Court of New Jersey, Essex County Decision on Motion to Exclude all References to, and Expert Testimony on, the MS-13 Street Gang

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**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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PETITION FOR A WRIT OF CERTIORARI

Appellant Rodolfo Godinez (“Godinez”) respectfully petitions for a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Third Circuit entered in this case.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Third Circuit denying Rehearing and Rehearing En Banc, *Godinez v. Administrator, et al.*, C.A. No: 22-2338 (3rd Cir. January 4, 2023), appears in **Appendix A** to this Petition beginning at page 1a. The order of the United States Court of Appeals for the Third Circuit denying COA, *Godinez v. Administrator, et al.*, C.A. No: 22-2338 (3rd Cir. December 1, 2022), appears in **Appendix B** to this Petition beginning at page 3a. The Opinion and order of the United States District Court denying Habeas

Corpus Relief, *Godinez v. Johnson, et al*, Civil Action No.: 2:18-cv-15402 (KM) (D.N.J. June 27, 2021), appears in **Appendix C** to this Petition beginning at 4a.

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The Opinion of the Superior Court of New Jersey, Essex County on Motion to Suppress Statement, *State v. Godinez*, Indictment No: 08-09-02688-I (Law Div. January 5, 2010), appears at **Appendix K** to this Petition beginning at 176a

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 1, 2022. An order denying a Petition for Rehearing and Rehearing En Banc was entered on January 4, 2023. Jurisdiction is conferred by 28 U.S.C. §2254(1).

CONSTITUTIONS AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

In all criminal prosecution, the accused shall enjoy the right . . . to have the assistance of counsel for his defense

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

No State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, Section 2254(d), of the United States Code provides:

- (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
 - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
 - (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Background

Godinez filed a Habeas Corpus Petition challenging his state court conviction and sentence on several grounds; *inter alia*, Pre-Miranda Statements was obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); the prosecutor's summation exceeded the standards enunciated in *Darden v. Wainwright*, 477 U.S. 168 (1986) and whether this summation violated Appellant's due process right to a fair trial; ineffective assistance of counsel claims contrary to *Strickland v. Washington*, 466 U.S. 668 (1984) and whether the Appellant's rights were violated; the district court's failure to utilize the *Jackson v. Virginia*, 443 U.S. 307 (1979) standard in analyzing Appellant's insufficient evidence claim a violation of Appellant's right to a fair trial; the testimony of the state's gang expert witness (and testimony of gang affiliation) violated Appellant's due process right to a fair trial; and the district court decision contrary to Appellant's sixth amendment right to a fair trial when the state was allowed to introduced testimony/evidence of an uncharged crime? The District Court of New Jersey had denied Godinez's request for relief on these issues.

Godinez then appealed to the Third Circuit Court of Appeals and the Court declined to issue a COA. Moreover, the Circuit Court denied Godinez's request for a Rehearing.

Godinez submits that the both the District Court and Circuit Court erred when they denied the relief requested during the Habeas Proceedings and hereby seeks Certiorari from this Court to review the constitutional issues presented.

Procedural History

Rodolfo Godinez (hereafter “Godinez”) was originally charged in Essex County 17-Count Indictment, Number 08-09-02688-I, with violating the following New Jersey Offenses: second-degree conspiracy to commit robbery in violation of *N.J.S.A. 2C:15-1* and *5-2* (count 1); four counts of first degree robbery against Terrance, Natasha, Dashon, and Iofemi, in violation of *N.J.S.A. 2C:15-1* (Counts two through five); three counts of first degree felony murder having killed Terrance, Dashon, and Iofemi during the course of a robbery in violation of *N.J.S.A. 2C:11-3a(3)* (counts six through eight); first-degree conspiracy to commit murder, in violation of *N.J.S.A. 2C:11-3a(1)* and *-3a(2)* and *2C:5-2* (count 9); three counts of first degree purposeful and/or knowing murder having killed Terrance, Dashon and Iofemi in violation of *N.J.S.A. 2C:11-3a(1)* and *-3a(2)* (counts ten through twelve); first-degree attempted murder of Natasha in violation of *N.J.S.A. 2C:11-3a(1)* and *-3a(2)* (count thirteen); third-degree unlawful possession of a weapon, a handgun, in violation of *N.J.S.A. 2C:39-5b* (count fourteen); second-degree possession of a weapon, a handgun, for an unlawful purpose, in violation of *N.J.S.A. 2C:39-4a* (count fifteen); fourth-degree unlawful possession of a weapon, a machete, in violation of *N.J.S.A. 2C:39-5d* (count sixteen); and fourth-degree unlawful possession of a weapon, a machete, for an unlawful purpose in violation of *N.J.S.A. 2C:39-4d* (count seventeen).

On May 24, 2010, the Jury returned their verdict finding Godinez guilty of the above-mentioned charges.

Pretrial and Trial Proceedings

a) Pretrial Miranda Statements

Pretrial, Godinez moved to suppress his statements which were allegedly made to the police on August 17 and August 18, 2007. After a three-day suppression hearing, the Court denied the motion in a written opinion of January 5, 2010 (Appx. K).

On March 10, 2009, *N.J.R.E.* 104(c) hearings commenced before the Honorable Nelson, J.S.C., concerning the admissibility at trial of oral unrecorded statements made by Godinez to law enforcement personnel on August 17th and a recorded interview of Godinez on August 18th, 2007. The State's only witness was Detective Lydell James of the Newark Police Department. The suppression hearing revealed that police burst into the Apartment where Appellant was living in Maryland. Appellant denied he was Rodolfo Godinez. A Detective then slapped Appellant in the face. Appellant then admitted his identity.

As Appellant affirmed at the hearing, the detective who had slapped him immediately asked him "Why did you kill those people?" Three detectives then took Appellant to a bedroom and asked him where his brother was. One Detective asked Appellant several times for this information, telling him that he (the detective) had promised Appellant's mother that police would protect his Appellant's brother. No *Miranda* rights of any sort had been provided to Appellant to this point.

