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BURRIS v. STATE: SUGGESTIONS FOR THE CONTINUED DEVELOPMENT OF THE RULE FOR ADMITTING THE TESTIMONY OF GANG EXPERTS

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In *Burris v. State*,[1] the Court of Appeals of Maryland asked whether it was appropriate to admit expert testimony on the culture and history of street gangs when doing so could explain why witnesses recanted their pretrial statements concerning the defendant's involvement in a murder case.[2] Acknowledging the potentially inflammatory nature of alleged gang membership, the court applied the two-part rule for admitting expert testimony on gangs that it had previously adopted in *Gutierrez v. State*.[3] It unanimously concluded that while there was adequate fact evidence connecting the murder to gang activity, the potential for unfair prejudice from the expert testimony outweighed its probative value.[4] Therefore, the court held that the testimony should have been excluded.[5] The court reached the necessary conclusion, but it missed the opportunities to further clarify the correct application of the *Gutierrez* test, and to define when, if ever, expert testimony could permissibly allege witness intimidation as an explanation for why a government witness might recant her pretrial statements. First, the court should have explicitly included in its test a requirement that the prosecution demonstrate the defendant's gang affiliation by clear and convincing evidence.[6] Second, it should have set forth a standard of proof required to establish a gang connection to a crime.[7] Third, the court ought to have stipulated a requirement that prosecutors demonstrate the presence of witness intimidation before a court might permit an expert to describe patterns of witness intimidation generally.[8] Failing to include such safeguards in the

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1. 435 Md. 370, 78 A.3d 371 (2013).
2. *Id.* at 384, 78 A.3d at 379.
3. *Id.* at 386, 78 A.3d at 381 (citing Gutierrez v. State, 423 Md. 476, 481–82, 32 A.3d 2, 5 (2011)).
4. *Id.* at 392, 78 A.3d at 384.
5. *Id.* at 397, 78 A.3d at 387.
6. *See infra* Part IV.A.
7. *See infra* Part IV.B.
8. *See infra* Part IV.C.

state's jurisprudence concerning such potentially toxic evidence as a defendant's membership in a gang is to risk a significant curtailment of the right to a fair trial.

I. THE CASE

On April 17, 2009, Shelton Burris was indicted in the Circuit Court for Baltimore City for the murder of Hubert Dickerson, Jr.[9] Prior to trial, the State moved to introduce evidence pertaining to the history and organization of the Black Guerilla Family (BGF) gang and to Burris' involvement with that association, including expert testimony provided by Baltimore City Detective, Sgt. Dennis Workley.[10] Over defense counsel's objection, the court allowed the testimony based on the State's argument that the murder was a gang-ordered execution resulting from the victim's failure to repay a debt to "Bam," a BGF boss, and thus that Burris' role in the BGF provided motive for the killing.[11]

At trial, the prosecution brought four different fact witnesses, each of whom either completely recanted his or her previous statements connecting Burris to the murder and to the BGF, or at least hesitated to reproduce such testimony in open court.[12] The prosecution then brought to the stand Sgt. Workley, who testified as to the history and culture of the BGF and its illegal activities within Maryland's prison system, described Burris' classification as a member of the BGF by the Division of Corrections, and interpreted Burris' tattoos as evidence of self-identification with the BGF.[13] The defense objected that all testimony concerning the BGF or Burris' tattoos was irrelevant and prejudicial because there was no evidence marking the instant offense as a gang-related murder or identifying the perpetrator by his

9. Burris v. State, 206 Md. App. 89, 94, 47 A.3d 635, 638 (2012), *rev'd*, Burris v. State, 435 Md. 370, 78 A.3d 371 (2013).

10. *Id.* at 95, 47 A.3d at 638.

11. *Id.* at 95–96, 47 A.3d at 638–39.

12. *Id.* at 97–102, 47 A.3d at 640–42. One witness, who previously told the police that he had heard Burris admit to killing a man and had heard Bam praise him for it, testified that he had lied in the interview because he feared the police would charge him for drug possession. *Id.* at 97–99, 47 A.3d at 640–41. A second witness, who told police he had seen Burris shoot the victim, testified that he made the story up on Bam's instruction. *Id.* at 100–101, 47 A.3d at 641–42. The third witness initially testified at trial that he had no recollection of discussing the murder with the police, but eventually stated that he had heard Burris confess to killing someone who owed Bam money. *Id.* at 102, 47 A.3d at 642. The fourth witness testified that she had been intoxicated during the interview with police in which she claimed to have heard Burris confess to a murder. *Id.*

13. *Id.* at 103–04, 47 A.3d at 642–43. Specifically, Sgt. Workley commented on the following tattoos: "Baltimore" and "Franklin" identify the territory in which Burris does business; the number 187 next to a picture of a gun represents the California Penal code for homicide; "OG" stands for "original gangster" and goes along with another tattoo, which reads "work real, real n---- don't die;" that images of weapons represent the concept in gang culture of "death before dishonor," and "Sixx 9" is Burris' street name. *Id.* (altered from original).

tattoos.[14] The court overruled these objections and admitted the testimony based on its observations that fact witnesses had recanted their statements prior to trial, that these witnesses had previously connected Burris to the BGF, and that Sgt. Workley's expert testimony concerning the BGF explained why those witnesses might have changed their statements.[15] The court further stated that jury instructions could mitigate any prejudice that Burris might suffer because of testimony connecting him to a street gang.[16] The jury convicted Burris of first-degree murder and of the use of a handgun in the commission of a crime of violence.[17]

On appeal, the Court of Special Appeals devised a test for admitting expert testimony to explain witness recantation, holding:

> [E]xpert testimony about the history, hierarchy, and common practices of a street gang is admissible where: (1) the evidence establishes that a witness has previously given information to law enforcement officers incriminating the defendant and the witness recants the information at trial, (2) the reason for the recantation is related to appellant's membership in, or affiliation with, a gang, and (3) the probative value of the expert testimony is not substantially outweighed by the danger of unfair prejudice to the defendant.[18]

Applying this rule to the facts at hand, the court quickly concluded that the first two of the above-enumerated conditions were met, i.e., (1) that witnesses had undisputedly recanted their pretrial statements[19] and (2) that two of those witnesses expressed that Burris' BGF membership made them afraid to testify against him.[20] As for the third condition, the court also concluded that the probative value of Sgt. Workley's testimony was not outweighed by its potential to unfairly prejudice Burris.[21] The court noted a number of factors demonstrating the probative value of this testimony, including: (1) that three witnesses recanted their statements; (2) that Sgt. Workley's opinion that Burris was a member of BGF added validity to statements made by other witnesses; (3) that Burris' tattoos confirmed his self-identification as a gang member and connected him to the neighbor-

14. *Id.* at 95, 104, 47 A.3d at 638, 643.

15. *Id.* at 104–05, 47 A.3d at 643–44.

16. *Id.* at 105, 47 A.3d at 644. The eventual jury instructions read, in pertinent part: "The Defendant is not charged with a crime involving being a member of any gang. Information about the Defendant's involvement if any with a gang was allowed only for you to understand the relationship between the Defendant and other parties in this case." *Id.* at 106, 47 A.3d at 644.

17. *Id.* at 93, 47 A.3d at 637.

18. *Id.* at 126–27, 47 A.3d at 656–57 (citing Gutierrez v. State, 423 Md. 476, 32 A.3d 2 (2011)).

19. *Id.* at 127, 47 A.3d at 657.

20. *Id.* at 129, 47 A.3d at 658.

21. *Id.* at 135–36, 47 A.3d at 662.

hood of the shooting; and (4) that the background information on the BGF explained why witnesses would fear Burris, why they described him as a hit man, and why Burris would obey the orders of "Bam," a BGF boss.[22] In light of that probative value, the court reasoned that potential prejudice to Burris was relatively limited because (1) Sgt. Workley never said that Burris actually intimidated witnesses, (2) he did not opine as to Burris' position in the BGF, and (3) he never alleged Burris or the BGF committed any specific crimes.[23] Furthermore, while Sgt. Workley did testify as to the Division of Corrections' classification of Burris, he avoided reference to Burris' past convictions, or sentences.[24]

Having thus described how the probative value of Sgt. Workley's testimony outweighed the danger it had to prejudice Burris, the Court of Special Appeals held that the circuit court did not abuse its discretion by admitting said testimony.[25] The Court of Appeals granted certiorari to consider whether the circuit court erred in admitting extensive gang-related evidence, particularly the testimony of an expert who explained why witnesses may have recanted prior statements.[26]

II. LEGAL BACKGROUND

If admitted at trial, evidence of prior "bad acts" can have a tendency to lead a jury to convict a defendant on the basis of her general character as opposed to the evidence that the government presents concerning the criminal offense in question.[27] Aware of this danger, Maryland courts have established a three-step inquiry to determine whether bad acts evidence is admissible: assessing the reason for admission, the strength of the connection between the defendant and the bad act in question, and the relative prejudicial risk and probative value of admitting the evidence.[28] When the evidence in question is the testimony of a gang expert, the Court of Appeals of Maryland has devised a more specific test, requiring 1) a connection between the gang activity and the crime in question and 2) a probative value of admitting the evidence that is not outweighed by its potential for preju-

22. *Id.* at 131–35, 47 A.3d at 659–61.

