

No. _____

18-8751

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM LEN RAINEX — PETITIONER
(Your Name)

vs.

TEXAS COURT OF CRIMINAL APPEALS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI

FILED
MAR 26 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Texas Court of Criminal Appeals - Austin Texas

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

PETITION FOR WRIT OF CERTIORARI

William Rainey #1885507

(Your Name)

2101 FM 369 N.

(Address)

Iowa Park Texas 76367

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

- 1) Whether Texas Code of Criminal Procedure Art. 38.37 (eff. Sept. 1, 2013), hereinafter "the statute" was unconstitutional as applied in a trial on Sept. 21, 2013 denying the Petitioner basic Due Process protections and affecting his substantial rights?
 - A. Whether the statute expands the States Brady duty to disclose evidence such as a Texas Rangers investigative records if said witness testifies regarding his investigation of the 38.37 offense and if so whether failure to disclose can render defendant's trial counsel ineffective or warrant reversal?
 - B. Whether the statute eviscerates Mr. Rainey's right to Confront and Cross-Examine witnesses against him by allowing the State to spread before the jury hearsay testimony of a non-testifying child complainant?
 - C. Whether the Statute exposed Mr. Rainey to double jeopardy when the State relitigated facts and elected to proceed on the elements of the extraneous offense including them in its charge?
 - D. Whether the Statute violated Mr. Rainey's U.S. Constitutional Fourteenth Amendment rights by allowing the State to use the evidentiary presumptive phrase "... engaged in sexual contact with another Jane Doe..." in its Final Charge?
 - E. Whether the Statute allowed a non-unanimous verdict when the State presents trial testimony and a jury charge describing three distinct acts, one describing the touching of the breasts of one complainant and two describing the touching of the breasts and genitals of a non-testifying complainant and where it is impossible to determine which act each juror relied upon to find defendant guilty?
 - F. Whether the Statute permits the State to use the same extraneous offense to both prove an essential element in the indicted offense and to enhance the defendant's sentence to automatic life?
- 2) In a he said/she said sexual abuse case, whether the attorney provides ineffective assistance when he possesses scientific evidence of defendant's innocence, agrees on record to call at least one witness but after meeting privately with the ADA rests defendant's case without presenting any defense?
 - A. Whether a counsel's verbal agreement on record violates Texas Penal Codes law against Theft of Services by deception thereby violating the Sixth Amendment of the U.S. Constitution?
- 3) Whether a defendant's autonomy can be vitiated by counsel's failure to present a defense because he claimed he fears opening the door to the use of extraneous offenses after the fact, despite agreeing mid-trial to call at least one witness?

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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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 A 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 _____.
A copy of that decision appears at Appendix A.

☒ A timely petition for rehearing was thereafter denied on the following date:
20 February 2019, and a copy of the order denying rehearing appears at Appendix B.

☐ 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

A. United States Constitution, Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

B. United States Constitution, Amendment XIV (abbreviated)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

C. Texas Code of Criminal Procedure Art 38.37 Amended by Texas Senate Bill 12 83rd Legislature (See Appx D)

D. Federal Rules of Evidence Rule 413(a) "In a criminal case in which a defendant is accused of sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant"

E. United States Constitution Amendment V (abbreviated)

"No person shall... be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law..."

STATEMENT OF THE CASE

The instant case involves an extraneous offense to wit: Mr Rainey accepted a plea bargain on or about May 2006, Cause No. 05-20783 alledgying he did "intentionally or knowingly engage in sexual contact with Jane Doe (a pseudonym) by touching the genitals of that said Jane Doe."

Mr. Rainey served five years and was paroled May 2011, was required to register as a sex offender and subjected to certain parole sanctioned requirements including a polygraph.

Mr. Rainey was subsequently allowed to contact his children after passing the polygraph which questioned whether he had ever had any sexual contact with a child including his children.

On Sept. 21, 2011 Rainey was arrested for assault family violence, TDFPS began an investigation by removing the seven Rainey children, including C.R.*, from their home. Eastland County CASA conducted forensic interviews on each child, wherein C.R. denies any sexual abuse, before being placed into foster homes. A Termination of Parental Rights suit and divorce proceedings are initiated.

