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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant-Respondent,

-against-

No. 186

EDGAR MORALES,

Respondent-Appellant.

27 Madison Avenue
New York, New York 10010
October 9, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Zipporah Geralnik
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Morales,
2 186.

3 Counselor, would you like any rebuttal
4 time?

5 MR. CODDINGTON: Yes, Your Honor. I would
6 like five minutes.

7 CHIEF JUDGE LIPPMAN: Five minutes. Go
8 ahead.

9 MR. CODDINGTON: Okay, Your Honor. Good
10 morning. I really don't have much to add what I put
11 in my brief. It seems to me - - -

12 JUDGE GRAFFEO: Could I ask you just to
13 move the microphone a little?

14 CHIEF JUDGE LIPPMAN: Just up towards you.
15 Yes. Good.

16 MR. CODDINGTON: Okay?

17 CHIEF JUDGE LIPPMAN: Good.

18 MR. CODDINGTON: Better?

19 CHIEF JUDGE LIPPMAN: Move it over a drop
20 too - - - great. That'll do it.

21 MR. CODDINGTON: How's that? Good?

22 CHIEF JUDGE LIPPMAN: Yes.

23 MR. CODDINGTON: Okay. It seems to me the
24 question you really have to look at here is the
25 intent of the gang, okay? Unlike almost every other

1 gang that's in operation in the Bronx, this gang is
2 not trying to - - -

3 CHIEF JUDGE LIPPMAN: But what makes that
4 terrorism? You would agree that in the normal course
5 what people look at when they talk about terrorism,
6 they're not thinking of gang violence?

7 MR. CODDINGTON: Well, no. I think, as
8 written by the legislature, they are. I mean, I - -
9 -

10 CHIEF JUDGE LIPPMAN: Isn't - - - wasn't
11 the state statute meant to be kind of parallel to the
12 federal statute and almost symbolic, standing
13 together with the federal government on this issue of
14 terrorism.

15 MR. CODDINGTON: Well, let me answer your
16 question. I mean, there's no doubt that the
17 legislature was focused on the events of 9/11. I
18 mean, this statute was written six days later. So, I
19 mean, it's clear that they were aimed at that.

20 CHIEF JUDGE LIPPMAN: So how does this
21 relate to something like 9/11?

22 MR. CODDINGTON: Well, because - - -

23 JUDGE GRAFFEO: There isn't anything in the
24 legislative history that mentions gang activity.
25 It's all directed at more international terrorism.

1 MR. CODDINGTON: Well, no, not necessarily.

2 JUDGE GRAFFEO: Domestic terrorism.

3 MR. CODDINGTON: Oh, yes.

4 JUDGE GRAFFEO: Like the Oklahoma bombing.

5 MR. CODDINGTON: The Oklahoma bombing,
6 right.

7 JUDGE CIPARICK: So where is the civilian
8 population here? The community that lives in that
9 area?

10 MR. CODDINGTON: The community of Mexicans
11 and, within that, the gang. The reason - - -

12 CHIEF JUDGE LIPPMAN: Can you say it again?

13 MR. CODDINGTON: It's the community of the
14 Mexican population in the Bronx, and within that, the
15 gangs.

16 CHIEF JUDGE LIPPMAN: But isn't - - -
17 wasn't this action directed at other gangs rather
18 than the population? Wasn't that the theory of the
19 prosecution of the People?

20 MR. CODDINGTON: No. I mean, you can't
21 separate one from the other, okay? This - - - I
22 mean, obviously, this gang was intending to coerce
23 other gangs - - -

24 CHIEF JUDGE LIPPMAN: If we're - - -

25 MR. CODDINGTON: - - - but in doing - - -

1 CHIEF JUDGE LIPPMAN: If we're in control
2 for the domination of a neighborhood - - -

3 MR. CODDINGTON: Right.

4 CHIEF JUDGE LIPPMAN: - - - in this area,
5 out near the park - - -

6 MR. CODDINGTON: Right.

7 CHIEF JUDGE LIPPMAN: - - - or wherever it
8 is, and one gang member does something to the rival
9 gang member, how is that terrorism?

10 MR. CODDINGTON: Okay.

11 CHIEF JUDGE LIPPMAN: And even assuming - -
12 - and I understand and that's what makes this case a
13 very serious one - - - that other people may have
14 been hurt or killed; but if the intention was to get
15 at the person in the other gang, how does it become
16 terrorism?

17 MR. CODDINGTON: Okay. You have to step
18 back and look at the entire problem. This gang
19 stopped everybody who came in - - - everybody who was
20 Mexican - - - who came into St. James Park. Are you
21 a gang member - - -

22 JUDGE CIPARICK: They were establishing
23 their dominance, but other than that, how were they
24 terrorizing?

25 MR. CODDINGTON: Well, they're robbing

1 every member that came out of the restaurant.

