

18-8102

No. _____

Supreme Court, U.S.
FILED

SEP 28 2018

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IN THE

SUPREME COURT OF THE UNITED STATES

Vivian Monroe Holman — PETITIONER
(Your Name)

VS.

LORIE DAVIS, TDJC Director — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fifth Circuit, New Orleans, LA 70130-3408
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Vivian Monroe Holman
(Your Name)

2305 Ransom Rd
(Address)

Gatesville Tx, 76528
(City, State, Zip Code)

(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

i) Is there ever a second act to a fundamentally fair first trial? If the original trial afforded all of the required procedural protection and if the institutional players - the prosecutor, the defense attorney, the judge, the jury - lived up to their legal moral and ethical obligations. Should the criminal justice system wash its hands of my dilemma and say "Bad luck it's not our fault?"

ii) Has justice been ^{seemed} when it denies a pro se Appellant, who has no legal background, her Appeal in federal courts, simply because she missed her deadline by approx 100 days? even though she is claiming her actual innocence?

iii) Should Appellant have to remain in prison because of the failure of her defense Attorney, when he failed to fully investigate this case; present mitigating evidence and witnesses that would have caused reasonable doubt?

iv) Isn't it worth the time and effort to send Appellant back to trial so that it can be shown that appellant finally received a fair and impartial trial because these errors are so obvious, prejudicial and substantial that failure to correct them would infringe on Appellant's due process right and damage the integrity of the judicial process?

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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MISCELLANEOUS CASE

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28 S.W.3d 240, for pro se liency

NAMES OF PARTIES TO FINAL JUDGEMENT

STATE OF TEXAS

Hilary Laborde
Gabrielle A. Massey
Andrew Erwin (appeal only)
McLennan County Criminal District Attorney's
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Lawrence E Johnson
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Trial Court Judge

The Honorable Matt Johnson
54th District Court Judge
McLennan County Courthouse
WACO TX 76701

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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 _____ 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 _____ 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.

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 6/7/2017.
A copy of that decision appears at Appendix C.

☐ 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

Fifth Amendment: The constitutional amendment, ratified with the Bill of Rights in 1791, providing that a person cannot be (1) required to answer for a capital or otherwise infamous offense unless a grand jury issues an indictment or presentment (2) subjected to double jeopardy, (3) compelled to engage in self-incrimination on a criminal matter, (4) deprived of life, liberty, or property without due process of law or (5) deprived of ~~the~~ private property for public use without just compensation.

Fourteenth Amendment: The constitutional amendment ratified in ~~the~~ 1868, whose primary provisions effectively apply the Bill of Rights to the States by prohibiting States from denying due process and equal protection and from abridging the privileges and immunities of U.S. citizenship. The amendment also gave Congress the power to enforce these provisions, leading to legislation such as the civil-rights acts.

Sixth Amendment: The constitutional amendment ratified with the Bill of Rights in 1791, guaranteeing in criminal cases the right to a speedy and public trial by jury, the right to be informed of the nature of the accusation, the right to ~~confront~~ confront witnesses, the right to counsel and the right to compulsory process for obtaining favorable witnesses.

§21.11 Indecency with a child.

The Statutory provision for this type of crime is

(a) A person commits an offense if, with a child younger than 17 years of age whether the child is of the same or opposite sex, the person (1) with intent to Arouse or gratify the sexual desire of Any person (2) Engages in sexual contact with the child or causes the child to engage in sexual contact,

(A) Exposes the person's anus or any party of the person's genitals knowing the child is present; or

(B) causes the child to Expose the child's anus or any part of the child's genitals.

(b) It is an affirmative defense to the prosecution under this section that the actor:

(1) was not more than three years older than the victim and of the opposite sex,

(2) did not use duress, force, or a threat against the victim at the time of the offense; and

(3) at the time of the offense;

(A) was not required under chapter 62, code of criminal procedure, to register for life as a sex offender or

(B) was not a person under chapter 62 had a reportable conviction or adjudication of the offense under this section.

(b-1) It is an affirmative defense to prosecution under this section that the actor was the spouse of the child at the time of the offense.

