People v Brown
2019 NY Slip Op 34189(U)
December 12, 2019
Supreme Court, Westchester County
Docket Number: 18-0810
Judge: Anne E. Minihan

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SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

MATTHEW BROWN (a/k/a "Da-Homie") and
JASON GARCIA (a/k/a "G-Shine" a/k/a (Mecca J"),

Defendants.

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DECISION and ORDER
Indictment Number: 18-0810

Minihan, J.,

An indictment has been filed against the defendants charging them with attempted murder in the 2nd degree (Penal Law §§ 110/125.25[01]), assault in the 1st degree (Penal Law § 120.10[01]) (two counts), and criminal possession of a weapon in the 2nd degree (Penal Law §§ 265.03[01][b] and 265.03[03]) (two counts). The People allege that on December 10, 2016, at approximately 1:44 a.m., in the vicinity of 766 South 5th Avenue, in the City of Mount Vernon, defendants Brown and Garcia, while aiding, abetting, and acting in concert with each other, approached the first victim and, with the intent to cause his death, did attempt to cause his death when one of them fired a loaded and operable .22 caliber revolver at this victim, shooting him multiple times. The People further allege that the defendants, while aiding, abetting, and acting in concert with each other and with the intent to cause serious physical injury to that first victim, did in fact cause such injury to that victim as well as to a bystander victim, by firing the loaded and operable .22 caliber revolver at the first victim.

Defendant Brown, claiming to be aggrieved by the improper or unlawful acquisition of evidence, has moved to suppress three noticed identifications of him made by witnesses whose identities are the subject of a protective order. The first two of noticed identifications were made from a video on July 22, 2018 during the grand jury presentation. The third noticed identification pertains to a photographic array which was shown to this same witness on January 26, 2017 in the City of Mount Vernon. Defendant Brown also seeks a pre-trial *Sandoval* ruling by the court.

Defendant Garcia, also claiming to be aggrieved by the improper or unlawful acquisition of evidence, has moved to suppress four noticed identifications of him, the first three of which were made from a video on July 22, 2018 and July 23, 2018 during the presentation of this case to the grand jury and the fourth of which relates to a photographic array shown to this same witness on February 6, 2017 in the City of Mount Vernon. He also seeks the suppression of

noticed oral statement that was electronically recorded on June 26, 2018 at the Metropolitan Detention Center in Brooklyn when defendant Garcia spoke with investigators from the Westchester County District Attorney's Office. Defendant Garcia also seeks a pre-trial *Sandoval* ruling from the court.

By Decisions and Orders dated January 3, 2019 (defendant Brown) and November 8, 2018 (defendant Garcia), this court granted so much of the defendants' motions which were to suppress the noticed identifications to the extent that a hearing was ordered to be held prior to trial to determine whether they were, as the People allege, confirmatory (*People v Rodriguez*, 79 NY2d 445 [1992]) or, alternatively were unduly suggestive so as to taint an in-court identification of the defendant at the trial of this matter (*United States v Wade*, 388 US 218 [1967]). If any noticed identification was held to be impermissibly suggestive, the hearing court would, in that instance, consider whether the People have proven by clear and convincing evidence that an independent source exists for the subject witness's proposed in-court identification. Additionally, as to defendant Garcia, the court directed that a *Huntley* hearing (*People v Huntley*, 15 NY2d 72 [1965]) be held as to the noticed statement attributed to him to determine the admissibility and voluntariness of that statement (CPL 710.30[1][a]; CPL 710.20[3]; CPL 710.60[3][b]).

On November 7, 2019, this court held combined hearings as to the *Huntley* and *Wade/Rodriguez* issues. The People called three witnesses: Investigators Marie D'Angelo and Edward O'Rourke, both with the Westchester County District Attorney's Office as well as Mount Vernon Police Officer Andres Sanchez. Received into evidence at the hearing were the following exhibits: two photographic arrays, Officer Sanchez's supplemental report, the transcript of the grand jury testimony of an identifying witness, a *Miranda* card, a compact disc containing the recorded interview of defendant Garcia with investigators from the District Attorney's Office and ten photographs which were shown to defendant Garcia during the course of that interview. Neither defendant called witnesses or offered evidence.

The court finds the testimony offered by the People's witnesses to be plausible, candid, and fully credible and makes the following findings of fact and conclusions of law.

FINDINGS of FACT

On December 10, 2016, Police Officer Andres Sanchez, an eight year veteran of the Mount Vernon Police Department, was assigned to the Detective Division as a police officer investigator and became involved in the investigation of a shooting that had occurred earlier that day near the Garden Bar, in the 700 block of South 5th Avenue in the City of Mount Vernon. On December 16, 2016, at approximately 4:30 p.m., he met with an eyewitness at the detective division and interviewed her. She told him that she had known a man by the nickname "G-Shine" for six or seven years and that he was an "OG" - or a high ranking member of the Bloods

gang, a gang to which she herself had belonged. She further told him that she also knew a man by the nickname "Da-Homie." She said that she had met him at approximately 9:00 p.m. on the night before the shooting and was with him and G-Shine from then until the incident at 1:44 a.m. the following morning. She did not know either man's actual name, first or last, but she told him that she knew G-Shine's sister, Sandra, and that she knew G-Shine also as "OG."

