

19-7308

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IN THE

SUPREME COURT OF THE UNITED STATES

NOV 16

JERRY LYNN MCGAVITT — PETITIONER
(Your Name)

vs.

THE 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

Jerry Lynn McGavitt, #2146489

(Your Name)

French Robertson Unit, 12071 F.M. 3522

(Address)

Abilene, Texas 79601

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

- 1.) Whether the failure to limit the definitions, in the abstract portion of the jury charge, of "Intentionally" and "Knowingly" to the nature of the conduct, where the accused is being prosecuted for murder, and in the alternative, under the law of parties, constitutes a violation of due process under the 14th Amendment of the U.S. Constitution.
- 2.) Whether it constituted legal insufficiency and a violation of due process under the 14th Amendment of the U.S. Constitution when the court failed to limit the definition, in the abstract portion of the jury charge, of "Intentionally" and "Knowingly" to the proper criminal mental state under the law of parties.
- 3.) Whether it constituted error to deny a motion for mistrial when the trial court allowed an undiscolsed DNA Expert witness to provide the jury with an opinion that was undisclosed, unreliable and unhelpful to the jury.
- 4.) Whether a video-taped confession should have been suppressed when the investigating officer used the two-step interrogation technique to extract incriminating evidence from the accused without complying with Miranda and Article 38.22 of the Texas Code of Criminal Pro. warning requirements in violation of the Fifth Amendment of the U.S. Constitution.

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:

RELATED CASES

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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 _____ 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 Eighth District Court of Appeals, Tex 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.

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 September 21, 2019. A copy of that decision appears at Appendix A.

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

Texas Penal Code § 6.03 DEFINITIONS OF CULPABLE MENTAL STATES

(a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

(b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Texas Penal Code § 7.02 (a)(2) CRIMINAL RESPONSIBILITY FOR CONDUCT OF ANOTHER

(a) A person is criminally responsible for an offense committed by the conduct of another if:

(2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense;

Texas Code of Criminal Procedure, Article 38.22 WHEN STATEMENTS MAY BE USED

UNITED STATES CONSTITUTION

Amendment V Right to remain silent, and right to have counsel present during interview.

Amendment XIV Right to Due Process of Law

STATEMENT OF THE CASE

Petitioner is seeking a Writ of Certiorari for review of his 60 year sentence and judgement. On June 26, 2017, Petitioner Jerry Lynn McGavitt, was tried before a jury in the 34th District Court of El Paso County, Texas, Cause No. 2014OD05274, the Honorable Judge William Moody, presiding, for murder as a primary actor and in the alternative, as a party responsible for the conduct of the co-defendants (C.R. 126). (R.R. 1:3). On June 30, 2017, the jury found the Petitioner guilty of murder. (C.R. 126). Petitioner is currently serving the 60 year sentence in the Texas Department of Criminal Justice-Institutional Division. (C.R. 182-183).

On April 3, 2019, the Eighth Court of Appeals, Texas, denied Petitioner's motion for rehearing without an opinion. The Eighth Court of Appeals rendered its decision affirming the conviction and sentence of Petitioner on March 7, 2019. In a slip opinion, not designated for publication, Jerry Lynn McGavitt v. The State of Texas, 08-17-00168-CR, (Tex.App.-El Paso, 2019), the Eighth Court of Appeals denied Petitioner's five points of error presented to the Court for review.

A Petition for Discretionary Review was timely filed on May 7, 2019. See attached Appendix A, PD-0457-19. Subsequently, the Texas Court of Criminal Appeals denied the Petition on August 21, 2019.

REASONS FOR GRANTING THE PETITION

- 1.) To determine whether the failure to limit the definitions, in the abstract portion of the jury charge, of "intentionally" and "knowingly" to the nature of the conduct, where the accused is being prosecuted for murder, and in the alternative, under the law of parties, constitutes a violation of due process under the 14th Amendment of the U.S. Constitution.
- 2.) To determine whether it constituted legal insufficiency and a violation of due process under the 14th Amendment of the U.S. Constitution when the court failed to limit the definition, in the abstract portion of the jury charge, of "intentionally" and "knowingly" to the proper criminal mental state under the law of parties.
- 3.) To determine whether it constituted error to deny a motion for mistrial when the trial court allowed an undisclosed DNA Expert witness to provide the jury with an opinion that was undisclosed, unreliable and unhelpful to the jury.
- 4.) To determine whether a video-taped confession should have been suppressed when the investigating officer used the two-step interrogation technique to extract incriminating evidence from the accused without complying with Miranda v. Arizona and Article 38.22 of the Texas Code of Criminal Procedure warning requirements in violation of the Fifth Amendment of the U.S. Constitution.