(c) In this section "sexual contact" means the following acts if committed with the intent to arouse or gratify the sexual desire of any person:

(1) Any touching by a person, including touching through clothing of the anus, breast or any part of the genitals of a child; or

(2) Any touching of any part of the body of a child, including touching through clothing, with the anus, breast or any part of the genitals of a person.

(d) An offense under Subsection (a)(1) is a felony of the second degree, and an offense under Subsection (a)(2) is a felony of the third degree.

§ 22.021. Aggravated Sexual assault

(a) A person commits an offense

(1) if the person

(A) intentionally or knowingly:

(i) cause the penetration of the anus or sexual organ of another person by any means, without that person's consent,

(ii) Causes the penetration of the mouth of another person by the sexual organ of the actor, without the person's consent or

(iii) Causes the sexual organ of another's person, without that person's consent, to contact or penetrate the mouth

Anus or Sexual organ of Another person, including the actor; or

(B) Intentionally or knowingly;

(i) causes the penetration of the Anus or Sexual organ of a child by any means;

(ii) causes the penetration of the mouth of a child by the Sexual organ of the actor;

(iii) causes the Sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor.

(iv) causes the anus of a child to contact the mouth, anus or sexual organ of Another person, including the actor, or

(v) causes the mouth of a child to contact the Anus or Sexual organ of Another person, including the actor, and

(2) if

(A) the person

(i) causes serious bodily injury or Attempts to cause the death of the victim or another person in the Course of the same Criminal episode;

(ii) by acts or words places the victim in fear that death, serious bodily injury or Kidnapping will be imminently inflicted on Any person.

(iii) by acts or words occurring in the presence of the victim threatens to cause the death, serious bodily injury or Kidnapping of Any person.

- (iv) uses or exhibits a deadly weapon in the course of the same criminal episode;
 - (v) acts in concert with another who engages in conduct described by ~~subdivision (d)~~ subdivision (i) directed toward the same victim and occurring during the course of the same criminal episode; or
 - (vi) administers or provides flunitrazepam, otherwise known as rohypnol, gamma hydroxybutyrate, or ketamine to the victim of the offense with the intent of facilitating the commission of the offense.
- (B) the victim is younger than 14 years of age or
- (C) the victim is an elderly individual or a disabled individual
- (b) In this section:
- (1) "child" has the meaning assigned by Section 22.011(c)
 - (2) "elderly individual" and "disabled individual" having the meaning assigned by Section 22.04(c)
- (C) An aggravated sexual assault under this section is without the consent of the other person if the aggravated sexual assault occurs under the same circumstances listed in Section 22.011(b)
- (d) The defense provided by section 22.011(d) applies to this section.
- (e) An offense under this section is a felony of the first degree
- (f) The minimum term of imprisonment for the offense under this section is increased to 25 years if:

- (1) The victim of the offense is younger than six years of age at the time the offense is committed or
- (2) the victim of the offense is younger than 14 year of age at the time of the offense is committed and the actor commits the offense in a manner described by SubSection (a)(2)(a)

STATEMENT OF THE CASE

On July 26, 2007, Appellant was questioned by the Waco police department about sexual contact between her and the complainant that was said to have occurred on or about the first and the fifteenth of July 2007. Appellant was then arrested on these charges on September 11, 2007. The case went untouched and was dismissed in February 2011.

In January 2012, Appellant was indicted on ~~at~~ three counts. Count I, Aggravated Sexual Assault of a child said to have occurred on or about July 15, 2007. Count II - Indecency with a child said to have occurred on or about July 15, 2007 and Count III - Indecency with a child said to have occurred on or about July 1, 2007.

Having been tried by a jury from January 5-8, 2015 on January 8, 2015 she was convicted on all three counts, receiving a sixty (60) year sentence for Count I and two twenty (20) year sentence for each of the two counts of Indecency all to run concurrent.