Utilizing a department maintained computer software program, Officer Sanchez had the witness view a number of photographs of individuals who had been photographed in connection with their arrests in Mount Vernon and who matched the physical description that she had given police. A detective with access to the system put in relevant descriptive information provided by the witness but the witness did not identify anyone from photographs. At the hearing, Officer Sanchez testified that the photograph of neither defendant was in the system.

On January 26, 2017, Officer Sanchez met with the witness and showed her a photograph array containing defendant Brown's photograph along with the photographic images of five other individuals bearing a resemblance to this defendant[1] (People's exhibit 62). Three of the six photographs in the array, including that of this defendant, are relatively dark. All of the men depicted are African American of the same general age, complexion, and appearance as defendant Brown. Hair styles and facial hair are similar in all but one photograph. The background color in each of the six photographs is different, varying from almost black to light gray.

Before showing the witness the array, Officer Sanchez read her written instructions about the procedure, telling her that the photographs she was being shown should not influence her judgment in any way and that she should not conclude or guess that within the array was the image of the person who had committed the crime she witnessed. She was advised to bear in mind that hair styles, beards and moustaches are easily changed. She was told not to indicate to other witnesses whether or not she had made an identification. Officer Sanchez testified that after reading her the instructions he transcribed those instructions into a report (People's exhibit 24).

According to Officer Sanchez, the witness appeared nervous, visibly "shaken," and "terrified." She pointed to the photograph of defendant Brown in the third position and said that that was "Da Homie." Officer Sanchez told her to circle the number or the picture that she selected and to mark her initials and the date. The witness complied, placing her initials and the date within the circled photograph in the third position as well as at the top of the array above the banner (People's exhibit 62). At the bottom of the array, below the photographs, the witness wrote, "The person in picture #3 was the one I seen [sic] shoot Xavier (Piff) on 12/10/16 @ approximately 2:30 a.m. I hope I don't have to testify in this case because he is a blood member and he has connections and at this time I fear me and my daughter lives [sic] are at jeopardy"

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[1]Although the witness described "Da Homie" as having a facial scar, none of the photographs in the array depicted men with such scarring. In the array, however, defendant Brown's photograph is relatively dark and his facial scar is not visible.

(People's exhibit 62). In the right margin, near defendant Brown's photograph, she wrote, "I don't want to come in and complete another statement. I am 100% sure that #3 is the shooter" (People's exhibit 62). Officer Sanchez testified that the words and the writings themselves were the witness's own.

Thereafter, on February 6, 2017, Officer Sanchez again met with the witness and this time showed her a photographic array containing defendant Garcia's photograph, along with the photographs of five other individuals bearing a resemblance to this defendant[2] (People's exhibit 63). Each of the six photographs in the array, including that of this defendant, is relatively dark such that the photographs appear almost sepia in color although, upon close inspection, the photograph of defendant Garcia is slightly more gray or black in tone than it is sepia. Every man depicted is African American and is of the same general age, complexion, hair style and appearance as defendant Garcia. The background color in all six photographs is similarly dark. The array was created with the assistance of Mount Vernon Police Detective McCue who helped choose photographs from the E-Justice system. Officer Sanchez helped select photographs for the array.

Before showing the witness the array, Officer Sanchez read her the pre-printed written instructions about the procedure, telling her that she would be asked to look at a group of photographs and that the fact that they were being shown to her should not influence her judgment in any way, nor should she conclude or guess that within the array was the image of the person who had committed the crime she had witnessed. She was told that she did not have to identify anyone and that it was just as important to clear innocent people of suspicion as it was to identify guilty parties. She was advised to keep in mind that hair styles, beards and moustaches are easily changed. She was told to thereafter indicate to other witnesses whether or not she had made an identification. Officer Sanchez then gave her the array.

In his testimony, Officer Sanchez described the witness's demeanor as "frightened." She viewed the array and selected defendant Garcia's photograph from the fourth position. When told to circle the photograph she had chosen and to initial and date the photograph, she complied. She also completed the written portion of the document underneath the array, writing that she was identifying the fourth photograph to be "G-Shine. The one who was driving the car the day of the shooting with the Homie." In the left margin by defendant Garcia's photograph, the witness wrote "This is G-Shine." She placed her name and address on the array and she signed and dated it as well.

Investigator Marie D'Angelo, from the Westchester County District Attorney's Office, testified that she had worked for the office for four years and that, prior to that, she worked as a

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[2]Although defendant Garcia has facial tattooing, none of the photographs in the array, including that of this defendant, depict any such tattoos.

law enforcement officer in Rockland County and as an investigator with the Bronx County District Attorney's Office for 17 years. She estimated that she had worked hundreds of investigations previous to this. Investigator D'Angelo testified that on July 22, 2018, at approximately 1:30 p.m., she met with the subject eye witness at the District Attorney's Office, along with another investigator and two Assistant District Attorneys. During this interview, the witness was shown two video recordings from the approximate time of the incident and, when asked if she recognized anything about them, pointed out herself as well as the men she knew as "G-Shine" and "Da Homie" from the first video and "G-Shine" from the second video.