23. *Id.*

24. *Id.* at 132–33, 47 A.3d at 660.

25. *Id.* at 136, 47 A.3d at 662. The Court of Special Appeals also considered two other grounds for appeal: the appropriateness of a "CSI-type" voir dire question and the admissibility of a recorded phone call between Burris and the girlfriend of one of the State's witnesses. On both grounds, the court upheld the circuit court's rulings. *Id.* at 136–45, 47 A.3d at 662–67.

26. Burris v. State, 435 Md. 370, 384, 78 A.3d 371, 379 (2013).

27. Hurst v. State, 400 Md. 397, 407, 929 A.2d 157, 162 (2007); Ross v. State, 276 Md. 664, 669, 350 A.2d 680, 684 (1976).

28. *See infra* Part II.A.

dice.[29] The court laid out this test for gang evidence in *State v. Gutierrez*, which provides a helpful exploration of how the test functions.[30]

A. The Maryland Rules of Evidence Restrict the Admissibility of "Bad Acts" Evidence That Carries with It a Danger of Unfairly Prejudicing the Defendant

"[T]here are few principles of American criminal jurisprudence more universally accepted than the rule that evidence which tends to show that the accused committed another crime independent of that for which he is on trial, even one of the same type, is inadmissible."[31] Generally speaking, the key factor governing the admissibility of evidence is its relevance.[32] Except where prohibited by constitution, statute, or rule, relevant evidence is admissible, and "[e]vidence that is not relevant is [never] admissible."[33] Maryland Rule of Evidence 5-403 provides one such prohibition, asserting that even if evidence is relevant, the trial court may exclude it whenever "its probative value is substantially outweighed by the danger of," among other things, "unfair prejudice."[34] Rule 5-404(b) identifies one particular avenue of potential prejudice, namely: "[e]vidence of other crimes, wrongs, or acts including delinquent acts," which is not admissible for the purpose of proving a defendant's bad character.[35] The term "bad acts evidence" refers to such evidence generally.[36]

While it is not always clear whether something constitutes a "bad act,"[37] the Court of Appeals has explained that "a bad act is an activity or

29. *See infra* Part II.B.

30. *See infra* Part II.C.

31. State v. Taylor, 347 Md. 363, 369, 701 A.2d 389, 392 (1997) (quoting Cross v. State, 282 Md. 468, 473, 386 A.2d 757, 761 (1978)).

32. *See* MD. R. 5-402.

33. *Id.* "Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MD. R. 5-401.

34. MD. R. 5-403.

35. MD. R. 5-404(b). Courts reason that if jurors are presented with evidence that a defendant committed an unrelated bad action in the past, then there is a risk that they will conclude that the defendant is a "bad person," and that either she was more likely to commit any given crime, or she should be convicted in the current litigation simply to punish her for being a bad person. Wynn v. State, 351 Md. 307, 317, 718 A.2d 588, 593 (1998); Harris v. State, 324 Md. 490, 496, 597 A.2d 956, 960 (1991).

36. Gutierrez v. State, 423 Md. 476, 489, 32 A.3d 2, 9–10 (2011).

37. "The most obvious reason for not defining 'bad acts' is that many acts, in and of themselves, are not 'bad.'" Klauenberg v. State, 355 Md. 528, 547, 735 A.2d 1061, 1071 (1999) (explaining that a given action often "cannot be said to be bad or good" until placed within the context of a lawsuit). Given the difficulty of such a definition, combined with the fact that the court's primarily concern is not to exclude some type of evidence for its own sake, but rather to avoid the result of character assault, it is unsurprising that it has not prioritized a need to lay out a strict definition of "wrongs." *See* Whittlesey v. State, 340 Md. 30, 58, 665 A.2d 233, 237 (1995) ("[A]cts that may reflect negatively on the defendant's character implicate the policies underlying the rule

conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit."[38] Courts should generally not admit such evidence because of the risk that it could encourage the jury to come to a guilty verdict even when unsupported by the facts of the case before it.[39] The Court of Appeals has declared that the rule governing the admissibility of evidence of other bad acts should correctly be an "exclusionary" one.[40] In other words, there is a presumption that such evidence is inadmissible except where an exception applies,[41] and the burden a party must carry in order to win admittance of such evidence is significant.[42]

The Court of Appeals interprets Rule 5-404(b), in combination with Rule 5-403, to imply a three-step analysis for the admission of bad acts evidence (referred to at times as the *Harris-Faulkner* test).[43] First, a court must inquire whether the state's rationale for admitting the evidence would fall under a recognized exception to exclusion.[44] Second, the State must be able to clearly and convincingly establish the basis for the bad act evidence in question.[45] Finally, the probative value of the evidence must not be outweighed by any unfair prejudice that is likely to result from its admission.[46]

against other crimes evidence." (citing E. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE §2:14 (1994)).

38. *Klauenberg*, at 549, 735 A.2d at 1072.

39. Neam v. State, 14 Md. App. 180, 189, 286 A.2d 540, 545 (1972) ("The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge." (quoting 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 194, at 646 (3d ed. 1940))).

40. Harris v. State, 324 Md. 490, 500, 597 A.2d 956, 961 (1991).

41. *Id.*

42. *Id.*, 597 A.2d at 962 ("The exclusionary form of the rule clearly serves to remind the bench and bar that, unlike most other evidence, this evidence carries with it heavy baggage that must be closely scrutinized before admissibility is warranted.").

43. Whittlesey v. State, 340 Md. 30, 58–59, 665 A.2d 233, 237 (1995); *see also Harris*, 324 Md. at 497–98, 597 A.2d at 960; State v. Faulkner, 314 Md. 630, 634–35, 552 A.2d 896, 898 (1989).

44. State v. Westpoint, 404 Md. 455, 489, 947 A.2d 519, 539 (2008) (citing Wynn v. State, 351 Md. 307, 317, 718 A.2d 588, 593 (1998)).

45. *Id.*

46. *Id.*, 947 A.2d 539–40.

1. Step One in the Harris-Faulkner *Test Is to Ask Whether the Evidence Under Consideration Fits into One of the Recognized Exceptions to the Rule Against Admitting Evidence of Prior Bad Acts*

The first step in the test for assessing the admissibility of bad acts evidence is to determine whether it serves an approved purpose.[47] Such a purpose demonstrates that the evidence has "special relevance"—that is, it is "substantially relevant to some contested issue in the case and [not be] offered" simply to prove criminal character.[48] So what purposes are legitimate? Rule 5-404(b) offers a list of permissible justifications for admitting bad acts evidence, including "proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident."[49] Essentially, this amounts to a list of possible contested issues to which bad acts evidence might have "special relevance."[50] While admitting that this list of actions is not exclusive, the Court of Appeals adheres fairly closely to it.[51]

For example, in *Harris v. State*,[52] in which the defendant was being tried for possession of cocaine with the intent to distribute, the Court of Appeals ruled it improper to admit evidence of his prior conviction for possession with the intent to distribute heroin.[53] "Tendency to commit similar crimes" is not one of the exceptions listed in Rule 5-404(b), and the court declined to find it a legitimate reason to introduce bad acts evidence.[54]

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47. *Id.*

48. *Harris*, 324 Md. at 497, 597 A.2d at 960. This special relevance requirement involves two parts: 1) the relevance must be substantial, that is, not simply technically related to a formal element of the case; and 2) it must relate to an issue that is actually in dispute. Emory v. State, 101 Md. App. 585, 602, 647 A.2d 1243, 1252 (1994).

49. MD. R. 5-404(b). Collectively, these are often referred to as "the *Ross* factors." Along with the list eventually codified in MD. R. 5-404 (b), the court in *Ross v. State*, 267 Md. 664, 350 A.2d 680 (1976), also acknowledged that

> [a]dditional exceptions have also been recognized: When the several offenses are so connected in point of time or circumstances that one cannot be fully shown without proving the other, and to show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial, and to prove other like crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused.

Id. at 669–70, 350 A.2d at 684 (citation omitted).

50. *See Harris*, 324 Md. at 500, 597 A.2d at 961 (substituting a description of "special relevance" for the list of approved exceptions).

51. State v. Westpoint, 404 Md. 455, 489 n.12, 947 A.2d 519, 539 n.12 (2008).

52. 324 Md. 490, 597 A.2d 956 (1991).

53. *Id.* at 504, 597 A.2d at 964.

54. Id. at 502, 597 A.2d at 962 ("[T]o be admissible there must appear between the previous offense and that with which the defendant is charged some real connection other than the allegation that the offenses have sprung from the same disposition. We find no such real connection or special relevance here." (internal quotation marks omitted)).

