

Tattoos as Evidence

BY RYAN LOZAR

It's a fact of life that people make snap judgments about each other's character based on discretionary aspects of physical appearance such as the way we dress or style our hair. This is especially true when it comes to tattoos, whose bearers—depending on the nature of the tattoo itself—may be viewed as seedy, provocative, or downright dangerous. The consequences of such judgments can be serious for a tattooed criminal defendant. Conservative clothes or coiffure may help the accused project a squeaky-clean image in court, but the risk of prejudice persists if a tattoo peeks out from under a shirt-sleeve, or when the prosecution introduces a photo of a tattoo as relevant evidence.

The problem made news a few years back when the defendant in a race-related murder trial in Florida asked the court to pay a makeup artist to paint over the swastika and barbed wire inked onto his head. His lawyer argued that his tattoos were so likely to offend, intimidate, or frighten the jurors that they would be unable to objectively weigh the evidence. The court agreed and ordered a

cosmetologist to hide the offending images every morning at a \$125-per-day cost to the state (*State v. Ditullio*, CRC-0605827-CSAWS (Fla. 6th Cir. Ct. order issued Nov. 12, 2009)).

Such tattoo coverage motions are still novel, and courts are split on whether they're required to guarantee a fair trial. Just this year a federal judge in Nevada granted such a motion (*United States v. Chandler*, 2011 WL 1979713 (D. Nev. May 19, 2011)), seven months after a Utah state court denied one (*State v. Allgier*, Case No. 071904711 (Utah 3d Dist. Ct. order issued Oct. 12, 2010)). Lawyers arguing tattoo coverage petitions frequently invoke *Estelle v. Williams* (425 U.S. 501 (1976)), which held that forcing defendants to wear prison garb when they appear before a jury undermines the constitutional presumption of innocence. The Ninth Circuit refused to apply *Estelle* to the tattooed defendant in *United States v. Quinteros* (933 F.2d 1017 (9th Cir. 1991)), but it conceded that "a particular tattoo could create prejudice under certain circumstances." No widely accepted standard has developed to govern this area of the law.

IDENTIFYING PHYSICAL EVIDENCE

The defendant's concern about a tattoo's effect on a jury is quite different when the government actively seeks to introduce the defendant's tattoo into evidence as relevant to its case. Often, when a witness testifies that the perpetrator of a crime bore a visible tattoo, the government will petition to use a defendant's similar tattoo to identify him as the culprit. Defendants sometimes object that being forced to expose their tattoos to a jury violates the Fifth Amendment's prohibition against compelling a criminal defendant to be a witness against himself. (U.S. Const. amend. V.) The objection fails, however, under *Schmerber v. California* (384 U.S. 757 (1968)), which held that the privilege against self-incrimination implicates testimony or communication, not physical evidence. *Schmerber* and its progeny confirm that the government's admission of biometrics such as fingerprints, blood, DNA samples, or height and weight measurements in evidence poses no Fifth Amendment problems. As Supreme Court Justice Oliver Wendell Holmes Jr. once said, the Fifth Amendment cannot thwart something so basic as a jury's ability "to look at a prisoner and compare his features with a photograph in proof." (*Holt v. United States*, 218 U.S. 245, 252–53 (1910).) Criminal prosecutions would be difficult indeed if defendants could not only remain silent but also render invisible identifying

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aspects of their physical selves.

If a defendant's tattoos—or the lack thereof—tend to exculpate rather than incriminate him, then the Fifth Amendment's inapplicability to physical evidence means that an accused can show his skin to jurors without waiving his privilege. This is precisely what happened in *United States v. Bay* (762 F.2d 1314, 1315 (9th Cir. 1984)), where an accused bank robber displayed his tattoos to show that eyewitnesses to the crime, whose recollections of the perpetrator made no mention of tattoos, could not have been describing him. The prosecution sought to cross-examine the defendant, but the Ninth Circuit ruled that he was entitled to refuse because his tattoo was nontestimonial evidence.