Police took him out to the detectives' car. While walking to the car, one detective kept asking Appellant "why he had killed the people." Appellant responded by stating "he had not killed anybody." Once in the police car (on the way to the local police station), conversation

about the safety of Appellant's mother and family and the whereabouts of Appellant's brother occurred -- all before any *Miranda* warnings were given.

Since the police violated *Miranda*, all of the statements obtained from Appellant following his unlawful questioning with *Miranda* warnings -- including his taped statement obtained during the formal interrogation at the Maryland Police Station -- should have been suppressed from the evidence under the fruit-of-the-poisonous-tree doctrine.

Appellant had remained with the same detectives from the time he was arrested in the Apartment through his formal interrogation at the local police station. Nothing in the suppression hearing demonstrated that the taped confessions were not tainted by the prior constitutional violation that led to the original oral statements by Appellant inside the Apartment, while walking to the detectives' car and inside the car. The subsequent formal statements, therefore, should have been excluded as fruit of the initial *Miranda* violation.

The trial court erred in ruling that the State had proven a knowing, voluntary and intelligent waiver by Appellant of his *Miranda* rights. The proofs at the suppression hearing showed that Appellant's borderline cognitive abilities, limited education and reading ability, and primary language of Spanish (not English, the language spoken to by the Detectives and in which the *Miranda* warnings were provided) rendered Appellant incapable of understanding and sufficiently waiving the *Miranda* rights provided. Dr. Joel Morgan's testimony at the suppression hearing supports this.

At the conclusion of Detective James' testimony, Godinez, whose native language is Spanish, was granted a continuance until April 7, 2009 to give him the opportunity to locate his school records and to retain an expert in connection with his ability to understand and waive his

Miranda warnings, which were administered in English. The records were obtained and an expert in the field of Forensic Psychology, Dr. Joel Morgan, was retained. The continuance was extended to enable the State to retain a witness concerning the same issue. The State eventually retained Dr. Ernesto Perdomo.

Dr. Morgan testified that he evaluated Appellant and that in his opinion, based on defendant's intellectual insufficiencies, as well as his lack of fluency in English, Appellant did not fully understand his constitutional rights when the police questioned him on August 18, 2007 and therefore did not knowingly and intelligently waive those rights prior to giving a statement.

The Court credited and accepted as true, Dr. Morgan's testimony, however, did not find credible Dr. Morgan's scientific opinion as to Appellant's lack of understanding of his Miranda Rights.

Ultimately, the Court denied Appellant's request to Suppress his Statements by concluding: "the State has proved beyond a reasonable doubt that the Miranda requirements were met and the requisite warnings given," and "that the State has proven beyond a reasonable doubt that the defendant knowingly and intelligently waived each and every one of these rights before making any statements during the custodial interrogation.."

b) *Pretrial Motion to Exclude References to and Expert Testimony*

Godinez also moved, pretrial, to exclude all references to, and expert testimony on, the MS-13 street gang. A *N.J.R.E. 101* hearing was held and the Court denied the motion in a written opinion dated March 15, 2010 (Appx J). The Court also held a *N.J.R.E.* hearing in which the State's MS-13 expert testified

The trial court erred in denying Appellant's motion ruling that the gang evidence and accompanying expert testimony were admissible to help explain Appellant's alleged motive and intent. The gang evidence and expert testimony had little probative value that was outweighed by the great danger of unfair prejudice to Appellant via his alleged association with the MS-13 gang.

The trial court said that though the danger of unfair prejudice via association with an "evil enterprise" was present, the gang testimony was admissible per *State v. Torres*, 183 N.J. 554, 562-63 (2005). It was "only fair," the court said, that the prosecution be allowed to present evidence to address the issues raised by Appellant's contention that he was "merely present at the scene" and did not share the mens rea of the actors who carried out the killings.

Trial Proceedings

Godinez was the first of six defendants to be tried in this case. The trial commenced on April 27, 2010 and lasted 22 days. On May 24, 2010, the jury convicted Godinez of all counts of the Indictment.

a) Media Exposure

During the trial, Counsel made several oral motions regarding prejudicial publicity. On April 29, 2010, defense counsel even moved for a Mistrial based upon spectators applauding at the end of the victim, Natasha Aerial's, testimony which was denied by the Court.

The trial court in this instant matter erred in denying Appellant's motions to remove jurors for cause (during jury selection), and for mistrials during trial and motion for a new trial following the jury verdict's because there was way too much inflammatory and prejudicial media exposure that compromised the fairness of the trial and jurors. Several jurors admitted during jury selection having knowledge of the crimes in question and about the MS-13 gang in which

defendant was an alleged "recruiter." Several jurors had been exposed to media reports about the crimes. Some "took an interest" in the case upon reading newspaper accounts.

- 1) One juror said that "people on the street were talking about it" and the juror was "getting phone calls about it;"
- 2) Another juror said that people in her neighborhood talked about the "execution style" killings and fear for their safety in the area;"
- 3) Another juror understood that "people were executed in the schoolyard;"
- 4) Newspaper and television accounts informed one juror that the crimes involved "an alleged gang with Latino guys;"
- 5) One juror had seen a documentary on the "MS-13 gang" and had formed an opinion that it was involved with "nefarious stuff" like "a war with drugs;"
- 6) Another juror upon seeing an MS-13 documentary said that if it was shown that the defendant had "an affiliation like that" that "would mean that he is guilty of a crime;"
- 7) Another juror, after seeing an account of the crimes on television, told her husband that "her prayer is that whoever is responsible" that "person should be brought to justice because I don't think any woman deserves to lose a child."

The trial court erred in denying Appellant's motions to remove for cause the jurors who were exposed to the crimes via media accounts or who had seen documentaries about the MS-13 gang, and in denying Appellant's subsequent motions for mistrial and for a new trial on ground of inflammatory publicity and compromise of the fairness of the jurors.

In the alternative, the State Intermediate Appellate Court and the District Court both erred in affirming this denial.

b) *Uncharged Offense*

The charges and conviction stems from an August 4, 2007 gang attack upon four young adults by Appellant and five-other co-defendants. The victims were robbed, beaten, sexually assaulted and/or slashed. Three victims died from gunshot wounds and the fourth victim survived. She related the events that allegedly occurred that night in the playground.