2. Step Two in the Harris-Faulkner *Test Is for the Court to Determine Whether the Government May Clearly and Convincingly Demonstrate the Bad Acts Evidence in Question.*

Provided that the bad acts evidence in question does advance a legitimate purpose, the court's second step should be to determine whether the State is able to demonstrate the bad act through clear and convincing evidence.[55] Whether the State can meet this standard of proof is a decision belonging to the court,[56] and typically requires the government to proffer its evidence outside of the presence of the jury.[57] As for the requisite strength for evidence to meet the clear and convincing standard, the Court of Appeals has held that it is not as demanding as a beyond a reasonable doubt requirement, but is greater than a preponderance of the evidence standard.[58] The evidence in question "should be 'clear' in the sense that it is certain, plain to the understanding, and unambiguous and 'convincing' in the sense that it is so reasonable and persuasive as to cause you to believe it."[59] The Court of Appeals does not require that to be clear and convincing, evidence must "be established with absolute certainty," and if the evidence is "to some degree conflicting," that need not necessarily prevent a trial judge from finding that the standard is met.[60] On review, an appellate court will not overturn the trial judge's decision on the second prong of the *Harris-Faulkner* test unless it is clearly erroneous.[61]

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55. "Similar act" and other Rule 5-404(b) evidence may only be admitted "if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act." Huddleston v. United States, 485 U.S. 681, 685 (1988) (upholding the trial court's admission of testimony regarding the defendant's previous sales of stolen merchandise when his defense to knowingly possessing and selling stolen blank videocassettes was that he did not know they were stolen).

56. Emory v. State, 101 Md. App. 585, 622, 647 A.2d 1243, 1262 (1994).

57. Cross v. State, 282 Md. 468, 478 n.7, 386 A.2d 757, 764 n.7 (1978) ("The preferred method for submitting any evidence of other crimes to the court during trial would be by way of a proffer to the trial judge outside the presence or hearing of the jury. Such a proffer not only protects the jury from immediate prejudice, but also allows the trial judge to determine whether there is any way to limit the prejudicial aspects of the evidence while retaining its probative character and whether the evidence should properly be introduced at that time.").

58. Vogel v. State, 315 Md. 458, 470, 554 A.2d 1231, 1236 (1989).

59. *Id.* at 470–71, 554 A.2d at 1237 (quoting THE COMMITTEE ON CIVIL PATTERN JURY INSTRUCTIONS OF THE MARYLAND STATE BAR ASSOCIATION, MARYLAND PATTERN JURY INSTRUCTIONS 1:8(b) (2d ed. 1984)).

60. *Id.*

61. *Emory*, 101 Md. App. at 622, 647 A.2d at 1262. In *Whittlesey v. State*, the court set forth a narrow exception to the *Harris-Faulkner* test: "where the probative value of the evidence does not depend upon proof that the misconduct actually took place, the court should not apply the clear-and-convincing requirement in assessing the admissibility of the testimony." 340 Md. 30, 61, 665 A.2d 223, 238 (1995) (holding that even though the government positively disproved the defendant's anecdote that he had frightened a woman by following her with a knife, and thus the content of that story failed under the second prong of *Harris-Faulkner*, the statement was still admissible because it demonstrated the defendant's willingness to lie in order to explain his whereabouts at the time of the murder for which he stood trial).

In *Cross v. State*,[62] a grand larceny case, the government presented evidence that the defendant had also been involved in a burglary on the same day as the crime in question.[63] In the burglary, which went uncharged, a witness identified a car at the scene, but other than a matching color and make, there was no evidence that the car belonged to the defendant (the witness provided a different license plate number) or that the defendant was present at the burglary crime scene.[64] The government also presented evidence that an empty beer bottle found at the scene matched the brand of a six-pack that the defendant bought earlier that day.[65] On appeal, the Court of Appeals found for the defendant on the grounds that the State could not clearly and convincingly connect him to the prior bad act, the burglary.[66] Evidence of that act thus failed the second prong of the *Harris-Faulkner* test.[67]

3. The Third Step in the Harris-Faulkner *Test Is to Weigh the Probative Value of the Bad Acts Evidence Against Its Potential to Prejudice the Defendant*

The final and most involved question of the *Harris-Faulkner* test is that the probative value of the evidence under consideration not be outweighed by its potential to unfairly prejudice the defendant.[68] While Rule 5-404(b) does provide a list of nine permissible reasons to admit bad acts evidence and only one impermissible reason,[69] this numerical imbalance does not indicate that bad acts evidence is admissible more often than not. Rather, because Rule 5-404(b) must be read in the context of Rule 5-403, even when one submits bad acts evidence for a legitimate purpose, the court still must weigh the evidence's probative value against its potential for creating unfair prejudice.[70]

62. 282 Md. 468, 386 A.2d 757 (1978).

63. *Id.* at 469–71, 386 A.2d at 759–60.

64. *Id.* at 479, 386 A.2d at 764.

65. *Id.* at 479–80, 386 A.2d at 764.

66. *Id* at 479, 386 A.2d at 764 ("In this case, one would be hard put to urge that the evidence of the petitioner's involvement in the . . . break-in was 'clear and convincing'; in fact, it was so deficient that it would not even suffice to create a jury issue were [the petitioner] being tried for any crime associated with [that] incident.").

67. *Id.*

68. State v. Westpoint, 404 Md. 455, 489, 947 A.2d 519, 539–40 (2008).

69. *See supra* text accompanying note 49.

70. The Advisory Committee's Note to the Federal Rule of Evidence on which MD. R. 5-404(b) is based supports this reading: "The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." FED. R. EVID. 404(b) advisory committee's note subdiv. b.

The kind of unfair prejudice that would outweigh probative value "involves more than damage to the opponent's cause."[71] Rather, unfair prejudice refers to something that makes the jury lose its objectivity or disregard the weight of the evidence presented.[72] Thus, probative value is outweighed by the risk of unfair prejudice when the evidence encourages jurors to make a primarily emotional response as opposed to a rational one.[73] When the evidence is sufficiently probative, it is more likely to appeal to the jury's rationality, and thus, any prejudice resulting from its admission is appropriate rather than unfair.[74] The Court of Appeals has implied that the potential prejudicial value of bad acts evidence is so significant that there is essentially a rebuttable presumption that such evidence is inadmissible.[75]

The relative weight of the probative versus prejudicial value of evidence of prior bad acts was critical to its admissibility in *Odum v. State*.[76] There, the defendant was initially charged, along with four co-defendants, with the armed robbery, carjacking, kidnapping, and murder of two victims.[77] "The jury acquitted him of all charges save for two counts of kidnapping."[78] On appeal, the defendant won a new trial on the kidnapping counts, and on retrial he unsuccessfully moved to suppress evidence of his involvement in the robbery, carjacking, and murder that accompanied the kidnapping.[79] After determining that the offenses were so closely connected with the kidnappings as to form one crime, the Court of Appeals ruled that "[a]lthough the evidence surely prejudiced Petitioner, we are not persuaded that it *unfairly* prejudiced him, much less that the prejudice 'substantially outweighed' the probative value of the evidence."[80]

Even though there is a strong presumption against the admissibility of prior bad acts evidence,[81] the prosecution may overcome that presumption provided that it can meet the requirements of the *Harris-Faulkner* test.[82] In

71. State v. Allewalt, 308 Md. 89, 102, 517 A.2d 741, 747–48 (1986).

72. Odum v. State, 412 Md. 593, 615, 989 A.2d 232, 245 (2010) (quoting LYNN MCLAIN, MARYLAND EVIDENCE STATE AND FEDERAL § 403:1(b) (2d ed. 2001)) ("[E]vidence may be unfairly prejudicial 'if it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged.'").

73. *Id.* (quoting JOSEPH F. MURPHY JR., MARYLAND CRIMINAL EVIDENCE HANDBOOK § 506(B) (3d ed. 1993 & Supp. 2007)).

74. *Id.* ("The more probative the evidence is of the crime charged, the less likely it is that the evidence will be unfairly prejudicial.").

75. Harris v. State, 324 Md. 490, 500, 597 A.2d 956, 961 (1991) (indicating that bad acts evidence ought generally to be excluded, except when it has special relevance to some contested issue, and its probative force "substantially outweighs its potential for unfair prejudice.").

76. 412 Md. 593, 989 A.2d 232 (2010).

77. *Id.* at 596, 989 A.2d at 234.

78. *Id.*

79. *Id.* at 596–600, 989 A.2d at 234–36.

80. *Id.* at 615, 989 A.2d at 245.

81. Harris v. State, 324 Md. 490, 500, 597 A.2d 956, 961 (1991).

82. State v. Faulkner, 314 Md. 630, 634–35, 552 A.2d 896, 898 (1989).

practice, however, this test requires some adjustments in order to apply to various types of bad acts evidence.

B. Details Relating to a Defendant's Involvement in a Street Gang Are a Particular Form of Bad Acts Evidence That Some Courts Have Found to Require Special Consideration

The *Burris* court faced a problem of how to deal with a particular sort of bad acts evidence, namely: expert testimony pertaining to a defendant's involvement in a street gang. Membership in a gang does not obviously fall under the statutory categorization of "other crimes, wrongs, or . . . delinquent acts,"[83] but it fits more clearly under the Court of Appeals' definition of bad acts evidence as "activity or conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit."[84] Therefore, Maryland courts have treated a defendant's gang involvement as a bad act for the purpose of making decisions on the admissibility of evidence.[85]

In many jurisdictions, courts conclude that evidence relating to a defendant's membership in a gang, like that of other bad acts, may be admissible for a purpose such as identification, proof of motive, or other reasons similar to those listed in Maryland's Rule 5-404(b).[86] Such purposes

83. MD. R. 5-404(b).

84. Klauenberg v. State, 355 Md. 528, 549, 735 A.2d 1061, 1072 (1999); *see also* James Blake Sibley, *Gang Violence: Response of the Criminal Justice System to the Growing Threat*, 11 CRIM. JUST. J. 403, 411 (1989) ("[A]ny attempt to use . . . information [related to gang membership] as character evidence must be avoided.").

