No. 18-8557

IN THE

SUPREME COURT OF THE UNITED STATES

FILED
MAR 11 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IGNACIO RUIZ — PETITIONER
(Your Name)

vs.

LORIE DAVIS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States District Court - Southern District of Texas
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ignacio Ruiz #1624305
(Your Name)

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(Address)

New Boston TX 75570
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

GROUND ONE: Houston Police Department Detective, John Brooks, testified during the State's case-in-chief concerning ownership of a cell phone involved in Petitioner's case. Detective Brooks was allowed to testify about statements made by Petitioner's brother concerning ownership of the cell phone without objection from Petitioner's trial counsel. Did the court of appeals err in denying Petitioner's COA, where Petitioner showed that the District Court unreasonably denied habeas relief based on Petitioner's claim of ineffective assistance of counsel for failing to object to the Confrontation Clause violation during trial?

GROUND TWO: During the sentencing phase of Petitioner's trial, and without objection from Petitioner's trial counsel, the State introduced, as bad character evidence, Petitioner's membership in a loose knit group of neighborhood friends calling them selves the "Fourth Ward Gang". Though the State did not present any evidence tending to show that the Fourth Ward Gang was known to engage in any criminal activity, the state trial court found that Petitioner's membership in the group was relevent and admissible under this Court's ruling in Dawson v. Delaware, 112 S.Ct. 1093 (1992). When the State failed to present any evidence tending to show that the Fourth Ward Gang was known to engage in any specific criminal activity, was trial counsel's failure to object to the trial court's admission of Petitioner's membership in the group as relevant evidence of bad character and admissible under Dawson ineffective assistance of counsel?

QUESTIONS PRESENTED (CONT.)

GROUND THREE: Petitioner's appellate counsel filed an Ander's Brief to the state court of appeals. However, counsel failed to send Petitioner a copy of the brief, failed to inform Petitioner that he had the right to file a brief on his own behalf, failed to inform Petitioner of his right to review the record, and failed to comply with the mandates set out by this Court in Anders v. California, 87 S.Ct. 1396 (1967). Did the District Court violate Petitioner's constitutional rights by shifting Ander's "education" burdens to the state court of appeals in Petitioner's ineffective assistance of appellate counsel claim?

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ______ to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the ______________________ court appears at Appendix ______ to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 12-10-18.

[✓] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: ____________, and a copy of the order denying rehearing appears at Appendix ____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ____________ (date) on ____________ (date) in Application No. __A____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was ____________. A copy of that decision appears at Appendix ____.

[ ] A timely petition for rehearing was thereafter denied on the following date: ____________, and a copy of the order denying rehearing appears at Appendix ____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ____________ (date) on ____________ (date) in Application No. __A____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution

Fifth Amendment to the United States Constitution

Sixth Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

STATEMENT OF THE CASE

Petitioner was indicted for the offense of murder. Petitioner was convicted in the 228th District Court, Harris County, Texas, and sentenced to LIFE in the Texas Department of Criminal Justice. During trial, the state introduced evidence, through Houston Police Department Detective John Brooks, of the ownership of a cell phone involved in the murder. Detective Brooks was allowed to testify about out-of-court statements made by Petitioner's brother, without objection from trial counsel. The statements made by Petitioner's brother linked Petitioner to the cell phone involved in the offense. During the punishment phase of trial, the state introduced evidence, also through Detective Brooks, of Petitioner's alleged membership in the "Fourth Ward Gang". This evidence was introduced, without objection from trial counsel, in spite of the fact that the state failed to show that the Fourth Ward gang engaged in any violent or illegal activities. On appeal, Petitioner's appointed appellate counsel filed an Ander's Brief, asserting that no non-frivolous grounds for appeal existed. Counsel failed to send Petitioner a copy of the Anders Brief, failed to inform Petitioner of his right to file a pro se brief, and failed to inform Petitioner of his right to review the record in order to discern whether any grounds existed for appellate review. Petitioner now petitions this Honorable Court for certiorari review to correct these constitutional injustices.

REASONS FOR GRANTING THE PETITION

Ground one: a United states Court of appeals has decided an important Federal Question in a way that Conflicts with relevant decisions of this Court.

In Crawford v. Washington, 124 S.CT. 1335 (2004) this court held that under the Confrontation clause of the Sixth amendment "testimonial statements of witnesses absent from trial [can be] admitted only where the defendant has had a Prior opportunitity to cross-examine." ID at 1354. This Court further held that "statements taken by Police officers in the cause of interrogations are also testimonial under even a narrow standard." Id at 1354. The Sixth amendment to the united states Constitution Protects anyone who is accused in a criminal Prosecution's right to be confronted with the witnesses against him.