In this case, one of the victims, Aerial, testified that the "black boy" sexually assaulted her and her friend Iofemi, by digitally penetrating the victims, who repeatedly yelled, "Jesus." The problem is that Appellant was never charged with such acts in the Indictment because he never committed any such act. Two of his co-defendants did, however, the jury was allowed to hear that the victim was sexually assaulted, which should not have been allowed. After trial counsel objected, the Court told the jury that Defendant was not charged with sexual assault of Aerial and that sexual assault was not a crime that the jury would be considering in the case. The judge never included Iofemi in its limited instruction to the jury, therefore, there's a strong possibility that the jury could have thought that maybe he wasn't charged with sexual assault against Aerial, but against Iofemi. Either way, there is no way to determine what they had heard from the victim was ignored. Even with a jury instruction, once something is said, it can't be undone or erased from a person's mind.

The State presented a significant amount of inflammatory evidence, including an uncharged bad acts to prove the other allegations against defendant. The evidence was highly prejudicial, resulting in an inherent danger "a jury may convict a defendant not for the offense charged, but for the extrinsic offense." *State v. Garrison*, 228 N.J. 182, 193-94 (2017). Courts are convinced "the inherently prejudicial nature of [wrongs or bad acts] evidence cast[ed] doubt on

[the] jury's ability to follow even the most precise limiting instruction." *State v. Stevens*, 115 N.J. 289, 309 (1989).

c) ***Expert Testimony***

Inv. Alicea gave several opinions within his area of expertise. Inv. Alicea testified to the MS-13 structure, hierarchy activities and identifiers. This testimony was not needed to show that that perpetrators participated in the crime. The crime was not gang related. The crime was not about gang on gang violence or retaliation. It was simply a crime of opportunity to rob someone (no disrespect to the victims in this case).

The error in the admission of expert testimony is that it included prejudicial testimony of defendant's involvement with the "MS-13" and specifically included Appellant's history and habits of the MS-13. This history included references to Godinez's leadership within the MS-13 gang, which had no relevance to the crime. This testimony was followed by the expert's identification of defendant as a top leader of the MS-13. The gang name are well known, and the public perception is that people who belong to these groups are bad people with a propensity to commit crimes. Even if any of the jury had not heard of the MS-13 before the trial, they knew about their involvement with law enforcement by the trial's end; a fact relevant to no material issue in dispute. Appellant's gang membership would have come before the jury, but not with the same impact as when a member of law enforcement testifies about the gang, its history, its hierarchy, and law enforcement's prior focus on and encounters with gang members.

There was no evidence presented at trial that this was a "gang executed crime of murder." The excessive amount of testimony on and about the MS-13 gang, pervaded the fairness of the

trial and actually, the trial became one about the MS-13 gang, not the Appellant or what he was charged with.

The Expert testified that the six assailants were members of the Mara Salvatrucha gang (a.k.a. "MS-13"). The Court held a *N.J.R.E.* 104 hearing to determine the admissibility of the Expert Testimony and eventually denied the motion to exclude the testimony by stating:

Without the evidence that [d]efendant is a gang member, the manner in which his gang operates, his status in the gang and that in that status he ordered the commission of these crimes, the State will not be able to prove his vicarious liability for the crimes committed by his codefendants. And it is for those reasons that the [c]ourt concludes that the probative value of the evidence is not outweighed by its apparent prejudice.

The State was however, ordered to cooperate with the defendant in sanitizing the proposed gang-related references, limiting them to motive and intent. They (State and Defense Counsel) even jointly crafted a jury instruction on the issue:

There has been evidence in the case concerning MS-13 and defendant's alleged membership in that gang. It will be up to you to determine if this evidence is credible or not. If you do find it credible, it will be up to you to determine if it has any relevance to a possible motive for the charges set forth in the indictment, or any other issues you may have to decide. I instruct you, however, that you can never use the evidence that defendant may be a member of MS-13 to conclude that defendant has a predisposition to commit any crimes. As well, you can never use the evidence that defendant may be a member of MS-13 to conclude that defendant must be guilty of the crimes alleged in the indictment.

The trial court erred by admitting the highly prejudicial testimony regarding Appellant's alleged membership in or of the MS-13 gang.

d) *Insufficient Evidence Claim*

Appellant views the trial evidence to be inadequate to sustain his conviction. Appellant asserts that the State did not prove beyond a reasonable doubt that 1) that he was the ringleader who had ordered the other co-defendants to attacked the victims; 2) that he was a 'high-ranking'

MS-13 member; and 3) that he participated in the alleged crimes, even though he was present at the playground.

The trial court erred in denying Appellant's motion for a new trial because the verdict was against the weight of the evidence and a manifest denial of justice under the law.

Nothing in the State's proofs provided direct evidence of Appellant's guilt. No physical evidence linked Appellant to the murder weapons. Bullet fragments recovered from the victims were not turned over to Ballistic Experts until years after the crime (just weeks before the trial).

The one eyewitness who was not involved in the crimes, testified that he heard a young lady's voice "begging for mercy," but his description of the gunshots and the number of men observed was not consistent with trial proofs. The State acknowledged that their one eyewitness statement to the police had been lost by the police officers.

The lone surviving victim, gave little evidence that implicated Appellant; her identification was inconsistent at best and did not implicate Appellant. Although Appellant's photo was in one of the arrays shown, the victim did not identify Appellant as a perpetrator. And one of the persons that she identified as a perpetrator was not involved in the crimes (the State acknowledged that this person was incarcerated at the time).

e) *Sentencing*

Prior to sentencing, defense counsel filed a motion for a new trial (based on *State v. Reyes*) which the sentencing court denied by stating:

Defendant's statement and the testimony of Will Jordan established defendant's criminal responsibility for the crimes charged. In other words, the Jury had every right to infer from those statements as they wished to infer and convict the defendant on evidence beyond a reasonable doubt. The Jury had the opportunity to assess the believability of defendant's defense, which was that he was merely

present at the scene, not a participant, and to the extent that his defense could be read to suggest that he was a participant, it was as an unwilling participant. Regrettably for defendant, the Jury's determination was against him. That determination was not unreasonable. This court finds that the evidence of defendant's guilt was overwhelming, and that Jury's verdict was correct, and that the Jury's verdict was just.