She was granted her right to appeal her case on January 15, 2015, and received a Court Appointed Appellate Counsel. Her conviction was affirmed in the Tenth Court of Appeals in October 2015. She then filed

a PDR which was denied in February 2016. Appellant then filed a writ of habeas corpus Act 11.07 in April 2017, which was denied without a hearing in the Court of Criminal Appeals in July 2017. Then in November 2017 she filed a writ of habeas corpus Act §2254 in the federal Court Western Division, which was time barred because Appellant missed the deadline date by less than 100 days, even though she was claiming her actual innocence and ineffective assistance of counsels. This pro se, Appellant then filed an Appeal in the fifth Circuit Court of Appeals in January 2018, requesting a certificate of Appeal ability by this court.

On July 26, 2018, she was denied a certificate of Appeal ability and is now attempting to obtain her freedom through this court. She claims her actual innocence as well as the violation of the Fifth, Sixth and Fourteenth Amendment, as well a violation of the Due Process to A fair and impartial trial.

FIRST POINT OF ERROR

Ineffective assistance of Counsel on direct Appeal
as a violation of Due Process Clause of the Fourteenth
Admendment. Relying on Evitts v Lucey, 105 S.Ct 830 (1985)

ARGUMENT AND AUTHORITIES

This violation occurred when:

- i) Appellate Counsel failed to raise on direct Appeal that trial court erred when it denied Appellant her motion for instructed verdict causing the burden of proof to be shifted from the State, ~~which is why~~ to the Appellant which is why she testified on her own behalf, see (RR vol 5 pgs 117, 227) because State did not prove the evidence necessary for a conviction of Aggravated Sexual assault. Relying on Adanandus v Johnson, 947 F. Supp 1021, 1026 (W.D. Tex 1996) and Herrera v Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed 2d 203 (1993) to show her factual innocence.

The State went through great lengths to ensure the jury that at five the complainant was a very smart child and was able to make herself to be understood as to what she was speaking of, even though the outcry witness, Wendy Monroe, stated that complainant was somewhat a "dingy person" (RR vol 3 pg 11) and in (RR vol 4 pg 87) After she returned from lunch she tells the court that the

Complainant was sort of a "blonde" type person but was not remedial or anything like that (RR vol 5 pg 81).

In (RR vol 6 pg 17) Laborde states that she thought the complainant is very smart even though she is five she could explain herself "like she's in her twenties." All but admitting that their case is without merit when she states in (RR vol 6 pg 18) "And she's so honest at five. It doesn't hurt. She could have said it hurt. She could have said it was everyday. She didn't. She said it's one day. It's not a lot. It didn't hurt." This statement was made by a five year old who was able to make herself known as though she was in her "twenties." However at 13 we hear the complainant contradict her five year old self by saying that "it's more than a one time thing see (RR vol 4 pg 131) and she couldn't remember all the "counts" and times. See (RR vol 4 pg 131) And that she would "zone out" (RR vol 4 pg 130) because it was not somewhere she wanted to be."

The evidence is factually and legally insufficient because the complainant used sophisticated terminology (1) when describing the number of times the incidents occurred by stating she couldn't remember all the "counts" and times. See (RR vol 4 pg 131) (2) when describing the alleged binger used to by the complainant by referring to the index finger as the "bone binger" even though Appellant plainly states that she used her pinky or fifth right finger

to examine the complainant. These two terms are not commonly used by a lay person see (RR vol 4 pg 130), and as seen in Davila v State, 252 S.W. 3d 846 (Tex App Dallas 2008), this teenager referred to the index finger as the "pointer finger". Also as we read in (RR vol 5 pg 80) there was no medical examine performed, and in (RR vol 5 pg 80) Laborde ask Det Holt if the child described feeling any pain or having any injuries based on the abuse. Holt answers "No." Almost verbatim Massey tells the jury what the complainant will say as if the complainant's testimony is coerced. In (RR vol 4 pg 11) Massey tells the jury that complainant doesn't have memory of every single time - compare to (RR vol 4 pg 130). In fact complainant states over twenty times throughout her testimony she couldn't remember. Massey also compare to (RR vol 4 pg 134) and in (RR vol 4 pg 135) the complainant answers the question before being asked.