Investigator Edward O'Rourke, from the Westchester County District Attorney's Office, testified that he had worked for the office for the previous 13 years and that, prior to that, had been a police officer with the New York Police Department (for 6 years) and the Ossining Police Department (for 5 years). On June 26, 2018, he and fellow investigator Michael LaRotunda interviewed defendant Garcia at the Metropolitan Detention Center in Brooklyn. When the investigators arrived, they were shown to a very small office where they waited until defendant Garcia was brought in in shackles. Once the defendant joined them, Investigator O'Rourke activated the audio recording feature of his cell phone and proceeded to record the entirety of the interview (People's exhibit 92).

In Investigator O'Rourke's presence, Investigator LaRotunda read defendant Garcia his *Miranda* warnings using a pre-printed form (People's exhibit 80). As defendant answered each question in the affirmative, Investigator LaRotunda checked off the corresponding box "yes" indicating the defendant's response: that he understood that he had the right to remain silent and refuse to answer any questions, that anything he said could and would be used against him in a court of law, that he had the right to speak to a lawyer for advice before speaking with them and to have a lawyer with him during questioning, that if he could not afford a lawyer, one would be provided to him free of cost before any questioning commenced, that if he decided to answer questions then, without a lawyer present, he would retain the right to stop questioning at any time.

Thereafter, Investigator LaRotunda asked defendant Garcia, "[h]aving been advised of your rights and acknowledging that you understand these rights, do you wish to talk with us and answer questions?" The defendant responded, "I want to know what this is about," and the investigator responded that he could stop answering questions at any time and that if he was "good with that" they would get into why they were there and that defendant Garcia could "shut it down at any time." The defendant answered "Yes," agreeing to speak with them. Investigator LaRotunda marked the form that the defendant had answered in the affirmative. Investigator O'Rourke filled out the portion of the form which called for the printed name and date of birth of defendant Garcia and upon letting Investigator LaRotunda sign the form, Investigator O'Rourke then signed as a witness. Since the defendant was in handcuffs that were attached to a waist restraint during the interview, he was not asked to sign the form, and thus, the line for the "signature of individual waiving rights" is blank (People's exhibit 80).

During the twenty minutes that followed, defendant Garcia stated in substance that he was at the Metropolitan Detention Center on a parole violation. Investigators showed the defendant still video images and told him that they were looking into a shooting that had occurred on December 10, 2016 near the Garden Bar on 5th Avenue and Kingsbridge in Mount Vernon. They told him that two men had been shot in the incident – that one had been paralyzed and the other had been shot in the head and suffered cognitive impairment. Defendant Garcia denied involvement in the shooting and told investigators that while he had been in the G-Shine gang for a time when he was serving a state prison sentence, he had gotten out because he wanted to change his life and spend more time with his family. The investigators told the defendant that they knew he was involved in the shooting and that if he later wanted to speak with them, he would be welcome to.

At the conclusion of Investigator O'Rourke's testimony, the People rested with respect to the *Huntley* part of the combined hearings. As to the *Wade* portion, the People also rested but reserved the right to litigate the *Wade* issue as to a newly noticed identification.

CONCLUSIONS of LAW

Huntley

That branch of defendant Garcia's motion which is to suppress his noticed statement is denied.

At a hearing to suppress noticed statements made to law enforcement officials, the People bear the burden of demonstrating that the defendant's statements were voluntary beyond a reasonable doubt (*People v Anderson*, 42 NY2d 35 [1977]; *People v Huntley*, 15 NY2d 72 [1965]; *People v Loucks*, 125 AD3d 890 [2d Dept 2015]) and, if applicable, that they were made following the defendant's knowing, intelligent, and voluntary waiver of his *Miranda* rights (*Miranda v Arizona*, 384 US 436, 444 [1966]; *People v Williams*, 62 NY2d 285, 288-289 [1984]). The *Miranda* rule protects an individual's privilege against self-incrimination and, "because the privilege applies only when an accused is 'compelled' to testify, the safeguards required by *Miranda* are not triggered unless a suspect is subject to 'custodial interrogation'" (*People v Berg*, 92 NY2d 701, 704 [1999]). By definition, custodial interrogation entails both custody and interrogation (*People v Huffman*, 41 NY2d 29, 33 [1976]; *People v Valentin*, 118 AD3d 823 [2d Dept 2014]).

Here, defendant Garcia was clearly in custody at the time of the interrogation; thus, the court's analysis of the voluntariness of the statement hinges principally on whether he was properly given his *Miranda* rights. As evidenced by both the *Miranda* form and the audio recording of the entire interview, Investigator LaRotunda adequately advised defendant Garcia of his *Miranda* rights prior to the interview which procured the noticed statement. The investigator read defendant Garcia his *Miranda* warnings using a pre-printed form and, after he answered

each question in the affirmative, Investigator LaRotunda checked off the corresponding box "yes" to show the defendant's response that he understood each of his *Miranda* rights. Investigator LaRotunda then asked defendant Garcia, "[h]aving been advised of your rights and acknowledging that you understand these rights, do you wish to talk with us and answer questions?" to which the defendant responded that he wanted to, "know what this is about." The investigator responded that the defendant could stop answering questions at any time and that if he was "good with that" they would get into why they were there and that the defendant could "shut it down at any time." The defendant told the investigators that he was agreeing to speak with them and the form was marked accordingly. Since the defendant was in handcuffs that were attached to a waist restraint during the interview, he was not asked to sign the form and, thus, the line for the "signature of individual waiving rights" is blank. However, defendant Garcia's willingness to speak to the investigators was demonstrated by the credible record evidence. The People adequately demonstrated that the purpose of *Miranda* warnings was demonstrably achieved, that defendant Garcia grasped that he was not obligated to speak with the police, that his statements would be used to his disadvantage in his prosecution, that he could have the assistance of an attorney merely by requesting one at any time and that he could terminate the interview at will.

