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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GARY MATTA, Defendant Below, Appellant v. STATE OF DELAWARE Plaintiff Below, Appellee.	)))))))))))	No. 514, 2024

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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I. MATTA'S OBJECTION THAT EVIDENCE OF HIS EXPULSION FROM THE BOY SCOUTS WAS IRRELEVANT, UNFAIRLY PREJUDICIAL, AND LIKELY TO CAUSE JUROR SPECULATION OF OTHER MISCONDUCT FAIRLY PRESENTED THE ISSUE OF UNCHARGED MISCONDUCT FOR APPELLATE REVIEW, AND ITS ADMISSION DENIED HIM A FAIR TRIAL.

Merits of Argument

The State argues that Matta's failure to specifically mention D.R.E. 404(b) at trial works a waiver of his claim on appeal that evidence of him being kicked out of the Boy Scouts should have been stricken as unproven and ambiguous uncharged misconduct evidence primarily relevant to prove criminal propensity and bad character and not probative of any material fact of the State's case that was in dispute.[1] The State also claims that the Trial Court did not err when it overruled Matta's objection under D.R.E. 403 and allowed the jury to consider the evidence without a limiting instruction. But the State is mistaken.

Matta preserved these claims for review by objecting to the State's introduction of the fact of him being kicked out of the Boy Scouts as non-probative and unfairly prejudicial and through his continuing efforts to combat the unfairly prejudicial effect this fact likely would have on the jury. Matta fairly presented to

[1] Del. Supr. Ct. R. 8 provides, "Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."

the Trial Court his legitimate apprehension that the jury would interpret him being kicked out of the Boy Scouts as propensity evidence of other similar wrongful and/or criminal conduct. However, even if any discrete portion of Matta's argument on direct appeal were to be deemed insufficiently presented below, the interests of just in this case justify this Court considering and determining all of them on appeal.

A. Matta's objection as well as his later argument to the Trial Court fairly presented the issue of whether evidence of Matta being "kicked out" of the Boy Scouts implicated D.R.E. 404(b)'s prohibition against uncharged crimes and misconduct.

Matta's objection fairly presented these questions to the Trial Court because it expressed his concern that evidence of his expulsion from the Boy Scout was "more prejudicial than probative," "was political," and "had nothing to do with molesting minors."[2] The objection, therefore, was clearly lodged to prevent the jury from drawing the harmful and improper inference of other uncharged sexual misconduct on Matta's part. Matta's expressed apprehension was, therefore, presented on the record for the Trial Court's consideration. When Matta tried to remedy the unfair prejudice the State had injected into its case by establishing Matta had been expelled for merely "political" reasons, the State objected:

> (The following sidebar discussion commences:)
> MR. ANTOINE: Your Honor, the problem is he -- go ahead.

[2] A150-151.

> MR. WYNN: Are we addressing my objection or your objection to your own question?
> THE COURT: Go ahead, Mr. Wynn.
> MR. WYNN: Okay. So my objection is he asked the question, he insinuated that he was out for political reasons, which was testimony which hasn't been drawn out. *A211
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> If he believes -- whatever he gets is the answer he gets. The answer, you take the ride, Your Honor. He didn't need to ask the question on why he was out there.
> MR. ANTOINE: *But he brought it up that Gary Matta got kicked out of the Boy Scouts due to some unsavory reason, the jury could speculate.* I don't think he can say what other people say. I can ask, did you know that it was a political reason? I think the reason was he insulted another Scouts master's kid.[3]

Matta objected at trial that the evidence was not probative (i.e., irrelevant to a material issue in dispute), unfairly prejudicial, and had nothing to do with the subject matter of this trial (molesting a minor), and argued that its admission allowed the jury to speculate that him being "kicked out" of the Boy Scouts was for "some unsavory reason" (uncharged crime or misconduct the nature of which was not established by clear and convincing evidence). Matta, therefore, fully and fairly

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[3] A210-211 (italics added) (Matta was permitted to ask a leading question to elicit hearsay that the reason for Matta's removal from the Boy Scouts was "insulting another Scouts master's kid." A211. But when asked the leading question, D.M. denied knowing that to be the case (A212), and although this question was referred several times, it remained unanswered throughout the trial. A276 (Direct Testimony of J.P.); A378 (Redirect Testimony of Detective Micolucci) ("[D.M.] had asked me if I had figured out why Mr. Matta had been kicked out of the Boy Scouts. I had not."); A485 (Prosecutor's Rebuttal Summation) (In response to Matta Summation criticizing police for not searching Matta's computer: "That was in reference to why Mr. Matta got kicked out of the Boy Scouts. Mr. Matta getting kicked out of the Boy Scouts is not a charged offense here. Getting kicked out of the Boy Scouts does not create probable cause to go roaming around in your old computer.")

presented the substance of the D.R.E. 404(b) issue now on appeal to the Trial Court below.