Proper foundation is key to the admissibility of all trial evidence, tattoos included. The government might want to show that a defendant's tattoo matches a witness's description, but it bears a threshold burden of establishing that the defendant had the incriminating tattoo on the date in question. Likewise for a defendant who would deploy his tattoo as exculpatory evidence, as in *Bay*. To retain his or her Fifth Amendment privilege, such a defendant would not take the stand to lay the foundation; instead, a close acquaintance, or even the tattoo artist who inked the design, might be called to testify as to the tattoo's longevity (*People v. Perez*, 216 Cal. App. 3d 1346 (1990)).

EXPRESSIVE CONTENT

Fifth Amendment self-incrimination analysis looks different when the government relies not on the fact of a tattoo but on its content. This use is common in the prosecutions of gang crimes. If a defendant's gang membership satisfies a necessary element of the charge, an accused's gang-related tattoo is relevant to that part of the case. Gang tattoos tend to be heavily coded, recording not only membership but rank, past criminal acts, convictions, and more. A defendant may object that such information-rich tattoos effectively confess

his affiliations and activities, and that the Fifth Amendment bars such involuntary revelations. But are they really involuntary? Surely the government does not compel people to get tattooed. This was the Second Circuit's conclusion last year in *United States v. Greer* (631 F.3d 608 (2d Cir. 2011)). In that case, a rented car was used in the commission of a bank robbery, but the government had difficulty tying the defendant to the vehicle.

Prosecutors eventually connected the dots when they discovered that the name of the woman who had rented the car was tattooed on the defendant's arm. The court of appeals affirmed the tattoo's use as evidence because the trial judge did not compel the defendant to testify that he knew the woman—the man had freely tattooed her name on his arm for all to see.

If the government succeeds in entering a tattoo's expressive content into evidence and the tattoo is susceptible to multiple interpretations, the defense can create reasonable doubt as to the government's preferred reading. A tattoo is such a highly personal mode of expression that the credible claims of a tattoo's daily wearer may have stronger sway with the jury than a prosecutor's conjecture as to the defendant's state of mind in selecting a particular design. Teardrop tattoos, for example, may for one bearer signify how many victims he has murdered and for another memorialize lost loved ones (*Gonzales v. Quarterman*, 458 F.3d 384 (5th Cir. 2006)).

RELEVANCE AND PREJUDICE

The defense's first line of attack is to question whether the tattoo is relevant at all. In *Dawson v. Delaware* (503 U.S. 159 (1992)), the Supreme Court vacated a sentence in part due to the prosecution's evidentiary use of a defendant's "Aryan Brotherhood" tattoo. Observing that the white defendant had



The debate over Casey Anthony's tattoo still resonates, despite her acquittal in a Florida court.

murdered a white victim, the Court held that the tattoo's racist message was irrelevant to the crime in question, and its mention served only to unfairly prejudice the jury. Likewise in *United States v. Thomas* (321 F.3d 627, 633 (7th Cir. 2003)), the Seventh Circuit rebuked the prosecution's use of a defendant's gun tattoo to prove firearm possession. If the government wanted the jury to believe that a gun tattoo indicates actual ownership of a gun, the court mused, then "the mind reels at the legal and evidentiary consequences of the unicorns, dragons, mermaids, and other flights of fancy that decorate people's bodies."

Relevance failures such as those in *Dawson* and *Thomas* are rare. The government usually will seek to use a tattoo only if it has a logical nexus to its burden of proof, in which case a defendant might wage an attack under Federal Rule of Evidence 403 that his tattoo's "probative value is substantially outweighed by the danger of unfair prejudice." In *United States v. Irvin* (87 F.3d 860 (7th Cir. 1996)), for example, the court ordered a new trial for a man whose drug and firearm conviction was tainted by testimony about the defendant's large gang tattoo. (The government had aimed to show that the crime was likely undertaken with a fellow gang member.) Observing that gangs suffer "poor public relations," the Seventh Circuit concluded that the gang

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tattoo's prejudicial effect overwhelmed its probative value.