A review of the totality of the circumstances demonstrates that the People met their burden under *Huntley* to show that the defendant's statements were voluntarily made (*see People v Mateo*, 2 NY3d 383 [2004]; *People v Anderson*, 42 NY2d 35, 38 [1977]). The People met their burden of demonstrating, beyond a reasonable doubt that the defendant's statements to law enforcement officials were made voluntarily and were not the product of coercion, promises, or false statements creating a substantial risk of false incrimination or undue pressure undermining his ability to make a free choice (CPL 60.45; *People v Huntley*, 15 NY2d 72 [1965]).

Accordingly, that branch of the defendant's motion which is to suppress his noticed statement is, in its entirety, denied.

Wade/Rodriguez

The court denies those branches of the defendants' motions which are to suppress the noticed identifications.

When a defendant challenges an identification procedure as unduly suggestive, the People have the initial burden of establishing the reasonableness of the police conduct and the lack of undue suggestiveness (*see People v Coleman*, 73 AD3d 1200, 1203 [2d Dept 2010]). As here, where the People claim that the identification was merely confirmatory in that the witness was sufficiently acquainted with the defendants, the People bear the burden of demonstrating that the defendant was known to the identifying witness to such a degree so as to be impervious to police suggestion (*see People v Rodriguez*, 79 NY2d 445, 452 [1992]). The confirmatory identification exception requires a case-by-case analysis which "rests on the length and quality of prior contacts between [the] witness and [the] defendant, but always requires a relationship which is more than 'fleeting or distant'" (*People v Waring*, 183 AD2d 271, 274 [2d Dept 1992], *quoting People v Collins*, 60 NY2d 214, 219 [1983]).

Although no single factor is determinative, under the totality of the circumstances, the court finds that the People sustained their burden of establishing that defendant Garcia was so well known to the witness that she was impervious to police suggestion. The credible record evidence demonstrates that she knew defendant Garcia as G-Shine for six or seven years and that she knew his sister as well. In her grand jury testimony, a transcript of which was introduced into evidence at the hearing, the witness testified that she had known G-Shine "for a long time," which she thought was six to eight years and estimated that she had known his sister since the tenth grade. She further testified that later on the night of the shooting, G-Shine had called her but that she had not picked up the phone call and that she saw G-Shine on the street after that and he had chastised her for not answering his phone calls, all of which suggest a relationship that was well established prior to the date of the incident.

The People did not, however, meet the *Rodriguez* burden as to defendant Brown. The record evidence demonstrates that the witness had just met defendant Brown on the day of the shooting and, while it is certainly possible that a confirmatory identification could be made of someone known to a witness for a single day, there was little evidence that the nature of their interaction on that day was sufficiently noteworthy or meaningful to support the conclusion that defendant Brown was well enough known to the identifying witness so as to make the identification of him confirmatory.

In any event, with respect to both defendants, the court finds that the People met their burden of showing the reasonableness of the police conduct and lack of suggestiveness. In neither array was the suspect's photograph in any way highlighted or emphasized nor were the arrays shown to the witness in a suggestive fashion (*see People v Anaya*, 206 AD2d 380 [2d Dept 1994]; *People v Burris*, 171 AD2d 668 [2d Dept 1991]). The witness was given detailed cautionary instructions each time prior to viewing the array and there is no record evidence that the officer who showed the arrays to this witness made any comments, suggestions or encouragement during the procedures. Neither is there any indication from the record that the witness viewed the array for more than a brief period of time before making positive identifications.

As to defendant Garcia, the identifying witness was shown a photographic array containing the defendant's photograph along with the photographs of five other individuals bearing a resemblance to this defendant. Although defendant Garcia has facial tattoos, no tattoos are visible in any of the six photographs in this array. The backgrounds and each of the six photographs themselves are relatively dark and appear almost sepia in color. Although, upon subjecting the array to particular scrutiny, it is possible to discern that the photograph of defendant Garcia is slightly more gray or black in tone than it is sepia, that difference is not readily apparent. Each of the men depicted is an African American of the same general age, complexion, hair style and appearance as defendant Garcia.

As to the array containing defendant Brown's photograph, all of the men depicted were generally of the same age, race and appearance and each bear a general resemblance to him. Although the witness described defendant Brown as having a facial scar no visible scarring is apparent on any of the photographs in the array. Half of the photographs, including the one of

defendant Brown, are relatively dark. The background in each photograph is different such that this defendant's photograph does not stand out from the others.