On July 8, 2010, Appellant appeared before the Court for sentencing, where he was sentenced to an aggregate term of three consecutive life sentences on the murder counts to run consecutive to a twenty-year term on the attempted murder count. (Appellant's overall sentence is 245 years).

State Post-Conviction Relief Proceedings

a) Ineffective Assistance of Counsel Claims

During the State Post-Conviction Relief Proceedings, Appellant raised the following Ineffective Assistance of Trial Counsel ("IATC") claims:

- 1) failure to seek removal of the jury foreman based upon the foreperson having "the wrong idea and making judgments and wanting to go through the [verdict] list and just mark off guilty" which evidences a lack of fairness and impartiality;
- 2) failing to question the juror who stated "we are not going to vote on the issues." During deliberations, a juror sent a note to the Judge stating "there's a young lady that says we are not going to vote on the issues." After receiving the note and conferring with counsel, jurors were not questioned or instructed further, but rather the judge instructed them to continue their deliberations;
- 3) failing to seek the trial judge's recusal because the judge had adjudicated a prior matter in which Appellant had jumped bail;
- 4) failing to challenge inconsistencies between statements of co-defendant Carranza and Captain Glenn, about the location of the machete that was allegedly used in the attack;
- 5) failing to highlight discrepancies in the testimony of one of the victims, Arial;
- 6) failing to investigate the impact of the publicity upon the jury;

7) failing to request a tailored jury charge relating to the gang expert's testimony and request an adverse inference jury charge relating to the destruction of interview notes; and

8) failed to object when Aerial testified that she was sexually assaulted by all of the defendants despite the fact that Appellant was never charged with sexual assault nor did he ever commit such a crime

The State PCR Court denied the Petition which was affirmed by the State Intermediate Court and again by the District Court of New Jersey.

REASONS FOR GRANTING THE WRIT

A. Whether The Appellant's Pre-Miranda Statements Was Obtained In Violation Of *Miranda V. Arizona*, 384 U.S. 436 (1966)?

Mr. Godinez argues that the District Court and the State Appellate Court opinions are an unreasonable application of clearly established federal law.

The "clearly established Federal law" relevant here is the United States Supreme Court decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court held that custodial interrogations have the potential to undermine the 5th Amendment privilege against self-incrimination by possibly exposing a suspect to physical or psychological coercion. *Id.* at 448-50, 467. To guard against such coercion, the Court established a prophylactic procedural mechanism that requires a suspect to receive a warning before custodial interrogation begins. *Id.* at 444; *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2401 (2011).

Under *Miranda*, before questioning suspects in custody, law enforcement officials must inform suspects that: (1) they have the right to remain silent; (2) their statements may be used against them at trial; (3) they have the right to the presence of an attorney during questioning; (4) if they cannot afford an attorney, one will be appointed for them. *Id.* at 478-79.

No additional warnings are required. Warnings do not have to be given exactly as written in the *Miranda* opinion, but law enforcement officials must convey *Miranda*'s essential message to suspects and procedures must be "at least as effective [as *Miranda* warnings] in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it. *Miranda* at 467; see also, *Florida v. Powell*, 559 U.S. 50, 62 (2010).

Before the prosecution may introduce a defendant's incriminating statement it generally must prove that the accused voluntarily, *Colorado v. Connelly*, 479 U.S. 157, 169-171 (1986); knowingly and intelligently *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), waived the *Miranda* Rights. *Miranda* at 475.

In this matter, the District Court erred in affirming the State Court decisions ruling that the statements made by Appellant between arrest and waiver of *Miranda* rights were "not subject to express questioning or its functional equivalent" and, thus, did not require *Miranda* warnings.

The suppression hearing revealed that police burst into the Apartment where Appellant was living in Maryland. Appellant denied he was Rodolfo Godinez. A Detective then slapped Appellant in the face. Appellant then admitted his identity.

As Appellant affirmed at the hearing, the detective who had slapped him immediately asked him "Why did you kill those people?" Three detectives then took Appellant to a bedroom and asked him where his brother was. One Detective asked Appellant several times for this information, telling him that he (the detective) had promised Appellant's mother that police would protect his brother. No *Miranda* rights of any sort had been provided to Appellant to this point.

Police took him out to the detectives' car. While walking to the car, one detective kept asking Appellant "why he had killed the people." Appellant responded by stating "he had not killed anybody." Once in the police car (on the way to the local police station), conversation about the safety of Appellant's mother and family and the whereabouts of Appellant's brother occurred -- all before any *Miranda* warnings were given.

Since the police violated *Miranda*, all of the statements obtained from Appellant following his unlawful questioning with *Miranda* warnings -- including his taped-statement obtained during the formal interrogation at the Maryland Police Station -- should have been suppressed from the evidence under the fruit-of-the-poisonous-tree doctrine.

Appellant had remained with the same detectives from the time he was arrested in the Apartment through his formal interrogation at the local police station. Nothing in the suppression hearing demonstrated that the taped confessions were not tainted by the prior constitutional violation that led to the original oral statements by Appellant inside the Apartment, while walking to the detectives' car and inside the car. The subsequent formal statements, therefore, should have been excluded as fruit of the initial *Miranda* violation.

The trial court erred in ruling that the State had proven a knowing, voluntary and intelligent waiver by Appellant of his *Miranda* rights. The proofs at the suppression hearing showed that Appellant's borderline cognitive ability, limited education and reading ability, and primary language of Spanish (not English, the language spoken to by the Detectives and in which the *Miranda* warnings were provided) rendered Appellant incapable of understanding and sufficiently waiving the *Miranda* rights provided. Dr. Joel Morgan's testimony at the suppression hearing supports this.

Therefore, the Court should grant a Writ on this issue to further review the matter as jurist of reasons could debate differently on this issue.