85. Ayala v. State, 174 Md. App. 647, 658, 923 A.2d 952, 958 (2007) ("There can be little doubt that evidence that a defendant is a member of an organization known for violent acts may be evidence of bad character or prior bad acts."). Many jurisdictions with similar rules have similarly found that evidence of a defendant's gang involvement should be governed under rules for admitting bad acts evidence. *See* John E. Theuman, Annotation, *Admissibility of Evidence of Accused's Membership in Gang*, 39 A.L.R. 4TH 775 (2010) (surveying jurisdictions and concluding that "[w]hile commonly recognizing that evidence identifying a defendant as a member of a gang may be prejudicial, since juries may associate such groups with criminal activity and improperly convict on the basis of inferences as to the defendant's character, many courts have held that such evidence may nevertheless be admissible if it is sufficiently relevant to a proper issue in the case, weighing this probative value against the danger of unfair prejudice").

86. Theuman, *supra* note 85 ("Gang membership has frequently been found to be probative and admissible, for example, as evidence of a possible motive for the crime, particularly in homicide cases where the defendant and his victim are shown to have been members of rival gangs; as an indication of possible bias on the part of defense witnesses who are shown to be members of the defendant's gang; as evidence of a common design or purpose in crimes committed by a group; or as bolstering the identification of the defendant, such as in cases where witnesses describe the perpetrators as having worn gang colors."); *see also* People v. Tolliver, 807 N.E.2d 524, 541 (Ill. App. Ct. 2004) ("Gang-related evidence is admissible to show common purpose or design, or to provide a motive for an otherwise inexplicable act. Gang-related evidence is also relevant to identification or to corroborate a defendant's confession."(citations omitted)).

demonstrate special relevance.[87] Evidence of gang involvement is inadmissible, however, when it is not relevant to a contested issue in the case.[88]

The Court of Appeals first confronted the question of whether to admit expert testimony on gangs in *Gutierrez v. State*.[89] There, it devised a two-part test to govern the admissibility of expert testimony on gangs.[90] First, a court must ask whether there is evidence connecting the crime to gang activity, and second, it must inquire whether the probative value of such testimony is outweighed by the potential unfair prejudice of admitting it.[91]

1. Courts Should Only Consider the Admission of Expert Testimony on Gangs When Such Evidence Bears a Connection to the Crime Charged

The Court of Appeals has held that in the case of expert testimony as to the workings of a gang, the threshold requirement is fact evidence that the crime was gang-related.[92] Once the government makes such a showing, the defendant's gang membership goes from being "an impermissible prior bad act to a concrete component of the crime for which the defendant is on trial."[93] The requirement of demonstrating a connection between gang-related activity and the crime serves the same function as Rule 5-404(b)'s list of exceptions to the exclusion of bad acts evidence in general, that is, both force the prosecution to show that the evidence has special relevance to the trial.[94]

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87. Theuman, *supra* note 85 ("[M]any courts have held that [evidence of gang membership] may nevertheless be admissible if it is sufficiently relevant to a proper issue in the case, weighing this probative value against the danger of unfair prejudice."); *see also supra* Part II.A.1.

88. *See, e.g.*, Gutierrez v. State, 423 Md. 476, 496, 32 A.3d 2, 13 (2011) ("Proof of . . . a link [between gang activity and the crime in question] transforms a defendant's gang membership, current or prospective, from an impermissible prior bad act to a concrete component of the crime for which the defendant is on trial."); *Tolliver*, 807 N.E.2d at 541 ("Testimony regarding the background, history and criminal activity of the gangs is improper if peripheral to the offense at issue.").

89. *See Gutierrez*, 423 Md. at 490–95, 32 A.3d at 10–13 (summarizing the practice adopted by courts in other jurisdictions as well as that of the Court of Special Appeals, but making no reference to any decisions by the Court of Appeals).

90. The Court of Appeals does not explain how the *Gutierrez* test fits with the *Harris-Faulkner* test described in Part II.A. For more discussion on how the two might be reconciled, see *infra* Part IV.A.

91. *Gutierrez*, 423 Md. at 496–98, 32 A.3d at 13–15.

92. *Id.* at 496, A.3d at 13.

93. *Id.* In requiring that evidence of a gang connection be established by fact evidence before expert testimony on the subject is admissible, the Maryland Court of Appeals explicitly sided with the Supreme Court of New Mexico's decision in *State v. Torrez*, 210 P.3d 228 (N.M. 2009), rather than with the Maryland Court of Special Appeals' decision in *Ayala v State*, 174 Md. App. 647, 923 A.2d 952 (2007), which claimed that the State did not need to present evidence that a crime was gang-related when it could show that the defendant was a member of the gang and that such membership created a plausible motive for the crime. *Id.* at 496 & n.2, 32 A.3d at 13–14 & n.2.

94. *See supra* notes 48–51 and accompanying text.

A prosecutor might seek to admit testimony concerning gangs as a means of explaining why a defendant would commit a crime.[95] For example, prior to trial in *Ayala v. State*,[96] the defendant in a murder case admitted to police that he was a member of one gang and that he believed the victim to have belonged to a rival gang, members of which had recently beaten him.[97] The Court of Special Appeals upheld the trial court's decision to admit the testimony of a gang expert who spoke, among other things, about the importance in gang culture of "getting at" members of a rival gang and the discipline a member could face for failing to "represent" his gang.[98]

Another common reason for prosecutors to submit gang-related evidence is to explain why witnesses might have recanted their previous statements to the police. Prior to *Burris*, no Maryland court had addressed the use of expert testimony to explain witness recantation, but several other jurisdictions have.[99] In *People v. Gonzalez*,[100] the Supreme Court of California held that the testimony of a gang expert concerning a culture of witness intimidation might be relevant to assess the credibility of a witness who repudiated at trial his previous statements to police.[101] The court reasoned that "[w]hether members of a street gang would intimidate persons who testify against a member of that or a rival gang is sufficiently beyond common experience that a court could reasonably believe expert opinion would assist the jury."[102] Similarly, in *People v. Dixon*,[103] the Appellate Court of Illinois held that "the trial court did not abuse its discretion by admitting gang-related evidence for the purpose of explaining the witnesses' change of heart at trial."[104] In that case, the court declined to narrow the parameters of relevance surrounding a gang expert's testimony. For example, the witness need not belong to the gang in order for evidence of intimidation to be relevant because "a gang may inspire fear in non-members as well as its own members."[105] Furthermore, the court reasoned that the issue regarding fear of retaliation is one of the witness's state of mind rather than gang members' deliberate choice to intimidate.[106] Finally, the court held that the de-

95. Establishing motive is one of the acceptable reasons to admit bad acts evidence. MD. R. 5-404(b).

96. 174 Md. App. 647, 923 A.2d 952 (2007).

97. *Id.* at 653–54, 923 A.2d at 955–56.

98. *Id.* at 655, 665–66, 923 A.2d at 956, 962–63.

99. Burris v. State, 206 Md. App. 89, 125–26, 47 A.3d 635, 656 (2012) *rev'd*, 435 Md. 370, 78 A.3d 371 (2013).

100. 135 P.3d 649 (Cal. 2006).

101. *Id.* at 657–58.

102. *Id.* at 657.

103. 882 N.E.2d 668 (Ill. App. Ct. 2007).

104. *Id.* at 681.

105. *Id.*

106. *Id.*

fendant need not be aware of the witness intimidation for evidence thereof to be relevant.[107]

Some jurists argue, however, that merely providing a possible explanation for why witnesses would recant their previous statements is not, on its own, sufficient to admit a gang expert's testimony concerning witness intimidation. In *People v. Tolliver*,[108] the Appellate Court of Illinois considered a case in which, at trial, six eyewitnesses recanted their prior statements implicating the defendant in the shooting death of a plainclothes police officer.[109] To explain those recantations, the trial court admitted testimony by an expert regarding punishments that gangs carry out against those who witness against their members.[110] While the appellate court affirmed the trial court's decision,[111] the presiding judge on the panel dissented, expressing concern that the prosecution failed to present any evidence that the witnesses had, in fact, been intimidated.[112]

2. Even If Gang-Related Expert Testimony Is Relevant to the Crime, the Court Should Only Admit It into Evidence When Its Probative Value Is Not Outweighed by the Potential Unfair Prejudice That Will Result

The second prong of the *Gutierrez* test for the admissibility of expert testimony concerning gangs, to balance the probative versus prejudicial value of the testimony, is a direct carry-over from the *Harris-Faulkner* test for admitting bad acts evidence in general, and from Rule 5-403.[113] The potential for prejudice with respect to gang-related testimony is very real.[114] Because citizens associate gangs with crime, identifying a defendant as a gang member introduces the risk that a jury will convict based on his presumably bad character regardless of the evidence presented against him.[115] Therefore, courts may exclude evidence when it is probative to no contested issue or only a minor one or when the same point could have been made with evidence that is less prejudicial.[116]

107. *Id.*

108. 807 N.E.2d 524 (Ill. App. Ct., 2004).