B. Matta's involuntary expulsion from the Boy Scouts implicates uncharged misconduct under D.R.E. 404(b).

The State denies Matta's claim that being kicked out of the Boy Scouts constitutes an "other crime, wrong, or act" or evidence of uncharged misconduct.[4] However, its position is not supported by legal authority generally and rings hollow in Matta's particular case. In fact, courts do recognize that evidence one has been forcibly expelled from an organization implies wrongful conduct upon the person so sanctioned depending on the circumstances. For example, in *Easter v. State*,[5] a court found that a prompt trial court instruction to disregard cured a prosecutor's "improper question" asking whether defendant was kicked out of his church. The court observed that

> The jury could have construed the question two ways: first, the church had kicked Easter out for the alleged acts or, second, the church had kicked him out because of other extraneous acts which were not before the jury. The court, in sustaining the objection to the question, determined that the question was improper. The question before us then is whether the jury was so affected by the question that they were unable to disregard it in their deliberations as instructed. In light of all the evidence that was heard, we believe that the asking of this single, unanswered question did not so affect the jury. [Citation omitted.] We overrule point one."[6]

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[4] Ans. Br. at 19.
[5] 867 S.W.2d 929 (Tex. Ct. App. 1993).
[6] *Easter*, 867 S.W.2d at 934.

As noted in that case, the question was not permitted to be answered before the jury because the court recognized something the Trial Court here did not, that the evidence could be taken two ways, as either implying wrongful other conduct of that defendant, or not.

More directly on point in *State v. Hood,*[7] the court held that evidence of a defendant's excommunication from his church directly implicated a 404(b) issue. There the defendant had been charged with rape and the admission of his excommunication was held to be reversible error because the danger of unfair prejudice of that evidence substantially outweighed its probative value.[8] A step of its analysis answered the threshold question of whether the defendant's forced separation from his church was properly considered evidence of other misconduct under their Rule 404(b).[9] In *Hood*, Utah denied, as the State of Delaware in analogous fashion does here, that "excommunication" was a "crime" or "wrong" that may be considered improper character evidence.[10] The court disagreed and found that although

> a person's status as an excommunicated member of the church does not necessarily imply the commission of a bad act[,] . . . in the unique context of this case, evidence of excommunication strongly implied that

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[7] *State v. Hood*, 438 P.3d 54 (Utah Ct. App. 2018).
[8] *Id.* at 59.
[9] *Id.* at 62.
[10] *Id.*

> [defendant] had committed an act relevant to his propensity to commit the crimes for which he was on trial.[11]

The same is true for Matta in the unique circumstances of this case. The crimes for which he was tried are alleged to have sprung from his position as an adult scoutmaster and the complainant's status as a boy scout in his care. Matta having been kicked out of the Boy Scouts, therefore, carried with it the strong implication it was for an act like the crimes for which he was standing trial.

The State's attempt to support its argument on this point by noting that "lack of employment is not, in itself, evidence of bad acts or negative character" is unpersuasive.[12] While that principal may be true when viewed in isolation, it becomes less so if the evidence is that: the unemployed person was fired; that the evidence is repeatedly presented to the jury; that the nature of the conduct causing the firing was not provided to the jury; and that the person is now on trial charged with sexually harassing a co-worker.[13] In fact, courts commonly do treat a

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[11] *Hood*, 438 P.3d at 62-63.

[12] Ans. Br. at 19.

[13] *Cf. Hood*, 438 P.3d at 63 (nothing that ". . . evidence that the defendant was fired strongly suggests that the termination resulted from similar conduct. Indeed, the likely (and perhaps only) inference a jury will draw is that the defendant committed a prior act that bears on his propensity to engage in the type of conduct for which he is on trial").

defendant's status as the recipient of discipline or punishment as evidence of uncharged conduct subject to Rule 404(b)'s restrictions.[14]

As a result, Matta's status as an ex-scoutmaster on trial for charges of molesting a minor who was a boy scout under his supervision combined with his unexplained expulsion from scouting would have naturally compelled his uninstructed jury to draw the most damning inference available—that he was kicked out of scouting for conduct similar to that for which he was on trial.