B. Whether The Testimony Of The State's Gang Expert Witness (And Testimony Of Gang Affiliation) Violated Appellant's Due Process Right To A Fair Trial And Whether The District Court Erred In Denying This Issue

Mr. Godinez argues that the District Court and the State Appellate Court opinions are an unreasonable application of clearly established federal law.

The "clearly established Federal law" relevant here is the United States Supreme Court decision in *United States v. Abel*, 469 U.S. 45, 48 (1984) and *Scales v. United States*, 367 U.S. 203, 220-21, 81 S.Ct. 1469, 1481-82, reh'g denied. 366 U.S. 978, 81 S.Ct. 1912 (1961) which states that "an individual may not be convicted merely for belonging to an organization that advocates crime" which was just what happened here in this case. This case was tried on Appellant's alleged affiliation with the MS-13 gang.

The trial judge allowed the State to call Investigator Hector M. Alicea as an expert on gangs. Investigator Alicea works for the New York State Police. Appellant argues that while Inv. Alicea's testimony may have been otherwise admissible, it should have been barred under *N.J.R.E. 404(b)*, which states:

Except as otherwise provided by Rule 608(b) evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

It is accepted that even when the jurors are instructed that prior crimes or bad acts are being admitted into evidence for reasons other than demonstrating defendant's propensity to engage in criminal activity, such evidence is uniquely prejudicial and inflammatory. The Supreme Court

recognized this as we acknowledged in *State v Hernandez*, 334 N.J. Super. 264, 269-70 (2000), aff'd as modified, 170 N.J. 106 (2001):

Because of the "widespread agreement that other-crimes evidence has a unique tendency to turn a jury against the defendant . . . ," *State v. Stevens*, 115 N.J. 289, 302 (1989), the compromise between the antagonistic interests that the Rule seeks to effect can be achieved only by the most delicate balancing. As *Stevens*, supra, at 303, explains, "[i]t is this inflammatory characteristic of other-crimes evidence that mandates a careful and pragmatic evaluation by trial courts, based on the specific context in which the evidence is offered, to determine whether the probative worth of the evidence outweighs its potential for undue prejudice." The tension between undue prejudice to the defendant and probative value to the State to prove a fact legitimately in issue induced the Supreme Court in *State v. Cofield*, 127 N.J. 328, 338(1992), to articulate further the conditions of admissibility of other-crimes evidence, the Court defining those conditions as follows: 1. The evidence of the other crime must be admissible as relevant to a material issue; 2. It must be similar in kind and reasonably close in time to the offense charged; 3. The evidence of the other crime must be clear and convincing; and 4. The probative value of the evidence must not be outweighed by its apparent prejudice. [(Alteration in original).]

Appellant argued under the first and last Cofield prongs the admission of the prosecution's gang expert's testimony at trial was error. Inv. Alicea's testimony was of little or no probative value, and had such a strong potential for prejudice it should have been excluded.

Inv. Alicea gave several opinions within his area of expertise. Inv. Alicea testified to the MS-13 structure, hierarchy activities and identifiers. This testimony was not needed to show that that perpetrators participated in the crime. The crime was not gang related. The crime was not about gang on gang violence or retaliation. It was simply a crime of opportunity to rob someone (no disrespect to the victims in this case).

The error in the admission of expert testimony is that it included prejudicial testimony of defendant's involvement with the "MS-13" and specifically included Appellant's history and habits of the MS-13. This history included references to Godinez's leadership within the MS-13

gang, which had no relevance to the crime. This testimony was followed by the expert's identification of defendant as a top leader of the MS-13. The gang name are well known, and the public perception is that people who belong to these groups are bad people with a propensity to commit crimes. Even if any of the jury had not heard of the MS-13 before the trial, they knew about their involvement with law enforcement by the trial's end; a fact relevant to no material issue in dispute. Appellant's gang membership would have come before the jury, but not with the same impact as when a member of law enforcement testifies about the gang, its history, its hierarchy, and law enforcement's prior focus on and encounters with gang members. The probative value of the references to Appellant's gang ties were substantially outweighed by its undue prejudice. See *N.J.R.E. 403* ("evidence may be excluded if its probative value is substantially outweighed by the risk of [] undue prejudice"). Gang references are admissible only if *N.J.R.E. 404(b)* is satisfied. "Other crimes evidence is considered highly prejudicial." *State v. Vallejo*, 198 N.J. 122, 133 (2009). "The prejudice of other-crime evidence is its tendency to demonstrate a criminal predisposition; therefore, it poses a distinct risk that it will distract a jury from an independent consideration of the evidence that bears directly on guilt itself." *State v. G.S.*, 145 N.J. 460, 468 (1996). An individual may not be convicted merely for belonging to an organization that advocates crime. *Scales v. United States*, 367 U.S. 203, 220-21, 81 S.Ct. 1469, 1481-82, reh'g denied. 366 U.S. 978, 81 S.Ct. 1912 (1961).

The trial court erred in denying Appellant's motion and ruling that the gang evidence and accompanying expert testimony were admissible to help explain Appellant's alleged motive and intent. The gang evidence and expert testimony had little probative value that was outweighed by the great danger of unfair prejudice to Appellant via his alleged association with the MS-13 gang.

The trial court said that though the danger of unfair prejudice via association with an "evil enterprise" was present, the gang testimony was admissible per *State v. Torres*, 183 N.J. 554, 562-63 (2005). It was "only fair," the court said, that the prosecution be allowed to present evidence to address the issues raised by Appellant's contention that he was "merely present at the scene" and did not share the mens rea of the actors who carried out the killings.

There was no evidence presented at trial that this was a "gang executed crime of murder." The excessive amount of testimony on and about the MS-13 gang, pervaded the fairness of the trial and actually, the trial became one about the MS-13 gang, not the Appellant or what he was charged with.

The District Court erred likewise in affirming the state court decision.

Therefore, this Court should grant a Writ on this issue to further review the matter as jurist of reasons could debate differently on this issue.

C. Whether the prosecutor's summation exceeded the standards enunciated in *Darden v. Wainwright*, 477 U.S. 168 (1986) and whether this summation violated Appellant's due process right to a fair trial

Mr. Godinez argues that the District Court and the State Appellate Court opinions are an unreasonable application of clearly established federal law.