In the case at bar, Petitioners trial counsel Failed to object to testimony by Houston Police Department Dective John Brooks about out of court statement made by Petitioner's brother, Antonio Ruiz, concerning the ownership of a cell phone linked to the murder. This Failure to object resulted in deficient Performance by trial counsel. Detective Brooks testified that after obtaining a court order for subscriber information reguarding the cell Phone's number, he learned that the number was registered to Antonio

Ruiz. Further testimony by Brooks shows that during the Process of eliminating Antonio Ruiz as a suspect, Antonio told him That he had Purchased the cell Phone associated With That Number and Given it to his brother, the Petitioner. Antonio Ruiz was never made available to Petitioner during trial nor was Petitioner Given the opportunity to Cross examine Antonio.

In his opinion, the district court relies on The affidavit submitted by trial Counsel during the state Habeas Corpus Process. In admitting that he failed to object to the Confrontation clause violation, trial counsel claimed that he did not object because the state could have Proved That Petitioner Possessed The cell Phone on the night of the Murder by introducing Petitioner's video taped statement to the Police, in which he admitted his brother Purchased The Phone and Gave it to him to use. The district court further reasons That "[BY] electing not to object to Dective Brooks testimony, defense counsel hoped to be able to Prevent the state from Playing Ruiz's videotaped statement before the Jury which was not in Ruiz's 'best interest' because it would have made clear from his manner of Communicating that he was not symPathetic." The district Court Continues "[C]oncluding that evidence of The cell Phone's ownership was coming in one way or the other defense Counsel decided not to highlight or bring the Jury's attention to this evidence as it was being admitted by objecting during Dective Brooks testimony." Trial Counsel failed to Mention in his affidavit that he actually wanted the video tape to be seen to the Jurors because it was long and boring and would wear them out also the admissibility of this video tape was never determined during court proceedings. Thus, whether or not the state would have even been able to introduce such videotape is still in Question.

Further, Petitioner has proven in other proceedings that defense counsel's affadavits should not be given deference and that counsel has a propensity to be less than truthful in his "sworn" affadavits. In his affadavit in response to the Texas state Grievance filed by Petitioner, Counsel stated "I was in constant contact with the 228 th District Court and Judge Marc Carter on this matter. The filing of my affadavit complied with the courts extention and time table and therefore was not filed late." Trial counsel took over 2 years to file said statement/affadavit in which he had been only given 30 days to file. after review of the trial Court's docket sheet showed that trial counsel never recieved any extentions of time to file his affadavit and that counsel in fact had not been in contact with the Court, the Texas state Bar found that counsel committed professional misconduct and issued counsel a reprimand (please see state Bar Grievance No. 2-1602125). clearly the state habeas court finding that counsel's "professional decision" not to object to an obvious confrontation clause violation was "reasonable trial strategy in light of the totality of the circumstances" is misplaced.

Petitioner has clearly shown that trial counsel was ineffective for failing to object to an obvious confrontation clause violation. Counsel's failure to object was deficient preformance and not part of any rational trial strategy decision. Further, Petitioner was prejudiced due to the fact that he was never afforded the opportunity to confront Antonio Ruiz about his out of court statements. Antonio's statement made to detectives regarding ownership and who used the cell phone was an Important Piece of evidence Used by the state to Convict Petitioner. Trial counsel's Preformance Fell below the standard set out in strickland v. Washington, 104 S.CT 2052 (1984). Counsel's Preformance clearly fell below an objective standard of reasonableness, and IT IS clear that had Counsel objected to the illegal evidence being introduced at trial, the result of the Proceeding Would have been different.

The District Courts ruling in this case conflicts With this Courts relevant decisions in Crawford v. Washington and strickland vs Washington. Because the 5Th Circuit Court of Appeals based their denial of Petitioners Certificate of Appealability on the district Courts ruling, this Court should Grant Certvorari.

GROUND TWO: The District Court erred in finding that Petitioner did not show that gang evidence presented during the punishment phase of trial was irrelevant and therefore inadmissible, and that Petitioner did not show that his trial attorney had a valid objection to make under the First Amendment. The habeas Court's decision conflicted with this Court's relevant decision in Dawson v. Delaware, 112 S.Ct. 1093 (1992).

