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STATE OF WASHINGTON
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Supreme Ct No. 911851

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

RICARDO J. DELEON, Respondent

ANSWER TO PETITION FOR REVIEW

Janet G. Gemberling
Attorney for Respondent

Janet Gemberling, P.S.
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Spokane, WA 99203
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ORIGINAL

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A. IDENTITY OF ANSWERING PARTY

Ricardo DeLeon is answering the Yakima County petition for review.

B. RELIEF REQUESTED

Mr. DeLeon asks this court to deny Yakima County's petition for review.

C. ISSUE PRESENTED FOR REVIEW

The State asks this Court to review the Court of Appeals decision finding the trial court erred in finding admissible portions of the gang expert's testimony, a document reflecting Mr. DeLeon's responses to inculpatory questions about his gang affiliation asked during the jail booking process, and testimony relating those responses. Mr. DeLeon asks the court to deny the State's petition.

D. STATEMENT OF THE CASE

When Ricardo DeLeon was being booked into the Sunnyside Jail, Corporal Gabiano Saenz asked him, "Who are you running with, what gang do you claim?" (RP 1142) According to Corporal Saenz, Mr. DeLeon responded "North Side Vario." (RP 1142) Corporal Saenz went

on to ask him about his gang color, tattoos, gang symbols, signs and numbers, and how often he was in the company of identified gang members. (RP 1142-45)

This series of questions is usually initiated by asking a person “if there were certain individuals or certain groups he could not be housed with.” (Supp RP 30, 44, 78) He then completed the Gang Documentation Form. (RP 1139) The purpose of the form is to keep the individual from being put in a cell with a rival gang member. (RP 1139-40)

The State charged Ricardo DeLeon, his brother Anthony DeLeon, and Octavio Robledo with three counts of first degree assault, while armed with a firearm and with intent to benefit a criminal street gang. (CP 225-26)

The details of Mr. DeLeon’s answers to questions about the gang, together with Corporal Saenz’s explanation of their significance, were all shared with the jury at his trial. (RP 1142-45; Exh. 15) According to Corporal Saenz, Ricardo DeLeon identified himself as an NSV or North Side Varrío and said his gang color was red and the number fourteen was associated with his gang. (RP 1142-43) Corporal Saenz went on to explain the significance of the number 14: “The letter 14 in the alphabet is letter N. Its Norteno or also Nuestra Familia. It is a prison gang and all red gangs, so to speak, have their alliance under that one prison gang, so.”

(RP 1145) Corporal Saenz told the jury that he recorded Mr. Deleon's responses on the Gang Documentation Form, which he then had Mr. Deleon sign. (RP 1146)

Detective Jaime Ortiz testified as an expert on gang culture. He provided an extended explanation of the terms "putting in work" and "courtship." (RP 1922-24, 1926) He told the jury that there is an inmate at the State Penitentiary who is "calling the shots" in a gang, and went on to elaborate the relationship between people who are in prison and people who are on the outside. (RP 1927-30) He discussed at length the number, variety and names of gangs in the Yakima area. (RP 1937-38; 1947-48) He testified about the use of the internet by gangs for intimidation as well as recruiting. (RP 1939-40)

The jury found Mr. DeLeon guilty of assault with intent to benefit a criminal street gang. The Court of Appeals held that portions of the expert testimony provided by Detective Ortiz were irrelevant but harmless and Mr. DeLeon's answers to questions about his gang affiliation were the product of coercion.

E. ARGUMENT

1. IRRELEVANT “GANG EXPERT” TESTIMONY ABOUT IRRELEVANT MATTERS SHOULD HAVE BEEN EXCLUDED.

The State contends expert testimony provided by Detective Ortiz was properly admitted because it was relevant to three issues: “1) what is a criminal street gang, 2) who the members are, and 3) how the gang hierarchy works.” (Petition at 5) A trial court abuses its discretion by admitting gang evidence if the danger of unfair prejudice substantially outweighs the probative value. *State v. Mee*, 168 Wn. App. 144, 159, 275 P.3d 1192 (2012). Evidence of gang affiliation is generally prejudicial. *State v. Embry*, 171 Wn. App. 714, 732, 287 P.3d 648 (2012).