Between September 2011 and November 30 2011 C.R. repeatedly denies any sexual abuse in weekly therapy sessions with L.P.C. Vickie Copeland. On November 30, 2011 TDFPS "RULED OUT" the sexual abuse of C.R. by William Rainey. Between December 1st and 30th 2011 medical experts diagnose and attribute C.R.'s PTSD to "Adjustment Disorder with mixed anxiety and depressive mood" which soon escalates to "suicidal ideations" due to her placement in the Darby foster home.

*C.R. a pseudonym for the child complainant

After a suicide attempt C.R. is admitted to Acadia Mental Health hospital. Dr. Brent Steadman diagnoses C.R. with a "Major Depressive Disorder" prescribes certain medications and C.R. is eventually released and returned to the Darley foster home.

Shortly thereafter on Dec. 30th 2011 C.R. allegedly makes an outcry of sexual abuse to Lisa Darley, initiating the investigation which led to the current indictment alleging sexual contact by touching the breast of C.R. a child. Weeks later C.R. is removed from the Darley home by request of Lisa Darley. C.R. is placed in a new foster home and begins seeing a new counselor, L.P.C. Shawna Bass. In February 2012 C.R. recants or denies any sexual contact by Mr. Rainey to L.P.C. Bass.

Mr. Rainey is indicted on charges of Indecency with a child by contact, subsequently convicted and given an enhanced life sentence.

The foundation of the States conviction rests solely upon the credibility of the complainant's testimony bolstered by character conformity evidence. The newly amended Tx Code of Criminal Procedure art 38.37 (2013) is applied and the May 2006 extraneous offense is utilized by the State both to prove an element of the offense and to enhance Mr. Rainey's sentence.

Mr. Rainey alleges he is actually innocent and that constitutional errors deprived him of substantial due process rights resulting in the conviction of one actually innocent. In a State writ of habeas corpus filed on or about

October 2018, Mr Rainey filed numerous Motions Related To Habeus Corpus as well, Mr. Rainey challenged the constitutionality of the statute as applied to his case. Mr Rainey motioned the trial court pursuant to Tx.C.C.P. art 11.023 for relief based on "relevant scientific evidence" claiming in part, had the Scientific Evidence been presented at trial, on the preponderance of the evidence he would not have been convicted. As well claiming trial counsel ineffective for failing to present a defense, failure to call expert witnesses and/or to present and impeach the credibility of the complainant with soft scientific evidence which alludes to his innocence, amongst other errors, which deprived him of his substantiated due process rights. (See WR-68,056-D8,*-10,*-14 Grounds One thru ten) (Filed in 91st Dist. Court Eastland County Texas)

The trial court denied without written order, or notice, all filings. On January 16th 2019 the Texas Court of Criminal Appeals "denied without written order the application for writ of habeus corpus" and "the applicants suggestion for reconsideration has been denied without written order" by the same on February 20, 2019.

Certiorari should be granted where the constitutional provisions, statutes and ordinances involved in this case wholly failed to provide the safeguards which ensure that the government may not imprison or otherwise restrain a person except in accordance with fair procedures. USCA Amend XIV, XI, V.

Regarding the statute, the State Courts have routinely held that:

"An appellants right to a fair trial is protected by the numerous procedural safeguards provided in the statute including: b1) A pretrial hearing determination, 2) Defense counsel has the right to challenge any witness's testimony and 3) 30 day notice

See Harris v State, 475 Sw3d 395 (Tex App Houston 2015, pdr rfd 2015)

Other similar cases including Bradshaw v State, 466 Sw3d 875 (Tex App Texarkana 2015, pdr rfd 2015) and Fahm v State, 473 Sw3d 486 (Tex App 2015, pdr rfd 2016) address similar instances where the State introduces the extraneous act by calling the child complainant to testify during trial, and discusses the history of T.C.C.P. art 38.37.

What sets apart the instant case from every other case known to the applicant is the fact that the very safeguards the State relies upon to protect appellants right to a fair trial were flawed or corrupted by the trial court in Rainey's trial.