109. *Id.* at 531–33.

110. *Id.* at 530.

111. *Id.* at 542.

112. *Id.* at 556 (Campbell, P.J., dissenting in part). There was also concern that the witnesses' prior statements might have been involuntary by reason of police coercion, and therefore improperly admitted. *Id.* at 555.

113. *See supra* Part II.A.3.

114. Gutierrez v. State, 423 Md. 476, 495, 32 A.3d 2, 13 (2011) ("[W]e remain ever-cognizant of the highly incendiary nature of gang evidence and the possibility that a jury may determine guilt by association rather than by its belief that the defendant committed the criminal acts.").

115. Theuman, *supra* note 85 ("[J]uries may associate [gangs] with criminal activity and improperly convict on the basis of inferences as to the defendant's character[.]").

116. *Id.*

C. After Adapting the Harris-Faulkner *Test to the Unique Circumstances of Expert Testimony Concerning Street Gangs, the Court of Appeals in* Gutierrez v. State *Affirmed the Lower Court's Decision to Admit Such Testimony in That Case*

The facts of *Gutierrez v. State*,[117] the case in which the Court of Appeals devised the above-described test, provide a useful illustration of how the court intended it to be applied. In *Gutierrez*, the defendant was on trial for murder.[118] According to witnesses, the victim was standing with a group when a car drove up, and a passenger shouted, "Mara Salvatrucha!"[119] One person in the group responded by insulting the gang MS-13, upon which the passenger opened fire, killing the victim.[120] Eventually, witnesses identified the defendant as the shooter.[121]

At trial, after several pieces of evidence tied the defendant and the murder to MS-13, a detective testified concerning a variety of elements of that gang's history and culture.[122] He explained the process of "jumping in," by which one can earn admission to the gang, and that the location of the shooting was within the territory of Mexican gangs, considered rivals to MS-13.[123] He went on to portray how gangs encourage their members to respond violently both to criticism of and to false identification with their gang ("false-flagging").[124] Furthermore, he described how the defendant identified himself with MS-13 through his MySpace page.[125] The expert also opined that MS-13 was the gang from which law enforcement had seen the most violence in the previous four to five years.[126]

After setting forth the legal background concerning the admissibility of prior bad acts in general, and the *Harris-Faulkner* test specifically,[127] the Court of Appeals announced that the threshold requirement for the admissibility of gang-related expert testimony is that there be sufficient fact evidence establishing a connection between the gang and the crime.[128] The court found that there was sufficient evidence to connect the murder to gang activity in this case for two reasons. First, several witnesses testified to hearing the shooter exclaim "Mara Salvatrucha," an MS-13 slogan, and

117. 423 Md. 476, 32 A.3d 2 (2011).

118. *Id.* at 482, 32 A.3d at 5.

119. *Id.*

120. *Id.*, 32 A.3d at 5–6.

121. *Id.* at 483, 32 A.3d at 6.

122. *Id.* at 484, 32 A.3d at 6.

123. *Id.* "Jumping in" is a ritual of induction in which a prospective member is beaten by a group of current members. *Id.* at 8.

124. *Id.* at 484, 32 A.3d at 7.

125. *Id.*

126. *Id.*

127. *Id.* at 489–91, 32 A.3d at 9–10; *see also supra* Part II.A.

128. *Gutierrez*, 423 Md. at 496, 32 A.3d at 13.

hearing someone respond by insulting that gang before the shooter opened fire.[129] Furthermore, another witness stepped forward claiming to have been a passenger in the car and acknowledged that the defendant fired into the crowd as a means of gaining membership to MS-13.[130]

The court next indicated that the second element of the test is to evaluate the expert's testimony to determine whether its probative value is not outweighed by the risk of unfairly prejudicing the defendant.[131] First, as to the danger of unfair prejudice, the court pledged to "remain ever-cognizant of the highly incendiary nature of gang evidence and the possibility that a jury may determine guilt by association rather than by its belief that the defendant committed the criminal acts."[132] As to the probative value of the testimony, the court found that four out of five of the expert's statements to which the defense objected directly helped to explain some element of the crime.[133] The description of the gang's name explained the gunman's words at the time of the shooting; the description of "jumping in" supported testimony that the shooting was an attempt to join the gang; the explanation of how gang members respond to insults with punishment "up to death" helped make sense of the seemingly disproportionate brutality of the act; and the statement concerning reactions to "false flagging" illustrated how important the sense of exclusivity and hierarchy are to gang members.[134] In light of the significant probative value of the evidence and the relatively weak risk of unfair prejudice, the court said that these statements were properly admitted.[135] The only statement that the court found to be erroneously admitted was the detective's identification of MS-13 as the gang from which local police had seen the most violence in recent years.[136] This statement did not help the jury to understand why the defendant was the person who committed the crime, and thus held no probative value.[137] The court, however, found this to be harmless error in that the statement was unlikely to have made the jury arrive at a guilty verdict if it was not already prepared to do so.[138]

Dissenting, Chief Judge Bell argued that while the court adopted the correct test, the expert testimony in the case did not pass either its first or its second step.[139] First, Chief Judge Bell argued that the expert testimony

129. *Id.* at 497, 32 A.3d at 14.
130. *Id.*
131. *Id.* at 497–98, 32 A.3d at 14–15.
132. *Id.* at 495, 32 A.3d at 13.
133. *Id.* at 498–99, 32 A.3d at 15.
134. *Id.* at 499, 32 A.3d at 15.
135. *Id.*, 32 A.3d at 15–16.
136. *Id.*, 32 A.3d at 16.
137. *Id.*
138. *Id.* at 499–500, 32 A.3d at 16.
139. *Id.* at 501, 32 A.3d at 17 (Bell, C.J., dissenting).

failed the relevancy prong of the analysis in that the prosecution had no need to demonstrate motive as it was not an element of the charged offense of murder,[140] nor did the defendant adopt a defense, for example, self-defense, that would challenge the presence of motive.[141] Because motive was not relevant to a contested issue, the expert's testimony was distinguishable from other cases in which such testimony was permitted, claimed Chief Judge Bell.[142] However, the Chief Judge did not stop there: not only were the expert's statements irrelevant, but because the risk of unfair prejudice from admitting such evidence far outweighed its potential probative value, the evidence failed to meet the test's second prong as well.[143] The probative value was diminished, he said, because through their testimony, *fact* witnesses had already established a connection between the defendant, the gang, and the shooting.[144] Therefore, the *expert* testimony had little to add.[145] Moreover, the potential for unfair prejudice was significant when a police officer aligned the defendant with a group he described as extremely violent.[146] Accordingly, the Chief Judge believed that the expert's testimony met neither prong of the test for admissibility and thus would have reversed the trial court's decision.[147]

III. THE COURT'S REASONING

In *Burris v. State*,[148] the Court of Appeals of Maryland unanimously declined to follow the intermediate court's focus on witness recantation.[149] Instead, it applied the *Gutierrez* test and held that testimony regarding the defendant's involvement in gang activity was not admissible under the in-

140. *See id.* at 506, 32 A.3d at 19 (recalling that "other crimes" evidence is only admissible when it "is substantially relevant to some contested issue and is not offered simply to prove criminal character." (quoting State v. Westpoint, 404 Md. 455, 488, 947 A.2d 519, 539 (2008) (internal quotation marks omitted))).

141. *Id.* at 507, 32 A.3d at 20 ("[E]vidence of motive 'serves no legitimate purpose,' and is therefore not material, when motive is not an essential element of any offense charged and when the prosecution is aware that it will not be contested." (quoting Martin v. State, 40 Md. App. 248, 254–55, 389 A.2d 1374, 1377–78 (1978))).

142. *Id.* at 512–13, 32 A.3d at 23–24.

143. *Id.* at 518, 32 A.3d at 27.

144. *Id.* at 519, 32 A.3d at 27.

145. *Id.*

146. *Id.* at 519, 32 A.3d at 28.

147. *Id.* at 501, 512–14, 519, 32 A.3d at 17, 24–25, 28. In a portion of his dissenting opinion in which Judge Greene also joined, Chief Judge Bell also disputed the court's conclusion that the admission of the statement identifying MS-13 as the most violent gang in the area represented harmless error. *Id.* at 520–23, 32 A.3d at 28–30.

148. 435 Md. 370, 78 A.3d 371 (2013).