2 JUDGE PIGOTT: You equate them with Timothy
3 McVeigh.

4 MR. CODDINGTON: Excuse me?

5 JUDGE PIGOTT: You equate them with Timothy
6 McVeigh.

7 MR. CODDINGTON: In one sense, yes. I
8 mean, the crimes are entirely different but, I mean,
9 yes. They're in effect setting themselves up as sort
10 of a - - -

11 JUDGE JONES: Can you point to any crime
12 that this gang committed against the Mexican-American
13 community itself?

14 MR. CODDINGTON: I'm sorry, I didn't hear
15 you.

16 JUDGE JONES: Can you point to any crime
17 that this gang committed against the Mexican-American
18 community - - -

19 MR. CODDINGTON: Well, we listed - - -

20 JUDGE JONES: - - - as opposed to another
21 gang.

22 MR. CODDINGTON: - - - all the crimes that
23 are listed as overt acts in the indictment. I mean,
24 we proved a pattern of criminal activity dating for
25 over three years.

1 JUDGE SMITH: But is there any evidence
2 that their purpose was to terrorize the community at
3 large? The Mexican-Americans or the whole area?

4 MR. CODDINGTON: Well, they stop every
5 person who goes into the park and demands money. I
6 mean, that - - -

7 JUDGE SMITH: So you're - - - is it your
8 theory really that this gang was - - - didn't - - -
9 at least that they were terrorizing all the young
10 males of Mexican descent in the area?

11 MR. CODDINGTON: That's correct. Correct.

12 JUDGE SMITH: And you say that's enough to
13 be a population?

14 MR. CODDINGTON: Yes. Yes.

15 JUDGE SMITH: Because they figure that
16 anybody who wasn't for them was against them. And
17 how strong is the evidence on that that they were
18 doing that?

19 MR. CODDINGTON: Well, we have Kiko's (ph.)
20 testimony, we have Detective Shanahan's testimony. I
21 mean Kiko flat out said that's what they're doing.

22 JUDGE SMITH: Well, Kiko said, as I
23 remember it, that if somebody - - - if a young
24 Mexican-American comes into the park, we ask him
25 whether he's in our gang but if he - - - and I

1 suppose - - - and you want to read it as saying even
2 if he tells us no - - - if he's in a rival gang so
3 even if he tells us no, we don't believe him, we
4 threaten him - - -

5 MR. CODDINGTON: Yeah.

6 JUDGE SMITH: - - - or we beat him or get
7 him out of the park.

8 MR. CODDINGTON: Look at Mancera's (ph.)
9 testimony. He wasn't in any gang for a long time and
10 they threatened him and took his money and finally he
11 joined the Calligeros (ph.) to protect himself. He
12 wasn't a gang member.

13 JUDGE PIGOTT: How do you distinguish this
14 from a hate crime? Because that's another way you
15 could enhance a felony.

16 MR. CODDINGTON: Okay. A hate crime is
17 directed at an individual. If I pick on you because
18 you're - - - pick a race and it's aimed at you,
19 specifically, this is aimed at the community at
20 large.

21 JUDGE PIGOTT: Well, no, isn't part of a
22 hate crime is you say I've picked on this person but
23 I picked on this person because he was Irish - - -

24 MR. CODDINGTON: Whatever - - -

25 JUDGE PIGOTT: - - - gay or what - - - so

1 in other words, it's not I'm picking on this person;
2 it's I'm picking on a part of civilization.

3 MR. CODDINGTON: It's both, though. You
4 see - - -

5 JUDGE PIGOTT: Do you get the option? I
6 mean, can - - - when you get a case like this, can
7 you say, well, we can prosecute him for manslaughter
8 or manslaughter as a hate crime or manslaughter as
9 terrorism.

10 MR. CODDINGTON: I understand. I mean,
11 it's sort of a little hole in the statute; I agree
12 with you. But I mean, you know, let's not go too far
13 from the statutory language. I mean, we've talked
14 all about theories of patriot - - - or excuse me,
15 terrorism. But what the legislature wrote is
16 specifically to condemn hate or coercive means.

17 JUDGE PIGOTT: But wouldn't this have been
18 a simpler case to pick a jury on if you didn't have
19 the judge saying, we're all struck by 9/11 and - - -
20 et cetera. I mean, that - - - if that's - - - if
21 this was not a manslaughter as terrorism, that never
22 would have come into this case.

23 MR. CODDINGTON: Well, you know, you're
24 right, Judge. If the legislature had called this
25 aggravated unsocial behavior and wrote the same

1 statute, all our problems would be solved. I mean,
2 they enacted this seven days after 9/11, and said
3 terrorism and they were aiming at terrorism.

4 JUDGE READ: Well, that brings up - - -

5 MR. CODDINGTON: But the statute they wrote
6 covers this conduct.

7 JUDGE READ: That brings up another point.
8 Let's say we don't agree with you and we agree with
9 the Appellate Division, given the kinds of statements
10 that Judge Pigott just related, how isn't there a
11 spillover effect?

12 MR. CODDINGTON: Well, okay. First place,
13 only one juror complained about the language, okay,
14 and she was excused. I mean, so I think that - - -

15 JUDGE READ: Well, what about Shanahan's
16 testimony? Wasn't there a lot of his testimony that
17 would not have come in or would not have come in in
18 the same way? You wouldn't have been able to say the
19 same things if - - -

20 MR. CODDINGTON: That was all elicited by
21 defense counsel. I mean, defense counsel was trying
22 to prove this man is guilty of no more than a
23 possession of a weapon. And he said look at all this
24 other language the gang did and he wasn't - - -

25 JUDGE SMITH: You're saying that they

1 actually used the - - - they used the testimony in
2 reverse to show what a little fish your guy was?
3 Well, not your guy, his guy.