Thus Certiorari should be granted to determine whether the way the State applied 38.37 in his case violated the due process clause and/or whether the Texas Court of Criminal Appeals ignored the Constitutional protections by denying without written order applicants writ of habeas corpus because:

1) The States jury charge election paragraph contained elements not alleged in the original indictment including a different date, the "genitals" instead of the "breasts" and the phrase "another Jane Doe" thereby lessening Rainey's presumption of innocence, exposing him to double jeopardy or a non-unanimous verdict and,

2) In the instant case, unlike every other 38.37 application, the State introduced the extraneous offense through hearsay testimony of an investigating officer not the child herself; the State did not produce the child and therefore Rainey was denied his right to confront and cross-examine his accuser and,

3) The State failed to disclose the officers investigative records of the extraneous offense to the defendants counsel; without seeing each and every statement the child said to the testifying officer and/or any other witness statements he secured during his investigation, counsel could not effectively confront or cross-examine the witness at the criminal proceedings.

4) The Texas Court of Criminal appeals wholly relied upon the convicting courts and the Special Prosecuting attorneys rationale, misstatement of facts and findings to support the denial of a persons due process of law.

REASONS FOR GRANTING THE PETITION

I. The instant case challenges the constitutionality of a State statute as applied in a he said/she said sex case where the only evidence, aside from character conformity, is the testimony of a child complainant. The case is a self-contained demonstration of unpredictable and inconsistent procedures and failures by the trial court and the States highest court, Texas Court of Criminal Appeals, to interpret the U.S. Constitution in a way that secures its intended constraint on judicial discretion.

The constitutionality of T.C.C.P. Art 38.37 (2013), hereinafter "the statute", as applied in the instant case was adjudicated and the application conflicts with the due process clause of the U.S. Const. Amendments Sixth and Fourteenth. This Honorable Court considers review when the States highest court has adjudicated numerous lower court cases, describing the due process protections that render the statute constitutional, but then rules arbitrarily against a select class in a way that conflicts with the relevant decisions of this Court. See Pennsylvania v. Finley, holding when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution and in particular in accord with the Due Process clause. 481 US 551, 558 (1987), See also Miller v. Pate, 87 S Ct 985 (1967)

A. Certiorari should be granted to determine whether Texas' statute expands the States duty to disclose to a defendant evidence related to the extraneous offenses it intends to use, when it is used to prove an element of the indicted offense under Brady v.

Maryland, 373 US 83 (1963). Favorable evidence includes impeachment evidence and the State has a duty to disclose even absent a request. US v Bagley, 105 S Ct 3375; Strickler v. Greene, 119 S Ct 1936. The State elected, pre-trial, to present evidence that Rainey committed an extraneous offense under § 38.37 by calling as a witness Texas Ranger D. Hallum. During the pretrial hearing the attorney for the defendant objected stating: "I believe its definitely an Ex Post Facto violation... It violates our-my opportunity to confront and cross-examine... I don't know the circumstances or the facts... To allow that to come in... is definitely a violation of his right to have counsel effectively confront and cross-examine the witnesses against him" (PR 3, 20, 21). Whereas, the State prepared its case using the Tx. Rangers investigative records without disclosing any records, interview notes, victim statements or any TDFPS records to the defense this honorable court should determine whether the State is required under Supreme Court precedent to disclose those records. Without seeing each and every statement the non-testifying complainant made to each individual, Rainey's counsel could not effectively defend, cross-examine, investigate or subpoena witnesses against the allegation.

B. Certiorari should be granted to determine whether the application complied with the Sixth Amendments guarantee that "...in all criminal prosecutions the accused shall enjoy the right... to be confronted with the witnesses against him and/or whether the application allowed testimonial hearsay such as this Court deemed improper in Crawford v Washington

Like Roberts the States application of the Statute and its discretionary trial procedures allowed the jury to hear untested evidence by the adversary process

based on a mere judicial determination of reliability, thus replacing the constitutionally prescribed method of assessing reliability with a wholly foreign one. Crawford, 124 Sct 1354

The Clauses primary object is testimonial hearsay and interrogations by law enforcement officers, like that of the Texas Rangers interrogation, fall squarely within that class. The Framers would not have allowed admission of testimonial statements of a witness, like what the Texas Ranger was told by ^{R.R.}~~Rasha~~ (a pseudonym), a child complainant who did not testify at trial, unless she was unavailable and the defendant had a prior opportunity for cross-examination. The State however allowed the very same by its application.