The "clearly established Federal law" relevant here is the United States Supreme Court decision in *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464 (1986), which explained that a prosecutor's improper comments will be held to violate the Constitution only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*, at 181, 106 S.Ct. 2464 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868 (1974)).

Courts evaluate the allegations of prosecutorial misconduct in light of the unique responsibilities of a prosecutor. Prosecutors must pursue their duties "with earnestness and vigor," *United States v. Young*, 470 U.S. 1, 7, 105 S.Ct. 1038, 1042 (1985) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935)), and make a "forceful presentation of the State's case." *State v. Ramseur*, 106 N.J. 123, 320 (1987).

Generally, prosecutorial misconduct does not constitute a ground for reversal unless the conduct is deemed "so egregious that it deprived defendant of a fair trial." *Ramseur*, supra, 106 N.J. at 322. A reviewing court must consider "the tenor of the trial and the degree of responsiveness of both counsel and the court to improprieties when they occurred." *State v. Marshall*, 123 N.J. 1, 153 (1991) (Marshall I). The United States Supreme Court has articulated a similar test: "whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, supra, 77 U.S. at 181 (internal quotations omitted).

The prosecutor made several comments to the jury that undermined the integrity of the trial. The prosecutor inferred to the jury that one alleged co-actor had snitched on Appellant, clearly implying that "that's why" Appellant was "getting back" at the person. Appellant had objected and contended that the improper summation led the jury to think that he co-actor "gave a statement implicating" Appellant, which had not occurred. But the trial court viewed the comment permissible.

Also in summation, the prosecutor inferred that police had tried to obtain evidence from Appellant's phone but "were unsuccessful because [defendant] destroyed his phone." This too was nowhere in the trial evidence and was improper and prejudicial. The prosecutor improperly

suggested that Appellant had made phone calls to the alleged co-defendants, which was not supported by the evidence submitted at trial. Again, the trial court did not order a mistrial.

These comments exceeded fair comments on the evidence and infringed Appellant's right to a fair trial before the jury. A prosecutor may not impart personal knowledge of facts not in evidence. *State v. Staples*, 263 N.J. Super. 602 (App. Div. 1993); *State v. Lockett*, 249 N.J. Super. 428, 434 (App. Div.), certif. den., 127 N.J. 553 (1991).

Further adding to the prejudice to Appellant was the prosecutor's comments in summation that the acts were an "MS-13 mindless attack" which defense counsel argued was improper and beyond the limits of the 404b testimony that had been permitted. Again, Appellant's motion for mistrial was denied by the trial court.

The cumulation effect of the comments unfairly prejudiced Appellant at trial. These comments were objected to by trial counsel, however, the court refused to grant a mistrial.

The District Court likewise erred in affirming the denial of this claim in the State Courts.

Therefore, the Circuit Court should grant a COA on this issue to further review the matter as jurist of reasons could debate differently on this issue.

D. Whether the Extensive Media Exposure and Publicity impacted the fairness of the trial and whether district court decision was contrary to *Shepard v. Maxwell*, 384 U.S. 333 (1966) and *Irvin v. Dowd*, 366 U.S. 717 (1961)?

Mr. Godinez argues that the District Court and the State Appellate Court opinions are an unreasonable application of clearly established federal law.

The "clearly established Federal law" relevant here is the United States Supreme Court decision in *Shepard v. Maxwell*, 384 U.S. 333 (1966) and *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) which explained that a "defendant's right to be protected from prejudicial trial publicity

arises from the State and federal constitutional right to a fair and impartial jury." See also U.S. Const. amends. VI, XIV; N.J. Const. of 1947, art. I, para. 10. See, e.g., *State v. Feaster*, 156 N.J. 1, 50 (1998); *State v. Harvey*, 151 N.J. 117, 210 (1997); *State v. Bey*, 112 N.J. 45, 75 (1988); *State v. Williams*, 93 N.J. 39, 59-62 (1983).

To establish juror partiality, the defendant must show that publicity either actually prejudiced an individual juror, see *Murphy v. Florida*, 421 U.S. 794, 800-03 (1975), **or so pervaded the proceedings that it raised a presumption of inherent prejudice**. See, *Sheppard v. Maxwell* at 355-57; *Estes v. Texas*, 381 U.S. 532, 544 (1965); *Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963).

When there exists a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should grant a continuance until the threat abates or allow a change of venue to another area where publicity about the case is less pervasive. *Sheppard* at 363.

"A defendant is entitled to a jury that is free of outside influences and will decide the case according to the evidence and arguments presented in court in the course of the criminal trial itself." *State v. Williams*, supra, 93 N.J. at 60. And see *Sheppard v. Maxwell*, 384 U.S. 333, 351, 86 S.Ct. 1507, 1516 (1966). The trial judge, therefore, must take such action as is necessary to assure that the jurors have not become prejudiced as a result of facts which "could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge." *State v. Scherzer*, 301 N.J. Super. 363, 486 (App. Div.), certif. denied, 151 N.J. 466 (1997) (quoting *Panko v. Flintkote Co.*, 7 N.J. 55, 61 (1951)). "The test is 'not whether the irregular matter actually influenced the result but whether it had the capacity of doing so.'" *Scherzer*, supra, 301 N.J. Super. at 486 (quoting *Panko*, supra, 7 N.J. at 61).

The trial court in this instant matter erred in denying Appellant's motions to remove jurors for cause (during jury selection), and for mistrials during trial and motion for a new trial following the jury verdict's because there was way too much inflammatory and prejudicial media exposure that compromised the fairness of the trial and jurors. Several jurors admitted during jury selection having knowledge of the crimes in question and about the MS-13 gang in which defendant was an alleged "recruiter." Several jurors had been exposed to media reports about the crimes. Some "took an interest" in the case upon reading newspaper accounts.