4 MR. CODDINGTON: Yeah. Precisely. Yeah.
5 I mean - - -

6 CHIEF JUDGE LIPPMAN: But how do the
7 charges relate to each other? When you have such a
8 massive amount of evidence relating to terror, how
9 does it not have some effect on the other more basic
10 charges? How could you sort of separate them out and
11 say, okay, terror, no, no, not really terrorism but
12 we're going to convict on this charge?

13 MR. CODDINGTON: Well, you separate it out
14 by not having the conspiracy count in the indictment.
15 These are all overt acts of the conspiracy count.
16 They're independently admissible.

17 JUDGE JONES: In your theory, are the
18 members of the rival gang terrorists also?

19 MR. CODDINGTON: Excuse me?

20 JUDGE JONES: Are the members of the rival
21 gang terrorists?

22 MR. CODDINGTON: In the abstract, yes. If
23 we can - - -

24 JUDGE JONES: So everybody's a terrorist.

25 MR. CODDINGTON: Well, no. I mean, what

1 I'm talking about. If you commit violence with the
2 intent to intimidate or coerce a civilian population
3 without a profit motive, you're banging up on the
4 community. For that - - -

5 JUDGE SMITH: Is any - - - I guess the
6 question is, is any gang violence terrorism?

7 MR. CODDINGTON: No. No.

8 JUDGE SMITH: Well, how do you tell what is
9 and what isn't?

10 MR. CODDINGTON: Well, that's why we
11 included the Jets and the Sharks. I mean, the Jets
12 and the Sharks weren't trying to coerce an entire
13 community. They were ganging up on each other. The
14 rest of the - - -

15 CHIEF JUDGE LIPPMAN: Isn't that what's
16 happening here?

17 JUDGE CIPARICK: Yeah, that's what's
18 happening here.

19 MR. CODDINGTON: No. No, no. Because they
20 rob every person that comes out of the Pancho Villa
21 Restaurant. They pick on the patrons of the
22 whorehouse. They stop every Mexican who walks into
23 St. James Park. I mean, there are zillions of acts
24 of terrorism.

25 CHIEF JUDGE LIPPMAN: Is this just an

1 updated version of the Jets and the Sharks?

2 MR. CODDINGTON: Of the who?

3 CHIEF JUDGE LIPPMAN: Isn't this just an
4 updated version of the Jets and the Sharks?

5 MR. CODDINGTON: Well, with the new statute
6 post-9/11 and it's terrorism.

7 JUDGE SMITH: In the thirty seconds you
8 have left, what's your definition of population?

9 MR. CODDINGTON: Okay. Let me give you a
10 hypothetical. Take the local birdwatchers club,
11 okay? The Audubon Society. The terrorist is mad at
12 them because they protect Canada geese who fly into
13 planes and fly into aircraft carriers. They cause
14 airplane crashes. They are a civilian population.
15 The man is picking on this group because he doesn't
16 like the way they protect Canada geese.

17 JUDGE SMITH: What's - - - I understand the
18 answer but what's - - - I was looking for a
19 definition. What's your definition?

20 MR. CODDINGTON: The dictionary definition,
21 a noticeable group of operations, you know, by
22 population within a greater population. Any of the
23 dictionary defi - - -

24 JUDGE SMITH: I mean if you're - - - well,
25 if you're literal about it, you and I can be a

1 population, right?

2 MR. CODDINGTON: Well, theoretically.

3 JUDGE SMITH: Or what about all the people
4 in this room? The population of this room, that's a
5 population?

6 MR. CODDINGTON: If we had a common grace
7 to understanding - - - you know, a political
8 viewpoint, something like that, perhaps. I mean, but
9 remember, Timothy McVeigh and Nichols were just a
10 group of two. I mean, granted, they picked on the
11 United States government but I mean, these - - -

12 CHIEF JUDGE LIPPMAN: Okay, counsel.
13 You're going to have rebuttal time - - -

14 MR. CODDINGTON: Okay.

15 CHIEF JUDGE LIPPMAN: - - - you have five
16 minutes. Let's hear from your adversary.

17 MS. AMIRFAR: May it please the Court.

18 CHIEF JUDGE LIPPMAN: Counsel.

19 MS. AMIRFAR: Thank you. May it please the
20 Court.

21 JUDGE CIPARICK: Well, it sounds as if they
22 were terrorizing everyone in the neighborhood.

23 MS. AMIRFAR: I would agree with the
24 observation. It seems that everybody's terrorists
25 under this theory advocated by the People. I think

1 that with respect to the observation about the Jets
2 and the Sharks - - -

3 CHIEF JUDGE LIPPMAN: Well, didn't our
4 state statute have a little different meaning to it
5 than the federal statute, given the citing of the
6 Halberstam incident, the - - - and the other kind of
7 local incident? Could it be that there's a different
8 - - - a wider definition of terrorism in the New York
9 statute than maybe in the federal?