During the punishment phase of trial, the state introduced evidence that Petitioner was a member of the Fourth Ward gang solely to show bad character, and was not used for rebuttal since it was used in the state's case-in-chief. See Wainright v. Lockhart, 80 F.3d 1226, 1234 (8th Cir. 1996). This evidence was presented without objection from Petitioner's trial counsel. Trial Counsel's failure to object, based on Petitioner's First Amendment right to Freedom of Association, resulted in Petitioner being denied effective assistance of counsel.

This Court ruled that the use of evidence of membership in an organization on First Amendment grounds at the punishment phase of trial is forbidden. The only exceptions to this is if the evidence is relevant, necessary for impeachment or is rebuttal evidence. See Dawson at 1097-98. In that case, Dawson had the words "Aryan Brotherhood" tattooed on the back of his right hand and swastikas on other parts of his body. Dawson argued that this evidence was irrelevant and inflammatory and that it's admission would violate the First and Fourteenth Amendments. Further this Court held that, "had the prosecution proved that the Aryan Brotherhood committed unlawful or violent acts, or had even endorsed such acts, the evidence might have been relevant to prove aggravating circumstances, and thus would not have been barred by the First Amendment." Id.

It has been determined that evidence of gang affiliation may be relevant and admissible at the punishment phase of a trial for it's bearing on the character of the accused. See Anderson v. State, 901 S.W.2d 940, 950 (Tx. Crim. App. 1995) Under Texas law, to prove the relevance of a defendant's membership in an organization or group, the state must show: 1) Proof of the groups violent and illegal activities, and 2) the defendant's membership in the organization. See Mason v. State, 905 S.W.2d 570, 577 (Tex. Crim. App. 1995). These factors satisfy the concerns addressed by this Court in Dawson. Tamez v. TDCJ Director, 550 F. Supp. 2d 646, 655 (E.D. Texas 2008). It is clear from the record, that the complainant in Petitioner's case was not even involved in the confrontation that led to the shooting, and was simply in the wrong place at the wrong time. The state never alleged that the shooting was gang related, in essence, gang evidence was unrelated to the crime, e.g. showing motive. See Barclay v. Florida, 463 U.S. 939.

In response to Petitioner's state writ application, trial counsel filed an affidavit explaining his reasoning for not objecting to the introduction of Petitioner's alleged membership in the Fourth Ward gang. According to trial counsel's affidavit, he did not object because:

> "I had several discussions with the defendant about appropriate behavior in the courtroom. Despite these instructions, during the trial, the defendant would look for friends of his in the audience watching the trial, and make hand gestures that were or could be interpreted to be gang related. The defendant made one of these gestures in grand style at the conclusion of the trial when being escorted out of the courtroom to the hold-over by the sheriff."

Trial counsel's explanation directly rebuts the District Court's finding that trial counsel, "did not object to this evidence because he believed it would be futile." (mem. op., pg 17). The District Court also stated: "The state habeas corpus court, which also presided over the trial, found as a matter of fact that Ruiz 'made hand gestures that were or could be interpreted as gang related during the course of the trial.'" The District Court concluded:

> "Based on this finding, the state habeas corpus court concluded that the attorney's failure to object to the evidence of Ruiz's gang affiliation was not deficient conduct, as such evidence was admissible during the punishment phase of trial, and the appellant's behavior in the courtroom during trial increased the relevancy of this evidence."

Although gang affiliation is admissible in the punishment phase, it first has to be relevant to the issues being decided. Here, the State introduced it for "character" purposes, but failed to inform the jury about the beliefs of the Fourth Ward group. Only after the jury has been provided with this information can there be a fair evaluation of how gang membership reflects on the gang members character. See Beasley v. State, 902 S.W.2d 452, 457 (Tex. Crim. App 1995) Moreover, the conclusion about the hand gestures that "were or could be gang-related" is based on nothing more than mere speculation, because "could be" is not a fact. Further, even if Petitioner had made hand gestures that were gang-related or, in fact, was a member of the Fourth Ward gang, it is indistinguisable from Dawson having tattoos expressing his association to the Aryan Brotherhood. Therefore, the reasons for not objecting were irrelevant to whether or not Petitioner's affiliation was admissible under Dawson and Texas Statute. A defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge. Trial counsel should have objected to the introduction of this evidence. The state never presented specific evidence that the Fourth Ward gang was violent or involved in criminal activities. This is a fact that even the District Court recognized. "The state did not present evidence tending to show that the Fourth Ward gang was violent or involved in criminal activity." (Mem. op., pg 19) Without such evidence being presented, the Fourth Ward gang is well protected by the First Amendment and not reliable for bad character evidence. In essence, the District Court admits the state failed to meet the first prong of the Dawson test under Texas Statute. Clearly, the state was required to show proof of the group's violent and illegal activities.