On this record, neither defendant demonstrated by a preponderance of the evidence that the photographic identification procedures were unduly suggestive; nor has either shown that there was any misconduct by police in the administration of the identification procedures. Accordingly, both defendants' motions to suppress the noticed identifications are denied.

Sandoval

Like every other witness in a civil or criminal matter, a defendant who chooses to testify on his own behalf at a criminal trial may be cross-examined regarding those of his prior crimes and bad acts which bear upon his credibility, veracity or honesty (*see People v Hayes*, 97 NY2d 203, 207 [2002]; *People v Bennett*, 79 NY2d 464, 468 [1992]; *People v Sandoval,* 34 NY2d 371 [1974]; *People v Marable,* 33 AD3d 723, 726 [2d Dept 2006]). Although the questioning about prior crimes and past conduct is not automatically precluded simply because the crime or conduct inquired about is similar to the crime charged (*see People v Hayes,* 97 NY2d at 208; *People v Walker,* 83 NY2d 455, 459 [1994]; *People v Pavao,* 59 NY2d 282, 292 [1983]), "cross-examination with respect to crimes or conduct similar to that of which the defendant is presently charged may be highly prejudicial, in view of the risk, despite the most clear and forceful limiting instructions to the contrary, that the evidence will be taken as some proof of the commission of the crime charged rather than be reserved solely to the issue of credibility" (*People v Sandoval,* 34 NY2d at 377; *see People v Brothers*, 95 AD3d 1227, 1228-1229 [2d Dept 2012]). Thus, "a balance must be struck between, on the one hand, the probative worth of evidence of prior specific criminal, vicious or immoral acts on the issue of the defendant's credibility, and, on the other, the risk of unfair prejudice to the defendant, measured both by the impact of such evidence if it is admitted after his testimony and by the effect its probable introduction may have in discouraging him from taking the stand on his own behalf" (*People v Sandoval,* 34 NY2d at 375). By so doing, the defendant may make an informed decision as to whether or not to testify at his trial (*People v Sandoval*, 34 NY2d at 375).

The People ask that they be permitted to inquire as to defendant Garcia's prior criminal convictions to the extent that, should he choose to testify, they be permitted to cross-examine him as to his June 21, 2005 conviction for aggravated unlicensed operation of a motor vehicle in the 3rd degree (together with the date of the incident, the underlying facts, and the sentence imposed), his January 24, 2004 conviction for assault in the 2nd degree and criminal possession of a weapon in the 3rd degree (together with the date of the incident, the underlying facts, and the sentences imposed), his October 5, 2005 conviction for attempted criminal possession of a weapon in the 3rd degree and attempted assault in the 3rd degree (together with the date of the incident, the underlying facts, and the sentences imposed), his June 2, 2011 conviction for false personation and aggravated unlicensed operation of a motor vehicle in the 3rd degree (together with the date of the incident, the underlying facts, and the sentences imposed), his August 4, 2011 conviction for aggravated unlicensed operation of a motor vehicle in the 3rd degree

(together with the date of the incident, the underlying facts, and the sentence imposed), his January 17, 2013 conviction for a violation of 18 USC § 922(g) (felony possession of a firearm) (together with the date of the incident, the underlying facts, and sentence imposed), and his June 22, 2016 conviction for aggravated unlicensed operation of a motor vehicle in the 3rd degree (together with the date of the incident, the underlying facts, and the sentence imposed). In so doing, the People maintain that each of these bear upon defendant Garcia's testimonial credibility and that they are demonstrative of his apparent willingness to place his own interests above those of society.

Defendant Garcia opposes use of his prior criminal convictions in any way whatsoever, pointing out that, inasmuch as the instant charges involve allegations of violence with a firearm, the jury would view his prior assault and attempted assault convictions and convictions for weapons possession as propensity evidence tending to demonstrate that he is a person prone to violence and that this would unduly prejudice him in the eyes of the jury. As to the numerous vehicular convictions, he maintains that they are not germane to his testimonial credibility. Defendant Garcia also argues, as to all but his 2013 and 2016 convictions that they are too remote to meaningfully bear upon the issue of his present credibility.

In order to properly balance the probative value of the defendant's prior convictions against any potential for undue prejudice, and to permit the defendant the opportunity to make an informed and meaningful decision as to whether to testify at trial, the court directs the following *Sandoval* compromise. Pursuant to this compromise, the People will not be permitted to inquire at all as to the nature of the defendant's prior criminal convictions. In my view the convictions arising out of the Vehicle and Traffic Law do not bear sufficiently upon the defendant's credibility, honesty or veracity so as to permit inquiry at the risk of unduly deterring the defendant from testifying on his own behalf and subjecting him to prejudice in the eyes of the jurors should he choose to testify. While each certainly does evince the defendant's willingness to place his own interests above those of society, none of these convictions except the one in 2016 is particularly recent in any event.