C. Evidence Matta had been "kicked out" of the Boy Scouts was not probative of a material issue or ultimate fact in dispute in the case.

The State now claims on appeal that the evidence was properly admitted "to establish a factual 'timeline' of the crimes charged here and 'the continuing of the relationship [between Matta and D.M.] outside of the Scouts' when D.M. mentioned that Matta was 'kicked out' of the Boy Scouts a few years after he joined" because the continuation of their relationship outside of Scouts was "relevant or material to an issue or ultimate fact in dispute in the case."[15] The State goes on to argue that

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[14] *See Hood*, 438 P.3d at 63-64; *see also United States v. Sandow*, 78 F.3d 388, 390-91 (8th Cir. 1996) (suspension of agent/broker license); *United States v. Fox*, 69 F.3d 15, 19-20 (5th Cir. 1995) (suspension of real estate license); *United States v. Cunningham*, 103 F.3d 553, 556-77 (7th Cir. 1996) (suspension of nurse's license).
[15] Ans. Br. at 20-21 (citing *Getz v. State*, 538 A.2d 726, 734 (Del. 1988)).

this evidence "forms the factual setting of the crime in issue"[16] and, therefore, its use "was not inconsistent with Rule 404(b)'s core prohibition against proof of criminal disposition."[17] The State, however, misconstrues the caselaw because neither the case cited nor the quotation extracted from it stands for the type of casual, low bar "relevance" the State proposes as a justification for admission in this appeal.

In *Williams v. State*, the case relied upon by the State, the 8th Circuit explained that for a "factual setting of the crime" to be sufficient to admit prejudicial uncharged misconduct, the evidence must "form an integral part of the crime charged."[18] The court held that evidence of an uncharged murder was properly admitted in order to prove a kidnapping charge because the killing had been in furtherance of the kidnapping and occurred during the victim's attempted escape from the defendants' car, making that other crime "extremely relevant" to prove that the defendants had held the victim in their custody against his will.[19] In contrast, the State's pitch for the evidence's relevance here as mere background in proving Matta's guilt is tenuous at best and far from "extremely relevant." In addition, the State's Opening Brief suffers from the legally significant flaw of ignoring throughout Matta's point that

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[16] Ans. Br. at 21 (citing *United States v. Williams*, 95 F.3d 723, 731 (8th Cir. 1996) "Rule 404(b) only forbids introduction of extrinsic bad acts whose only relevance is to prove character, not bad acts that form the factual setting of the crime in issue.").
[17] Ans. Br. at 21.
[18] *Williams*, 95 F.3d at 731.
[19] *Williams*, 95 F.3d at 730-731.

even if the fact or date of Matta and D.M.'s exit from scouting had some minimal background relevance to show their general relationship continued after scouting ended (NOT a material issue in dispute), the unfairly prejudicial fact that Matta had been forced out had none.[20]

D. Matta being "kicked out" of the Boy Scouts was not "inextricably intertwined" with the State's case against Matta.

The State alternatively posits that the *Getz* factors are not implicated at all because Matta being expelled from the Boy Scouts was "inextricably intertwined" with the State's "theory of the case and establishing a timeline that the abuse continued after Matta was no longer involved in scouting."[21] But this doctrine of admissibility is meant to be applied narrowly to avoid overly broad *res gestae* exceptions,[22] and in the instant case, how or why Matta left scouting—i.e., that he was kicked out—fills no "chronological and conceptual void"[23] likely to result in jury confusion, nor was the evidence of it subjected to a meaningful consideration of its probative value balanced against its unfair prejudice under D.R.E. 403, as required for this theory of admissibility.[24]

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[20] Op. Br. at 23.
[21] Ans. Br. at 23.
[22] *Pope v. State*, 632 A.2d 73, 76 n.8 (Del. 1993) (citing *United States v. Hill*, 953 F.2d 452, 457, n.1 (9th Cir. 1991))
[23] *Pope*, 632 A.2d at 76.
[24] *Pope*, 632 A.2d at 76 ("A trial judge may only admit evidence of "inextricably intertwined" misconduct for the purposes of avoiding the confusion which would be

What does an uncharged bad act that is inextricably intertwined with a charged offense look like? It is an act the exclusion of which would make it difficult for the jury to understand what crime happened, why it happened, and how it happened.[25] Matta's forced removal from the Boy Scouts was unnecessary to answer any of those questions and was not intertwined with his charges as approved by the caselaw.[26] Nor was its introduction necessary to understand that some of the charges allegedly happened after he and the complainant were no longer involved in scouting.[27]

E. The Trial Court's failure to evaluate standards of relevance and unfair prejudice and to instruct the jury on the limits of its consideration of the evidence constituted plain error.