According to the complainant's testimony in (RR vol 4 pg 146-47) we learn that not only did the current DA's office but past DA's have discussed with her on numerous occasions on what to say or as she stated "help her remember what to say." Now, According to Dr. William Carver in (RR vol 4 p 141) we learn that you can tell a child something so

often that - that illusion becomes a reality. This same Dr. William Carter in Perez v. States, 113 S.W. 3d 819, 831 (Tex App-Austin 2003) tells us that alleged sexually abused children can make false accusations that a child can be "Analyzed" so frequently the child will come to believe what she has been told and that children witnesses are often anxious about Court Appearances whether they have been sexually abused or not. The only true memory that happened that did not require the assistance of the State to "help her remember" are those when she was laughing and smiling while she was living with Appellant ~~and~~ see (RR vol 4 pg) and in (RR vol 4 pg 147) where the complainant states she was on the bunk beds and fell causing there to be blood between her legs, which is why Appellant states she examined the complainant.

In (RR vol 4 pg 128 line 11) the State asked complainant if she remembered things Appellant would do to her that she didn't like when she was four and five years old, the complainant's response was "Yes ma'am" and when told to tell the jury what these things were, And not once did the complainant say she was penetrated with Appellant's finger, as charged in the indictment, however she merely states "inappropriate things that no one is suppose to do to you." Unlike in actual sexual abuse cases

Such as Couchman v State, 3 S.W. 3d 155 (Tex App Ft. Worth 1999); Wilson v State, 3 S.W. 3d 223, 226 (Tex App Waco 1999) or Davila v State, 252 S.W. 3d 846 (Tex App Dallas 2008) where these actual victims were able to give complete and specific occasions and detailed description of the types of assaults against them, this complainant however does not give any, and but for the leading questions complainant would not be able to give any information concerning any type of assault against her.

In Ex parte Thompson v State, 153 S.W. 3d 416, 421 (Tex Crim App 2005), we learn that there are documented cases where we see convictions for aggravated sexual assault of a child and factual scenarios are similar. At trial a young girl testifies that the defendant sexually molested her, this child's memory may be limited or whose version of what may have actually occurred has been influenced by others with an agenda, and agrees with the leading questions asked her. There is generally no medical finding of sexual abuse and no physical evidence that definitely points toward molestation. Usually a child psychologist or sex abuse therapist testifies that the child's behavior is consistent with that of a sexually-molested child. There is frequently an out cry witness

who testifies that the child told her about the abuse. The jury convicts and the defendant is sentenced to a long prison term."

By improperly denying appellants her motion for instructed verdict a miscarriage of justice occurred because the evidence is legally and factually insufficient to sustain this conviction and the proof of guilt is so weak as to make the verdict clearly wrong and manifestly unjust and a constitutional violation which prevented her from showing her innocence and resulted in this conviction. Therefore Appellants' conviction should be over turned.

ii) Failed to ~~not~~^{omit} raise the issue that the evidence for Counts II and III, pursuant Tex. Penal Code § 21.11, Intentionally with a child with the element of "intent to arouse or gratify the sexual desire of any person" were not legally and factually sufficiently met to show that Appellant acted with specific "intent to arouse or gratify" her sexual desire. Relying on Jackson v Virginia, 443 U.S. 307, 319 99 S.Ct 2781, 2789, 111 Ed 2d 560 (1979). In CRR Vol 6 pgs 21-23 Assist DA Laborde tells the court how he derived at the charges in which they were seeking a conviction, stating that Count II was obtained

because the Appellant asked "Did you examine her?"
Stating "And when the detective tells her and he's here
when he tells her um S.A. is saying someone molested
her, well have you checked her?" "Is that the reaction of an
innocent person?" Then calls this Statement Count II, Indecency
with a child. Causing Appellant's conviction to be based on
a conduct that is not illegal.

Also Count III, is legally insufficient because as stated
by Laborde that checking a child for blood in her underwear
was not a medical concern even though the complainant
herself in (Re vol 4 pg 147) tells us that she had been
playing on the bunk beds, fell and caused blood between
her legs, which is why appellant states she checked the
complainant. However, not checking a five year old child
who has blood in their underwear is a neglectful matter.