With respect to the assault, attempted assault, criminal possession of a weapon and firearms possession convictions, most of these are at least fourteen years old and, in any event, their relative probative value is outweighed by the real and significant danger of these incidents being perceived by the jury as proof of defendant's propensity towards violence, despite any curative instruction. As to the 2013 conviction for the violation of 18 USC § 922(g), which is significantly more recent and which is demonstrative of defendant Garcia's willingness to place his interest above those of the community, it is entirely germane to his testimonial veracity and integrity. Accordingly, the People may inquire, should the defendant testify, as to whether he has been convicted of a felony as well as the date of the incident and the date of conviction. By limiting impeachment questioning in this way, any undue prejudice which could result from the fact that this 2013 offense, like those charged herein, involved a firearm, is ameliorated.

Defendant Garcia may not use the *Sandoval* ruling as both a sword and a shield (*see People v Marable*, 33 AD3d 723, 725 [2d Dept 2006]). If he chooses to testify and then deny or equivocate as to having been convicted, or should he claim to have never acted in violence, or should he contend that in prior cases he pleaded guilty because he was in fact guilty but that here he did not plead guilty because he is not guilty, he will have opened the door to cross-examination exploring his true motivation for the prior guilty plea and the People will, upon their application to the court, be permitted to impeach his credibility with questions about all of the underlying facts of his prior criminal conviction (*see People v Fardan*, 82 NY2d 638, 646 [1993]; *People v Thomas*, 47 AD3d 850 [2d Dept 2008]; *People v Marable*, 33 AD3d at 725).

Defendant Garcia is thus cautioned not to misuse the *Sandoval* protection afforded him under this ruling. If defendant Garcia testifies, and if the People believe that the defense has opened the door, the People may seek either a curative instruction or leave to use his prior convictions that were limited by this decision and order. The People shall raise this issue, if it arises, outside the presence of the jury and the court will made a determination at that time.

People's *Molineux/Ventimiglia* motion

The People have brought an application to introduce in their case-in-chief evidence pursuant to *People v Molineux* (164 NY 264) and *People v Ventimiglia* (52 NY2d 350). As for the proposed *Molineux* evidence, the People seek to introduce evidence of uncharged crimes and prior bad acts of the defendants, Brown and Garcia, to prove identity, establish motive, complete the narrative, and assist the jury in understanding the crimes charged herein. Specifically, the People seek to introduce through five witnesses evidence of the following: (1) defendants' gang membership in the G-Shine Bloods; (2) the hierarchy within that gang and defendant Garcia's high-ranking position; (3) the fact that Garcia sells marihuana and has others sell marihuana on his behalf; and (4) a conflict between Garcia and one of the victims, Zavier Etheridge, over money owed for marihuana. With respect to the proposed *Ventimiglia* evidence, the People seek to introduce, as proof of consciousness of guilt, efforts by defendant Garcia to intimidate a cooperating eyewitness to the subject shooting and the alleged conspiracy between defendants and others to kill that cooperating eyewitness.

The proposed *Ventimiglia* evidence as to the alleged conspiracy to kill the witness relates to charges in a separate Westchester County Indictment (No. 19-448), by which defendants, along with Damien Rickard, Laquanna Kershaw, and Cassaundra Dunham, are charged, in pertinent part, with Conspiracy in the Second Degree (Penal Law § 105.15), for their alleged plan to kill a cooperating eyewitness to the subject shooting charged herein.[3]

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[3]Indictment No. 19-448 also charged Garcia, Rickard, Kershaw and Dunham with Attempted Murder in the First Degree (Penal Law § § 110/125.27 [1][a][v]) and Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[3]), and charged Garcia and Kershaw, individually, with Promoting Prison Contraband in the First Degree (Penal Law § 205.25[2]).

***Molineux*: gang membership, hierarchy & Garcia's marihuana sales & conflict with victim**

The court finds that the proffered evidence as to defendants' gang membership and the hierarchy within that gang, and defendant Garcia's uncharged marijuana sales and conflict with one of the victims is admissible under *Molineux*. Pursuant to the well-established *Molineux* rule, "evidence of a defendant's uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate the defendant's propensity to commit the crime charged" (*People v Cass*, 18 NY3d 553, 559 [2012]; *see People v Alvino*, 71 NY2d 233, 241 [1987]; *People v Allweiss*, 48 NY2d 40 [1979]; *People v Molineux*, 168 NY 264, 291 [1901]). This "rule reflects the importance of an accused being judged only on relevant, probative evidence, rather than on the basis of propensity to commit crime" (*People v Gillyard*, 13 NY3d 351, 355-356 [2009];), and exists to avoid the danger that the jury will "misfocus . . . on defendant's prior crimes" (*People v Rojas*, 97 NY2d 32, 36-37 [2001]) and will, despite the lack of convincing evidence, "find against [the defendant] because his conduct generally merits punishment" (*People v Allweiss*, 48 NY2d at 46).

Where, however, relevant evidence of uncharged crimes has a bearing upon a material aspect of the People's case, other than the defendant's general propensity toward criminality, the probative value may justify its admission if the evidence is not unduly prejudicial (*People v Molineux*, 168 NY at 293). To that end, evidence of other crimes may be competent to prove specific crimes when that evidence tends to establish, inter alia, "(1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial" (*People v Molineux*, 168 NY at 293). The list of exceptions recognized in *People v Molineux* is "merely illustrative and not exhaustive" (*People v Rojas*, 97 NY2d at 37; *see People v Resek*, 3 NY3d 385 [2004]).

