No.

IN THE

SUPREME COURT OF THE UNITED STATES

HSIU YING LISA TSENG

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent

On Petition for Writ of Certiorari to the
Court of Appeal of the State of California,
Second Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

VERNA WEFALD
65 North Raymond Avenue, Suite 320
Pasadena, California 91103
Telephone: 626-577-2658
Email: verna@vernawefald.com

Counsel of Record

QUESTION PRESENTED

Whether this Court should finally decide that the admission of irrelevant prior act evidence in a state trial that amounts to nothing more than propensity evidence violates Fourteenth Amendment due process, a question left open by *Estelle v. McGuire*, 502 U.S. 62, 70 (1991)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Federal

California

No.

IN THE

SUPREME COURT OF THE UNITED STATES

HSIU YING LISA TSENG, Petitioner,

vs.

STATE OF CALIFORNIA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION ONE

Petitioner, HSIU YING LISA TSENG, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Second Appellate District, Division One, filed on December 14, 2018.

OPINION BELOW

The opinion of the Court of Appeal of the State of California was certified for partial publication and reported at *People v. Tseng*, 30 Cal.App.5th 117 (2018). The slip opinion is reproduced as Appendix A to this

petition. The order of the California Court of Appeal denying rehearing is attached as Appendix B. The order of the California Supreme Court denying review is attached as Appendix 3.

JURISDICTION

The judgment of the California Court of Appeal was filed on December 14, 2018, affirming petitioner's convictions for second degree murder. (Appendix A.) The California Court of Appeal denied rehearing on January 11, 2019. (Appendix B.) The California Supreme Court denied the petition for review on March 20, 2019. (Appendix C.) This petition for certiorari is due for filing on June 18, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment (pertinent part)

> No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

California Evidence Code section 1101 (Evidence of character to prove conduct)

> (a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is

inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

California Evidence Code section 352 (Discretion of court to exclude evidence)

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

California Evidence Code section 210 (Relevant evidence)

"Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence fo the determination of the action.

STATEMENT OF THE CASE

Petitioner, a physician, was convicted of three counts of second degree murder (Penal Code § 187) after three patients (Vu Nguyen, Steven Ogle, and Joseph Rovario) died from drug overdoses. She was also convicted of twenty counts of unlawful controlled substance prescription (Health & Safety Code § 11153(a) and one count of obtaining controlled substance by fraud (H & S § 11173(a).) Petitioner appears to be the first and thus far only physician in this country to be convicted of murder for prescribing opiates.

Prosecution experts testified that petitioner violated the standard of care by *e.g.* failing to conduct adequate examinations, failing to order drug or other testing, failing to contact prior physicians, and failing to check with state databases for prior drug use. One of these experts, Dr. Ezekiel Fink, however, testified that opioid overdose deaths happen to good doctors in the course of their practices as well. A death "does not mean that something wrong was done." (16 RT 5450.)

Petitioner did not dispute that her handling of several patients was negligent. Mere negligence cannot constitute implied malice murder under California law. Her pretrial offers to plead guilty to involuntary manslaughter were rejected.

Evidence was also presented that Petitioner did turn away patients who she believed were merely drug seeking. She argued at trial and on appeal that she was not guilty of implied malice, necessary for a finding of second degree murder.

The jury was initially unable to agree on whether petitioner was guilty of murder or involuntary manslaughter. Over defense objection, the court allowed additional argument, after which petitioner was convicted of second degree murder. She was sentenced to 30 years to life in prison.

Pretrial, over defense relevance, more prejudicial than probative, and due process objections, the prosecution was permitted to introduce evidence that six other patients had died. Three of these deaths were uncharged (Matthew Stavron, Ryan Latham, and Naythan Kenney). Three more were patients were named in overprescribing counts (Joshua Chambers, Michael Katsnelson, and Joseph Gomez).

Significantly, Chambers and Gomez both died of heroin overdoses, which had nothing to do with Petitioner. Katsnelson died of a preexisting heart condition, which also had nothing to do with Petitioner. And, Latham's death was officially determined to be a suicide.

As to Kenney, Petitioner prescribed four drugs in the days before he died: Oxycontin (oxycodone); Xanax (alprazolam); Adderall (amphetamine);

and Soma (carisoprodol). (12 RT 3961- 3962.) Kenney's death was attributed to methadone, which was not one recently prescribed.

The prosecution also sought to introduce evidence that two more patients named in the over-prescribing counts had died (Nicholas Mata and Michael Huggard). Because Mata and Huggard died after the patients alleged in the murder counts, the trial court ruled that the prosecution could not mention that these two patients had died. Nevertheless, the first question elicited from Nicholas Mata's father was, "when did your son pass away?" (11 RT 3347.) After defense counsel objected, the court reminded the prosecutor that he was not supposed to mention Mata had died. The prosecutor conceded the error and said he would not let it happen again. (11 RT 11348-11349.)

After Mata's father finished testifying jurors told the judge that the testimony was "emotional" and asked to have Kleenex for the jury box. (11 RT 3364.) Defense counsel asked that Mata's testimony be stricken and the jury admonished: "And emotion is exactly what the People are trying to get in, and that's why it's more prejudicial than probative, and that was no accident when that question came out on direct." (11 RT 3367.)

The court told the jury that the testimony of Mata's father did not go to the murder counts but only to overprescribing. Even though it was

"emotional testimony" the "death had nothing to do with this charge, the defendant is not being charged with that, so please do not consider that evidence for any purpose." (11 RT 3371-3372.)