So to show that Appellant acted with the "specific"
intent to arouse or gratify her sexual desire in these
two counts were not met because the conduct, remarks,
and circumstance were not that of a sexual nature,
proving a less culpable mental state. These convictions
are clearly wrong and manifestly unjust. Harm came
to the Appellant because she was convicted unnecessarily
of multiple convictions and therefore these two
convictions should be over turned.

iii) failed to raise that trial court erred when it allowed the forensic interview video of the Appellant to be seen as a ~~violate~~ violation of the Fifth Amendment of the Constitution of the United States, privilege against Self incrimination. Relying on U.S. v Ebb, 444 F. Supp 2d 731 731 (E.D. Tex 2006) and as a violation of Art 38.22 Section 16 of the Tex. Rules of Evidence, because Appellant's statement was not done willingly and knowingly but under duress and coercion. See State Exhibit 7. As seen in this video interview Appellant tells Det Holt and Kristen Shavers that she had been up all night long without sleep driving back and forth from Waco to Palestine, calling her daughter Wendy, the Palestine PD and the local hospitals in Palestine numerous times, fearing the worst and finally late afternoon on the 21st of July the Palestine PD tells her that her children and newly born grandson were at the Waco PD only to learn from the Waco PD that they were at the Advocacy Center. There in the video Appellant explains the turn of events that had transpired over the past 24 hours. Det Holt then begins asking Appellant questions with no consideration to her current state of mind.

Since there was a motion filed to suppress her statement (CR vol 1 pg 45) a hearing on the voluntariness of her statement should have been conducted. Relying on

Jackson v Denno, 374 U.S. ~~308~~³⁰¹ 368 84 S.Ct 1774 (1964);
Martinez v Eselle, 612 F.2d 173 (5th Cir 1980). Therefore
trial court erred by not making an independent finding
on the voluntariness of Appellant's statement. This fundamental
constitutional error of due process occurred because the
Honorable Matt Johnson, in his own words stated he knew
nothing about the facts of this case. See (LR vol 2 pg 18).
Now the State wants us to believe that because Appellant
came to the Advocacy Center on her own and was told
sometime during the course of the interview by Det Holt
that she was free to leave, she was therefore not entitled
to the "Fifth Amendment" Protection. But we know that the
"Fifth Amendment is triggered when a statement could
provide a lead or link in the chain of evidence needed
to prosecute the speaker whether in a formal or informal
custodial setting." Citing United States v Von Behren, 822 F.2d 1139.
In (LR vol 5 pgs 98, 111 and 112) Det Holt tells the court that he
interviewed the Appellant a total of three times all never
having advised Appellant of her right to an attorney, making
her statements not of her free choice. Relying on Escobedo
v Illinois 374 U.S. 478 84 S.Ct. 1758 (1964)

Therefore her conviction is void having been obtained through evidence introduced under an unconstitutional statute to wit, the Fifth Amendment of the United States and the Due Process clause of the Fourteenth ~~Amendment~~ Amendments. Consequently, a hearing on the voluntariness of her statement should be conducted.

iv) Trial court erred when it improperly admitted the testimony of Michael Monroe, even though his testimony was admitted under Rule 404(b) the trial court nonetheless should've excluded it from the evidence because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. His testimony was a violation of Appellant's Fourteenth Amendment of Due Process of a fair and impartial trial because Michael Monroe not indentified as the proper "out cry" witness and his presence was only to inflame the case against this Appellant. His testimony should've been declared inadmissible hearsay in violation of Art 38.072 § 2(a)(1)(2)(b) of the Rule of Evidence. Relying on Couchman v State, 3 S.W. 3d 155, 160 (Tex. App Ft Worth 1999) and Mosley v State, 983 S.W. 2d 249, 259 (Tex Crim App 1998). This is a reversible error because Michael Monroe was not the first person over the age of eighteen, but because he was the brother of the

Appellant unfair prejudice against the Appellant occurred. This error affected Appellant's substantial rights. Therefore her conviction ~~should be overturned~~ ^{VM 19} should be overturned.