- 1) One juror said that "people on the street were talking about it" and the juror was "getting phone calls about it;"
- 2) Another juror said that people in her neighborhood talked about the "execution style" killings and fear for their safety in the area;"
- 3) Another juror understood that "people were executed in the schoolyard;"
- 4) Newspaper and television accounts informed one juror that the crimes involved "an alleged gang with Latino guys;"
- 5) One juror had seen a documentary on the "MS-13 gang" and had formed an opinion that it was involved with "nefarious stuff" like "a war with drugs;"
- 6) Another juror upon seeing an MS-13 documentary said that if it was shown that the defendant had "an affiliation like that" that "would mean that he is guilty of a crime;"
- 7) Another juror, after seeing an account of the crimes on television, told her husband that "her prayer is that whoever is responsible" that "person should be brought to justice because I don't think any woman deserves to lose a child."

The trial court erred in denying Appellant's motions to remove for cause the jurors who were exposed to the crimes via media accounts or who had seen documentaries about the MS-13 gang, and in denying Appellant's subsequent motions for mistrial and for a new trial on ground of inflammatory publicity and compromise of the fairness of the jurors.

Additionally, the trial court should have granted Appellant's request for a change of venue or at a minimum, empanel a foreign jury, because the pretrial publicity and pretrial exposure of so many jurors failed to ensure that Appellant received a fair trial by an unbiased jury who had not already prejudged Appellant's guilt. The trial court had an independent duty to act swiftly and decisively to overcome the potential bias of the jury from outside influences, *Irvin v. Dowd*, *supra*, but failed to do so.

The District Court likewise erred in affirming the State Court decisions, therefore, this Court should grant a COA on this issue to further review the matter as jurist of reasons could debate differently on this issue.

E. Whether the district court failure to utilize the *Jackson v. Virginia*, 443 U.S. 307 (1979) standard in analyzing Appellant's insufficient evidence claim a violation of Appellant's right to a fair trial

Mr. Godinez argues that the District and the State Appellate Court opinions are an unreasonable application of clearly established federal law.

The "clearly established Federal law" relevant here is set forth in *Jackson v. Virginia*, 443 U.S. 307, 316-19, 321, 99 S.Ct. 2781 (1979); see also, *In re Winship*, 397 U.S. 358 (1970). In a habeas corpus proceeding, where the sufficiency of the evidence is in contention:

[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Byrd*, 105 F.3d 145, 147 (3d Cir. 1997) (quoting *Jackson v. Virginia*, 443 U.S. at 318-19) (internal citations and quotes omitted). See also *Robertson*, 580 F.3d at 164; *Orban v. Vaughn*, 123 F.3d 727, 731-33 (3d Cir. 1997).

The sufficiency of the evidence does express a federal constitutional claim. See *Robertson v. Klem*, 580 F.3d 159, 165 (3d Cir. 2009); see also *Fiore v. White*, 531 U.S. 225, 228-29 (2001) (per curiam) ("We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.")).

In the within matter, the District Court's reliance upon the Appellate Division decision was in error because the Appellate Division failed to consider the entirety of the evidence -- the evidence presented by both the State and defense -- as required by state and federal law, *State v. Williams*, 218 N.J. 576, 594 (2014) and *Jackson v. Virginia*, 443 U.S. 307, 316-19, 99 S.Ct. 2781 (1979) (stating that due process demands that "all of the evidence" be considered in deciding such an issue (emphasis omitted)).

Appellant views the trial evidence to be inadequate to sustain his conviction. Appellant asserts that the State did not prove beyond a reasonable doubt that 1) that he was the ringleader who had ordered the other co-defendants to attacked the victims; 2) that he was a 'high-ranking' MS-13 member; and 3) that he participated in the alleged crimes, even though he was present at the playground.

The federal constitutional standard derives from the Sixth and Fourteenth Amendment guarantee "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof -- defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson*, 443 U.S. at 316, 99 S.Ct. 2781; see also *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970) ("[T]he Due Process Clause

protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

Applying that standard, federal courts determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781. As the Supreme Court noted, that "standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Ibid.*

The trial court erred in denying Appellant's motion for a new trial because the verdict was against the weight of the evidence and a manifest denial of justice under the law.

Nothing in the State's proofs provided direct evidence of Appellant's guilt. No physical evidence linked Appellant to the murder weapons. Bullet fragments recovered from the victims were not turned over to Ballistic Experts until years after the crime (just weeks before the trial).

The one eyewitness who was not involved in the crimes, testified that he heard a young lady's voice "begging for mercy," but his description of the gunshots and the number of men observed was not consistent with trial proofs. The State acknowledged that their one eyewitness statement to the police had been lost by the police officers.

The lone surviving victim, gave little evidence that implicated Appellant; her identification was inconsistent at best and did not implicate Appellant. Although Appellant's photo was in one of the arrays shown, the victim did not identify Appellant as a perpetrator. And one of the persons that she identified as a perpetrator was not involved in the crimes (the State acknowledged that this person was incarcerated at the time).

The District Court likewise erred in affirming the State Court decisions and never utilize the *Jackson* standard of review, therefore, this Court should grant a Writ on this issue to further review the matter as jurist of reasons could debate differently on this issue.

F. Whether the district court's decision on ineffective assistance of counsel claims contrary to *Strickland v. Washington*, 466 U.S. 668 (1984) and whether the Appellant's rights were violated by this

Mr. Godinez argues that the District and the State Appellate Court opinions are an unreasonable application of clearly established federal law.

The "clearly established Federal law" relevant here is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) which stated that the purpose of the effective assistance guarantee of the Sixth Amendment is ... to ensure that criminal defendants receive a fair trial. *Id.* at 689.

In this case, trial counsel was ineffective for:

- 1) failure to seek removal of the jury foreman based upon the foreperson having "the wrong idea and making judgments and wanting to go through the [verdict] list and just mark off guilty" which evidences a lack of fairness and impartiality;
- 2) failing to question the juror who stated "we are not going to vote on the issues." During deliberations, a juror sent a note to the Judge stating "there's a young lady that says we are not going to vote on the issues." After receiving the note and conferring with counsel, jurors were not questioned or instructed further, but rather the judge instructed them to continue their deliberations;
- 3) failing to seek the trial judge's recusal because the judge had adjudicated a prior matter in which Appellant had jumped bail;
- 4) failing to challenge inconsistencies between statements of co-defendant Carranza and Captain Glenn, about the location of the machete that was allegedly used in the attack;
- 5) failing to highlight discrepancies in the testimony of one of the victims, Aerial;

- 6) failing to investigate the impact of the publicity upon the jury;
- 7) failing to request a tailored jury charge relating to the gang expert's testimony and request an adverse inference jury charge relating to the destruction of interview notes; and
- 8) failed to object when Aerial testified that she was sexually assaulted by all of the defendants despite the fact that Appellant was never charged with sexual assault nor did he ever commit such a crime

The District Court erred in affirming the State Court decisions, therefore, the Circuit Court should grant a COA on this issue to further review the matter as jurist of reasons could debate differently on this issue.