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caused by its exclusion, and then only after balancing the prejudicial effect of its inclusion.").

[25] *State v. Caldwell*, 1996 WL 190792, at *3 (Del. Super. February 13, 1996).

[26] *See, e.g.*, *Zickgraf v. State*, 1992 WL 276424, at *2 (Del. September 21, 1992) (statement referring to uncharged sexual conduct made by defendant asking victim "if he could do the same thing" as he did before and criminal sex act when victim acquiesced were inextricably intertwined because they were necessary to understand what sex crime was committed in Delaware); *see also, e.g.*, *State v. Caldwell*, 1996 WL 190792 (prior uncharged sexual abuse of same victim inextricably intertwined with later, charged sexual abuse of same victim because it was part of a "continuum," and its admission was necessary to show why victim did not try harder to resist defendant's advances and its exclusion would require redaction of statements made by defendant while committing charged offenses thus "thoroughly confusing the jury")

[27] *Hood*, 438 P.3d at 65 ("Establishing some minimal relevance to the State's narrative is insufficient to place other-act evidence beyond the reach of rule 404(b). If it were otherwise, application of rule 402 would be the first and last step of the analysis. Because evidence of Hood's excommunication was not so closely connected to the charged crimes to be intrinsic, rule 404(b) applies to this other-act evidence.").

The State claims Matta waived harmless error analysis because the issues he raises on appeal were not raised in the Trial Court by means of an express objection under D.R.E. 404(b).[28] For plain error review on appeal, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.[29] The defects at trial must be material and apparent on the face of the record; basic, serious and fundamental in their character which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.[30]

Although Matta denies that his conduct of the trial below waived harmless error analysis, the Trial Court's error of admitting the evidence of Matta being expelled from the Boy Scouts where the State's case against him as a scoutmaster alleged to have molested a scout in his care began with a police report nearly 30 years after the events forming the basis of the indicted charges made by a third person and not the alleged victim was clearly prejudicial to Matta's rights and jeopardized the fairness and integrity of the trial process.[31] Therefore, plain error analysis, too, requires reversal and a new trial.

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[28] As discussed, Matta did in fact object to the evidence with language clearly challenging its relevance and unfair prejudice and Matta argued the likelihood that its admission would cause the jury to wrongfully speculate that Matta had committed other wrongs that would merit his expulsion from the Boy Scouts but were not charged in the indictment. Rep. Br. at 2-3; A150-151; A211.

[29] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

[30] *Id.*

[31] *Id.*; *See also* Op. Br. at 26-28 for a full discussion of factual infirmities of the State's evidence, also applicable here.

II. MATTA'S OBJECTION THAT THE OUT-OF-COURT STATEMENTS OF THE COMPLAINANT'S GRANDMOTHER AND UNCLE WERE OFFERED FOR THE TRUTH OF THE MATTER ASSERTED FAIRLY PRESENTED TO THE TRIAL COURT A SCENARIO WHERE IT WAS REQUIRED TO BALANCE THOSE STATEMENTS' UNFAIR PREJUDICE AGAINST THEIR PROBATIVE VALUE AND INSTRUCT THE JURY ON THEIR PROPER USE.

Merits of Argument

Matta's two objections to the introduction of statements allegedly made by the complainant's uncle and grandmother[32] fairly presented the Trial Court with the dilemma discussed in *Sanabria v. State*:[33] whether statements the State claims are being introduced for some purpose other than to establish the truth of a matter they assert are nevertheless likely to be taken by a jury as proof of what those statements assert. When a statement contains an allegation of the crime charged or of another uncharged crime and no alternative to its introduction is found by the trial judge to exist,[34] there is a mandatory requirement placed upon a trial judge if an objection is lodged against it:

> If the out-of-court statement is necessary to provide relevant background information, the second question the trial court must consider is whether the State's need for the background information outweighs the prejudice to the defendant. If the probative value of the third-party statement is substantially outweighed by the prejudice to the

[32] A171; A173.
[33] *Sanabria v. State*, 974 A.2d 107 (Del. 2009).
[34] *Id.* at 114.