Irvin's wholesale exclusion of tattoo evidence is atypical. Courts are loath to grant such broad relief because all relevant evidence is by its nature prejudicial (see *United States v. Hankey*, 203 F.3d 1160 (9th Cir. 2000)). Rule 403 motions therefore should not be treated as an all-or-nothing proposition; because of its weighty evidentiary value, a judge may not be willing to rule an inflammatory tattoo wholly inadmissible but may instead order redactions where possible. In *Thomas*, where the government wanted to use a photograph depicting the defendant's gun tattoo at trial, the accused successfully negotiated with prosecutors to obscure offensive and irrelevant text from a photo of the tattoo before it was submitted to the jury (*Thomas*, 321 F.3d at 630).

When all else fails, the defense can request jury instructions warning against drawing improper character inferences (*Woods v. McKee*, 2009 WL 804148 (E.D. Mich.)). Another approach is to stipulate to whatever element of the charge the tattoo tends to establish in exchange for an agreement that its prejudicial content will not be presented to the jury. However, whether to accept or decline such a stipulation offer is the prerogative of the prosecution, which may prefer the narrative power of an evidentiary presentation over a "naked admission." (*Parr v. United States*, 255 F.2d 86, 88 (5th Cir. 1958).)

FOURTH AMENDMENT CONCERNS

The *Los Angeles Times* recently detailed the LAPD's routine practice of asking to photograph the tattoos of detainees held for minor traffic violations. The justification for the practice is not only to record the arrestee's physical characteristics in furtherance of the original charges. The city, plagued by gang activity, also cross-references information gleaned from tattoo photos against its files in unsolved investigations. In one such review, officers were shocked to find that a detain-

ee's tattoo depicted the scene of a violent and long-unsolved liquor store shooting. However effective, this practice raises Fourth Amendment concerns.

It goes without saying that the police could not walk up to ordinary citizens without a warrant or absent exigent circumstances and examine them for tattoos under their clothes. But the Fourth Amendment applies differently with regard to convicted prisoners, parolees, and arrestees due to legitimate law enforcement purposes endorsed by courts. An arrestee can be constitutionally fingerprinted and photographed for identification purposes, and the government's professed need to also record an arrestee's scars, tattoos, and other markings would seem to fit this rationale (*United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004)). Constitutionality, however, is not a foregone conclusion. It depends on how a contested search is conducted. Search and seizure jurisprudence does not rely on per se rules but rather employs a four-factor reasonable-

and therefore constitutional, under the Fourth Amendment. As to the scope, place and manner of the intrusion, the court accepted the prosecution's arguments that the police required the woman to disrobe only to the extent necessary to gain a clear view of her tattoo, conducted the search in a private area of the station, and did so without any physical harassment.

The LAPD's routine searches are distinguishable from the *Schmidt* search in that the city uses tattoo information not just in an immediately ensuing prosecution but to link arrestees to other offenses. This more ambitious use should have little impact on the constitutionality of the practice, however, as similar use is made of fingerprints, mugshot photos, and DNA databases; courts have repeatedly upheld the constitutionality of collecting and using such data from convicted prisoners and arrestees (*United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010)). Nor does the LAPD's practice differ much from run-

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ness test, developed by the Supreme Court in *Bell v. Wolfish* (441 U.S. 520 (1979)), that evaluates a search's justification, scope, location, and manner.

The Eighth Circuit had occasion in *Schmidt v. City of Bella Vista* (557 F.3d 564 (8th Cir. 2006)) to apply the *Bell* test in a tattoo case where a woman was arrested for underage alcohol possession. The police photographed her tattoo during booking, and she later challenged the constitutionality of the search. The police answered that the search was warranted because the tattoo could be used to identify the arrestee in her subsequent prosecution. Implementing the *Bell* test, the Eighth Circuit upheld the trial court's determination that the tattoo search was reasonable,

and therefore constitutional, under the Fourth Amendment. As to the scope, place and manner of the intrusion, the court accepted the prosecution's arguments that the police required the woman to disrobe only to the extent necessary to gain a clear view of her tattoo, conducted the search in a private area of the station, and did so without any physical harassment.

Tattoos are extremely popular in California, as everyday people watching quickly confirms. However, it is unlikely that most people, when getting inked, give much forethought to how their tattoo might become a relevant in a case against them. A working knowledge of the emerging legal trends in this area is therefore a must for any litigator, especially criminal law practitioners. ☉

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