NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

ANTONIO PARA PEREZ
Petitioner,

v.

THE STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is Texas Code of Criminal Procedure Article 38.37 §2, which permits evidence of prior bad acts to prove the character and propensity of a defendant accused of a sex crime, unconstitutional on its face because it does not contain a provision excluding remote allegations or requiring a trial court to exclude evidence whose probative value is outweighed by the danger of unfair prejudice?
2. Was Texas Code of Criminal Procedure Article 38.37 §2 unconstitutional as applied to Perez as the evidence admitted against him could not support a finding beyond a reasonable doubt that he committed the extraneous offenses as required by the statute?

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OPINIONS BELOW

The Texas Court of Criminal Appeals refused Mr. Perez's Petition for Discretionary Review on February 27, 2019. *App. A.* The opinion of Texas' intermediate appellate court in this case, the Second Court of Appeals of Texas at Fort Worth is published at 562 S.W. 3d 676. *App. B.*

JURISDICTION

The jurisdiction of this Court to review a final order or judgment of a state court is timely invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be… deprived of life, liberty, or property, without due process of law…

The Sixth Amendment to the United States Constitution provides:

> 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…

The Fourteenth Amendment to the United States Constitution provides:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law...

Texas Code of Criminal Procedure Article 38.37 §2 is attached as Appendix C.

STATEMENT OF THE CASE

A. Facts and Background

Petitioner (herein after Perez) was indicted by a Wichita County Texas grand jury for aggravated sexual assault and indecency by contact against two of his grandchildren. At the trial the State offered testimony regarding extraneous offenses that allegedly occurred in Mexico in the 1960s. Pursuant to Texas Code of Criminal Procedure Art. 38.37, § 2, the State called defendant's two younger sisters to testify regarding their abuse allegations from over 50 years ago.[1] A petit jury later convicted Perez and assessed his punishment at life in prison. Perez, for purposes of this petition, adopts the use of the pseudonymity for his two younger sisters, G.P. and G.C. and two granddaughters C.R. and Y.P.

[1] *Perez v. State*, 562 S.W. 3d 676, 682-83 (Tex. App.—Fort Worth, pet. ref'd).

When the State called G.P. as a 38.37 witness the court held a hearing outside the presence of the jury to determine the admissibility of her testimony.[2] G.P. is a younger sister of Perez, who is about twenty years older than G.P.[3] G.P. testified to "one time" that something happened between her and Perez.[4] She could not recall how old she was, except to state that she was born in 1962 and the incident occurred before 1970. G.P. testified that prior to 1970 in Mexico Perez rubbed his genitals in between her legs. She could not recall penetration.[5] G.P. testified on cross-examination that no medical examination ever occurred, that she never alerted authorities in Mexico, that she never told anyone other than her sister, and that her disclosure to authorities came only after the allegations of C.R. and Y.P.[6] At the conclusion of the

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[2] RR 9:77 For ease of reference, a witness called to support the State's case-in-chief with extraneous testimony pursuant to Texas Code of Criminal Procedure Art. 38.37 will be referred to at times as a "38.37 witness."

[3] RR 9:78

[4] RR 9:81

[5] RR 9:86

[6] RR 9:94-95

hearing regarding the admissibility of her testimony, Perez objected to the remoteness of the alleged incident, that the testimony did not rise to the standard of beyond a reasonable doubt, and that the prejudicial effect of the evidence substantially outweighed its probative effect. Perez also objected to the constitutionality of Article 38.37 of the Texas Code of Criminal Procedure.[7] The trial court overruled the objections and allowed the testimony.[8]

The State called G.C. as a 38.37 witness and the court held a hearing outside the presence of the jury to determine the admissibility of her testimony.[9] G.C. is a younger sister of Perez, who is about nine years older than G.C.[10] G.C. testified to incidents that "constantly happened all the time" prior to 1970.[11] She stated that Perez would penetrate her vagina with his penis and fingers and that he fondled