149. *Id.* at 397, 78 A.3d at 387.

stant conditions,[150] thus reversing the Court of Special Appeals' judgment.[151]

The Court of Appeals explained that under the facts in *Burris*, the two-step *Gutierrez* test for admitting expert testimony as to gang culture and the defendant's membership in a gang ought to control.[152] Again, in the first step of this analysis, a court must ask whether there is sufficient fact evidence to support a nexus between a defendant's alleged gang membership and the crime in question.[153] Applying this threshold requirement, the court agreed that the evidence in the instant case was sufficient to tie the crime to Burris' gang membership.[154] Witness statements provided a basis to argue that Burris was a gang member, and that his alleged position in the gang relative to Bam (hit man to boss) established a nexus between the offense and his membership.[155]

Having satisfied itself that this first requirement was met, the court proceeded to ask whether it should nonetheless exclude the expert testimony because its probative value is substantially outweighed by the danger of unfair prejudice.[156] Here, the court held that the probative value of Sgt. Workley's testimony was outweighed by its prejudicial effect.[157] The testimony concerning the violent, criminal nature of the BGF "was prejudicial to Burris because of its negative implication regarding Burris's character," and the testimony concerning the BGF's illegal activities within prisons was not probative because the crime at issue did not involve a prison.[158] Also, statements describing the violent imagery of Burris' tattoos and the connection of such imagery to prison culture invited the jury to make inferences regarding his propensity to kill as well as to his history of incarceration.[159] Furthermore, to the extent that Sgt. Workley's testimony identified Burris as a BGF member, it was cumulative of the evidence presented by the other witnesses and was therefore not probative.[160] Finally, Sgt. Work-

150. *Id.* at 390–97, 78 A.3d at 383–87.

151. *Id.* at 397, 78 A.3d at 387.

152. *Id.* at 390, 78 A.3d at 383; *see supra* Part II.B.

153. Burris, 435 Md. at 390, 78 A.3d at 383; *see supra* Part II.B.1. The court clarified that while the gang connection to the crime ought to determine whether gang membership has become a component of the crime (as opposed to evidence of a prior bad act), the defendant need not be charged with a "gang crime" to meet this requirement. *Burris*, 435 Md. at 391, 78 A.3d at 384.

154. *Id.* at 392, 78 A.3d at 384.

155. *Id.*

156. *Id.*; *see supra* Part II.B.2. The court clarified that "evidence is considered unfairly prejudicial when it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged." *Burris*, 435 Md. at 392, 78 A.3d at 384 (quoting Odum v. State, 412 Md. 593, 615, 989 A.2d 232, 245 (2010) (internal quotation marks omitted)).

157. *Burris*, 435 Md. at 392, 78 A.3d at 384.

158. *Id.* at 394, 78 A.3d at 385.

159. *Id.* at 394–95, 78 A.3d at 385–86.

160. *Id.* 395–96, 78 A.3d at 386.

ley's testimony did not link the murder to debt collection, nor did it establish that a BGF "hit man" would play a role in extortion, nor did it show how Burris' gang membership would explain witness recantation.[161]

Given the above analysis, the court determined that the unfair prejudice generated by Sgt. Workley's testimony outweighed its probative value.[162] Accordingly, it held that the trial court erred in allowing said testimony and therefore reversed and remanded for a new trial.[163]

IV. ANALYSIS

In *Burris*, the Court of Appeals correctly applied the *Gutierrez* test to determine that the trial court improperly admitted the evidence. However, it missed an opportunity to establish a precedent that would enable more just and consistent results in the future concerning the admissibility of expert testimony regarding street gangs. The court could have done so if it had enhanced its decision in three principle ways. Part IV.A will discuss why the court ought to have explicitly retained the *Harris-Faulkner* test's requirement that the prosecution demonstrate the defendant's gang membership by clear and convincing evidence. Part IV.B will discuss the desirability of specifying a standard of proof for the threshold requirement of evidence connecting the crime with gang activity. Part IV.C will propose that for an expert to testify about specific gang behaviors such as witness intimidation, the prosecution must first present evidence that such behaviors actually occurred in connection to the instant case.

A. While the Gutierrez *Rule Provides the Correct Guidance in That Case as Well as in* Burris*, It Lacks the Protections Granted by the Second Element of the* Harris-Faulk*ner Test*

Both the *Gutierrez* and the *Burris* courts cited the *Harris-Faulkner* test for the admission of bad acts evidence.[164] The *Gutierrez* court then went on to create a more specific, two-step rule to apply to the admission of expert testimony on the history, organization, and customs of street gangs,[165] a rule that the *Burris* court later cited.[166] Mysteriously lost in the process was the second step of the *Harris-Faulkner* test, requiring a party seeking its admission to establish bad acts evidence clearly and convincingly.[167] While prosecutors could easily satisfy that prerequisite under the facts in both

161. *Id.* at 396, 78 A.3d at 386–87.

162. *Id.* at 392, 78 A.3d at 384.

163. *Id.* at 397, 78 A.3d at 387.

164. Burris v. State, 435 Md. 370, 390 n.14, 78 A.3d 371, 383 n.14 (2013); Gutierrez v. State, 423 Md. 476, 489–90, 32 A.3d 2, 10 (2011).

165. *Gutierrez*, 423 Md. at 496–98, 32 A.3d at 13–15.

166. *Burris*, 435 Md. at 390, 78 A.3d at 383.

167. *See supra* Part II.A.2.

Gutierrez and *Burris*, this requirement could provide an important protection to defendants in future cases. Therefore, the court should not discard it.

The *Gutierrez* and the *Harris-Faulkner* tests substantially overlap one another.[168] Step one of the *Gutierrez* test fulfills the same purpose as step one of the *Harris-Faulkner* test, that is, both function to ensure that the evidence has "special relevance" to a contested issue.[169] Step two of the *Gutierrez* test is identical to step three of the *Harris-Faulkner* test.[170] Without explicitly stating why, the court has neglected step two of the *Harris-Faulkner* test for the admission of bad acts evidence.

In *Gutierrez*, the State brought ample evidence that the defendant was a member of MS-13, including photographs from his MySpace page depicting him making identifiable MS-13 hand gestures, and testimony by the driver in the incident that the defendant's reason for shooting the victim was to gain entry into the gang.[171] Similarly, in *Burris*, two fact witnesses made statements to police that Burris was a member of BGF, and the prosecution's expert interpreted photographs of his tattoos to indicate the same conclusion.[172] Thus, in both cases, the prosecution could demonstrate by clear and convincing evidence that the prior bad act it sought to admit (that is, membership in a gang) actually applied. In other words, the evidence satisfied the second step in the *Harris-Faulkner* test.

One could, however, imagine facts satisfying both steps of the *Gutierrez* test, but where the prosecution is unable to clearly and convincingly show that the defendant is a member of a gang, which would be required under the *Harris-Faulkner* line of cases. In such a situation, the defendant would face all of the prejudice that would come with gang involvement without the court being certain that he is a gang member. For instance, assume a hypothetical situation similar to the facts of *Gutierrez*: there is a drive-by shooting where the gunman shouts a gang slogan, the victim or someone in the victim's vicinity counters by insulting the gang, and both the defendant and a vehicle to which he has access match descriptions from witnesses to the crime. However, to depart from the facts in

168. The *Harris-Faulkner* test indicates that a court should only admit bad acts evidence when: 1) the reason for admitting the evidence falls under an approved *Ross* exception, 2) the prosecution can establish the evidence of bad acts clearly and convincingly, and 3) the probative value of admitting the evidence is not outweighed by its potential unfair prejudice. State v. Faulkner, 314 Md. 630, 634–35, 552 A.2d 896, 898 (1989). The *Gutierrez* test indicates that a court should only admit expert testimony with respect to gangs when: 1) fact evidence establishes that the crime is gang-related, and 2) the probative value of the testimony is not outweighed by its potential unfair prejudice. *Gutierrez*, 423 Md. at 496–98, 32 A.3d at 13–15.

169. *See supra* notes 48–51, 85–88 and accompanying text.

170. *See Gutierrez*, 423 Md. at 498, 32 A.3d at 15; *Faulkner*, 314 Md. at 635, 552 A.2d at 898.

171. *Gutierrez*, 423 Md. at 484, 497, 32 A.3d at 5–6, 14.

172. Burris v. State, 435 Md. 370, 376, 381, 78 A.3d 371, 375, 378 (2013).

Gutierrez, assume further that any evidence that the defendant is a member of the gang fails to meet the clear and convincing standard: perhaps he socializes with known gang members, but he has no gang-related tattoos; police records reveal no known gang affiliation; and the state produces no witnesses who will testify to his involvement in a gang.[173] The shouted declarations for and against the gang would support a claim by the prosecution that there is evidence that the crime was gang-related, and it is possible that a court would still assess the probative value not to be outweighed by prejudice were a gang expert to testify as to gang-related motives for the crime.[174] However, a defendant in this situation needs and deserves the protection of a rule demanding that the prosecution clearly and convincingly show a connection between the defendant and the gang as well as between the gang and the crime.[175] Without such protection, a government expert would be able to discuss gang culture as it pertains to the crime, stirring up fears and negative associations in the minds of jurors, without ever demonstrating that gang culture connects the defendant to the crime. Certainly, such a defendant would still be able to argue against introduction of this evidence under the *Harris-Faulkner* precedent, but it would be clearer if the specific rule for admitting testimony by a gang expert explicitly included this requirement.

B. The Court Ought to Have Specified a Minimum Standard for the Evidence of Gang-Connection Because, as in Burris*, the Facts May Only Establish a Tenuous Connection Between the Crime and Gang Activity.*

The first step in the *Gutierrez* test, the determination whether fact evidence provided sufficient connection between the crime in question and gang activity,[176] is necessary but is incomplete until case law establishes the standard of proof that the prosecution must meet in order to satisfy that requirement. The court held that testimony by fact witnesses gave evidence to such a connection both in *Gutierrez* and in *Burris*. However, the connection in the latter case is less clear-cut than in the first, which raises the question: what is the minimum standard of proof that is acceptable in similar cases? Because the *Harris-Faulkner* test requires a clear and convincing

173. We could imagine evidence that meets a lesser standard, but that is not clear and convincing, for instance, all of the clothes in his closet are of an identifiable gang color, or he has tattoos that are ambiguous in their connection to gang culture.