The court agrees with defendants' arguments in opposition to the People's motion, that evidence of defendants' gang membership is not needed to prove their identity. However, the court finds convincing the People's position that evidence as to gang membership/hierarchy, and Garcia's drug sales and conflict with victim Etheridge, are relevant to explain Brown's motive, and to complete the narrative and assist the jury in understanding the relationship between the defendants and the witnesses. Evidence of gang activity, and prior uncharged crimes, may be admitted to provide necessary background, or when it is "inextricably interwoven" with the charged crimes, or to explain the relationships of the individuals involved (*see People v Bailey*, 32 NY3d 70, 83 [evidence of gang membership probative of defendant's motive and intent to join the assault on the victim, and provided necessary background information on the nature of the relationship between codefendants, placing charged conduct in context]; *People v Dorm*, 12 NY3d 16, 19 [2009] [evidence of defendant's prior bad acts toward victim probative of his motive and intent, provided necessary background information on the relationship between defendant and victim, placed charged conduct in context]; *People v Sarkodie*, 172 AD3d 909, 911 [2d Dept 2019] [evidence of defendant's gang affiliation providently admitted, probative of defendant's motive, explained relationship of the individuals involved]; *People v Bruno*, 127 AD3d 986, 986 [2d Dept 2015] [court providently admitted evidence of defendant's gang membership and an incident that occurred one week before the subject stabbing, relevant to motive and to claim of justification and explained relationship of the parties], *lv denied* 27 NY3d 993 [2016]; *People v Faccio*, 33 AD3d 1041, 1042 [3d Dept 2006] [county court did not err in

permitting proof of defendant's gang membership, evidence of gang membership, structure and some of its activities was inextricably interwoven with the charged crimes, provided necessary background, explained relationships and explained motives and intent], *lv denied* 8 NY3d 845 [2007]; *compare People v Kims*, 24 NY3d 422, 438 [2014] [evidence of gang activity not relevant to material issue, did not provide relevant background information, not needed to explain relationships, not interwoven with the charges; but error in admitting evidence of gang affiliation harmless]).

Here, the People argue convincingly that defendants' gang membership explains the heightened level of trust between them and the witnesses, explains why defendant Garcia would share inculpatory information with the witnesses as to his conflict with victim Etheridge, whom he referred to as "Piff," and the shooting itself and explains why defendant Brown would seek retribution against victim Etheridge on behalf of Garcia. The People seek to introduce testimony that: Garcia discussed in front of fellow gang members his conflict with "Piff" over money Piff owed for marihuana which Garcia had given him to sell; Garcia stated that he was "riding around with a gun in his lap and a ski mask on" looking for "Piff," and described the conflict as "personal" but alerted other G-Shine members to be "on the lookout" for "Piff;" as a high-ranking member of the G-Shine Bloods, Garcia would call upon others, such as Brown, to carry out acts of violence on his behalf; Brown stated just moments before the shooting that he was carrying out Garcia's orders to "take care of" a man at the Garden Bar because Garcia is "the big homie;" Garcia told his fellow gang members that he had Brown "flat line" victim Etheridge.

The People met their burden of showing a non-propensity purpose for offering the subject *Molineux* evidence. The proponent of the evidence must identify some issue other than mere criminal propensity, to which the evidence is relevant (*People v Cass*, 18 NY3d at 560). Here, the People have shown that the evidence of defendants' gang membership/hierarchy, and defendant Garcia's marijuana sales and conflict with one of the victims, is relevant to motive, explains the relationships of the individuals, provides necessary background information, and is "inextricably interwoven" with the charged crimes (*see People v Bruno*, 127 AD3d at 986; *People v Faccio*, 33 AD3d at 1042).

Moving to the second aspect of the *Molineux* inquiry, the court finds that the probative value of the subject evidence outweighs its potential for prejudice (*see People v Alvino*, 71 NY2d at 242; *see People v Gillyard*, 13 NY3d, 355-356 [2009]; *People v Sayers*, 64 AD3d 728 [2d Dept 2009]). Thus, the court will permit the People to elicit limited testimony as to defendants' gang membership and their hierarchy with the gang, defendant Garcia's marijuana sales through the victim Etheridge and the conflict between Garcia and victim Etheridge about money the victim allegedly owed for marihuana Garcia gave him to sell. The People are strongly cautioned that the testimony as to gang membership, hierarchy, Garcia's marihuana sales and conflict with the victim must be strictly limited to the purposes of showing the relationship of the parties and providing necessary background information which is "inextricably interwoven" with the instant crimes. Witnesses will not be permitted a wide latitude to testify on these matters, and the People will not be permitted to introduce duplicative testimony on these matters by multiple witnesses. As to the marihuana sales, the People will only be permitted to introduce evidence that Garcia sold marihuana through the victim Etheridge, not through other individuals. Testimony intended merely to show defendants' connection to a culture of violence, or their

propensity to commit the charged crimes, is strictly prohibited, and any attempt to elicit testimony for those purposes is expressly prohibited.

Counsel for all parties are instructed to submit to the court, in writing within three (3) days of the date of this decision and order, a proposed limiting instruction for the jury as to the use of the evidence of gang membership, hierarchy, defendant Garcia's marijuana sales and Garcia's prior conflict with one of the victims.