10 MS. AMIRFAR: I don't believe so, Your
11 Honor.

12 CHIEF JUDGE LIPPMAN: Why not?

13 MS. AMIRFAR: Because it is clear that this
14 was animated by the 9/11 attacks. We all agree with
15 that.

16 CHIEF JUDGE LIPPMAN: Yes, but why - - -

17 MS. AMIRFAR: And we need to look no
18 further - - -

19 CHIEF JUDGE LIPPMAN: Why couldn't - - -

20 MS. AMIRFAR: We need to look - - -

21 CHIEF JUDGE LIPPMAN: Why couldn't there be
22 a little broader - - -

23 MS. AMIRFAR: Right.

24 CHIEF JUDGE LIPPMAN: - - - definition?

25 MS. AMIRFAR: We need to look no further

1 than the language of the act itself in the preamble.
2 If you take a look at the preamble, what is listed by
3 the legislature as the animating purpose here? And
4 remember, all they wanted to do was complement the
5 federal laws.

6 CHIEF JUDGE LIPPMAN: But didn't the
7 legislature - - - the legislature talked about what
8 its purpose was. And they wanted to have, in New
9 York, something that would address, you know, the - -
10 - some of the kinds of incidents that they talked
11 about, which included some local incidents.

12 MS. AMIRFAR: Let's talk about those local
13 incidents.

14 CHIEF JUDGE LIPPMAN: Yes.

15 MS. AMIRFAR: Because you're right. You
16 have the bombings of the American embassies, you have
17 the Lockerbie bombing. You also have what - - - the
18 local incidents, the 1994 murder of the Hasidic Jew
19 on top of the Brooklyn Bridge, you have the shooting
20 of tourists on top of the Empire State Building,
21 defined as local. But what they have in common,
22 which is not present in this case here, what they
23 have in common is an intent to intimidate on a
24 broader scale - - - as the First Department put it -
25 - - on a broader scale than just their adversary,

1 their gang.

2 JUDGE SMITH: Suppose it were proved that
3 this gang - - - suppose the cooperating witness,
4 Kiko, had testified our goal was to be feared and
5 respected by every Mexican-American in the community,
6 and we wanted to intimidate every Mexican-American
7 young male who was not a member of our gang. Does
8 that make it a crime of terrorism?

9 MS. AMIRFAR: I don't believe so. And
10 that's certainly - - -

11 JUDGE SMITH: Why not?

12 MS. AMIRFAR: - - - that certainly wasn't
13 the testimony here. I think there was - - -

14 JUDGE SMITH: Well, he said - - - because
15 you can read it that way if you're a little
16 aggressive. He doesn't say "if you're a little
17 aggressive."

18 MS. AMIRFAR: I don't think - - - I think
19 you'd have to be very aggressive, Your Honor. And it
20 actually doesn't comport with what the gang expert of
21 the People said because, as you heard here today,
22 there was some notion that anybody would be stopped
23 by this gang.

24 JUDGE SMITH: Okay. Deal with the - - -
25 deal with the hypothetical. Why isn't that

1 terrorism?

2 MS. AMIRFAR: Because the terrorism here -
3 - - again, as the First Department articulated - - -
4 the terrorism here has to be directed at not just
5 the, say, intended victims. It has to be directed at
6 a broader group. It has to have the objective
7 purpose of intimidating some kind of broader group.

8 CHIEF JUDGE LIPPMAN: What if they did?
9 What if said I'm going to go and kill or injure this
10 fellow from the other gang and this will show
11 everybody in this Mexican-American community in this
12 area that we control this area. Terrorism?

13 MS. AMIRFAR: It could be. With the
14 significant caveat - - - and again, that's not
15 present here - - - that the objective purpose was to
16 intimidate or coerce a broader community.

17 CHIEF JUDGE LIPPMAN: So if - - - in my
18 hypothetical, terrorism, right?

19 MS. AMIRFAR: It could be. Again, if that
20 objective purpose is demonstrated. If you look at
21 the Halberstam murder on the top of the Brooklyn
22 Bridge, there, there was a targeting of the Hasidic
23 students on the bus, on the Brooklyn Bridge, in
24 retaliation for the killing of Muslims in Israel.
25 There it was directed at the Jewish community in New

1 York City. And again, we need not look at conjecture
2 when we think of this to say why it's not this case.
3 There's two pending indictments by the Manhattan DA
4 that have to do with targeting of Christians and
5 Muslims in the Pimentel case, bombing in order to - -
6 -

7 CHIEF JUDGE LIPPMAN: But here everyone's
8 part of the same community, right? Is that the
9 distinction that you're making?

10 MS. AMIRFAR: I'm sorry? Who's - - -

11 CHIEF JUDGE LIPPMAN: That everyone's a
12 part of the Mexican-American community.

13 MS. AMIRFAR: No. The distinction is that
14 on this record you have - - -

15 CHIEF JUDGE LIPPMAN: In other words, if it
16 was Mexicans versus another Latin American group,
17 would that make this different?