v) failed to raise the claim that Appellant's Constitution right of the Due Process under the Fourteenth Amendment to a fair trial was violated when trial court ~~erred~~ abused its discretion in not giving jury instruction of a lesser included charge on aggravated sexual assault of a child being indecent with a child, pursuant to Tex Penal codes §§ 22.021, 21.11. In (CR vol 2 pg 18 line 22) the trial judge states "Okay I mean I don't know any of the facts in the case. No one briefed me. No one brought me up to speed I haven't talked to the lawyers". By not knowing any of the facts about this case caused the trial court to err. Because since 2007, Appellant has plead not guilty to this charge and by using the cognate approach as explained in Hull v State, 205 S.W. 3d 544 (Tex Crim. App 2007); Tex Code Crim. Proc. Ann. Art 36.14 and Vernon's Ann Tex CCP Art 37.09 (1) "An accused is entitled to any instruction of every defense theory raised by the evidence." This is true regardless of whether such evidence is strong or weak, unimpeachable or contricted and regardless of what the trial court may or may not think about the credibility of

this evidence. If there is proof necessary to establish the charge then there is proof necessary to establish that if the defendant is guilty she/he is guilty only of the of the lesser included offense."

Citing Evans v State, 299 S.W.3d 138 "All the elements of Indecency with a child are included in aggravated sexual assault of a child because the "intent to arouse or gratify" sexual desire did not constitute a fact in the indecency offense that was not found in aggravated sexual assault offense." Touching with the intent to arouse or gratify the sexual desire" is a lesser included species of conduct of the "intentional or knowing penetration." Unlike in Dudley v State, 334 S.W. 3d 20 who cites that indecency with a child is not a lesser included offense, because the element "intent to arouse or gratify the sexual desire of any person." is not included in the elements of aggravated sexual assault, which would have given the court's no jurisdiction to convict him of the lesser. I, however agree with the State, that indecency with a child is nevertheless a lesser included offense of aggravated sexual assault by penetration are "functionally the same or less than those required to prove the charge offense." See Jacob v State, 892 S.W. 2d 905, 908 (Tex Crim App 1995) and Farrakhan v State, 247 S.W. 3d 720, 724 (Tex

Crim App 2008) (noting that nothing in the functional equivalence concept is contrary to the court's lesser-included offense in *Hall*). Also the element of "intent to arouse or gratify sexual desire" can be deduced from the fact required to establish intentional or knowing penetration." in an aggravated sexual assault case. Since the indictment in this case alleged that Appellant "intentionally and knowingly caused the penetration of the female sexual organ of the complainant by the object to wit, the finger of said Appellant." the receiving Court must compare the elements of the original offense as they are alleged in the charging instructions, see (CR.1 pg 171) with the element of the potential lesser-included offense. Relying on *Hall v State*, 225 S.W. 3d at 535.

Hence, touching the female sexual organ with the "intent to arouse or gratify" sexual desire is a lesser-included species of conduct of the intentional or knowing penetration of the ~~female~~^{vulva} female sexual organ. In *Coverage v State*, 848 S.W. 2d 357, 358 (Tex App Austin (1993)) In order for penetration to have

Occurred a finger or sexual organ would have to have gone past the hymen. And since there was no medical examination to say otherwise, Appellant's examination of the complainant can only be considered as contact or to say the least a mere examination of the complainant therefore no sexual assault of the complainant actually occurred.

Intent to arouse or gratify sexual desire as a part of the definition of sexual conduct § 21.11(c). The Texas Legislature choose to use the words "sexual contact" denoting a lesser form of touching than "penetration" and included the intent to arouse or gratify desire in the definition section. The legislative choice supports the conclusion that the "sexual desire" wording is not intended as an extra element not contained in the sexual assault statute rather the "sexual desire" language appears to be intended to denote a form of touching short of penetration, that is sexual in nature.

Because of the wording of the indictment the language is sufficient to show that indecency with a child is a lesser-included offense of aggravated sexual assault of a child.