Here, the Court of Appeals acknowledged the relevance of portions of the detective’s evidence but specified testimony that was not probative of the issues for which the expert testimony had been admitted, and provided detailed analysis of the relevance or lack thereof. *State v. DeLeon*, 185 Wn. App. 171, 195-96, 341 P.3d 315 (2014). The State has failed to suggest any theory of relevance that would refute the court’s analysis. Similarly, the State asserts, without any supporting discussion or analysis, that the evidence was “clearly not prejudicial . . .” (Petition at 5) The State has not suggested why this court should review the Court of

Appeals determination that portions of the expert testimony were inadmissible.

2. WHEN AN OFFICER ASKS A SUSPECT ABOUT HIS GANG AFFILIATION WHILE BOOKING HIM INTO JAIL, THE ANSWERS ARE INHERENTLY INVOLUNTARY.

The Court of Appeals held that:

when . . . answering inculpatory questions on a gang documentation form is implicitly required for an inmate to obtain safe housing, then whatever incriminating answers the State gets are not voluntary for purposes of the Fifth Amendment. They are not admissible in a criminal trial.

State v. DeLeon, 185 Wn. App. 171, 203, 341 P.3d 315 (2014). It is not apparent what part of this holding requires further review.

The State contends that asking an individual, “Who are you running with, what gang do you claim?” after having asked “if there were certain individuals or certain groups he could not be housed with” is not coercive, or at least not as coercive as the circumstances in *Arizona v. Fulminante*, 499 U.S. 279, 285-6, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), or *Payne v. Arkansas*, 366 U.S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958). (Petition at 11-15)

The State argues that the gang affiliation questions are mere routine booking questions, citing *United State v. Washington*, 462 F.3d 1124, 1133 (9th Cir. 2008). (Petition at 16-17) *Washington* involved

questions asked prior to advising the suspect of his constitutional rights, and the issue was whether asking about his alias constituted interrogation designed to elicit incriminating information. *Id.* The court concluded this was a routine booking question for which prior *Miranda* warnings were not required. *Id.* The issue of possible coercion was not presented.

Relying on other jurisdictions' characterization of questions about gang affiliation as routine booking questions, the State argues that the Court of Appeals decision in the present case is inconsistent with cases in which Washington courts hold that even when routine booking questions result in incriminating answers, the answers are not excluded. (Petition at 19-20) Whether certain questions have become part of the routine booking process is not relevant to whether their use may coerce an individual to give inculpatory answers.

The State's arguments do not suggest any inconsistency between the Court of Appeals decision in this case and existing Washington law.

F. CONCLUSION

Review should be granted and the Court of Appeals decision should be reversed.

Dated this 25th day of June, 2015.

Respectfully submitted,


Janet Gemberling #13489
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 911851
vs.)	
)	CERTIFICATE
RICARDO J. DELEON,)	OF MAILING
)	
Petitioner.)	

I certify under penalty of perjury that on this day I served a copy of the Answer to Petition for Review in this matter by email on the attorney for the respondent, receipt confirmed, pursuant to the parties' agreement:

Tamara Hanlon
Tamara.Hanlon@co.yakima.wa.us

I certify under penalty of perjury that on this day I served a copy of the Answer to Petition for Review in this matter by pre-paid first class mail addressed to:

Ricardo DeLeon
#346529
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

Signed at Spokane, Washington on June 25, 2015.


Janet Gemberling #13489
Attorney for Petitioner

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, June 25, 2015 1:20 PM
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Received 6/25/2015.

From: Robert Canwell [mailto:admin@gemberlaw.com]
Sent: Thursday, June 25, 2015 1:14 PM
To: OFFICE RECEPTIONIST, CLERK; Janet Gemberling; Tamara Hanlon
Subject: DeLeon (911851] Answer to Petition

Dear Clerk,

Attached please find Ricardo DeLeon's Answer to Petition for Review for filing.

Thank you,

Robert Canwell
Legal Assistant

Janet Gemberling, PS
PO Box 8754
Spokane, WA 99203