18 MS. AMIRFAR: No, Your Honor. What we have
19 here are - - -

20 CHIEF JUDGE LIPPMAN: And the purpose was
21 to intimidate everyone from Uruguay who came in to
22 this area and this was Mexican turf, would that be
23 terrorism?

24 MS. AMIRFAR: You could articulate a
25 targeting of an ethnic population on some kind of

1 broad scale that would meet the standard of
2 terrorism. That is not what's going on here.

3 JUDGE PIGOTT: But I think Judge
4 Lippman's - - -

5 MS. AMIRFAR: What you have in the
6 record - - -

7 JUDGE PIGOTT: - - - point is that it's
8 hard to terrorize a group you're part of.

9 MS. AMIRFAR: And that's - - -

10 JUDGE PIGOTT: Is that your argument? In
11 other words, that no Mexican gang can terrorize
12 Mexicans. It has to be Columbians or Uruguayans or
13 something else.

14 MS. AMIRFAR: If - - - if every individual
15 or every gang member was deemed to be able to
16 terrorize each other and they're all terrorists,
17 you're right. It becomes ludicrous.

18 JUDGE SMITH: But you're not really saying
19 that a Mexican can't terrorize Mexicans.

20 MS. AMIRFAR: No. There could be a case
21 out there in which that is true. But what you have
22 here is, again, it has to be directed at a broad
23 range of people. You cannot have a narrowly defined
24 group that the perpetrator of the violence believes
25 is his adversaries and say because they're

1 adversaries in gang warfare, were necessarily
2 intimidated - - -

3 CHIEF JUDGES LIPPMAN: Judge Jones?

4 JUDGE JONES: Can we talk about the - - -

5 MS. AMIRFAR: - - - then suddenly you have
6 terrorism.

7 JUDGE JONES: Can you talk about the
8 spillover effect on these other convictions?

9 MS. AMIRFAR: Yes. The spillover effect.
10 There's really - - - as it was articulated earlier,
11 there's two parts. The first has to do with the
12 legal standard, which we believe was an error by the
13 First Department, in terms of there has to be a
14 reasonable possibility and not actual prejudice. The
15 second has to do with how fundamentally different
16 this trial was because terrorism was included - - -

17 JUDGE SMITH: You still - - -

18 MS. AMIRFAR: - - - in two ways.

19 JUDGE SMITH: You still - - - even if
20 terrorism's not in, you can - - - you still prove
21 that the defendant's a member of the St. James Boys
22 and you prove a lot about what the St. James Boys are
23 like, don't you, just so that you can understand
24 whether happened that night?

25 MS. AMIRFAR: You can provide some context,

1 but you certainly can't bring in what Detective
2 Shanahan did here, which was sixteen different acts
3 by other members that had nothing to do with the
4 incidents at issue - - -

5 JUDGE SMITH: And your trial counsel spent
6 a long time - - -

7 MS. AMIRFAR: - - - that did not involve
8 Mr. Morales - - -

9 JUDGE SMITH: - - - your trial counsel went
10 through them one by one to show how little his client
11 had to do with them and how - - - and also to show
12 that his client was way down on the organization
13 chart. Didn't that - - - isn't there an argument
14 that it may have worked to your client's benefit?

15 MS. AMIRFAR: No, Your Honor. That's a man
16 who's dealing with the cards he was dealt. There the
17 evidence - - -

18 JUDGE CIPARICK: He's just defending his
19 charges.

20 MS. AMIRFAR: - - - is in, he's going to
21 try to minimize it.

22 JUDGE CIPARICK: He was defending the
23 charges. Your client.

24 MS. AMIRFAR: I'm sorry?

25 JUDGE CIPARICK: He was just defending

1 against the charges that were made.

2 MS. AMIRFAR: Exactly. And that presumes
3 that the evidence would come in in the first place.

4 CHIEF JUDGE LIPPMAN: So - - -

5 MS. AMIRFAR: There is nothing - - -

6 CHIEF JUDGE LIPPMAN: - - - if there's
7 mention - - -if there's mention of terrorism - - -
8 you know, if there's some evidence of terrorism, it
9 taints the whole process? Where - - - how do you
10 draw the line, I guess is what I'm asking?

11 MS. AMIRFAR: You draw the line in the
12 sense that what is - - - what would this trial have
13 looked like if the terrorism charges were out? The
14 biggest point I could make is the Shanahan evidence.
15 You have a situation where a man comes in and says,
16 I'm an expert, and gives you fifteen acts of other
17 gang members, completely unrelated to the incident,
18 that would not have come in otherwise. It would not
19 have come in otherwise.

20 CHIEF JUDGE LIPPMAN: So it makes it seem
21 like these are bad guys, and whatever this guy did,
22 he's bad and therefore we convict him. Is that your
23 theory?

24 MS. AMIRFAR: Absolutely. It's a
25 fundamentally different trial.

1 JUDGE SMITH: Does it matter - - -

2 MS. AMIRFAR: It's the definition of - - -

3 CHIEF JUDGE LIPPMAN: - - - does it matter
4 that the Shanahan testimony wasn't objected to?

5 MS. AMIRFAR: Again, dealing with the cards
6 that he was dealt. The terrorism was in.

7 JUDGE SMITH: You're saying, okay. As long
8 as the terrorism charge was there, he had nothing to
9 object to.

10 MS. AMIRFAR: Exactly. Exactly. And can
11 you think of a more pejorative term, more emotionally
12 laden, in New York, in a trial in New York, to call
13 someone repeatedly a terrorist? That's what was
14 going on. Each and every day, he was being tried as
15 a terrorist, he had to deal with evidence that would
16 not have been in that case.

