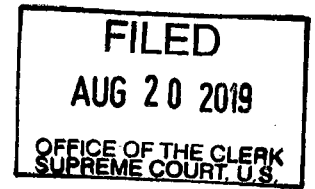


No. 19-5797

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



RICHARD JOSEPH MARTIN — PETITIONER
(Your Name)

vs.

STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TEXAS COURT OF CRIMINAL APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Richard Joseph Martin TDCJ # 2117315
(Your Name)

12071 FM 3522
(Address)

Abilene, Texas 79601
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Issue No. 1

Over Petitioner's pre-trial objection as to relevance, the trial court admitted into evidence during the guilt and innocence phase of his trial a photograph of Petitioner's tattoos which illustrated what could only be depicted as Petitioner's abstract belief in what is known as the "no-snitch culture" and is protected speech under the First Amendment of the United States Constitution. Petitioner's First Amendment rights of free speech, expression, and association were violated where the State failed to offer any evidence that the tattoo was relevant to the murder of D'Quay Harris. Does this First Amendment violation warrant Certiorari review?

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:

Defendant / Appellant / Petitioner:

Richard Joseph Martin

Complainant / Appellee / Respondent:

State of Texas

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Respondent's Counsel on Appeal:

Michael Bloch, Assist. D.A.
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Odessa, Texas 79761

Trial Court:

The Honorable Denn Whalen
70th Judicial District Court
Ector County, Texas

Appellate Court:

Chief Justice John M. Bailey, Senior
Chief Justice Jim R. Wright, (Retired),
Wilson J. (not participating), Court of
Appeals, 11th District of Texas

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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 _____ 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 _____ 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 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 Eleventh Court of Appeals Eastland, Texas court 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.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ 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 6-12-2019.
A copy of that decision appears at Appendix B.

☐ 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, United States Constitution: Congress can make no law that establishes a religion or prohibits the free exercise of a religion. This amendment also guarantees freedom of speech and of the press.

Fourteenth Amendment United States Constitution: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Rule of Evidence 402: Relevant evidence is admissible unless any of the following provides otherwise: 1) the United States or Texas Constitution; 2) a statute; 3) these rules; or 4) other rules prescribed under statutory authority. Irrelevant evidence is not admissible.

Texas Rule of Evidence 403: The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly

presenting cumulative evidence.

STATEMENT OF THE CASE

On November 15, 2014, D'Quay Jerome Harris, ("Harris"), died. (RR 10: SX 17). Twenty-one months earlier, Harris had been an active member in the Rollin 60's Crips gang, ("Crips"). (RR 6:21). Between 2:00 a.m. and 3:00 a.m. on January 31, 2013, Harris was shot multiple times and left laying on his stomach in a vacant lot off of Rochester Street, a desolate road located in Ector County, Texas. (RR 6:65, 67, 68, 72, 100, 142; 7:16-17, 100). As a result of his gunshot wounds, Harris was paralyzed from the chest down. (RR 7:20, 55). Almost two years after being shot, Harris entered the hospital with a urinary tract infection and severe sepsis. These conditions eventually led to Harris' death. (RR 7:25-26).

The State accused Petitioner of murdering Harris, or in the alternative, of assaulting Harris with a deadly weapon. (CR 1:11-12). To meet its burden of proof, the State essentially relied upon the testimonies of two witnesses and a tattoo.

The Tattoo

The evidence at trial established that Petitioner had countless tattoos on his chest, back, arms, and feet. (RR 10: SX # 8-#9, SX # 129-144). The evidence also established that Petitioner obtained many of his tattoos after February 24, 2013. (RR 10:

SX #8, SX # 129-131).

At trial, the State focussed on one of the tattoos Petitioner had gotten since February 24, 2013. This particular tattoo was located on Petitioner's side and depicted a rat hanging from a stop sign referencing the street name of "Seminole," (hereinafter referred to as the "Tattoo"). (10: SX #100). Under the authority of a court order, law enforcement officials took a picture of the Tattoo one Sunday in late December of 2016. (CR 1:73; RR 7:97).

Over Petitioner's numerous objections, the trial court allowed the State to introduce this picture of the Tattoo into evidence during the guilt/innocence stage of the jury trial. (RR 3:4-12; 4:11-19; 7:92-96; 10: SX #100). As a result of the trial court's evidentiary ruling, the Tattoo became the linchpin of the State's case-in-chief during this portion of the trial. In closing arguments, the State argued the tattoo was actually Petitioner's "confession" to, and Petitioner's "trophy" for, shooting Harris on January 31, 2013. (RR 8:11, 17-18, 37).

The Jury Trial

The jury trial in this case lasted ⁶three days. (RR 5:1; 9:1) Petitioner did

not testify on his behalf at any point in the jury trial. (RR 7:157-59, 166-67; 9:38).