174. Admittedly, because the potential for unfair prejudice is higher where the evidence of the gang connection is not clear and convincing, a court could still refuse to admit such evidence based on the second step of the *Gutierrez* test. However, preserving a separate clear and convincing requirement provides a stronger safeguard than does blending it in with the balancing test.

175. Like the parallel requirement of the *Harris-Faulkner* test, such a showing should be made to the judge, outside of the presence of the jury. *See supra* note 57.

176. *Gutierrez*, 423 Md. at 496, 32 A.3d at 13.

showing that a defendant committed a prior bad act,[177] the court would achieve some sense of symmetry were it to require the same standard to establish a gang connection to a crime. But specifying any standard would be preferable to leaving defendants in the dark as they weigh their trial strategies and judges free to make inconsistent rulings on whether the State carried its burden of establishing a connection.

In concluding that there was ample evidence establishing a gang connection to the murder in question, the *Gutierrez* court referred to the sworn testimony of witnesses to the murder. First, one witness, who admitted to driving the car from which the shooter fired, acknowledged that the defendant perpetrated the attack in order to gain admission into MS-13.[178] Also, multiple witnesses testified that the gunman shouted a known MS-13 slogan, "Mara Salvatrucha!"[179] This factual evidence convinced the *Gutierrez* court that there was a gang connection to the murder, and thus, that the prosecution satisfied the test's first requirement.[180] Whether the appropriate standard is clear-and-convincing or a simple preponderance of the evidence, the government certainly met its burden. In fact, it might have proven its case beyond a reasonable doubt.

The *Burris* court likewise found that the facts of that case evidenced a gang connection.[181] Specifically, the court referred to pre-trial statements of witnesses that:

> Burris and Bam were BGF members; Bam was a "boss" within the organization; Burris was a "hit man for real" for Bam who was told by Bam to commit the killing; that Bam, apparently, responded to Burris's telling him that he "just killed a boy," by stating "[t]hat's my boy, straight G[ue]rilla"; and Burris was overheard stating that he committed a murder because the victim owed Bam money.[182]

While the quoted summary by the *Burris* court at first sounds like a convincing argument for a gang connection to the murder, there are several reasons for which one might hesitate to reach that conclusion. Most critically, all of the fact evidence cited by the court came from pre-trial statements that witnesses later recanted, rendering the connection less reliable than it would have been if supported by consistent, sworn testimony. Secondly, even if one were to rely on the recanted statements, one could still question the witnesses' basis of knowledge for their conclusion that the murder was committed to avenge a debt that Dickerson owed Bam. Considering these

177. *See supra* Part II.A.2.
178. *Gutierrez*, 423 Md. at 497, 32 A.3d at 14.
179. *Id.*
180. *Id.*
181. Burris v. State, 435 Md. 370, 392, 78 A.3d 371, 384 (2013).
182. *Id.*

shortcomings, the prosecution in *Burris* may not necessarily have made its case by a clear and convincing standard,[183] even if it did meet a simple preponderance of the evidence standard.[184]

The principal concern with claiming that fact evidence establishes the relevancy of a gang connection to the crime in *Burris* is that all the fact evidence in question came in the form of statements that witnesses recanted at trial.[185] Granted, the court did admit these witnesses' pretrial statements into evidence for purposes of impeaching their contrary testimony under oath.[186] Nevertheless, these statements fail to provide the same basis for a gang connection as did the sworn statements provided in *Gutierrez*, which were not recanted.[187] Not only is the gang connection less reliable by virtue of its reliance on recanted statements, but there is no evidence that the wit-

183. For a discussion of the clear and convincing standard, see *supra* text accompanying notes 58–60.

184. In addition to these shortcomings, some observers might argue that motive was not relevant to the crime, and that there was no other reason to discuss a gang connection in this case. This complaint echoes a point in Chief Judge Bell's dissent from *Gutierrez*, in which he argued that unless motive was an element of the crime or the defendant made motive an issue through an affirmative defense, "evidence of motive serves no legitimate purpose, and is therefore not material, when motive is not an essential element of any offense charged and when the prosecution is aware that it will not be contested." 423 Md. 476, 507, 32 A.3d 2, 20 (2011) (Bell, C.J., dissenting) (quoting Martin v. State, 40 Md. App. 248, 254–55, 389 A.2d 1374, 1377–78 (1978) (internal quotation marks omitted).

The problem with the Chief Judge's position in *Gutierrez* is that it seems inconsistent with earlier decisions by the Court of Appeals with respect to other types of bad acts evidence. For example, in *Snyder v. State*, Chief Judge Bell himself wrote for the court that, "[m]otive is not an element of the crime of murder, but, in addition to supporting the introduction of other crimes evidence, it also may be relevant to the proof of two of the other exceptions to Rule 5–404, intent or identity." 361 Md. 580, 604, 762 A.2d 125, 138 (2000). Similarly, the Maryland Criminal Pattern Jury Instructions support the admissibility of evidence showing motive. THE MARYLAND INSTITUTE FOR CONTINUING PROFESSIONAL EDUCATION OF LAWYERS, INC., MARYLAND CRIMINAL PATTERN JURY INSTRUCTIONS 3:32 (2d Ed. Supp. 2013) ("Motive is not an element of the crime charged and need not be proven. However, you may consider the motive . . . or lack of motive as a circumstance in this case. Presence of motive may be evidence of guilt. Absence of motive may suggest innocence. You should give the presence or absence of motive the weight you believe it deserves."). The evidence in question, suggesting that Burris killed Dickerson because the latter owed money to Burris's boss, *Burris*, 435 Md. at 376, 78 A.3d at 374–75, seems to establish that Burris meant to kill, thus motive would be relevant to show intent.

The *Snyder* court raised one further requirement on the admission of bad acts evidence for purposes of showing motive, requiring that the prior conduct "be committed within such time, or show such relationship to the main charge, as to make connection obvious." *Snyder*, 361 Md. at 605, 762 A.2d at 139 (quoting Johnson v. State, 332 Md. 456, 470, 632 A.2d 152, 158–59 (1993) (internal quotation marks omitted). As gang membership is an on-going consideration, it would meet the requirement of being linked in time and circumstances to a gang-ordered murder.

185. *Burris*, 435 Md. at 392, 78 A.3d at 384 ("Fact evidence adduced at trial in the alleged statements of fact witnesses that were introduced, established that both Burris and Bam were BGF members."); *id.* at 375–76, 78 A.3d at 374–75.

186. *Id.* at 376, 78 A.3d at 375. Admitting these statements for impeachment purposes was appropriate according to the Maryland Rules of Evidence. MD. R. 5-613.

187. *See Gutierrez*, 423 Md. at 497, 32 A.3d at 14 .

nesses recanted because of gang member intimidation.[188] While the State might have established such a connection by a simple preponderance of the evidence, it would be difficult to say that the State established a clear and convincing connection between gang activity and the murder given the diminished weight that one would reasonably accord the recanted statements.

Furthermore, even if the State witnesses' pretrial statements were reliable, one must ask whether these statements are sufficient to tie the victim's murder to BGF activity. One witness claimed in his statement to the police to know that the defendant worked for Bam as a hit man, that both were BGF members, and to have heard Bam praise the defendant for the murder.[189] Again in a statement to police, another witness claimed to know that the victim owed Bam money.[190] A third witness claimed to overhear the defendant say that pursuant to Bam's instruction, he killed someone who owed Bam money.[191] Accepting these statements at face value, they still do not allow the final logical connection that the murder was related to the defendant's membership in the BGF,[192] but they provide evidence that could at least arguably meet simple preponderance standard.

On the question of meeting the first requirement of the *Gutierrez* test, that is, establishing a gang connection to the crime for which the prosecution seeks to admit gang evidence, *Burris* represented a closer case than *Gutierrez*. Without specifying a minimum standard of evidence for this part of the test, it is difficult to say whether or not the court was correct to conclude that the prosecution in *Burris* met its burden. Accordingly, it will be difficult for defendants in future borderline cases to weigh trial strategies, and for judges to make consistent decisions. Therefore, the court would have established a more useful precedent if it had made such a clarification.

C. While the Burris *Court Correctly Concluded That the Potential Prejudice of the Contested Expert Testimony Outweighed Its Probative Value, It Missed an Opportunity to Add a Requirement That the Probative Value of Expert Testimony Be Supported by Relevant Fact Evidence.*

The final step in the *Gutierrez* analysis is to determine whether the probative value of the testimony given by the state's gang expert is not outweighed by its potential for unfair prejudice.[193] In *Gutierrez*, the court

188. *Burris*, 435 Md. at 396–97, 78 A.3d at 387.

189. Burris v. State, 206 Md. App. 89, 98–99, 47 A.3d 635, 640 (2012).

190. *Id.* at 101, 47 A.3d at 641.

191. *Id.* at 102, 47 A.3d at 642.