[7] RR 9:101-103

[8] RR 9:106

[9] RR 10:6

[10] R 10:7-8

[11] RR 10:13

her.[12] She could not state how old she was when the alleged events occurred. She testified that the conduct stopped when the family moved to Wichita Falls in 1970 and that the only person she ever told during that time was her sister G.P.[13] There was no medical examination, no investigation, no physical proof, and no one alerted authorities in Mexico. At the conclusion of the hearing regarding the admissibility of her testimony, Perez objected to the remoteness of the alleged incident, that the testimony was accumulative, and that the prejudicial effect of the evidence substantially outweighed its probative effect.[14] Perez also objected again to the constitutionality of Article 38.37.[15] The trial court overruled the objections and allowed the testimony.[16] After these *in camera* proceedings the trial proceeded to conviction and sentencing.

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[12] RR 10:14

[13] RR 10:16-17

[14] RR 10:21-22

[15] *Id*.

[16] RR 10:24

B. Prior Proceedings

Perez timely appealed his conviction to the appropriate Texas intermediate court, the Second Court of Appeals at Fort Worth, Texas. In his appeal, Perez argued that article 38.37 §2 is unconstitutional both on its face and as applied. The court of appeals rejected the constitutional challenges finding article 38.37 facially constitutional because of other procedural safeguards like the requirements the State give notice of intent to use extraneous offenses, that the trial court must hold a hearing to determine that the evidence will be adequate to support a finding by the jury that the defendant committed the offenses beyond a reasonable doubt, and the availability of Texas Rule of Evidence 403.[17] In rejecting the as applied challenge, the court of appeals found the trial court did not abuse its discretion in ruling that the testimony of G.C. and G.P. would support a jury finding that Perez committed the extraneous offenses beyond a reasonable doubt.[18]

[17] *Perez*, 562 S.W. 3d at 688.

[18] *Id* at 689.

The court of appeals affirmed Perez's conviction and sentence. Perez filed a motion for rehearing which was denied on November 8, 2018. Perez timely file a Petition for Discretionary Review in the Texas Court of Criminal Appeals. On February 27, 2019, the Texas Court of Criminal Appeals refused Perez's Petition for Discretionary Review.

REASONS FOR GRANTING WRIT

This writ should be granted because the appeals court decided an important question of federal law that has not been, but should be decided by this Court.[19] The Court should address the issue left open by *Estelle v. McGuire*, 502 U.S. 62 (1991), as to whether a state law that permits evidence of prior bad acts to prove the character and propensity of a defendant accused of a sex crime violates the Due Process Clause.

Texas Code of Criminal Procedure Article 38.37 is facially unconstitutional in that is overly broad, circumvents the rules of evidence prohibiting extraneous offense evidence, and violates the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution,

[19] See Sup. Ct. R. 10(c).

particularly a defendant's right to due process and an impartial jury.[20] Allowing the unfettered use of propensity evidence undermines the presumption of innocence. Further, the trial court unconstitutionally applied the statute to Appellant in a manner that failed due process and prevented Appellant from receiving a fair trial.

A. Texas Code of Criminal Procedure Article 38.37 §2 is Facially Unconstitutional

Texas Code of Criminal Procedure Art. 38.37 states in pertinent part:

> "Sec. 2.
>
> > (b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence, and subject to § 2-a, evidence that the defendant has committed a separate offense described by Subsection (a)(1) or may be admitted in the trial of an alleged offense described by Subsection (a)(1) or (2) for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.
> >
> > Sec. 2-a. Before evidence described by Section 2 may be introduced, the trial judge must:

[20] See e.g. U.S. Const. Amend. V; U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Tex. Code. Crim. Pro. Art. 37.38.

(1) determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt; and
(2) conduct a hearing out of the presence of the jury for that purpose."[21]

This Court has historically held that character-propensity evidence is inadmissible out of concern that a defendant might be convicted based on that evidence rather than the evidence pertaining to the charged offense.[22] Courts have held that the admission of character-propensity evidence violated the defendant's due-process rights.[23]

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[21] Tex. Code of Crim. Pro. Art. 38.37 §2.