After deliberating, the jury found Petitioner guilty of murder. (CR 1:129, 145-48; RR 8:43). At the beginning of the punishment phase of the trial, Petitioner pled "True" to the single enhancement paragraph. (RR 9:9-10). After hearing the punishment evidence, the jury sentenced Petitioner to life in prison. (CR 1:134; 145-48; RR 9:50).

The Appeal

On appeal, it was Petitioner's argument that he had properly asserted both evidentiary and constitutional objections to the State's introduction of a picture of one of his tattoos during the guilt/innocence phase of the jury trial which had nothing to do with the indicted charge. The State's use of the evidence transformed the fundamental nature of the Tattoo into a testimonial statement. The prejudicial nature of the Tattoo was extreme, as was the time and attention the State devoted to this evidence. The trial court erred in admitting the picture of the Tattoo and thereby violated Petitioner's First and Fifth Amendment rights, and violated Petitioner's right

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to the presumption on innocence. Petitioner was harmed by the trial court's mistake as such error impacted his substantial rights and contributed to both his murder conviction and his life sentence.

In an opinion authored by Chief Justice Bailey, (Appendix A) the Eleventh Court of Appeals held that the trial court did not abuse its discretion in overruling Petitioner's objection under the First Amendment and affirmed Petitioner's conviction.

Summary Of The Argument

It is well established law that the First Amendment of the United States Constitution protects an individual's right to join groups and associate with others holding similar beliefs, and that it protects the freedom of speech. Thus, Petitioner's First Amendment rights were violated when the trial court allowed the Tattoo to be admitted during the guilt/innocence phase of his trial when it was not admitted for purposes of identifying Petitioner, nor was it admitted to establish Petitioner's gang affiliation. Neither was the Tattoo admitted to establish Petitioner's future dangerousness - an issue for punishment and not guilt/innocence.

Rather, the Tattoo was admitted into evidence to serve as Petitioner's confession to the murder of Harris. Once the trial court wrongfully admitted the Tattoo into evidence -- over Petitioner's constitutional and evidentiary objections -- the State treated the Tattoo for all purposes as Petitioner's testimonial statement. The State even argued the jury could base its guilty verdict solely on the Tattoo and nothing else. The harm to Petitioner as a result of the trial court's error in admitting the Tattoo was both substantive and pervasive and violated Petitioner's First Amendment rights.

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Argument and Analysis

Issue No. 1:

Over Petitioner's pre-trial objection as to relevance, the trial court admitted into evidence during the guilt and innocence phase of his trial a photograph of Petitioner's tattoos which illustrated what could only be depicted as Petitioner's abstract belief in what is known as the "no-snitch culture" and is protected speech under the First Amendment of the United States Constitution. Petitioner's First Amendment rights of free speech, expression, and association were violated where the State failed to offer any evidence that the Tattoo was relevant to the murder of D'Quay Harris. Does this First Amendment violation warrant certiorari review?

Introduction

Petitioner properly asserted both evidentiary and constitutional objections to the State's introduction of a picture of one of his tattoos during the guilt/innocence phase of the jury trial which had nothing to do with the indicted charge. The State's use of the evidence transformed the fundamental nature of the Tattoo into a testimonial statement. The prejudicial nature of the Tattoo was extreme, as was the time and attention the State devoted to this evidence. The trial court erred in admitting the picture of the Tattoo and thereby violated Petitioner's First and Fifth amendment rights.

and destroyed Petitioner's presumption of innocence. Petitioner was harmed by the trial court's mistake as such error impacted his substantial rights and contributed to both his murder conviction and his life sentence.

Right of Free Speech

The First Amendment protects, among other things, the freedom of speech.

U.S. CONST. amend. I; State v. Johnson, 475 S.W. 3d 860, 864 (Tex. Crim. App. 2015).

The First Amendment right to freedom of speech applies to the states by virtue of the Fourteenth Amendment. U.S. CONST. amend. XIV; Johnson, 475 S.W. 3d at 864. No form of speech is entitled to greater protection than political speech. Doe v. State, 112 S.W. 3d 532, 534 (Tex. Crim. App. 2003).

Petitioner's Constitutional and Evidentiary Objections

The question of whether the State would be allowed to introduce a picture of the Tattoo into evidence was a topic of a pretrial hearing. (RR 3:4). At the pretrial hearing, Petitioner asserted the following constitutional and evidentiary objections against allowing a picture of the Tattoo to be introduced into evidence:

(1) the Tattoo was not relevant under Tex. R. Evid. 402;

- (2) if relevant, the probative value of the Tattoo was substantially outweighed by the danger of unfair prejudice under Tex.R. Evid. 403;
- (3) the introduction of a picture of the Tattoo would violate Petitioner's Fifth Amendment right against self-incrimination;
- (4) the introduction of a picture of the Tattoo would violate Petitioner's First Amendment right to free speech; and
- (5) the introduction of a picture of the Tattoo would violate Petitioner's right to the presumption of innocence.