In the present case, the evidence only shows that the Fourth Ward gang was a loosely knitted group of residents in Houston. The District Court further stated:

> "The state presented evidence that Ruiz committed an assault that caused serious bodily injuries while free on bond for the murder charges against him, and that he was accompanied during that incident by at least one other documented member of the Fourth Ward gang (Victor Sanchez), who was also present with Ruiz on the night he shot and killed Rigoberto Careaga."

According to the District Court, "the testimony was admitted in a context that linked Ruiz's gang affiliation to the underlying violent offense and in such a way that it was relevant for purposes of sentencing." This reasoning is not supported by the State's own theory of the case. There was no evidence that Petitioner was engaged in any Fourth Ward gang activity in the commission of any alleged offense.

The extraneous offense noted above was in no way connected to the beliefs of the Fourth Ward gang, although the District Court reasons that, "Ruiz was a documented member of the Fourth Ward gang and that he committed other violent acts as a member of that gang." What if Petitioner was a member of the Boy Scouts and commits a crime? Does that make the Boy Scouts known to engage in criminal activity? It is essential for the jury to know the types of activities the gang "generally" engages in, so that they can determine if his gang membership is a positive or negative aspect of his character. Therefore, not only was the context given not proof of what the gang generally engages in, but the State first has to establish what the beliefs are before any context could be used. Also, this reasoning by the District Court is completly contrary to the evidence presented at trial, and is not supported by the record at all. The District Court attempts to alter the facts to support his finding that the state presented the testimony "in a context that linked Ruiz's gang affiliation to the underlying violent offense and in such a way that it was relevant for purposes of sentencing." The record clearly refutes this reasoning by the District Court.

The District Court relies heavily on Victor Sanchez to link Petitioner with the Fourth Ward gang, but no where in the record does it show the criteria used to document Victor Sanchez to the Fourth Ward gang. Testimony by Detective Brooks, during the punishment phase of trial, states that, "Mr. Ruiz was with four other gentlemen and committed an assault." (RR. Vol. 5, pg. 10) Further testimony by Detective Brooks shows, "and he (Ruiz) and another gentleman were arrested and the other three got away." (RR. Vol. 5, pg 11). At no time does Detective Brooks testify that Victor Sanchez, or any other alleged Fourth Ward gang member for that matter, accompanied Petitioner during the alleged assault. It is clear that the District Court misconstrued the testimony in order to support his faulty reasoning. Further, the District Court's assesment that Victor Sanchez was present with Petitioner on the night of the murder is also not supported by the record. Testimony at trial shows that Victor Sanchez was only "ID'd" as the back seat passenger on the night of the murder. However, Petitioner's brother, Antonio, was also ID'd as the back seat passenger by witnesses. It is clear from the record that the state had no idea who also was present the night of the murder, The State of Texas has never been hesitant to charge individuals under the "law of parties." If the state would have had any concrete evidence that Victor Sanchez was involved in any form of gang activity with the Petitioner on the night of the murder, Sanchez would have been charged as well. This fact is further proof that the state did not believe that the Fourth Ward gang was involved in criminal activity as a group.

The District Court further stated:

> "Ruiz does not dispute that he was a member of the Fourth Ward gang; and he has made no attempt to refute the state habeas corpus court's finding that he made gang-related gestures in court, which made evidence of his gang affiliation relevant."

In his response to Summary Judgement (Doc. 23, pgs. 6 and 10), Petitioner showed that the record from trial does not reflect any sufficient evidence that would establish Petitioner as a member of the Fourth Ward gang. The state introduced photos during the punishment phase of trial, however none of the people seen in the photos with Petitioner were identified as actual members of the Fourth Ward gang. Also, witnesses that knew Petitioner personally were asked if they knew of Petitioner being in a gang, and they answered, "No." (RR Vol. 5, pgs. 37, 42, 51) This, along with the fact that the state habeas corpus court's finding was that Petitioner made hand gestures that "were or could be" interpreted as gang related, shows that the state failed to meet the requirements necessary to introduce the gang evidence at the punishment hearing.

Petitioner is entitled to effective assistance of counsel in the sentencing phase of trial. Wiggins v. Smith, 123 S.Ct. 2527(2003) Trial counsel has a duty to object to inadmissible evidence. Id. To prove ineffective assistance of counsel, Petitioner must show counsel's performance was deficient and that the deficient performance prejudiced the Petitioner. Strickland v. Washington, 104 S.Ct. 2052, 2064 (1994).