192. The debt that supposedly motivated the killing might not, for instance, have been related to BGF activity.

193. Gutierrez v. State, 423 Md. 476, 498, 32 A.3d 2, 15 (2011).

found that because the probative value of the evidence in question outweighed its danger for unfair prejudice, it should be admitted.[194] Under the facts in *Burris*, the court resolved the balancing test to reach the opposite conclusion.[195] While the court was correct in doing so,[196] a prosecutor who reads the *Burris* decision too narrowly could conclude that the error would have been prevented simply by adding more expert testimony concerning the prevalence of witness intimidation by gangs. The court could have prevented future unfair prejudice in this and similar cases if it had required a showing of fact evidence relevant to each area of gang culture to which an expert would testify.

In *Gutierrez*, while the court did not discuss it, there was ample and undisputed fact evidence to support each properly admitted aspect of expert testimony. The court found that the probative value gained by allowing the State's expert to testify came through his explanation of the phrase "Mara Salvatrucha," his description of the "jumping in" process by which one is initiated into a gang, and his discussion of the import in gang culture of defending the gang's honor.[197] This probative value, the court said, outweighed any danger of unfair prejudice that might arise if jury were to draw a conclusion of guilt by association to a gang.[198] The court also found that the trial court improperly admitted the expert's statement that MS-13 was a particularly violent gang because this statement "[did] little to add to the jury's understanding of why the defendant was the person who committed the particular crime charged."[199] The court's ruling corresponded with a basic relevance requirement.[200] The proposed condition that there be fact evidence to tie a gang expert's testimony to aspects of gang culture in the case is simply a more specific relevance requirement that would likewise have excluded the offending statement in *Gutierrez*.

In contrast to the expert in *Gutierrez*, the Court of Appeals saw little to no probative value to be gained from the testimony of the State's gang expert in *Burris*.[201] This testimony did not explain what role a hit man would play in an alleged extortion attempt nor why gang membership would explain witness recantation, and his identification of the defendant as a BGF member added nothing that fact witnesses had not already said.[202] Indeed, the court clarified that expert testimony has reduced probative value when-

194. *Id.* at 498–99, 32 A.3d at 15–16.
195. Burris v. State, 435 Md. 370, 392, 78 A.3d 371, 384 (2013).
196. *See infra* text accompanying notes 201–210.
197. *Gutierrez*, 423 Md. at 498–99, 32 A.3d at 15.
198. *Id.* at 499, 32 A.3d at 15–16.
199. *Id.*, 32 A.3d at 16.
200. *See* MD. R. 5-402 ("Evidence that is not relevant is not admissible.").
201. *Burris*, 435 Md. at 395–96, 78 A.3d at 386–87.
202. *Id.*, 78 A.3d at 386.

ever it simply restates conclusions already asserted by fact witnesses.[203] The court's position corresponds with Rule 5-403's statement that evidence may also be excluded if its probative value is substantially outweighed by "needless presentation of cumulative evidence."[204] In this case, since multiple fact witnesses expressed personal knowledge that the defendant was a member of the gang, it added little probative value for the state's expert to deduce the same conclusion.[205] On the other side of the balance, the expert's testimony carried significant possibility of unfair prejudice.[206] First, Burris suffered the obvious risk that the jury would be more likely to convict him because of his association with a gang.[207] Second, multiple allusions to the fact that he had spent time in jail could lead to a conviction based on a criminal past unrelated to the crime for which he stood trial.[208] Finally, the expert's analysis of his tattoos invited inferences regarding his propensity for violence.[209] Given the lack of probative value, it is not surprising that the court, on balance, concluded the expert's testimony was unfairly prejudicial.[210]

The Court of Appeals also correctly pointed out the error in presuming that expert gang testimony was justified to explain why the witnesses' testimony did not match their pretrial statements or why a hit man would have a role in a gang's extortion schemes.[211] However, the court missed an opportunity to impose a requirement that the government present evidence that each area of gang culture about which the expert shall speak is relevant to the crime in question. For example, if the expert is to discuss the phenomenon of witness tampering, then the government should first present evidence of witness tampering, or if the expert is to discuss how extortion by gangs works, then the government should first present evidence of extortion. Without such a requirement, a lower court could allow the prosecution to remedy its error simply by having its expert discuss gangs' propensity to intimidate witnesses and to kill those who do not pay their debts, thus adding more unfair prejudice to the testimony. In any case in which an ex-

203. *See id.*

204. MD. R. 5-403. Chief Judge Bell applied the same logic in his dissenting opinion in *Gutierrez*, 423 Md. at 519, 32 A.3d at 27 (Bell, C.J., dissenting), and the court was right to adopt it in *Burris*. If a fact witness has personal knowledge that the defendant is a member of a gang, then logically, that should sway the jury more than an expert who reaches the same conclusion through an examination of photographs, tattoos, or prison records. The testimony of the police expert thus offers little additional probative value, but brings with it the potential prejudice of a condemnation from a figure of authority.

205. *Burris*, 435 Md. at 395–96, 78 A.3d at 386.

206. *Id.* at 394–95, 78 A.3d at 385–86.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 392, 78 A.3d at 384.

211. *Id.* at 396–97, 78 A.3d at 386–87.

pert testifies about witness intimidation, the lack of fact evidence indicating actual intimidation is problematic because witnesses may revise their pretrial statements for other plausible reasons. For example, a witness might change his testimony if the pretrial statement was inaccurate as a result of improper interview tactics or even coercion by police.[212] While police interference with witness's pretrial statements is not relevant under these facts, the courts would do well to keep such a possibility in mind in other cases where the government seeks to admit gang expert testimony as a means of explaining witness recantation.

Just as evidence linking the crime to gang activity is necessary for the proper admittance of testimony by a gang expert in the first place,[213] it makes sense that evidence tying a witness's changed statement to gang intimidation should be necessary for the admittance of expert testimony on the subject of gang coercion of witnesses.[214] Indeed, in each of the out-of-state witness tampering cases to which the court turned for guidance in *Burris*, there was at least some fact evidence that gang members had actually threatened the witnesses.[215] Similarly, before a court permits an expert to discuss the typical behavior of gang extortionists, the State should have to present some evidence that the alleged creditor considered the other party to owe him a debt.[216] In short, if the first step of a *Gutierrez* analysis is to provide some assurance that the gang expert's testimony will be relevant, then the State should also bear the burden of showing through fact evidence

212. *See, e.g.*, People v. Tolliver, 807 N.E.2d 524, 553–54 (Ill. App. Ct. 2004) (Campbell, P.J., dissenting in part) (arguing that the trial court's admission of witnesses' prior inconsistent statements was reversible error in light of substantial evidence that those statements were coerced through lengthy detentions by police). To be clear, the defendant in *Burris* did not present evidence of any such impropriety, but then again, neither did the State present any evidence of gang intimidation.

213. Gutierrez v. State, 423 Md. 476, 496, 32 A.3d 2, 13 (2011).

214. *Tolliver*, 807 N.E.2d at 556 ("Prosecutors are forbidden from arguing or presenting testimony that a witness is afraid of a defendant, afraid to testify, or otherwise afraid due to involvement in a case unless the prosecution first directly connects such fears to defendant's conduct.").

215. *See* People v. Dixon, 882 N.E.2d 668, 671, 674, 675 (Ill. App. Ct. 2007) (detailing statements made by multiple witnesses to prosecutors, police, and the grand jury that they were scared, had received threats, or had been assaulted once it became known that they had made statements about the defendant's involvement in a murder); *Tolliver*, 807 N.E.2d at 532 (relaying one witness's grand jury testimony that she was visited by family members of a defendant, some of whom belonged to his gang, who threatened to "blow up her apartment," "whip her ass," and "kill her niece"); People v. Gonzalez, 135 P.3d 649, 653 (Cal. 2006) (recounting a statement by a witness that he was reluctant to testify because he "might feel something might happen to [him] after" testifying).

216. In *Burris*, the only evidence that Burris believed the victim owed Bam money came in the form of a statement one of the witnesses made to police, 435 Md. at 376, 78 A.3d at 374–75, which would have been hearsay even if it was not recanted at trial. *See* MD. R. 5-802 to 5-806 (declaring hearsay inadmissible and listing exceptions, none of which apply to the circumstances at hand).

that each area of gang culture to which the expert shall speak is relevant to the crime in question.

V. CONCLUSION

The *Burris* court was correct in deciding that in a case where the prosecution alleges without evidence that gang intimidation was responsible for the witnesses' recantation of their pretrial statements, the potential for unfair prejudice from testimony by a gang expert outweighs the probative value of such testimony.[217] However, the court should have recognized the importance of establishing a defendant's gang involvement through clear and convincing evidence,[218] specifying the correct evidentiary standard necessary for fact evidence to establish a connection between gang activity and the crime in question,[219] and establishing a requirement that all areas of gang culture on which an expert testifies be first demonstrated through fact evidence.[220] These three missing elements would provide necessary safeguards against unfair prejudice and would help ensure the kind of consistency and predictability that a criminal defendant requires in order to develop a trial strategy and adopt a meaningful defense.

217. *See supra* Part IV.C.
218. *See supra* Part IV.A.
219. *See supra* Part IV.B.
220. *See supra* Part IV.C.