17 CHIEF JUDGE LIPPMAN: Terrorists are
18 capable of anything and therefore we're going to
19 convict the terrorist.

20 MS. AMIRFAR: It is - - -

21 CHIEF JUDGE LIPPMAN: Even if those
22 particular charges are gone.

23 MS. AMIRFAR: That's the reasonable
24 possibility of prejudice. That's why this is such a
25 powerful case for spillover prejudice. Look at the

1 Castillo case. It was two events on different days.
2 One had to do with robbery, the other had to do with
3 a rape and robbery. One of the events, the rape and
4 robbery, was taken out, and the second event, the
5 pure robbery, was left in.

6 There, the court found that the prejudice
7 was so overwhelming, of course you get a new trial.
8 You cannot expect that people are going to
9 disentangle that. And that's why here, again, I
10 can't think of a stronger case for spillover
11 prejudice. If I could go back to the state of this
12 record, because there were - - -

13 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

14 MS. AMIRFAR: Thank you very much. Because
15 there were some statements made about what the
16 testimony reflected about the objective purpose of
17 this gang. The First Department got it right because
18 they read the record evidence. The notion that
19 anyone would be attacked, completely wrong. I point
20 you to Shanahan's testimony. This is their gang
21 expert who said, if a member of the public
22 actually - - - "actually understood not to be a gang
23 member" was in the area or in the park, they would
24 not be assaulted. This is at A-478. I urge the
25 Court to read that. This is their gang expert.

1 JUDGE SMITH: Well, he also said that his -
2 - - in his judgment, that once they start asking you
3 questions, no matter what you said you were going to
4 get assaulted.

5 MS. AMIRFAR: That's - - - that's if you're
6 young, that's if you're male, if you're a suspected
7 gang member. It doesn't change the calculus of who
8 they were targeting.

9 JUDGE SMITH: Well, if you couldn't - - - I
10 mean, if you're young, male and Mexican-American,
11 you're a suspected gang member to these guys, aren't
12 you?

13 MS. AMIRFAR: Then their civilian
14 population is young, male, Mexican, around a three
15 block area of the park. We are getting narrower and
16 narrower - - -

17 JUDGE SMITH: Yeah, what's wrong with that?

18 MS. AMIRFAR: That is too narrow, Your
19 Honor.

20 JUDGE SMITH: How do you tell? While
21 you're at it, why don't you give me a definition of
22 population?

23 MS. AMIRFAR: And therein lies madness.
24 It's - - - that, I think, the First Department got
25 right in that you don't need to define the contours

1 of civilian population in order to say gang-on-gang
2 violence is not it. I think that civilian
3 population, to the extent that you could - - - you
4 look at all the federal analog cases, it's - - - as
5 the First - - - let me read the First Department's
6 word. "The general public in a given area or a broad
7 category of the general public in a given area."

8 I think that's right. And I think that
9 this is a test - - -

10 JUDGE SMITH: Broad category - - -

11 MS. AMIRFAR: This is a case by case - - -

12 JUDGE SMITH: - - - of the general public.
13 You're really going to tell me even that's too vague.
14 I mean, you have an argument that this thing is void
15 for vagueness anyway.

16 MS. AMIRFAR: As applied. As applied.

17 JUDGE SMITH: I never understood that.

18 MS. AMIRFAR: But the key being that the
19 civilian population cannot be the - - - your
20 adversaries in a gang warfare, it cannot be the one-
21 off victims of even violent crimes. I mean, here you
22 have the situation where, again, if you look at what
23 happens in the restaurant, Kiko's testimony is if
24 there's a rival gang member at the restaurant, then
25 we start trouble. If not, they don't.

1 And there's no testimony in the record
2 below as to actual ethnicity of the patrons of this
3 restaurant. They would have this Court - - - if you
4 look at their brief - - - draw an inference that only
5 Mexicans eat at Mexican restaurants. I suggest you
6 could take judicial notice of the fact that that may
7 not be the case. But that goes to how paltry the
8 evidence is in the record below that the conscious
9 objective was to actually target the Mexican-American
10 community.

11 JUDGE JONES: And how should we define
12 civilian population?

13 MS. AMIRFAR: I think the way to - - - I
14 think the way to define - - -

15 JUDGE JONES: In the context of this
16 statute.

17 MS. AMIRFAR: In the context of this
18 statute, I think the way to define the civilian
19 population is one that gives meaning and sense to all
20 three prongs, including the two political objective
21 prongs that are not at issue. It is intended to have
22 some kind of mass effect, a broad category, and it
23 has to impact a community above and beyond or
24 independent of the actual victims of the crime.

25 JUDGE SMITH: And how do we know when it's

1 mass or broad? I mean those are - - - those words,
2 themselves, are kind of elusive.