The State presented evidence through the Texas Ranger alleging that Rainey committed indecency by contact against ~~Rasha~~ (a pseudonym) in his home in Gorman Texas by fondling the breasts and genitals of ^{R.R.}~~Rasha~~ the child complainant, during the guilt innocence phase of the trial applying T.C.C.P. Art. 38.37 (2013)

^{R.R.}~~Rasha~~ (a pseudonym) the alleged child complainant and victim of the extraneous offense did not appear at trial. The § 38.37 requisite judicial determination was made in a pre-trial hearing as required by statute and the jury was allowed to hear the testimonial hearsay evidence that the Tx. Ranger received from witnesses who did not testify. The evidence was allowed based on the mere judicial determination of reliability. The defense objected and was granted a running objection however the defense attorney chose not to confront or cross-examine the testimony of the Tx. Ranger leaving the evidence untested.

Several lower courts have affirmed that a State's Court's decision that prohibited a defendant from cross-examining a minor complaining witness, about past accusations of sexual assault against other persons, did not violate the confrontation clause was an unreasonable application of clearly established right to confront adverse witnesses.

See White v. Coplan, 399 F.3d 18 (1st Cir. 2005)

Mr. Rainey argued he was denied the right to confront his accuser when the State presented testimony of the act of touching the breast and genitals of R.R. (a pseudonym) through Texas Ranger D. Hullum. (Habeas Memorandum pg 22-23). The jury was required by law and charge only to consider the past accusation of sexual abuse if they determined beyond-a-reasonable doubt the act occurred. Ranger Hullum testified in detail about an act he did not witness including about where the child was when she was touched, how she was touched, who else was supposedly present when it occurred, what she was wearing all based on his interrogation.

C. Certiorari should be granted where the line between a Unanimous and a Non-Unanimous verdict is no sharper than between twilight and dusk, permitting this Court to exercise its surgical skills to dissect a case thereby demonstrating and establishing much needed guidance to the Courts facing the § 38.37 dilemma.

As in similar cases the lower court's duty is to determine whether or not under the statute, in a single count indictment for Indecency by contact, the presentation

of two or more distinct acts of contact (one act occurring in August of 2011 involving the touching of C.R.'s breast (C.R. a pseudonym, alleged victim of the indicted offense) and two acts occurring on or about June 2004 involving the touching of R.R.'s (a pseudonym) breasts and genitals) had no effect on the jury's unanimity and/or if the verdict was based solely on the indicted offense.

The instant case is made more complex than usual due to a jury charge error in which the State's election paragraph contained the elements of the past allegation rather than the indicted offense. Where normally a properly executed charge provides certain safeguards to prevent confusion and ensure the proper utilization of an extraneous offense, the trial court wholly failed to correct the charge prior to reading it to the jury* (CR 84) (RRv4pp

The State indicted Mr. Rainey for one act of Indecency by contact occurring on or about August 2011 and presented evidence of the touching of the breasts of C.R. (a pseudonym) by the child's testimony. Then, pursuant to T.C.C.P. Art. 38.37 (2013) the State was permitted to present a past allegation of Indecency with a child by contact occurring on or about 2004 and presented, through the investigator of that offense, Tx Ranger D. Hullum, evidence of the touching of the breasts and genitals of R.R. (a pseudonym). The State submitted a jury charge stating (Paragraph V) that the State "elected to proceed on ~~the~~ ^{the} ~~allegation that~~ ^{the} ~~an~~ ^{the} ~~about~~ ^{the} ~~J.R.~~ ^{the} alleged incident that occurred June 1, 2004 when the accused, with intent...

*The charge issue is addressed separately.