[22] *See, e.g., Boyd v. United States*, 142 U.S. 450, 458, 12 (1892) (explaining that "[h]owever depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence and only for the offense charged"); *Brinegar v. United States*, 338 U.S. 160, 174, 69 (1949) (determining that evidence of prior similar acts was not admissible and noting that decision was supported by "historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions").

[23] *See McKinney v. Rees*, 993 F.2d 1378, 1385 (9th Cir. 1993) (determining that admission of "emotionally charged" evidence regarding defendant's alleged

This Court has not reached, and instead has expressly reserved, the question of whether a state law admitting propensity evidence violates the Due Process Clause.[24] However, it has been explained that admitting propensity evidence raises questions of fair play:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt.... The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.[25]

In *Old Chief v. United States*, this Court held a trial court abused its discretion by admitting the name and factual circumstances of a previous conviction, even though a prior felony conviction was an element of the crime charged.[26] Citing *Michelson* it was held the

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fascination with weapons "was not relevant to the questions before the jury…[and] served only to prey on the emotions of the jury").

[24] *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5 (1991).

[25] *Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

[26] *Old Chief v. United States*, 519 U.S. 172, 191 (1997).

evidence was unfairly prejudicial, explaining, "[t]here is, accordingly, no question that propensity would be an 'improper basis' for conviction."[27]

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.[28] To establish a due process violation, it is the appellant's burden to show that the challenged statute or rule violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency."[29]

The current version of article 38.37 provides for the admission of evidence of other sex crimes committed by the defendant against children *other than the victim* of the alleged offense "for *any bearing the evidence has on relevant matters*, including the character of the defendant and acts performed in conformity *with the character of defendant*." While courts have historically permitted extraneous

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[27] *Id* at 181-82.

[28] *In re Winship*, 397 U.S. 358, 364 (1970).

[29] *Dowling v. United States*, 493 U.S. 342, 352-53 (1990).

evidence to establish motive, intent, identity, or absence of mistake or accident, the general understanding underlying the admission of such crime was that the evidence, though admitted, still was not admitted to show that the defendant was simply a bad person.

Here the evidence is statutorily admissible to prove the character of the defendant. The defendant is no longer on trial for the offense charged in the indictment; he stands before a jury that hears accusations, some remote, some never before disclosed, some more heinous than the charged offense, and he fights for a fair trial against a mountain of evidence that says he is indeed a monster who deserves to be locked away. The statute subverts the purpose of our justice system and allows juries to convict individuals based on something other than legally sufficient evidence of the charged offense in contravention of longstanding principles embraced by this Court. Instead, the jury convicts the defendant on fear, emotion, and disgust.

Article 38.37 lacks the procedural safeguards necessary to ensure due process is protected and that a defendant receives a fair trial. There is no balancing test provided in the statute that would require a trial court to exclude evidence whose probative value is outweighed by unfair

prejudice. Federal Rule of Evidence 413 provides for the admission of evidence of other sexual misconduct in cases involving sexual assault while Rule 414 allows evidence of other acts of molestation in child molestation cases.[30] Though never reviewed by this Court, lower courts considering 413 and 414 have determined they are facially constitutional because, as rules of evidence, Federal Rule of Evidence 403 can be used as an added protection.[31] State courts of last resort considering similar laws have found them facially constitutional only because they contain provisions with a balancing test.[32] As article 38.37

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[30] Fed. R. Evid. 413; Fed. R. Evid. 414.

[31] *See e.g. United States v. Enjady*, 134 F. 3d 1427, 1433 (10th Cir. 1998); *United States v. Castillo*, 140 F. 3d 874, 881-83 (10th Cir. 1998); *United States v. LeMay*, 260 F. 3d 1018, 1026-27 (9th Cir. 2001) (Rules 413 and 414 constitutional because of the safeguard of Federal Rule of Evidence 403, which directs the court to exclude the evidence if it concludes the probative value of the similar crimes evidence is outweighed by the risk of unfair prejudice).