3 MS. AMIRFAR: I - - - that's right. That's
4 right. And I think that's why it's - - -

5 JUDGE SMITH: Does this - - - I mean, if
6 somebody comes in to this room and holds one of us
7 hostage in order to terrorize the others, is that a
8 crime of terrorism? The whole population of this
9 room is terrorized?

10 MS. AMIRFAR: No. I don't believe so. And
11 that's exactly why I think that, for purposes of
12 definition, it could suffice to have a broad - - -
13 suffice to have a standard that requires a mass
14 effect, that requires a broadness.

15 CHIEF JUDGE LIPPMAN: What if - - -

16 MS. AMIRFAR: But allows a - - -

17 CHIEF JUDGE LIPPMAN: - - - more people
18 were injured - - -

19 MS. AMIRFAR: - - - case by case
20 consideration.

21 CHIEF JUDGE LIPPMAN: - - - in this - - -

22 MS. AMIRFAR: What's that?

23 CHIEF JUDGE LIPPMAN: What if more people
24 were injured than the two who were affected from the
25 community? What if it, you know, was directed

1 towards the gang member but fifty people were hurt in
2 the violence that went on in the community? Would
3 that make a difference?

4 MS. AMIRFAR: No. That would not be
5 terrorism. Again, it's not a matter of the number of
6 victims. And you saw that the People in their brief
7 looked at the Halberstam murder and said well, that's
8 one. That's localized terrorism. No, that's not
9 what is intended. What has to be there is the
10 objective purpose to intimidate and, there it was the
11 Jewish population that was intended to be
12 intimidated. Here, if someone took us all hostage
13 with the intent to intimidate public officials
14 somewhere, the general U.S. populace, New York City,
15 that would be terrorism. That's what's encompassed
16 in the explicit wording in the statute.

17 JUDGE GRAFFEO: So you're saying if there
18 were rival gang members in a restaurant, along with
19 other patrons, and another gang, you know, throws a
20 bomb into that restaurant, that's not terrorism, even
21 though they kill individuals that are not part of the
22 rival gang.

23 MS. AMIRFAR: That's right. Because it
24 requires an objective purpose. The reason why this
25 is different, the reason why we call this and we - -

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JUDGE GRAFFEO: You'd have to prove that they did that in order to terrorize the neighborhood as well? Would that be terrorism?

MS. AMIRFAR: To terrorize - - - that's far closer than this case. To terrorize a broader group, other than the victims of the crime, other than the adversaries of this crime.

JUDGE SMITH: But then you're going to argue about whether the neighborhood - - - whether it's a big neighborhood or a small neighborhood?

MS. AMIRFAR: And I submit that there you get into a line-drawing exercise that is extraordinarily difficult, which again, I think goes to show that defining the precise contours shouldn't be done in the abstract. It should be done in the appropriate case. And the Manhattan DA's office has demonstrated that there are appropriate cases out there. But gang rivalry, this kind of narrowly defined group, can't be it.

CHIEF JUDGE LIPPMAN: Okay, counselor.
Thank you, counselor.

Counsel, rebuttal.

MR. CODDINGTON: Yes, Judge.

CHIEF JUDGE LIPPMAN: Doesn't it make total

1 sense what your adversary is saying that unless you
2 really intend to influence a broad part of the
3 community, it's really not terrorism?

4 MR. CODDINGTON: Well, I think we were
5 talking about a broad part of the community. I mean,
6 granted, there're not all that many Mexicans, as the
7 population goes in the Bronx - - -

8 CHIEF JUDGE LIPPMAN: Yes, but it's focused
9 on the other gang, isn't it, rather than on a
10 community?

11 MR. CODDINGTON: Well, it affects the
12 entire community. I mean, this is where I think the
13 Appellate Division - - -

14 CHIEF JUDGE LIPPMAN: Yes, but the
15 intention. I think what she's - - - what your
16 adversary is saying is that the intention has to be
17 directed - - -

18 MR. CODDINGTON: Well, that's - - -

19 CHIEF JUDGE LIPPMAN: - - - controlled
20 towards that community.

21 MR. CODDINGTON: - - - what I'm trying to
22 answer you, Judge. I think the Appellate Division
23 made its mistake there. I mean, gang violence can or
24 cannot be terrorism, depending on the intent of the
25 individual acts. Look at the facts before this Court

1 and the three-year period of violence against the
2 community culminating in the shooting of the child -
3 - -

4 CHIEF JUDGE LIPPMAN: Aren't we could have
5 an awful lot of - - -

6 MR. CODDINGTON: After the shooting - - -

7 CHIEF JUDGE LIPPMAN: Aren't we going to
8 have an awful lot of terrorism cases - - -

9 MR. CODDINGTON: No.

10 CHIEF JUDGE LIPPMAN: - - - if this is
11 drawn as narrowly as what you are saying?

12 MR. CODDINGTON: I don't think so. I mean,
13 this is the first terrorism case we've brought in the
14 eleven years the statute's been - - -

15 JUDGE PIGOTT: Let me move you to Erie
16 County, New York where, in the city of Lackawanna,
17 they have a large Islamic population.