(RR 3:6-9). In this pretrial hearing, the trial court asked the parties to submit copies of relevant Texas case law for its consideration. (RR 3:9-10).

The parties revisited this issue once again during a pretrial hearing held immediately prior to trial. (RR 4:11). At that time, the trial court informed the parties it would allow the State to introduce a picture of the Tattoo during the guilt/innocence phase of the jury trial, and it would also allow the State to address the Tattoo in opening arguments. (RR 4:18-19). Petitioner asserted the same five objections as noted above, and once again, the trial court overruled these objections. (RR 4:20-21).

During the State's opening argument, the prosecutor more than simply made a passing reference to the Tattoo. Instead, the prosecutor told the jury that Petitioner "has tattooed a trophy of his kill." (RR 6:16). The State then proceed to describe the

details of the Tattoo to the jury. (Id.).

During its case-in-chief, the State offered a picture of the Tattoo into evidence. (RR 7:93). Petitioner again asserted the five objections listed above to this evidence. (RR 7:93-96). The trial court yet again overruled all of Petitioner's evidentiary and constitutional objections. (RR 7:93-96). The trial court did rule, however, that the picture of the Tattoo was only "conditionally admitted" into evidence. (RR 7:96). The condition was that there would be no interpretations, that the Tattoo would speak for itself.

When the prosecutor began questioning a witness about the Tattoo, Petitioner objected, asserting the picture spoke for itself without any interpretation. (RR 7:97). The trial court sustained Petitioner's objection, finding the Tattoo "speaks for itself, and the "jury can draw whatever conclusion they desire to." (RR 7:98).

The jury was certainly given an ample opportunity to look at this picture and to draw their own conclusions. The State enlarged the picture of the Tattoo to more than a "foot by foot" and to more than four feet tall. (RR 7:121). The State then displayed the blown-up picture to the jury like a billboard. (Id.).

Petitioner objected to the State leaving the blown-up picture of the Tattoo up for any length of time due to its prejudicial effect. (RR 7:99). The trial court overruled Petitioner's objection and allowed the State to display the enlarged picture to the jury throughout the testimonies of two witnesses and for more than thirty minutes before directing the State to take the picture down. (RR 7:121, 133-34).

The Trial Court's Error.

The trial court abused its discretion in allowing the State to introduce a picture of the Tattoo during the guilt/innocence stage of the jury trial.

Generally, evidence of a defendant's tattoo is introduced only during the punishment phase of a trial. See Banda v. State, 890 S.W.2d 42, 61-62 (Tex. Crim. App. 1994), cert. denied, 515 U.S. 1105, 115 S.Ct. 2253, 132 L.Ed.2d 260 (1995) (testimony concerning defendant's tattoo of word "Satan" relevant and admissible in punishment as to defendant's future dangerousness); Conner v. State, 67 S.W.3d 192, 202 (Tex. Crim. App. 2001), cert. denied, 551 U.S. 1183, 128 S.Ct. 24, 168 L.Ed. 2d 168 (2007) (defendant's choice of tattoos, like personal drawings, can reflect character, and therefore admissible in punishment phase). In the case at bar, the

States purpose in introducing evidence of the Tattoo was not to influence Petitioner's punishment, but to insure Petitioner's conviction for murder.

In other cases, evidence of a defendant's tattoo is admissible to establish his gang affiliation. See Garza v. State, 213 S.W. 3d 338, 347 (Tex. Crim. App. 2007) (evidence of defendant's tattoo admitted to prove criminal street gang element of offense). In this case, the State was not seeking to introduce a picture of the tattoo for purposes of establishing Petitioner's gang membership. The fact that Petitioner was a member of the Crips was undisputed at trial, and the State had placed Petitioner's gang membership squarely before the jury.

The introduction of the picture of the Tattoo violated Petitioner's First Amendment right to free speech. A tattoo is considered pure First Amendment "speech." Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1060 (9th Cir. 2010). "Tattoos are generally composed of words, realistic, or abstract images, symbols, or a combination of these all of which are forms of pure expression that are entitled to full First Amendment protections." *Id.* at 1061. Additionally, tattoos can express a countless variety of messages and serve a wide variety of functions such as

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decorative, religious, magical, punitive, political, and can serve as an indication of identity, status, occupation, or ownership. *Id.*

In this case, Petitioner asserted the Tattoo was a form of free speech relating to the "no-snitch culture." (RR 3:7). There is a prevailing "no-snitch culture" among young people, particularly in communities with gang problems (RR 3:7-8). It is a call for informants not to cooperate with law enforcement. As such, the Tattoo was not relevant to the offense for which Petitioner was being tried, and the trial court abused its discretion in admitting the Tattoo under Tex. R. Evid. 402.