G. Whether the district court decision contrary to Appellant's sixth amendment right to a fair trial when the state was allowed to introduced testimony/evidence of an uncharged crime?

The State presented a significant amount of inflammatory evidence, including an uncharged bad acts to prove the other allegations against defendant. The evidence was highly prejudicial, resulting in an inherent danger "a jury may convict a defendant not for the offense charged, but for the extrinsic offense." *State v. Garrison*, 228 N.J. 182, 193-94 (2017). Courts are convinced "the inherently prejudicial nature of [wrongs or bad acts] evidence cast[ed] doubt on [the] jury's ability to follow even the most precise limiting instruction." *State v. Stevens*, 115 N.J. 289, 309 (1989).

Under *N.J.R.E.* 404(b), uncharged extrinsic bad acts may not be introduced to demonstrate a defendant's criminal disposition as a basis for proving guilt of the crimes charged. *Rule 404(b)* provides that

evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity

therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

One of the well-recognized dangers inherent in the admission of so-called "other-crimes evidence" is that a jury may convict a defendant not for the offense charged, but for the extrinsic offense. *State v. Skinner*, 218 N.J. 496, 514 (2014); See also, *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (in banc), cert. denied, 440 U.S. 920, 99 S.Ct. 1244, (1979) (the court pointed out that "one of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for the extrinsic offense.") 82 F.2d at 914. The court continued, "this danger is particularly great where, as here, the extrinsic activity was not the subject of a conviction; the jury may feel that the defendant should be punished for that activity even if he is not guilty of the offense charged." Id. Courts therefore "cautiously examine any evidence that is in the nature of prior bad acts, wrongs, or, worse, crimes by a defendant" because such evidence has a tendency to prejudice a jury. Ibid. "Put simply, a defendant must be convicted on the basis of his acts in connection with the offense for which he is charged. A defendant may not be convicted simply because the jury believes that he is a bad person." Ibid.

In order to minimize the dangers presented by other-crimes evidence, this Court has insisted that evidence proffered under *Rule 404(b)* "must pass [a] rigorous test." *State v. Kemp*, 195 N.J. 136, 159 (2008). In *State v. Cofield* we adopted the following four-part test for analyzing the admissibility of other-crimes evidence: 1. The evidence of the other crime must be admissible as relevant to a material issue; 2. It must be similar in kind and reasonably close in time to the offense charged; 3. The evidence of the other crime must be clear and convincing; and

4. The probative value of the evidence must not be outweighed by its apparent prejudice. [127 N.J. 328, 338 (1992).]

To satisfy the first prong of the Cofield test, the "proffered evidence must be 'relevant to a material issue genuinely in dispute.'" *State v. Gillispie*, 208 N.J. 59, 86 (2011) (quoting *State v. Darby*, 174 N.J. 509, 519 (2002)). Evidence is relevant if it tends "to prove or disprove any fact of consequence to the determination of the action." *N.J.R.E.* 401. The main focus "in determining the relevance of evidence is whether there is a logical connection between the proffered evidence and a fact in issue." *State v. Willis*, 225 N.J. 85, 98 (2016)). The burden of establishing this connection is not onerous: "if the evidence makes a desired inference more probable than it would be if the evidence were not admitted, then the required logical connection has been satisfied." *State v. Williams*, 190 N.J. 114, 123 (2007) (describing standard for connection as "generous"). "Moreover, the material fact sought to be proved must be one that is actually in dispute[.]" *Willis*, *supra*, 225 N.J. at 98).

In this case, one of the victims, Aerial, testified that the "black boy" sexually assaulted her and her friend Iofemi. The problem is that Appellant was never charged with such acts in the Indictment because he never committed any such act. Two of his co-defendants did, however, the jury was allowed to hear that the victim was sexually assaulted, which should not have been allowed. After trial counsel objected, the Court told the jury that Defendant was not charged with sexual assault of Aerial and that sexual assault was not a crime that the jury would be considering in the case. The judge never included Iofemi in its limited instruction to the jury, therefore, there's a strong possibility that the jury could have thought that maybe he wasn't charged with sexual assault against Aerial, but against Iofemi. Either way, there is no way to determine what

they had heard from the victim was ignored. Even with a jury instruction, once something is said, it can't be undone or erased from a person's mind.

The second prong of the Cofield test requires that the other-crimes evidence "be similar in kind and reasonably close in time to the [alleged crime]." *Skinner*, supra, 218 N.J. at 515 (quoting *Cofield*, supra, 127 N.J. at 338).

Under the third prong of the Cofield framework, evidence of the other crime must be clear and convincing. It is undisputed that Appellant never committed the sexual assault. Two of his co-defendants did and they were charged with the offense.

Finally, the Court must consider whether the uncharged other-crime evidence meets the fourth prong of the Cofield test - whether the probative value of the evidence is outweighed by its apparent prejudice - "generally the most difficult part of the test." *State v. Barden*, 195 N.J. 375, 389 (2008). Some types of evidence, however, "require a very strong showing of prejudice to justify exclusion. One example is evidence of motive or intent." *Skinner*, supra, 218 N.J. at 516 (quoting *State v. Covell*, 157 N.J. 554, 570 (1999)).

Based on the foregoing, it is being requested that the Circuit Court grant a COA on this issue to further review the matter as jurist of reasons could debate differently on this issue.

CONCLUSION

For the foregoing reasons, certiorari should be granted in this case.

Date: x 3-2-23

x Rodolfo Godinez

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