18 MR. CODDINGTON: Right.

19 JUDGE PIGOTT: And from time to time,
20 groups of young people take on groups of other young
21 people, some of whom are Islamic, some of whom are
22 not. Now, depending on who's attacking whom, if it
23 was, I assume, a bunch of white kids attacking an
24 Islamic group, we might not consider that terrorism
25 but if it's a bunch of Islamic kids attacking a bunch

1 of white kids, we'd find that to be terrorism because
2 the civilian population of Lackawanna or Erie County
3 is much more white than the small group of Islamics
4 who are causing the trouble.

5 And I only bring that up because we're into
6 line drawing here which seems to me is impossible.
7 But are we - - - are we intending to give to district
8 attorneys the authority to say, all right, it was a
9 gang fight but this group, terrorism?

10 MR. CODDINGTON: No. I mean, that's an
11 impossible question to answer.

12 JUDGE PIGOTT: I know.

13 MR. CODDINGTON: I mean, you have to look
14 at the facts. I mean, if, in fact, the gang in
15 Lackawanna is trying to intimidate and coerce the
16 Muslim community and that's the intent of the gang,
17 well, then you've got terrorism. I mean - - -

18 CHIEF JUDGE LIPPMAN: Terrorism or a hate
19 crime?

20 MR. CODDINGTON: Probably terrorism on
21 those facts. I mean, if he's - - - well, it depends
22 - - - I mean, you have to - - - again, you have to
23 tie it to the facts. I mean, you assume the guy
24 confesses and he says I want to pick - - - I don't
25 know, a large group. I mean, that's terrorism.

1 Whereas I want to pick on you because you're a
2 Muslim, that's a hate crime, we say. I mean, it's
3 just impossible to answer this in the abstract. It
4 really is. You have to look at the facts.

5 JUDGE SMITH: What's your best evidence - -
6 - well, maybe you already told me. The best evidence
7 you've got that this particular defendant was aiming
8 at a large group. Or does it - - - do we have to
9 show that Mr. Morales was aiming at a large group or
10 just the gang was aiming at a large group?

11 MR. CODDINGTON: Both, I think.

12 JUDGE SMITH: And what's the evidence that
13 Mr. Morales was trying to intimidate a large group
14 when he committed this crime?

15 MR. CODDINGTON: Look - - - look at
16 Mancera. I mean, I quote his testimony at pages 13
17 and 14 of my reply brief. I mean, this is the
18 Mexican kid who wasn't a gang member who was
19 intimidated by them and was forced to join a gang.
20 That's intimidation of a large group. But remember,
21 after this shooting, these guys went out - - -

22 JUDGE SMITH: Well, but where's the
23 evidence that Morales intended to intended to
24 intimidate him?

25 MR. CODDINGTON: Well, it's - - - St. James

1 is a gang. It's a hundred percent St. James. His
2 confession. It's the Mexican community. This is a
3 Mexican - - - this was a gang member. He came to a
4 Mexican party, a christening party, of all things.
5 And you walk out with a severely paralyzed young man
6 and a, you know, a dead ten-year old. I mean, that's
7 terrorism. I'm sorry. It's not nice but it is.

8 JUDGE SMITH: Well, but it's one of the
9 most horrible crimes that you run across. Obviously
10 everyone's horrified about the crime, but not every
11 horrible crime is terrorism. Not every murder of a
12 ten-year old child is terrorism.

13 MR. CODDINGTON: That's right. Correct.
14 Yeah.

15 JUDGE SMITH: What makes in this - - -
16 well, I guess I've asked it.

17 MR. CODDINGTON: Well, the intent to
18 coerce, it's the robberies of the restaurant, it's
19 three-year period of terror, it's all the stuff that
20 defense counsel brought out. I mean, this is a wide,
21 wide act of terror that's aimed at Mexican-Americans.
22 We're saying that's terrorism. I mean, it's the
23 first case in the state and, you know, you're dealing
24 with it now but we think that under the statute - - -

25 CHIEF JUDGE LIPPMAN: It's the first case

1 in the state how many years after the statute?

2 MR. CODDINGTON: Yeah, right. Exactly. I
3 mean, that's what we're saying.

4 CHIEF JUDGE LIPPMAN: So - - -

5 MR. CODDINGTON: We're not overusing this
6 statute.

7 CHIEF JUDGE LIPPMAN: Yet.

8 MR. CODDINGTON: Okay. And also, on - - -
9 excuse me? Oh, yet.

10 JUDGE JONES: He said yet.

11 MR. CODDINGTON: Well, and also on the
12 terrorism. I mean, they're talking about the
13 spillover effect. Remember, the judge defined
14 terrorism. And he said - - - not in so many words
15 but certainly in import, I mean this isn't the World
16 Trade Center bombing. There's terrorism and you read
17 the statute. Okay?

18 CHIEF JUDGE LIPPMAN: Okay, counsel.

19 MR. CODDINGTON: Okay. Just before - - -

20 CHIEF JUDGE LIPPMAN: Thank you both.
21 Appreciate it.

22 (Court is adjourned)

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C E R T I F I C A T I O N

I, Zipporah Geralnik, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Edgar Morales, No. 186 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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