The State of Texas has decided an important question of federal law that has not been, but should be, settled by this Honorable Court. See Supreme Court rule 10(c).

This question is of great national importance because it concerns a criminal defendant's right's before and during trial. Among the issues that this Court should address are whether the U.S. Constitution allows a defendant to be charged with murder even though he was simply involved in a neighborhood street fight and it was never his intention to murder the victim and he himself did not initiate the fight. Texas and other states have for years allowed the prosecution wide latitude in bringing forth murder charges under the law of parties and it is the contention of the Petitioner that the State of Texas has abused the law of parties statute in his case.

Secondly, the Petitioner would ask this court to decide whether his Constitutional rights were violated when the State put on a DNA expert who confused the jury by saying that it contained a "mixture" when in fact the DNA sample did not match the Petitioner.

Again, the State of Texas has abused its authority for years by saying that such tactics by the prosecution are legal and poses no constitutional issues.

Finally, the Petitioner would ask this court to review the Constitutionality of allowing video-taped statements involving the investigator's use of the highly controversial "two-step" interrogation technique to extract incriminating evidence from the accused in violation of *Miranda v. Arizona*. Such practices have started to creep back in during Texas's interrogation sessions and the Court of Appeals and the Texas Court of Criminal Appeals have declined to address this issue in Petitioner's case, thereby requiring a review by this Honorable Court.

REASONS FOR GRANTING THE WRIT

I. THE TEXAS COURT OF CRIMINAL APPEALS DECISION TO DENY A PETITION FOR DISCRETIONARY REVIEW TO DETERMINE WHETHER THE FAILURE TO LIMIT THE DEFINITIONS OF "INTENTIONALLY" AND "KNOWINGLY" IN PETITIONER'S MURDER CASE UNDER THE TEXAS LAW OF PARTIES DOCTRINE CONSTITUTES A VIOLATION OF DUE PROCESS UNDER THE 14TH AMENDMENT OF THE U.S. CONSTITUTION.

The Texas court of Criminal Appeals let stand this issue by failing to overrule the Eighth Texas Court of Appeals decision in this matter. The Eighth Court of Appeals erred in asserting that ". . .the trial court correctly defined the culpable mental state . . .the jury instructions were not erroneous." See Opinion at page 15.

In the case at bar, the definition of "intentional" and "knowingly" would have been correct had the Petitioner been charged with murder as the primary actor only. But he was charged with murder under the law of parties, which should have required the State to precisely tailor the definitions of "knowingly" and "intentionally" to the precise nature of the conduct.

When the party is not the primary actor, the State must prove conduct constituting an offense plus an act by defendant done with the intent to promote or assist such conduct. See Peek v. State, 494 S.W. 3d 156 (Tex.App.-Eastland, 2015). Simply stated, the State must not only prove that the Petitioner aided the primary actors, the State must further prove that the Petitioner knew and intended to assist them with purposeful murderous intent. The jury charge failed to explain this properly and the result was that the jury was confused.

Texas for years has similarly been confusing juries with this misapplication of the law of parties. The Due Process Clause of the 14th Amendment requires the State to show "mens rea" when finding a defendant guilty of murder. Here the state only proved that the Petitioner jumped into a neighborhood fight. By their incorrect jury charge they failed to prove that it was the specific intent of the Petitioner to commit murder. This Court must settle this confusion and hold the State of Texas accountable.

II. THE TEXAS COURT OF CRIMINAL APPEALS DECISION TO DENY
A PETITION FOR DISCRETIONARY REVIEW TO DETERMINE WHETHER
THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE PETITIONER
FOR MURDER UNDER THE LAW OF PARTIES WAS A VIOLATION OF THE
DUE PROCESS CLAUSE OF THE 14th AMENDMENT.

The Texas Court of Criminal Appeals let stand this issue by failing to overrule the Eighth Texas Court of Appeals decision in this matter. Under the Due Process Clause of the U.S. Constitution, the State is required to prove every element of the crime charged beyond a reasonable doubt. see Jackson v. Virginia, 443 U.S. 307, 319 (1979). As stated in the previous error, the State did in fact prove that the Petitioner engaged in a fight with the deceased. But the evidence was wholly insufficient to prove that it was his intention to murder the victim.