... engaged in sexual contact with another Jane Doe by touching the genitals of that said Jane Doe" (CR84 Par V, RPR4pp)

During trial C.R. testified regarding the touching of her breasts as well as an incident where Mr. Rainey tried to put his hands down her pants. Mr. Rainey argued "If it were clear... that the jury clearly understood that it was only to consider the 2011 touching of the breasts allegation to determine Rainey's guilt or innocence on the single Indecency with a child charge, any error concerning the judges submission of a count containing a broader time frame and a separate body part instruction and/or any failure to specifically instruct the jury as to what it could consider would have been harmless under Brecht" (Memp25)

However, the totality of the State record paints quite a different picture. Rather than admitting the truth of the matter to wit: the State submitted an erroneous jury charge, the trial judge minimized the error by stating "I have mistakenly used the wrong date" (RPR4p95)

Thereafter the copies of the erroneous charge were collected from the jurors, the date was replaced and the word "genitals" was changed to "breasts" and the charge was reread to the jury.

Texas Penal Code 21.11 creates three separate offenses and each subsection criminalizes a separate type of contact, unanimity requires the jury to be unanimous as to the type of contact.

A unanimous verdict is required by both the U.S. Constitution and the Texas Constitution, and is more than mere agreement on a violation of a statute, it ensures jury agreement on the factual elements underlying the offense. See Almanza v State, 175 SW3d 743 (2005)

Considering the complexity caused by the trial testimony under 38.37, combined with an election paragraph error containing separate criminal acts not alleged in the indictment and the guilt inferring phrase "engaged in sexual contact with another Jane Doe"; Supreme Court guidance is necessary to equip the lower courts with precedent which clearly defines the testing and importance of dissecting a case where it is virtually impossible from the general verdict to determine which date, which Jane Doe and/or which touching each juror depended upon to convict the defendant.

D. Similarly Certiorari should be granted to determine whether charging procedures, in this case and similar cases involving more than one allegation presented to a jury, meet the essential standard of fairness under the Due Process Clause.

More specifically whether a, state defined, "clerical error" where the States election paragraph supplements the factual elements of the indictment with elements of an extraneous offense, entitled to be used under 38.37 discretion, and which contains phrases inferring guilt, such as "another Jane Doe"; is a fundamental error which renders the trial unfair by one or more reasons i.e.: by commenting on the weight of the evidence, or by inferring the defendant is guilty, or by exposing the defendant to double jeopardy? Is that verdict non-unanimous?

Furthermore Certiorari should be granted to determine whether a jury charge error can be corrected by simply stating: "I used the wrong date" without removing guilt

ensensuating phrases such as "— engaged in sexual contact with another Jane Doe" without depriving the defendant of Due Process and/or deciding a vital issue for the jury?

The controversial paragraph in the charge read: (CR 84, RRv 4pp)

"The State has elected to proceed on an alleged incident that occurred June 1, 2004 when the accused, with intent... engaged in sexual contact with another Jane Doe by touching the genitals of that said Jane Doe"

Immediately after the charge was read, each juror reading along on their copy, and before objection could be made, the A.D.A. requested a bench conference and stated: "... I don't know what happened this date, this is our extraneous offense" (RRv 4p 94)

Supreme Court precedent described by Sullivan, 508 US 295 and Neder, 527 US 1 as well as Texas Court of Criminal Appeals cases Trevino v State, 440 SW3d 722 (2013) and/or Kirsch v State, 357 SW3d 645 explains fundamental or charge errors as egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right or vitally affects a defensive theory. Texas courts have even held that comments from the bench is material if the jury is considering the same issue; comments can destroy neutrality and the impartiality of trial atmosphere as well as affect defendant's credibility, the presumption of innocence and constitutes plain error. See Uddin v State, 503 SW 3d 710 (Tx App Houston - 2016)

This court has held that the use of a contrary general instruction does not automatically cure a deficient instruction. Francis v Franklin, 105 S Ct 1965 at 309, and that language that merely contradicts and does not explain a constitutionally infirm instruction will not be cured by a comment like "I mistakenly used the wrong date," and will not

suffice to absolve the infirmity. A Sullivan error precludes harmless error review because ~~no~~ verdict within the meaning of the Sixth Amendment has been rendered. 113 S.Ct 2018 at 280-282.

