

NO. 18-7590 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
JAN 15 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOSHUA JACOBS — PETITIONER
(Your Name)

vs.

THE STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COURT OF CRIMINAL APPEALS OF TEXAS

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

PETITION FOR WRIT OF CERTIORARI

JOSHUA JACOBS

(Your Name)

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(Address)

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(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- I. When trial-judge-imposed limitations on voir dire interfere with trial counsel's ability to identify veniremembers whom may be challengeable for cause because they have a bias against a law relevant to the case, does such limitations run afoul of Petitioner's right under the U.S. Constitution to a fair and impartial jury?

- II. When trial-judge-imposed limitations on voir dire interfere with trial counsel's ability to identify veniremembers whom may be challengeable for cause because they have a bias against a law relevant to the case, does such limitations run ~~xxxx~~ afoul of Petitioner's right under the U.S. Constitution to effective assistance of counsel at trial?

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:

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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[] is unpublished.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[] is unpublished.

[X] 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

[X] reported at ____ S.W. 3d (Tex.Crim.App. 2018); or,
[x] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the Sixth Court of Appeals of Texas court appears at Appendix B to the petition and is

[X] reported at 506 S.W. 3d 127(Tex.App.Texarkana); 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).

[x] For cases from **state courts**:

The date on which the highest state court decided my case was 10/10/18. 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

I. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]"
Amend. VI., U.S. Constitution .

II. "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense."
Amend. VI., U.S. Constitution

STATEMENT OF THE CASE

As a result of unlawful contact with a twelve-year-old girl, a Bowie County, Texas jury found Jacobs guilty of aggravated sexual assault of a child. Texas Penal Code Ann. § 22.021(a)(B)(i) (West Supp. 2016). After Jacobs pled true to having been previously convicted of felony carnal knowledge of a juvenile in Louisiana, the trial court imposed the mandatory sentence of life. Tex. Penal Code Ann. § 12.42(c)(2)(A)(i), (B) (West Supp. 2016).

Realizing that, by dint of Article 38.37 of the Texas Code of Criminal Procedure, art. 38.37, § 2(b), the jury deciding his guilt or innocence would certainly be told not only of the prior, but also that they could use it as evidence of his character and also of any "acts performed in conformity" therewith, (Id.) quite naturally Jacob's trial counsel wanted to identify any potential jurors with a bias against repeat sexual offenders, where such an either implicit or explicit bias would cause them not to hold the state to its burden of proof beyond a reasonable doubt in the instant case. To that end, trial counsel requested from the trial court that he be permitted to pose the following questions to the venirepanel in order to identify any potential jurors who would be challengeable for cause if Jacobs prior conviction would cause them to not hold the state to its burden of proving the instant case beyond a reasonable doubt:

QUESTIONS:

- 1) "Who would not ~~XXXX~~ require the State to prove beyond a reasonable doubt that the charged offense occurred in Bowie County, if evidence of an unrelated sexual offense is proven beyond a reasonable doubt?"
- 2) "Who would not require the State to prove beyond a reasonable doubt that the charged offense occurred on November 25, 2014?", and,
- 3) "was committed by...Jacobs and that he intentionally or knowingly ~~XXXX~~ penetrated the sexual organ of [the complainant] with his finger."
- 4) "Who would require that the State only prove that...Jacobs contacted the sexual organ of the [complainant] with his finger, if evidence of an unrelated sexual offense is proven beyond a reasonable doubt?"

5)"Who would not require the State to prove beyond a reasonable doubt that at the time the charged offense is alleged to have occurred that [the complainant] was under 14 years of age, if the evidence of an unrelated sexual offense is proven beyond a reasonable doubt?"

Trial counsel argued that these questions were proper questions concerning a proper area of inquiry in lieu of the leeway given the State by virtue of 38.37.

The trial Court wouldn't allow the questions out of concern that such questions could result in "poisoning the minds of the veniremembers," or "busting the panel." The most the Court would agree to is allowing trial counsel to voir dire using the term "Assaultive offense."

Jacobs filed his direct appeal raising, *inter alia*, a claim that the trial court abused its discretion in barring his trial counsel's request to voir dire the panel in regard to prior "sexual offense." A unanimous opinion handed down by the Sixth Appellate District of Texas agreed and reversed the judgment of the trial court and ordered that Jacobs receive a new trial. (See Appendix B, hereto attached).

The State was granted its Petition for Discretionary Review. The State conceded in its argument to the Texas Court of Criminal Appeals (hereinafter "TCCA") that the trial court erred in not allowing the questions. However, the State argued that the error was "nonconstitutional error" and not "constitutional error", as the Sixth Appellate Court had found.

The TCCA agreed with the State that the error was nonconstitutional and therefore reversed the Sixth Court of Appeals. (See Appendix A, hereto attached)(The TCCA's decision consisted of two concurring opinions and one dissenting opinion.) The TCCA ruled that the Sixth Court of Appeal was to apply a "nonconstitutional" harm analysis, rather than the "constitutional" harm analysis.