[32] *See e.g. State v. Cox*, 781 N.W. 2d 757 (Iowa 2010); *People v. Donoho*, 204 Ill. 2d 159 (2003); *People v. Falsetta*, 21 Cal Cal. 4th 903 (1999) *Contra State v. Ellison*, 239 S.W. 3d 603 (Mo. 2007) (holding law allowing admission of evidence of prior sexual

lacks a balancing test it can be argued none is permitted. Nor does article 38.37 include any provision excluding remote allegations.[33] The failure of the statute to include such provisions renders it facially unconstitutional in all operations.

B. Texas Code of Criminal Procedure Article 38.37 §2 was Unconstitutionally Applied to Perez

Article 38.37 requires the trial court to find that the evidence is relevant and that the evidence is adequate to support a finding by the jury that the defendant committed the offense beyond a reasonable doubt.[34] The evidence is adequate to support such a finding when it is legally sufficient to prove each element of the offense.[35]

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crimes unconstitutional under Missouri Constitution even though statute contained a balancing clause similar to Fed. R. Evid. 403).

[33] Cf. Fed. R. Evid. 609(b) (allowing impeachment by convictions in the last 10 years).

[34] Tex. Code Crim. Proc. Art. 38.37, Sec. 2-a.

[35] *See Jackson v. Virginia*, 443 U.S. 307, 317-18 (1979).

The State notified Perez of its intent to offer an extraneous act allegedly committed by Perez between 1965 and 1970.[36] However, the evidence adduced at the 38.37 hearing for G.P.'s testimony was not adequate to support a finding that Perez committed the offense beyond a reasonable doubt because the evidence was insufficient to prove the elements of the offense.[37] The evidence was also insufficient to show relevance under Article 38.37 due to its remote nature.

Specifically, the evidence was too remote in time with no physical evidence to support the allegation and no evidence of any outcry to authorities. In other words, there was no corroborative testimony for an allegation that happened over 40 years prior to the time of trial. The witness did not make the allegations in public until after this case began. Based on this testimony, the only testimony supporting the

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[36] Specifically, the State alleged that "[B}etween 1965 and 1969, in Monterrey, Nuevo Leon, Mexico, the defendant did then and there, with the intent to arouse or gratify the sexual desire of said defendant, engage in sexual contact with Psuedonym F, by touching the genitals of Psuedonym F, then a child younger than 17 years of age, with the defendant's penis. CR 99-111.

[37] *See Jackson*, 443 U.S. at 317-19.

admission of this extraneous offense, no reasonable trier of fact would find that the evidence establishes the offense beyond a reasonable doubt.

Even if the jury believed all of her testimony, the evidence does not prove each of the elements of the offense as required. G.P. was unable to testify to a specific time for the allegations, instead testifying that one incident occurred sometime in an 8-year period. Specifically, the State would not be able to prove that the incident occurred between 1965 and 1969 as alleged because her testimony established that the incident she was testifying about could have occurred between 1962 and 1970. Furthermore, G.P. was unable to testify that she saw Perez's penis and the State elicited no testimony to explain how she knew it was his penis that contacted her genitals. The record of her testimony is thus devoid of legally sufficient evidence that Perez used his penis to contact G.P.'s genitals. Further, the State would not be able to prove that Perez acted with the intent to arouse or gratify his sexual desire as G.P.'s testimony offers no foundation for such a finding. She did not testify to any statements of Perez, nor did she attempt to testify to his intent or his motivation in any manner. Her testimony is too limited

and remote for a reasonable juror to infer such intent. The evidence failed to adequately support a finding that Perez committed this act beyond a reasonable doubt and it therefore should not have been admitted.

This Court should take this opportunity to determine the parameters of the use of propensity evidence by the State against the accused. At a minimum any statute allowing the use of propensity evidence to create an inference of guilt should have an explicit balancing test, a limitation on remote allegations, and a requirement that the evidence meet a burden of proof before admission. Texas Code of Criminal Procedure Article 38.37 §2 fails to provide these important procedural safeguards. Its misapplication in the case of Perez highlights the pitfalls when remote extraneous offenses are admitted at trial.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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