E. Certiorari should be granted to determine whether the trial under T.C.C.P. art 38.37 exposed the defendant to double jeopardy and to provide guidance to the lower courts to prevent 38.37 or similar double jeopardy exposure.

The double jeopardy clause bars retrial while collateral estoppel doctrine bars retrial of specific and discrete facts fully and fairly adjudicated. While 38.37 allowed prior offenses to be used "for relevant matters including but not limited to, the opportunity of the defendant to sexually touch a child in a home with people present" (PR 3pp 17-18)

Certiorari should be granted to draw ~~the line~~ or distinguish the line between using a prior conviction to prove an element of the indicted offense and the re-litigation of discrete facts which have been fully and fairly adjudicated.

In the instant case in 2006 by Cause No: 05-20783 Rainey adjudicated and served a sentence for Indecency with a child by contacting R.R. (a pseudonym) In 2011 Rainey was indicted and charged with the same statute by contacting C.R. (a pseudonym and not the same person as R.R.) The State elected to enhance the penalty using the 05-20783 prior conviction*, then after the Sept. 1, 2013 amendment to 38.37 the State was allowed to use the 38.37 05-20783 past allegation as well to prove an element of the indicted offense. ~~which~~ ^{WR}

* Tx Penal Code 12.42

The jury was instructed it must find or believe beyond a reasonable doubt that the contact of R.R. occurred in order to consider it to decide whether the contact of C.R. occurred. However, the State erred by presenting to the jury the adjudicated facts and by incorporating the elements of 05-20783 or the touching of the breasts and genitals of R.R. Thus it is virtually impossible for the Courts to know which "that Jane Doe", which act of sexual contact "touching the breasts", "touching the genitals" that each juror relied upon to convict. Nationally, 38.37 and the similar Federal rules which allow evidence of past allegations, as well as crimes involving sexual contact are increasing. Therefore the Supreme Court should grant Certiorari to set precedent and provide guidance to the lower courts by detailing the surgical precision type analysis required to ensure a defendant in a he said/she said sexual abuse case with no physical, medical or DNA evidence which reliably proves guilt is not convicted based on character conformity or for being a criminal generally.

F^{WR} Finally, Certiorari should be granted to distinguish the Supreme Courts "structural error" from Stricklands demand for ineffective assistance of counsel for the benefit of pro se inmates with little or no experience. More specifically Certiorari should be granted to determine with finality whether ~~a court~~ an indigent defendants right to govern his case can be vitiated by court appointed counsels rationale that he feared the State would introduce ~~an~~ extraneous offense evidence?

The indigent defendant claimed his attorney was ineffective, in part, because he failed to present a defense, but not just any defense, the attorney in a he said/she said sexual abuse case ^{were} ~~with~~ the only evidence, other than character conformity, is the child's testimony failed to present scientific evidence provided to him by his client pre-trial in the form of TDFPS records, Forensic Interview reports, Counseling Records and Medical/Psychological records which revealed that (a) the child had a motive to lie or was compelled to say her dad touched her, (b) the child repeatedly denied any allegations of sexual abuse, (c) the child suffered from PTSD, Depression and Suicidal Ideations due to her placement immediately prior to the outcry and (d) the child recanted after leaving that particular foster home.

Furthermore, the defendant claimed that counsel's actions violate the Texas Penal Code, specifically, §31.04 Theft by Deception* because the defendant consumer had a verbal agreement made on the record in a court of law with the attorney when the attorney stated (RRV 4p 87) "Judge, I would anticipate that we will call one witness... and Mr. Rainey... to discuss his right to testify"... "And you [Mr. Rainey] also understand the positives of us calling the other witness that we have subpoenaed.. [Yes, Sir].. And you and I are in agreement that we will present the one witness... [Yes Sir]... And also, you're choosing or electing not to testify in this matter [At this time that's correct] (RRV 4pp 87-90)

Immediately thereafter the attorney has a private conversation with Assistant District Attorney Adams and the record reveals the following abandonment:

* Defined by Tex Penal Code 31.01(A)(B) and (C)

(RRv 4p91) The Court: "Okay...and anything else before we bring the jury in?" [Mrs Adams, ADA] "Judge, may I have a minute to confer with Mr. Gregory?" [The Court] "Yes." (Pause, Jury Enters, Attorneys meet in between tables) [The Court] "Immediately before we took this recess, the State rested, and sir" [Mr. Gregory] "Judge the defense would rest too."