Had appellate counsel raised this claim it might have at least resulted in a retrial on punishment with the possibility of a lesser sentence and no possibility of a greater sentence and would have acquitted appellant of aggravated sexual assault and her sentence would not have exceeded twenty years. See Vernon's Texas Ann § 21.11. Relying on Ex parte Miller v State, 335 S.W. 3d 610 (Tex. Crim. App. 2010). A

second degree felony. This harm is so egregious in that it greatly affected appellant's right to a fair and impartial trial. Therefore, appellant's judgment should be set aside and an acquittal should be granted.

SECOND POINT OF ERROR

Ineffective assistance of trial counsel as a violation of the Sixth and Fourteenth Amendment. Citing Cuyler v Sullivan, 100 S.Ct. 1708 (1980) "Failure of a retained counsel to provide adequate representation can render a trial so fundamentally unfair as to violate the Fourteenth Amendment." Also see Passmore v Estelle, 594 F.2d 115 (5th Circuit 1979)

Argument and Authorities

i) The right of an accused on a criminal proceeding to effective assistance of counsel is guaranteed by the Const. Amend. VI; Tex. Const Art I §10. "Citing Strickland v Washington, 444 U.S. 180 104 S.Ct. 2052." There is reasonable probability that but for counsel's unprofessional error the results of the proceeding would have been different and that had it not ^{been} for the deficiency in his performance there is reasonable probability that at least one juror would have harbored a reasonable doubt. This deficiency in his performance and representation can be seen early on in (RR vol 2 pg 8-17 Q4A) when trial counsel is objecting to State offering extraneous offense evidence but not sure why he is objecting whether it's timing (RR vol 2 pg 11) first he says it's not timing but then later says it's timing (line 17). Also in (RR 2 pg 174) trial counsel states that the defense does not have the same subpoena power and that the defendant is at a disadvantage but when corrected by assist DA Laborde, he states that he didn't say that, and in (RR vol 4 pg 28) ~~he~~ he once again states that the State had the advantage.

Appellant contends that it is her belief that because defense counsel believed he did not have the same "Subpoena power" as the State did is why he did not subpoena favorable witnesses such as 1) Kristen Shavers, the third person seen in State's Exhibit #7, forensic interview video, who is a representative of the Texas Child Protective Service. Had he ~~sub~~ subpoenaed Kristin Shavers, she would've been able to present to the Court the conclusion of the findings from the psychologist who performed a psychological assessment on behalf of child protective service which the results were that Appellant "passed no traits consistent with a pedophile or sex offender of any sort" which is why the child protective service closed out their investigation and allowed Appellant to retain custody of her two minor children, who were eight (8) and three (3) years of age at the time of these charges in 2007. However, because Appellant is now incarcerated, Kristen Shavers, states that she is unable to assist Appellant, but had she been subpoenaed at the time of the trial, she would've been able to present the results of her investigation to the Court.

2. Z.M. Appellant's daughter who was already in the Shower when Appellant noticed that complainant had blood in her underwear and witnessed Appellant

instructing complainant to lay on the commode lid to be examined in order for Appellant to determine the ~~source~~ source of blood seen in complainant's underwear, who also can, according to her Affidavit submitted to the Federal courts, testify that Appellant did not assault this complainant but instead it was Wendy Monroe who encouraged the complainant to say the things she said.

By failing to subpoena these witnesses trial counsel was unable to present to the court and jury mitigating evidence that was otherwise available, which might have established reasonable doubt or an acquittal, this failure affected Appellant's constitutional rights to have an effective assistance of trial counsel. Therefore an evidentiary hearing for ineffective assistance of counsel with these witnesses should be granted. Relying on Cross v Lackawanna County Dist Atty, 204 F.3d 453 (3rd Cir 2000).