While the arguments involved the Texas Constitution, the TCCA's analysis relied on federal Supreme Court caselaw in addition to the U.S. Constitution. (See Appendix A, hereto attached).

REASONS FOR GRANTING THE PETITION

Since the State and the TCCA's opinion concede the error, Petitioner's complaint goes to the TCCA's ruling that the error is not constitutional. Review of this issue(s) should be granted because:

- 1) The TCCA's decision has decided an important question of federal law that has not been, but should be, settled by this Court; and,
- 2) The TCCA has decided an important federal question in a way that raises a conflict with decisions by federal circuit court decisions and/or exposes a split amongst the circuits in regards to the issues raised herein.

QUESTION I

When trial-judge-imposed limitations on voir dire interfere with trial counsel's ability to identify veniremembers whom may be challengeable for cause because they have a bias against a law relevant to the case, does such limitations run afoul of Petitioner's right under the U.S. Constitution to a fair and impartial jury?

In beginning its analysis, the TCCA posed the question:

"What, then, does the Sixth Amendment require when an accused seeks to inquire into a veniremember's potential biases?" (Appendix A, at P.9). The Court further states, "[t]he Supreme Court has yet to provide an exhaustive list of the circumstances under which a trial court is "constitutionally compelled" to ask specific, rather than general, questions about the veniremembers' ability to remain impartial." (Appendix A, at P. 11); citing Mu'Min v. Virginia, 500 U.S. 415,425-26.

The TCCA then holds that:

"In light of Mu'min and the cases applying it, the prevailing standard for assessing whether a trial court's voir dire limitation violates the Sixth Amendment appears to be the following: The trial court retains broad discretion in conducting voir dire, and it does not abuse its discretion by refusing questions that only "might be helpful" in examining the venire for bias. To constitute an abuse of discretion, the trial court's limitation must "render the defendant's trial fundamentally unfair. (id.)

As the dissenting opinion pointed out, the applicability of Article 38.37 is critical. (Richardson, J., dissenting, at P.4.

Under normal circumstances, extraneous offense evidence is not admissible during the guilt/innocence phase, or, under the circumstances where it would be allowed, it still wouldn't be allowed as evidence of "character conformity." However, the Texas Legislature carved out an exception under Article 38.37.

Under 38.37, sections 2(a) and 2(b), extraneous prior sexual offenses (not assaultive offenses) committed against a different child (not the complainant) are allowed to be admitted in the guilt/innocence phase of a defendant's trial for a sexual offense against a child. The majority of the TCCA states on page 4 of its opinion that "Jacobs conducted his Article 38.37 voir dire by referring primarily to prior 'assaultive' offenses." This is not accurate. Article 38.37 does not apply to "assaultive" offenses. It only applies when there is a prior offense against a child. Jacobs was erroneously prohibited from conducting an Article 38.37 voir dire, which kept him from knowing if he was selecting an impartial jury, which he has a constitutional right to do.

Jacobs did not have the opportunity to initiate any questioning that might have exposed so much as a negative feeling, much less a challengeable bias, possessed by a potential juror against a prior sex offender. Because of Article 38.37 section 2, the prosecutor was allowed to present evidence, during the guilt/innocence phase of trial, of Jacobs's prior sexual-assault-of-a-child offense. However, Jacobs's counsel was not allowed to ask during voir dire if knowing that Jacobs had a prior sex offense would they still be able to be fair and impartial and hold the State to its burden of proof beyond a reasonable doubt in the instant case. Jacobs was therefore precluded from identifying veniremembers who would be challengeable for cause based on their bias against an accused repeat child sex offender. Gauging the venire's reactions to information of a prior sex offense could not be done by simply voir dire questions about prior "assaultive" offenses. A voir dire concerning the panel's reaction to Jacobs having a prior "assaultive" offense did not (and could not) reveal any bias or prejudice towards Jacobs for having a prior "sexual" assault conviction. Since the type of prior assaultive offense was the key to whether Jacobs's prior

sexual offense would be admissible during guilt/innocence, the type of prior offense was also key to revealing whether, knowing such information, the potential jurors could or could not have been fair and impartial toward a defendant who was an accused "repeat" sex offender.

The majority's opinion relies on various federal and state (including out-of-state) case law. (See Majority Opinion at 10-13, nn. 43-44, 55-57). It is apparent that, in the Majority's opinion, this issue is an issue of first impression which various states' appellate courts and federal circuit courts have struggled to clarify in light of the Supreme Court's decision in Mu'Min v. Virginia, 500 U.S. 415 (1991).

The TCCA's reliance on Mu'Min, *supra*, is not exactly on point in that Mu'min addressed what level of questioning is appropriate in assisting counsel in making "preemptory" challenges, which the Supreme Court pointed out is not of constitutional right. *Id.*, at 424-425. In the instant case, Counsel's attempt was to identify venirepersons who might be challengeable for "cause" due to their inability to be fair and impartial if they were presented with evidence of Jacobs's prior.

