

No. _____

**In the Supreme Court of the United States
October Term, 2018**

CRISTOBAL VELASQUEZ, also known as Little Cris; RAUL
RODRIGUEZ, also known as Fat Boy; GEORGE SANCHEZ, also known
as Curious; **MIKE CASSIANO, PETITIONER**

v.

UNITED STATES OF AMERICA,

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on January 30, 2018.

PARTIES TO THE PROCEEDINGS

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in ruling that the District Court did not err under Rule 403 F.R.E. in requiring the Defendants to appear shirtless in open court.

Whether the Court of Appeals' erred in ruling that the District Court's admission of the tattoo photographs did not violate Defendants' 5th Amendment right against self-incrimination.

PARTIES TO THE PROCEEDINGS

The undersigned counsel of record certifies that the persons having an interest in the outcome of this case are those listed below:

1. **Mike Cassiano**, Defendant-Petitioner;
2. **Richard L. Durbin, Jr.**, U.S. Attorney;
3. **Joseph H. Gay, Jr.**, Assistant U.S. Attorney;
4. **Erica Benites Giese, Patrick Burke, Ralph Paradiso** Assistant U.S. Attorneys, who represented Plaintiff-Respondent in the District Court;
5. **Reginald Van Wade**, Attorney who represented Defendant-Petitioner in the District Court;
6. **Reginald Van Wade**, Attorney who represents Defendant-Petitioner in *this* Court.

This certificate is made so that the Judges of this Court may evaluate possible disqualification or recusal.

OPINION BELOW

A copy of the opinion of the United States Court of Appeals for the Fifth Circuit, *United States v. Velasquez*, No. 15-51164, published. Op. 881 F.3d 314 (5th Cir. 2018), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on January 30, 2018. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. §1254(1).

FEDERAL STATUTES INVOLVED

The text of The Fifth Amendment of the United States Constitution is reproduced in Appendix B.

The texts of Rule 403 Federal Rules of Evidence is reproduced in Appendix C.

STATEMENT

On October 7, 2011, Mike Cassiano was arrested on a bench warrant, subsequent to being indicted in this case under R.I.C.O. The arrest warrant was the result of a joint investigation by the Federal Bureau of Investigation and other law enforcement agencies, which began in August 2009. The investigation targeted the criminal activities of the Texas Syndicate (TS) prison gang.

Mike Cassiano was charged in a seven-count indictment. He was specifically charged in Counts 1, 3, and 5. Count 1 charged him with Conspiracy to Conduct the Affairs of an Enterprise through a Pattern of Racketeering, in violation of 18 U.S.C. §1962(d). Counts 3 and 5 charged Cassiano with Conspiracy to Commit Murder in Aid of Racketeering, in violation of 18 U.S.C. §1959(a)(5).

It was alleged in the indictment that racketeering activity in this case began on or about January 1, 2002, and continued through September 28, 2011. The indictment alleged that the persons charged, were members, prospects, and associates of the Texas Syndicate.

Mike Cassiano was alleged to be a member of the Texas Syndicate, who held the rank of sillon in 2005. It was alleged that at various times during the racketeering conspiracy, that Cassiano directed other members of the criminal enterprise in carrying out unlawful activities in furtherance of the Texas Syndicate.

Mike Cassiano underwent a 5-day jury trial. It was alleged during trial that in 2005 a truce was reached between the Texas Mexican Mafia (MM) and the Texas Syndicate, wherein it was agreed that both gangs would coexist in Uvalde, Texas. It was alleged that on Christmas Eve, 2005 that Mike Cassiano and others were at a bar in Uvalde,

Texas, and that there, Cassiano inquired of Mexican Mafia members, whether Jose Guadalupe De La Garza, Jr. was a member of the MM. It was alleged that he was told that De La Garza was not a member of the MM. On Christmas Day, 2005, De La Garza was shot to death at his residence in Uvalde, Texas. De La **Garza was allegedly targeted because he had stolen property from the Texas Syndicate.** The getaway vehicle allegedly belonged to Mike Cassiano. The getaway vehicle was allegedly driven by Jesse James Polanco, an alleged member of the Texas Syndicate. It was alleged that prior to De La Garza's murder, a TS meeting was held to determine whether De La Garza should be killed. It was alleged that Cassiano held the rank of sergeant at the time, and that he pushed for, and eventually succeeded in, obtaining enough votes to have a "green light" issued for the murder of De La Garza.