ii) Trial counsel failed to seek jury charge instructions on indecency with a child as a lesser-~~in~~ included

offense of Aggravated Sexual Assault because according to the wording of the indictment of Count 1 is the charging elements of Aggravated Sexual Assault states that Appellant "then and there intentionally or knowingly caused the penetration of sexual organ of the complainant by means of defendant's finger," and since Appellant plead not guilty to the aggravated sexual assault charge she should've been entitled to an instruction on the lesser-included charge. Relying on the cognate approach as explained in Hall v State, 225 S.W.3d 524 (Tex Crim App 2007) and Vernon's Ann Tex C.P. Act 37.09(a) 37.09(1) and Citing Hayes v State, 728 S.W. 2d 804, 807. "An accused is entitled to an instruction on every defense theory raised by the evidence. This is regardless of whether such evidence is strong or weak, unimpeachable or contradicted, and regardless of what the trial court may or may not think about the credibility of the evidence. If there is proof necessary to establish the offense charge then there must be evidence that if the defendant is guilty she/he is guilty only of the lesser-included offense. In Evans v State, 294 S.W. 3d 138

we learn that "all the elements of Indecency with a child are included in aggravated sexual assault of a child because the "intent to arouse or gratify sexual desire did not constitute a part in the indecency offense that was not found in the aggravated sexual assault offense." Touching with the intent to arouse or gratify the sexual desire is a lesser-included species of conduct of the intentional or knowing penetration. Unlike in Dudley v State, 334 S.W. 3d, 20, who ^{not} cites that indecency with a child is not a lesser-included offense, because the element "intent to arouse or gratify the sexual ^{not} desire of any person" is not included in the element of aggravated sexual assault which would have given the court no jurisdiction to convict him on the lesser. I, however agree with the state that indecency with a child is nevertheless a lesser-included offense of aggravated sexual assault by penetration and are "functionally the same or less than those required to prove the charged offense." See Jacob v State, 829 S.W. 2d 905, 908 (Tex. Crim. App. 1995) and Furrah v State, 247 S.W. 3d 720, 724 (Tex. Crim. App. 2008) noting that nothing in the functional

equivalence concepts is contrary to the court's lesser-included offense analysis in Hall. Also the element of intent to arouse or gratify sexual desire can be deduced from the facts required to establish "intentional or knowing penetration," in an aggravated sexual assault case. Since the indictment in this case alleges Appellant "intentionally and ~~knowingly~~ knowingly caused the penetration of the complainant's sexual organ by the object to wit, the finger of the Appellant, the receiving Court must compare the original offense as they are alleged in the charging instruction See (CR vol 1 pg 171) with the element of the potential lesser-included offense. See Hall v State, 2005 S.W.3d at 535. Hence, touching the female organ with the intent to arouse or gratify sexual desire is a lesser-included species of conduct of the intentional or knowing penetration of the female sexual organ. "It is hard to imagine how it would be even be theoretically possible to commit this particular form of penetration without one's intent to arouse or gratify one's sexual desire." Therefore the language in the indictment is sufficient to show that Indecency with a child is a lesser-included

offense of aggravated sexual assault of a child in this case. A conviction of this lesser-included offense would've acquitted appellant of aggravated sexual assault, which carried a very lengthy sentence of sixty (60) years as oppose to a second degree felony which carries a sentence of up to twenty (20) years. This harm is so egregious in that it affected appellant's substantial rights depriving appellant of a fair and impartial trial as a violation of the Due Process clause of the Fourteenth Amendment. Therefore her writ should be granted.

REASONS FOR GRANTING THE PETITION

There are several controverted previously unresolved facts material to the legality of Appellant's confinement that are so obvious, prejudicial and substantial that failure to correct it would infringe Appellant's due process right. Yes I had contact with the complainant's private area on two occasions, but not once was it to gratify my sexual desire. The State wants you to believe that examining a child for blood in her underwear is that of a sexual nature! When did it become a crime for a "mother" and a nurse wanting to know about the source of blood in any person's underwear that's under her care.

In the Assistant DA's closing statement - assist DA Laborde states "And she is so honest at five. It doesn't hurt. She could have said it hurt. She could have said it was everyday. She didn't. She said it's one day. It's not a lot. It didn't hurt." How much simpler does it get than this. Does winning a case no matter what should mean that it's okay to destroy innocent lives?

I need you to fix this wrong. Don't hold it against me because I didn't state the correct statute or law. It's not doing the right thing ~~for~~ by a person who has been wronged by a system put in place to protect her much more true justice than leaving an innocent person in prison.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Vivian Monroe Holman

Date: September 24, 2018