> defendant, then the background information should not be provided to the jury.[35]

Finally, if that evidence is to be admitted after consideration of any alternatives and its D.R.E. 403 implications, then there *must* also be a contemporaneous limiting instruction provided to the jury to guide their consideration of this evidence:

> [W]e note for the benefit of future litigation that if the trial court concludes that the probative value of the background information is not substantially outweighed by its unfair prejudice to the defendant and decides to admit a third-party statement into evidence, the admission of the background information *must* be accompanied by a limiting instruction to the jury. The jury must be contemporaneously advised that the third-party statement or other bad acts are not being admitted for the truth of their content but only to provide the jury with a background explanation for the actions taken by the police. Giving a limiting instruction "regarding the purpose for which the testimony is received further averts any prejudice to the defendant."[36]

Without such an instruction, jurors will do what is natural, consider it for its direct meaning. In this case, Matta's second objection before the jury was that it was being offered for "the truth of the matter asserted."[37] Matta's objection on that basis was overruled in front of the jury without any guidance. As far as the jury was concerned, Matta's basis of objection was invalidated by the Trial Court and each juror was free to consider the statements for the truth of the accusations they contained.

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[35] *Sanabria*, 974 A.2d at 114.
[36] *Id.* at 116 (italicized "*must*" included in the original opinion of the Court).
[37] A173.

The State says Matta waived his right of appellate review because he objected only to hearsay and (it claims) he now "concedes" the statements were not "hearsay" at all.[38] But this simplistic and cramped reading of Supreme Court Rule 8 ignores the facts and standard of review employed by the Court in *Sanabria* itself and what the Court treated as "fairly presented" for its review.[39] In that case, the defense "objected on hearsay grounds" and the prosecution responded that the question was "not offered for its truth or veracity" but to explain why a police officer responded to a certain address. As here, the trial court overruled the objections because it agreed with the prosecution, not the defense.[40] Nevertheless, on that basis, similar to the record below, and not finding any waiver or imposing a plain error standard upon the appellant,[41] the Court found an abuse of discretion in not engaging in a D.R.E. 403 analysis[42] and further announced *the requirement* of a limiting instruction to guide juries in the consideration of evidence of criminal conduct imbedded in out-of-court declarations made by non-testifying persons.[43]

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[38] Ans. Br. at 35.
[39] In *Sanabria*, the Court discussed *United States v. Maher*, 454 F.3d 13 (1st Cir. 2006), distinguishing the latter's holding of no plain error for the admission of an out-of-court declarant based upon two facts: (1) there was no objection to the testimony at trial; and (2) the trial court *sua sponte* gave a limiting instruction to the jury. *Sanabria*, 974 A.3d at 118 (distinguishing *Maher*, 454 F.3d at 23).
[40] *Sanabria*, 974 A.2d at 110-111.
[41] *Id.* at 120.
[42] *Id.* at 116-117.
[43] *Id.* at 116.

As in *Sanabria*, the evidence against Matta was admitted over his objection without considering any alternatives, without conducting a D.R.E. 403 balancing test and without any limiting instruction.[44]

Because these errors were fairly presented below and not harmless, they are reversible.[45] The out-of-court statements of the non-testifying declarants related to the jury by the complainant were of "the most incriminating sort,"[46] and, therefore, not to be admitted unless necessary, highly probative for a purpose other than to establish their truthfulness, and not unfairly prejudicial in comparison.[47] That the Trial Court made none of these determinations after Matta's objection and did not at a minimum guide the jury's consideration of them was plainly erroneous. As a result, to the extent any part of Matta's argument on appeal is argued to be not fairly

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[44] *Sanabria*, 974 A.2d at 117 ("Most importantly, in this case, not only was the evidence admitted without considering any alternative—such as that the police acted upon information received—and without balancing the probative value to the State against the unfair prejudice to the defendant, but also, the background information was presented to the jury without a limiting instruction. Although the trial judge admitted the third-party statements because the State disclaimed any intent to use them for the truth of the matter asserted, the jury was never given an instruction to that effect. Consequently, the jury was free to use that evidence—in particular, the dispatcher's last call to Officer Garcia—for the truth of its content to establish an element of the burglary offense, i.e., entry into the foyer.").

[45] Op. Br. at 36-38 (the full discussion of the infirmities of State's case in harmless error argument).

[46] *Cf. Commonwealth v. Palsa*, 555 A.2d 808, 811 (Pa. 1989).

[47] *See id.*; *accord Sanabria*.

presented below, these errors were so clearly prejudicial to Matta's rights that they jeopardized the fairness and integrity of his trial.[48]

[48] *Wainwright v. State*, 504 A.2d at 1100; *see supra* note 45.

CONCLUSION

For the reasons and upon the authorities cited in Appellant's Reply and Opening Briefs, the judgment of convictions should be reversed and the case remanded for a new trial.

Respectfully submitted,

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