Officer Roy Ramos ("Ramos") corroborated Petitioner's claim of a "no-snitch culture." Ramos testified during the trial that in Petitioner's neighborhood, the police found it very difficult to find anyone willing to stand up as witnesses when crimes were committed. (RR 6:91). Additionally, Ramos testified that a "snitch" could also be known as a "rat." (*Id.*). Accordingly, the Tattoo was an expression and recognition of Petitioner's cultural beliefs and opinions and therefore constituted protected speech under the First Amendment. Accordingly, the trial court's admission of a picture of the Tattoo violated Petitioner's right to free speech under the First Amendment.

In upholding Petitioner's conviction, the decision of the Eleventh Court of Appeals was contrary to this Court's ruling in Dawson v. Delaware, 503 U.S. 159, 112 S. Ct. 1093, 117 L.Ed.2d 309.

In Dawson, this Court held that the introduction of the Aryan Brotherhood evidence under the circumstances presented violated the defendant's rights under the Federal Constitution's First Amendment, because the evidence proved nothing more than the defendant's abstract beliefs and had no relevance to the issues being decided in the capital sentencing proceeding.

While in Dawson, the circumstances were that the tattoo evidence was not relevant because both Dawson and the victim were white, in the case at bar the Tattoo was not relevant because it merely established Petitioner's abstract belief that informants are dispicable vermin that are worthy of no respect on Seminole Street where he lived. Even if this belief is offensive, it is still protected speech under the First Amendment. In Texas v. Johnson, 491 U.S. 397, 414, 105 L.Ed.2d 342, 109 S. Ct. 2533 (1989) this Court held, "The government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Yet, in Petitioner's case this is

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exactly what happened.

Through the testimony of "Ramos" (~~not Amos~~), it was established that a rat is a snitch. However, the State offered absolutely no evidence that Harris had any history whatsoever that involved him being an informant of any kind. On appeal, the State argued that the Tattoo is extremely probative in showing Petitioner's motive in killing Harris - that he was a rat who robbed him. (State's Brief at pg. 14). Not only did the State fail to provide even a scintilla of evidence that Harris was a "rat" or "snitch," but the State failed to offer any evidence that any robbery occurred. Lastly, the Tattoo clearly shows that the rat is hanging from a stop sign with Seminole attached. (10: SX# 100). Harris was not shot on Seminole Street, he was shot on Rochester Street. All of the evidence was located on Rochester Street. (RR 7:122-24). In closing, the State mentioned the stop sign. "Rochester, Seminole, I don't care. Seminole, Rochester, same thing to me." (RR 9:39). But Seminole is NOT Rochester, which is exactly why the Tattoo was not relevant to the issues involved in Petitioner's case. Furthermore, it should be noted that Chante Woods testified that Petitioner and his wife Linda Martin lived with her on Seminole Street. (RR 7:162-~~63~~). It is not unusual for gang members to put their neighborhoods in

their tattoos.

The probative value of this evidence was substantially outweighed by its prejudicial effect. The State had several witnesses and numerous medical records with which to try to meet its burden of proof in this case. As the State had other means available to try to establish Petitioner's guilt, this factor weighed against the Tattoo's admissibility.

The huge impact the Tattoo was going to have on the jury could easily be predicted by both parties. This is why the State fought so hard for the admission of this evidence and Petitioner fought so hard against its admission. The graphic nature of the tattoo alone was so prejudicial that it would have been impossible for the jury to overcome it.

While Petitioner's case is distinguishable from Dawson in the respect that in Dawson the tattoo was admitted during the sentencing phase while in Petitioner's case it was admitted during guilt/innocence. It is an issue for the Court to decide which is worse. To be sentenced excessively based upon irrelevant issues, or to be found guilty based upon issues which have no relation to the offense for

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which one is being tried. In either instance, just like Dawson, Petitioner's First Amendment rights were violated when the Tattoo was admitted into his trial where it had no relevance, and Petitioner prays that this Honorable Court would adhere to the precedent set in Dawson and grant certiorari in this cause.

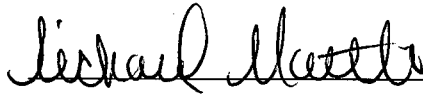
REASONS FOR GRANTING THE PETITION

This Court should grant this petition because the First Amendment right to freedom of speech is one of the fundamental rights that the Constitution was built on. And while we may all have different ideas and opinions, the United States Constitution protects all citizens from government prosecutions just because we believe in certain things. The State did not provide a single item of physical evidence connecting Petitioner with the murder of D'Quay Harris. Nor any credible witness. If this Court does not grant this petition a dangerous precedent would be set which would in essence eviscerate the First Amendment and allow the government to disregard citizens' constitutional protections with impunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

_____

Date: AUG 20th 2019