The most serious evidence that the State produced at the Petitioner's trial was his supposed confession. But the confession only made mention of his fighting, not any specific intent to murder Luna, nor an intent to aid the others in murdering Luna. At any rate, a confession or statement standing alone is not enough to determine guilt. The statement must be included with independent "corpus delicti". At any rate, no mention is made or found in the statement showing or proving that it was the Petitioner's clear and specific intent to murder Luna. And certainly there is no other corroborating evidence to support a finding of guilt. In Texas, the Court of Criminal Appeals has long subscribed to the common law rule that an extrajudicial statement made by the accused is wholly insufficient to support a conviction unless corroborated. See Gribble v. State, 808 S.W.2d 65 (Tex.Crim.App. 1990).

This Court should review this point and make a determination concluding that State courts can no longer convict individuals under the law of parties unless they closely adhere to the specific requisites which are easily understood. As it stands now, the State of Texas has played fast and loose with the law of parties for so long that the Texas courts are themselves confused.

III. THE TEXAS COURT OF CRIMINAL APPEALS DECISION TO DENY A PETITION FOR DISCRETIONARY REVIEW TO DETERMINE WHETHER IT CONSTITUTED A VIOLATION OF PETITIONERS RIGHT TO DUE PROCESS TO DENY A MOTION FOR MISTRIAL WHEN THE TRIAL COURT ALLOWED A DNA EXPERT TO CONFUSE THE JURY.

Three years before the Petitioner's trial, a Texas Department of Public Safety DNA expert reported that the DNA found on the Petitioner's shirt was insufficient to make a comparison match with the DNA of the deceased victim. This should have been the end of the story as far as DNA evidence is concerned.

But on the eve of the trial the State introduced a new expert, a Mr. Nicolas Ronquillo, a supervisor at the DPS DNA lab to testify that the blood stain found on the Petitioner's shirt was a mixture of DNA. Keep in mind that no new testing was performed. Mr. Ronquillo merely reworded the report for the jury, and the jury was led to believe that the "mixture" was able to determine that the deceased victim's blood was found on the victim's shirt.

Of course the defense asked for a mistrial. It was obvious that this last minute new expert was put on the stand to confuse the jury. The motion for mistrial was overruled. Remember, it had already been determined that no match could be made. The state's new expert was obviously put on the stand to confuse the jury with the word "mixture".

The State of Texas has long been confusing juries with sleight of hand techniques and most judges still allow this practice. It is time that the Supreme Court finally disallow the practice of juror confusion brought on the prosecution.

IV. THE TEXAS COURT OF CRIMINAL APPEALS DECISION TO DENY A PETITION FOR DISCRETIONARY REVIEW TO DETERMINE WHETHER THE FAILURE A VIDEO-TAPED CONFESSION SHOULD HAVE BEEN SUPPRESSED WHEN THE OFFICER USED AN ILLEGAL TWO-STEP INTERROGATION TECHNIQUE RESULTED IN A VIOLATION OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION.

The Court of Appeals found that Miranda warnings were not required because the interaction between the Petitioner and the police interviewer were "consensual". See Miranda v. Arizona.

The extrajudicial confession obtained from the Petitioner should have been suppressed by the court because it was secured during an illegal detention. See Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975). It is apparent from the record in this case that when stopped, the Petitioner was already labeled as a murder suspect. Petitioner's co-defendant, Marcus Adkins had already been interviewed before the investigator talked to the Petitioner. The Petitioner was held by the detectives who also transported him to the police station. (RR3: 126). The investigator admitted that before he actually mirandized the Petitioner he was able to gather some incriminating statements from him. Then the tape recording and video recording machines were turned on. (RR4: 135).

The detective intentionally failed to comply with article 38.22 warnings to elicit incriminating statements from the Petitioner in order to extract a confession.

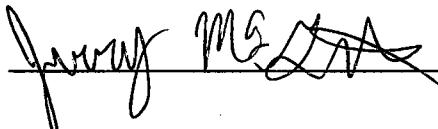
Such techniques are common practice in Texas and most judges allow them as "get-arounds" of constitutional law. It is time that the Supreme Court step and finally disallow such illegal practices.

CONCLUSION. Based on the aforementioned grounds for review, this Court should grant this writ and reverse and remand for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 11-17-19