***Ventimiglia*: Garcia's witness intimidation, defendants' conspiracy to kill witness.**

With respect to the proffered *Ventimiglia* evidence as to witness intimidation, the court finds that such evidence is admissible on the People's case-in-chief against defendant Garcia to show his consciousness of guilt (*see People v Ventimiglia*, 52 NY2d 350]). In a *Ventimiglia* application, the court must determine whether alleged prior bad acts of the defendant can be used by the prosecution as *direct evidence* of defendant's guilt (*see People v Spotford*, 85 NY2d 593, 597 [1995] [emphasis in original]). Here, the People seek to have the subject witness testify that shortly after the shooting Garcia approached the witness and inquired whether the witness had spoken to the police about the incident, and then told the witness, in sum and substance, to "remember the code" and that "snitches get stitches." The court finds that the evidence of defendant Garcia's implied threats to the witness are probative of defendant Garcia's consciousness of guilt (*see People v Kims*, 24 NY2d 422, 439 [2014] [evidence of defendant's escape was probative of consciousness of guilt]; *People v Montanez*, 57 AD3d 1366, 1367 [4th Dept 2008] [affirming *Ventimiglia* ruling admitting evidence of defendant's threats to three of the People's witnesses as consciousness of guilt], *lv denied* 12 NY3d 857 [2009]; *People v Rosario*, 309 AD2d 537, 538 [1st Dept 2003] [court properly admitted testimony that defendant made implied threat to People's main witness if he did not provide favorable testimony, highly probative of defendant's consciousness of guilt], *lv denied* 1 NY3d 579 [2003]). Moreover, the court finds that the probative value of the evidence of Garcia's attempts to intimidate an eyewitness outweighs its potential for prejudice. The court agrees with counsel for defendant Brown that such witness intimidation evidence is not relevant to Brown and, as such, the People will not be permitted to introduce such evidence in their case against Brown.

With respect to the proposed *Ventimiglia* evidence as to defendants' conspiracy to kill an eyewitness, specifically, the transcript of the jail phone calls, the CD of the video visit between defendant Garcia and Laquanna Kershaw, and the jail correspondence allegedly between the defendants, the court finds that much of this evidence lacks sufficient probative value to overcome its potential to cause prejudice. With the exception of the March 11, 2019 telephone call between defendant Garcia and Cassaundra Dunham, and the March 14, 2019, telephone call between defendant Garcia and Laquanna Kershaw, the telephone conversations offered by the People are exceedingly difficult to decipher and require substantial assumptive leaps to connect the dots to a point where the calls are comprehensible and probative of anything. The same goes for the CD of the video visit, and the jail correspondence. They will more likely confuse and discourage the jury than help them to understand the present charges and to perform their fact-finding function. As such, the court denies the People's motion to introduce the CD of the video visit, the jail correspondence, and all of the telephone calls except for the March 11, 2019, and March 14, 2019, telephone calls. Other than those two specific phone calls, the court finds that

the alleged conspiracy evidence which the People seek to introduce to show consciousness of guilt in this case lacks sufficient evidentiary value to overcome its potential to cause great prejudice.

As for the March 11, 2019, telephone call between defendant Garcia and Cassaundra Dunham, the two discuss in relatively clear terms a statement given by the subject witness and Garcia's desire to have someone contact that witness about it. This call, the court finds, is relevant as to Garcia's consciousness of guilt and more probative than prejudicial. As to the March 14, 2019, telephone call between defendant Garcia and Laquanna Kershaw, the contents are probative as to Garcia's consciousness of guilt in that the two discuss the surveillance video of the shooting incident charged herein, and Garcia states his plans to shave his beard and change his walk, to look different from the video. This call is more probative than prejudicial.

Accordingly, the People's motion to introduce in their case in chief evidence as to the alleged conspiracy to kill the witness is granted to the limited extent that the People may, in the case against defendant Garcia, introduce evidence of the March 11, 2019, and March 14, 2019, telephone calls. The People and counsel for defendant Garcia are instructed to provide the court, within three days of the date of this decision and order, with a proposed limiting instruction for the jury as to how to consider the subject witness intimidation and conspiracy evidence.

To the extent that the People, as part of this motion, are seeking to introduce evidence that on March 16, 2019, as part of a surveillance operation, law enforcement observed Cassaundra Dunham provide Damien Rickard with a loaded operable firearm "at the directive of Garcia," and that police officers recovered the firearm and arrested Dunham and Rickard, the court denies that branch of the People's motion and precludes them from introducing any reference to such evidence as it lacks sufficient evidentiary value in this case to overcome its potential to cause extreme and irreparable prejudice. To the extent that the People, as part of this motion, are seeking to introduce evidence as to the contraband cell phone and charger allegedly used by defendant Garcia, and the methods by which they were brought to the jail, the People are instructed that their inquiry will be limited to eliciting the simple fact of Garcia using a contraband phone in the jail.

This constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
December 12, 2019

Hon. Anne E. Minihan, A.J.S.C.

People v Michael Brown and Jason Garcia
Indictment Number 18-0810

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