In light of the record Certiorari should be granted to establish enlightening precedent for pro se inmates as well as the Courts to specify or define the fine line between the defendants right to present a complete defense, to control his defense and to testify and an, court appointed, attorneys role as advocate.

This honorable Court has previously held in Florida v Nixon, 543 US 175 (2004) that a defendant does not surrender complete control of his defense to counsel by choosing to be represented. The ruling suggests he surrenders some control, however, since defendants autonomy and ~~not~~ counsels competence is at issue which jurisprudence applies, structural error or ineffective assistance of counsel or both?

After review, the State of Texas' Court of Criminal Appeals did not recognize counsels actions as either a constitutional violation of the Sixth Amendment or as harmful. Certiorari should thus be granted to enlighten the Courts and determine whether a verbal contract witnessed by the Court establishes defendants autonomy and/or whether counsels failure to impeach the witness using her own statements to numerous professionals or his failure to present soft scientific evidence to subject the States case to meaningful adversarial testing

constitutes a violation of the Sixth Amendment of the U.S. Constitution.

In Williams v Taylor, 120 Sct 1495 (2000) the Court held counsel ineffective for failing to investigate and present substantial mitigating evidence to the jury. The Petitioner repeatedly argued, in he said/she said sexual abuse cases where a child's testimony alone is sufficient to convict, a.k.a. in "credibility convictions", where there are no medical findings or physical or Dna evidence, that his soft scientific evidence which wholly impeaches the child with her own statements is vital impeachment evidence. Evidence suggesting a motive to lie has long been regarded as powerful evidence undermining credibility and its importance has been stressed in Supreme Court confrontation cases. See Olden v Kentucky, 109 Sct 408

The Soft Science evidence and impeaching material is even more important when character conformity evidence is allowed under §38.37. Texas has even passed law, T.C.C.P. Art 11.073 that now recognizes (a) relevant scientific evidence that (2) contradicts scientific evidence relied on by the State at trial to grant habeas relief.

Notably in this case the record reveals the State is not "working in tandem with CPS" (PR13) Normally the State itself would rely on the TDFPS or CPS investigation to make their case but in this instance the CPS records establish that TDFPS "Ruled Out" the allegation of sexual abuse of C.R. by William Rainey. Therefore the State hides the evidence from the jury in order to obtain a conviction rather than to seek justice. Certiorari should be granted to determine whether the trial was constitutionally valid. Miller, 87 Sct 785.

Summary

The State of Texas' Court of Criminal Appeals and lower courts have recognized that "Despite the State courts best efforts, the standard impetus for the proposed questioning in this case, Tex. C.C.P. art 38.37, can be especially problematic because it makes character conformity relevant in cases involving sexual offenses against children" See Jacobs v. State, PD-1411-16 (2016?)

The Court of Criminal Appeals' denial without written order cannot be reconciled with this Court's long standing precedent. Whether the Texas Courts failure to address the constitutionality, as applied, of art 38.37, ~~is not~~ denied Mr. Rainey access to courts and whether they applied the proper standard(s) is an important question of law that this Court should decide. Petitioner declares he is actually innocent and prays for relief.

What makes "the application" of art 38.37 "so substantial" is that it can easily encroach on constitutional rights. Which right? The right to Due Process, a fair trial, the right to unanimity, the right to effective assistance of counsel and the right to be free from double jeopardy. What does a proper analysis of this claim look like, does it require precision not yet identified?

Whatever form it takes it should be more than a denial without written order under Equal Protection of Law. Petitioner therefore prays this Court grant Certiorari and asks this Court to grant him the relief to which he is entitled. Respectfully Submitted on this 15th day of March, 2019.

William Rainey

— WR —

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

William Rainey

Date: 15 Mar 2019