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Recent Developments: *Burris v. State*: Expert Witness Testimony Concerning a Defendant's Gang Affiliation Must Create a Nexus between the Crime and Gang Membership and Any Prejudicial Effect of the Testimony Must Not Substantially Outweigh the Probative Value

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RECENT DEVELOPMENT

BURRIS V. STATE: EXPERT WITNESS TESTIMONY CONCERNING A DEFENDANT'S GANG AFFILIATION MUST CREATE A NEXUS BETWEEN THE CRIME AND GANG MEMBERSHIP AND ANY PREJUDICIAL EFFECT OF THE TESTIMONY MUST NOT SUBSTANTIALLY OUTWEIGH THE PROBATIVE VALUE.

By: James M. Darrah

The Court of Appeals of Maryland held that gang-related testimony linking a defendant to gang activity was inadmissible despite the fact that such testimony created a nexus between the crime and gang affiliation. *Burris v. State*, 435 Md. 370, 78 A.3d 371 (2013). The court reasoned that, in addition to successfully creating a nexus between the crime and gang involvement, the testimony's probative value must also outweigh the risk of unfair prejudice. *Id.* at 392, 78 A.3d at 384. Specifically, expert testimony regarding a gang's history and prevalence in prisons, as well as the defendant's gang-related tattoos, was inadmissible as such testimony failed to prove defendant's motive and did not sufficiently link the defendant's gang affiliation with witness recantations. *Id.* at 396, 78 A.3d at 386.

A jury sitting in the Circuit Court for Baltimore City convicted Shelton Burris ("Burris") of first degree murder in the killing of Hubert Dickerson, Jr. ("Dickerson"). The State theorized that Burris, an alleged hit man for the Black Guerilla Family ("BGF"), was ordered by a gang boss, Bam, to kill Dickerson because of an unpaid debt. BGF is a gang prevalent in Baltimore and Maryland prisons.

Prior to trial, the State proffered Sergeant Dennis Workley as a "gang expert" to testify on BGF's propensity for violence and Burris's involvement in the gang. Further, the prosecution intended on utilizing Workley's testimony describing Burris's gang activity to explain why several witnesses recanted their pre-trial statements. Although Burris contended that such evidence did not further the State's case and only "tainted the water" for the jury, the trial court disagreed and admitted the testimony.

Burris was ultimately convicted of first degree murder. On appeal, the Court of Special Appeals of Maryland affirmed the trial court's decision, holding that the court did not err in admitting Workley's testimony. Burris appealed to the Court of Appeals of Maryland, which granted certiorari on two issues: whether the trial court erred in admitting gang-related evidence, and whether the intermediate court erred in holding that expert testimony was admissible to explain why witnesses recanted their testimony.

The Court of Appeals of Maryland began by analyzing whether evidence of prior bad acts may be introduced under Md. Rule 5-404(b). *Burris*, 435 Md. at 385-86, 78 A.3d at 380. Under Md. Rule 5-404(b), evidence of prior

bad acts may be admissible to prove motive, among other contested issues. *Id.* The court acknowledged that even when evidence of prior bad acts is established clearly and convincingly, the evidence is only admissible where its probative value substantially outweighs its prejudicial effect. *Id.* at 386, 78 A.3d at 380.

To determine whether Workley's testimony was admissible, the court looked to its recent holding in *Gutierrez v. State*, 423 Md. 476, 32 A.3d 2 (2011). *Burris*, 435 Md. at 386, 78 A.3d at 381. In *Gutierrez*, the court determined that evidence regarding the history, hierarchy, and practices of a street gang was admissible as evidence of prior bad acts. *Burris*, 435 Md. at 386, 78 A.3d at 381 (citing *Gutierrez*, 423 Md. at 481, 32 A.3d at 5). The test established in *Gutierrez* required that to be admissible, gang-related testimony must establish that the crime charged was gang-related and that the probative value of the testimony was not substantially outweighed by unfair prejudice. *Burris*, 435 Md. at 386, 78 A.3d at 381 (citing *Gutierrez*, 423 Md. at 481-82, 32 A.3d at 5).

Applying the *Gutierrez* two part test, the court first determined whether sufficient fact evidence existed to establish a nexus between Burris's crime and his gang membership, even though Burris was not charged with a gang-related crime. *Burris*, 435 Md. at 391, 78 A.3d at 384. At trial, the State introduced alleged statements of fact that depicted Burris as a hit man for BGF, introduced establishing that Bam ordered Burris to commit the killing, and that Burris was overheard discussing a murder he committed. *Id.* at 392, 78 A.3d 384. The court concluded that such evidence sufficiently established a nexus between Burris's alleged criminal activity and him membership in BGF. *Id.*

The court, having established that the State sufficiently met the threshold for admissibility of gang evidence, turned to the second prong of the *Gutierrez* test, which requires that probative value of the evidence must exceed its risk of unfair prejudice. *Burris*, 435 Md. at 393, 78 A.3d at 384. Balancing these interests, the court held that the danger of unfair prejudice resulting from Workley's testimony exceeded its probative value. *Id.* at 392, 78 A.3d at 384. Specifically, the court noted that the testimony of Workley likely influenced the jury to disregard evidence or the lack thereof regarding the charged crime. *Id.* at 392, 78 A.3d at 384 (citing *Odum v. State*, 412 Md. 593, 615, 989 A.2d 232, 245 (2010)).

Acknowledging the inherent risk of admitting gang-related evidence given the negative image of gangs, the court reasoned that even if the threshold requirement between the crime and gang affiliation is met, evidence regarding the gang not material to the case at bar must be excluded. *Burris*, 425 Md. at 393-94, 78 A.3d at 385. The court reviewed Workley's lengthy testimony detailing BGF's prevalence in Maryland prisons and stated that such testimony was prejudicial insofar as it was not material. *Id.* The court additionally noted that Workley's testimony describing BGF as a violent organization was prejudicial, as such testimony could reflect

negatively on Burris's character. *Id.* Further, the court concluded that Workley's testimony discussing Burris's tattoos was incendiary. *Id.* at 394-95, 78 A.3d at 385-86.

Ultimately, the court concluded that Workley's testimony was not probative in that it failed to explain Burris's motive and did not introduce any new substantive evidence that was material to the case. *Burris*, 435 Md. at 396-97, 78 A.3d at 387. The court cited multiple other witnesses that had attested to Burris's gang membership and that Workley's testimony failed to provide any evidence that linked Burris's affiliation with BGF to witness recantation or motive. *Id.* at 396, 78 A.3d at 386-87. Thus, because the second prong of the *Gutierrez* test was not met, the court found that Workley's testimony was inadmissible and reversed the lower court's decision. *Id.* at 397, 78 A.3d at 387.

In *Burris*, the court held that gang evidence would not be admitted if its risk of unfair prejudice outweighed its probative value, even if a nexus existed between gang membership and the crime. Based on the court's holding, Maryland criminal defense attorneys should be wary of prosecutors' attempts to introduce gang evidence and should also note that sufficient evidence may exist to link a crime to gang membership, such evidence must also have probative value to outweigh possible prejudice.