Polanco, along with co-defendants Caleb, Josue, and Cristobal Velasquez (brothers), were arrested for the murders. Caleb and Josue admitted to having committed the murders and were convicted of Murder on January 29, 2007. Cristobal Velasquez was convicted of Aggravated Assault Causing Serious Bodily Injury on April 7, 2007. The murder charges against Polanco were dismissed on April 9, 2007, due to insufficient

evidence. It was alleged that Cassiano was upset that Polanco had not been convicted for the murder of DeLa Garza along with the Velasquez brothers. It was further alleged that

Cassiano believed Polanco to be an informant, and that he had paperwork showing that Polanco and another individual had implicated him in possessing kilograms of narcotics. It was alleged that once Cassiano returned to prison, that he would send word to the TS that Polanco should be killed. On November 7, 2009, Sotero Rodriguez Martinez asked Ervey Sanchez to kill Jesse James Polanco. At the time, both Ervey Sanchez and Polanco

were TS prospects. Sotero Rodriguez Martinez told Sanchez that he would become a member if he killed Polanco. On November 8, 2009, TS members voted to authorize the murder of Polanco. On November 9, 2009, Jesse James Polanco, Jr. was murdered at the Southwest Livestock Exchange in Uvalde County, Texas. Ervey Sanchez confessed to killing Polanco on orders of the Texas Syndicate.

It was alleged that Mike Cassiano sold cocaine and had marijuana and heroin smuggled in to him while he was incarcerated in a BOP facility.

Tattoo: During trial, the district court required the defendants to remove their shirts so that the jury could see their tattoos. This is how the government sought to prove the defendants were members of a criminal enterprise under R.I.C.O. An FBI agent pointed out which tattoos on their bodies represented the Texas Syndicate.

All the defendants were found guilty. Cassiano, in particular, was found guilty on the three counts he was specifically named in. On Count 1, he was sentenced to life imprisonment. On Count 3, he was sentenced to 120 months imprisonment. On Count 5, he was sentenced to 120 months imprisonment. All three counts were ordered to run concurrently.

On appeal, the defendants argued that, under Rule 403 F.R.E., the District Court erred in requiring them to appear shirtless in open court. The Fifth Circuit found that requiring the defendants to appear shirtless in the presence of the jury created the risk of unfair prejudice. The Court noted that there were other avenues available to the Government, including showing the jury pictures of the tattoos that had previously been admitted into evidence. However, the Court held that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence so as to amount to an abuse of discretion by the district court.

Next, the defendants argued that the admission of the tattoo photographs violated their 5th Amendment right against self-incrimination. They argued that the presentation of their tattoos was testimonial because the pictures were admitted, not for identification purposes, but as substantive evidence of the defendants' affiliation with the Texas Syndicate. Because the defendants did not make this objection in the District Court, it was reviewed under the plain error standard of review on appeal. The Fifth Circuit noted that to qualify for the 5th Amendment privilege against self-incrimination, a communication must be (1) testimonial in character, (2) incriminating, and (3) compelled.

Here, the Court held that the showing of the defendants' tattoos was analogous to physical evidence that is not protected by the 5th Amendment. (*citing Holt v. United States*, 218 U.S. 245 (1910), and *Schmerber v. California*, 384 U.S. 757 (1966)) However the Court "recognizes than an argument can be made that the showing of defendants' tattoos was testimonial in character." Indeed, showing the tattoos may be "implicitly testimonial in nature"; but any error was not "clear" or "obvious" as is required under plain error review.

REASONS FOR GRANTING THE WRIT

This Honorable Court Should Grant Certiorari to Decide This Issue: (1)
Whether the Court of Appeals erred in ruling that the District Court did not err under Rule 403 F.R.E. in requiring the Defendants to appear shirtless in open court.

Requiring the defendants to appear shirtless in the presence of the jury created the risk of unfair prejudice and outweighed any probative value such evidence may have had.

This Honorable Court Should Grant Certiorari to Decide This Issue: (2)
Whether the Court of Appeals' erred in ruling that the District Court's admission of the tattoo photographs did not violate Defendants' 5th Amendment right against self-incrimination.

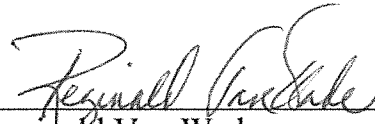
The presentation of the defendants' tattoos was testimonial because the pictures were admitted, not for identification purposes, but as substantive evidence of the defendants' affiliation with the Texas Syndicate. The tattoos were essentially a statement saying that the wearer is a member of the Texas Syndicate // which is one of the elements of the alleged offense.

FOR THESE REASONS, CASSIANO's conviction should be Reversed.

CONCLUSION

For these reasons, Petitioner CASSIANO asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted,


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