The gang evidence covered 19 pages of the punishment phase. Moreover, the state raised it in it's closing arguments. (RR Vol. 5, pg 58). As in Dawson, the state in Petitioner's trial introduced the evidence for no other reason except to inflame the minds of the jurors and to prejudice Petitioner. There were no witnesses with personal knowledge to testify about the Fourth Ward gang or any of it's members. The State relied heavily on the allegations that Petitioner was a member of the Fourth Ward gang, however, as the District Court concluded, the State failed to present any evidence at all that the Fourth Ward gang was organized to engage in violent or illegal activities. Therefore, the evidence was irrelevant, and trial counsel's failure to object to it's introduction harmed Petitioner and undermined confidence in the outcome of the punishment procedure.

The District Court's decision in this case clearly conflicts with this Court's relevant decisions in Dawson v. Delaware and Strickland v. Washington. Because of this conflicting decision, certiorari review is necessary in this case.

Ground Three: a united states court of appeals has decided an important Federal Question in a way that Conflicts with relevant decisions of this Court.

Petitioner's appointed appellate Counsel filed an Ander's brief in this case on December 6, 2010. Andee's v. California, 386 U.S. 738, 87 S. CT 1396 (1967). This Court in Andees clearly sets forward three distinct "education" burdens on Attorneys attempting to withdraw as appellate Counsel and clearly outlined the responsibilities that appellate Counsel has toward the client. First, According to Anders, the attorney is required to provide the client with a copy of the brief in support of the Motion to withdraw. Second, he must inform the client that he has a right to file a brief on his own behalf. Finally, Counsel must tell the defendant that he has a right to review the record to determine what points to raise in his Pro se brief. Petitioner's appellate Counsel wholly failed to meet these burdens. Failure to follow these mandates results in a defendant being deprived of his Constitutional right to effective Assistance of appelate Counsel.

In the District Court's Memorandum Opinion the Court states:

"Ruiz argues that his appellate Counsel failed to provide him with a copy of the Anders brief but Ruiz does not dispute that the Court of Appeals provided him with a copy of the Anders brief and advised him of his right to file a Pro Se response." (mem. op. at 22) clearly the District Court, against everything Anders stands for, shifts the responsibility and burdens set out in Anders for appellate counsel to the State Court of Appeals. The District Court seems to exonerate appellate counsel of any wrong doing just because Petitioner "eventually" was sent a copy of the Anders brief. The District Court fails to note that Petitioner only recieved a copy of the brief after his conviction had been affirmed and he was forced to file a Motion for Rehearing to the state Court of Appeals. Only then did the Court of Appeals send Petitioner a copy of the Anders brief. Up until Petitioner recieved notice that his case had been affirmed, Petitioner had no idea an Anders brief had been filed. Petitioners claim to the District Court and throughout his appellate process is that appellate counsel was ineffective. It is not the responsibility of the state Court of Appeals to notify defendants of the filing of an Anders brief or to send a copy of the brief to anyone. Those responsibilities clearly fall upon appellate counsel. Petitioner has attempted, unsuccessfully throughout the entire appellate process to have prison mail records reviewed in order to substantiate his claim. The District Courts response to Petitioners request was as follows:

" Ruiz requests an evidentiary hearing and review of prison mail records to establish that his counsel did not provide him with a copy of the anders brief. Because Ruiz does not dispute that he eventually recieved a copy of the Anders brief and was advised of his right to file a pro-se response an evidentiary hearing is unnecessary. Ruiz request will therefore be denied."

(mem. op. footnote 47
pg. 22-23)

Had the District Court ordered review of the Prison mail records, not only would have it found that appellate Counsel failed to serve Petitioner with a copy of the Anders brief but the District Court would have seen that appellate Counsel never corresponded with Petitioner the whole time he was appointed to represent Petitioner. Never. Not one letter. The fact that Petitioner "eventually" recieved the Anders brief and filed a Pro se brief on his own behalf does not absolve appellate Counsel of his duties. This Court set out appellate Counsels duties, and Counsel in this Case failed to uphold those duties. This failure deprived Petitioner of his Sixth and Fourteenth amendment right to effective Assistance of Counsel on Appeal. Further, the District Court's shifting of the appellate Counsel's responsibilities to the state Court of Appeals is in direct Conflict to this Courts relevant decision in Anders v. California. Because of these facts, the Certiorari review is necessary in this Case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ignacio Ruiz

Date: March 8, 2019