The State gave formal notice of its intent to introduce evidence of the prior sexual offense pursuant to Article 38.37 section 3. Since the State was able to, and did, introduce evidence of the prior sexual offense in its case in chief, and since the State would have therefore been permitted to address such topic on voir dire, which it would ~~have~~ have been, Jacobs should also have been permitted to voir dire as requested. Jacobs was entitled to know whether the potential jurors would still hold the State to its burden of proof despite ~~a~~ such evidence.

An error that infringes on a constitutional right is a constitutional error. A defendant's right to an impartial jury is a constitutional right. How can an error in a process designed to select an ~~a~~ impartial jury not be a constitutional error?

In Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222 (1992), the Court stated that "part of the guarantee of a defendant's right to a fair trial and impartial jury is an adequate voir dire to identify unqualified jurors. *Id.*, at 729, 112 S.Ct. at 2230)

Jacobs was denied an adequate voir dire and was essentially prevented from identifying those venirepersons whom were challengeable for cause.

The TCCA's majority incorrectly indicates that Jacobs's trial counsel wished to be overly specific. (See Appendix A, at P. 11) However, that is not the case. Because even though 38.37 is specific to the introduction of prior "child" sex cases, Jacobs's counsel only requested to be able to voir dire the jury in regards to prior "sexual" offenses.

In reversing the judgment of the trial court, the Sixth Court of Appeals stated that it found the limitations on voir dire to be especially harmful because "[i]n reviewing the record, we note that the State relied heavily on the unrelated sexual offense in its opening statement, in its case-in-chief, and its final argument.

As highlighted in an opinion concurring with the majority, even then the Honorable Judge Newell recognized that "[i]t is starting to consider the scope of the license provided by this statute." (Newell, J, concurring, at P. 4).

This is clearly a case where the State wants its cake and to eat it too. The State wants to be able to place great emphasis in its case-in-chief on extraneous offenses of prior child sexual assault, clearly relying on the inflammatory nature to fill in any gaps it might have in proving its case-in-chief. Yet, the State wants to be able to rely on such an inflammatory statute without allowing voir dire sufficient enough to identify those venirepersons who would be inclined to convict in the instant case based on information of a prior sexual assault regardless of whether the State proves its case-in-chief.

In fact, the reasons given by the trial judge for disallowing the questions counsel wished to pose themselves prove how critical the voir dire counsel desired was. The trial court didn't want to end up "poisoning the minds" of the venire panel and "busting" the jury. In other words, the trial court was concerned that too many of the veniremembers on the panel would express either implicit or explicit bias and would be therefore challengeable for cause and deplete the jury pool. The judge's reasoning was all the reasons to allow the voir dire requested by counsel.

In the limitations it placed on counsel's voir dire, the trial

judge prevented from adequately identifying unqualified jurors, in violation of Jacobs's right to select a fair and impartial jury. Jacobs respectfully request that this Court grant certiorari.

QUESTION II

When trial-judge-imposed limitations on voir dire interfere with trial counsel's ability to identify veniremembers whom may be challengeable for cause because they have a bias against a law relevant to the case, does such limitations run afoul of Petitioner's right under the U.S. Constitution to effective assistance of counsel?

The TCCA reviewed the issue of whether the limitations imposed by the trial court interfered with Jacobs's right under the Texas Constitution "of being ~~xxxxx~~ heard by counsel." (Appendix A, at P. 16. The TCCA found that:

"While the right "of being heard" under the Texas Constitution arguably affords some procedural advantages in voir dire that the Sixth Amendment does not, we will not construe the former to require more in the way of substantive questioning than the latter." (Appendix A, at P. 18)

This finding is in great tension with Jacobs's right to effective assistance of counsel at every critical stage in the proceedings.

In Smith v. Phillips, 455 U.S. 209, 217, 102 S.Ct. 940, 946 (1982), the Supreme Court held that one of the touchstones of a fair trial is an impartial trier of fact- "a jury capable and willing to decide the case solely on the evidence before it."

Voir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on voir dire may result in a juror being excused for cause. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 555, 104 S.Ct. 845, 849 (1984).

The Sixth Amendment guarantees the "Assistance of Counsel" and a trial before "an impartial jury." U.S. Const. Amend. VI. Part of this constitutional guarantee is an adequate voir dire to identify unqualified jurors. Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222 (1992). The limitations on voir dire essentially hamstrung Jacobs's counsel and prevented him from rendering the effective assistance of counsel during perhaps the most critical stage of the proceeding. It was crucial that counsel be permitted to ask questions sufficient to identify jurors unwilling to set aside any biases they harbored against Jacobs due to his prior sex offense and judge his guilt or innocence based on the evidence in the State's case-in-chief regarding the allegations for which Jacobs was being tried. The trial court's limitations infringed upon Jacobs' right to effective assistance of counsel. Jacobs therefore suffered harm, because the error undermines confidence in the impartiality of the jury that convicted Jacobs.

Jacobs respectfully request that certiorari be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeffrey J. Miller". The signature is fluid and cursive, with a horizontal line underneath it.

Date: 01/19/2019