The prosecutor next elicited that Huggard had died, which prompted defense counsel to move for a mistrial on grounds of prosecutorial misconduct. The prosecutor said he had in good faith thought Huggard's death was not in violation of the court's order. Significantly however, he failed to mention that just a few days before, the prosecution said it would not be presenting evidence as to the deaths of Michael Huggard and Donald Bender, "trying to avoid that John Mata issue." (12 RT 3967.)

On direct appeal, Petitioner argued, inter alia, that the evidence of second degree murder was insufficient as to all three counts. She argued that introduction of evidence that six other patients had died violated her right to due process because it was nothing more than propensity evidence. She also argued that the evidence that Mata and Huggard had died was prosecutorial misconduct, warranting a new trial. The Court of Appeal rejected all three claims.

The Court of Appeal held that the six additional deaths were admissible under Evidence Code section 1101(b) and did not violate due process:

Tseng contends the trial court erred in permitting the prosecution to present evidence of the uncharged deaths of Stavron, Latham, Keeney, Chambers, Gomez, and Katnelson. She argues that the trial court should have excluded this evidence under Evidence Code section 1101, subdivision (a), because the six patient deaths were not relevant for any purpose authorized by Evidence Code section 1101, subdivision (b). Tseng further asserts that the trial court should have excluded the evidence under Evidence Code section 352 because the undue prejudice from this evidence substantially outweighed its probative value and its admission also violated her due process rights. We disagree.

Under Evidence Code section 1101, subdivision (b), evidence that a defendant has committed a crime, civil wrong, or some other act is admissible to prove a material fact "such as motive, opportunity, intent, preparation, plan, knowledge, identity, [the] absence of mistake or accident." (Evid. Code, § 1101, subd. (b); see *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.) The admissibility of prior acts evidence "turns largely on the question whether the uncharged acts are sufficiently similar to the charged offenses to support a reasonable inference of the material fact they are offered to prove." (*People v. Erving* (1998) 63 Cal.App.4th 652, 659-660.) "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*People v. Ewoldt, supra,* 7 Cal.4th at p. 402.) "On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion." (*People v. Kipp* (1998) 18 Cal.4th 349, 369.)

The trial court did not abuse its discretion in admitting evidence of the six uncharged deaths to prove Tseng's intent. This evidence was relevant to the issue of Tseng's subjective awareness of the dangerous consequences of overprescribing opioids and other controlled substances to patients whom she knew to be "drug-seeking" or suffering the symptoms of addiction.

The evidence showed that, over the course of a few years, Tseng was repeatedly made aware of the potentially lethal risks posed by her prescribing practices, yet she ignored those warnings. Prior to the charged deaths, Tseng had learned of the uncharged

> deaths of her patients—Stavron, Lathan, Keeney, Chambers, and Katnelson—from overdoses of the same or similar drugs she prescribed Nguyen, Ogle, and Rovero. Despite this knowledge, Tseng continued to prescribe Nguyen, Ogle, Rovero, and others these drugs in sometimes even higher doses without any medical justification for doing so. Her prescribing practices thus tended to show a conscious disregard for the lives of her patients, including the murder victims. Even if the investigators did not expressly inform Tseng that her treatment and prescription practices caused the deaths of the uncharged patients, her knowledge of the uncharged patients' deaths after she prescribed powerful drugs with no medical justification for those prescriptions was circumstantial evidence of her subjective knowledge of risk to support an implied malice mental state. In short, evidence of her knowledge of the uncharged murders helped the jury assess Tseng's level of awareness of the risk in determining whether, at the time of the murders, she acted with conscious disregard for life. The evidence was therefore admissible under Evidence Code section 1101, subdivision (b).
>
> Further, the trial court did not abuse its discretion under Evidence Code section 352 in admitting the uncharged crimes. Evidence of the uncharged deaths was highly probative on the key issue in the case—whether Tseng harbored implied malice—and was not substantially outweighed by its prejudicial effect. (See Evid. Code, § 352 ["The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice."].)
>
> Finally, admission of uncharged crimes under Evidence Code sections 352 and 1101 did not violate Tseng's constitutional rights to due process, a fair trial, and a reliable adjudication. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1289 [" ' "routine application of state evidentiary law does not implicate [a] defendant's constitutional rights" ' "]; *People v. Lindberg* (2008) 45 Cal.4th 1, 26.)

(Appendix A at 26-28.)

Respondent Attorney General conceded that eliciting the deaths of Mata and Huggard in violation of the court's order was misconduct and the Court of Appeal agreed. However, the court held the misconduct did not warrant reversal as it was not so pervasive as to infect the trial with such unfairness as to make the resulting conviction a denial of due process. (Appendix A at 39.)

Petitioner filed a petition for rehearing emphasizing that the Court of Appeal's recitation of the facts regarding the deaths of Chambers, Gomez, Latham, and Katsenelson was inaccurate. The petition for rehearing was denied without comment. (Appendix B.)

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD DECIDE ONCE AND FOR ALL WHETHER THE ADMISSION OF IRRELEVANT YET INFLAMMATORY PROPENSITY EVIDENCE VIOLATES FEDERAL DUE PROCESS

A. This Court has not yet decided whether propensity evidence in a state trial may violate federal due process

This Court has thus far not held that the admission of propensity evidence in violation of state law rules is a matter of federal due process. The issue was left open in *Estelle v. McGuire*, 502 U.S. 62 (1991). Petitioner's case is the one that presents the perfect opportunity to settle this issue once and for all.

In *Estelle v. McGuire*, the defendant was accused of killing his infant daughter. The prosecution presented evidence that on prior occasions the child suffered non-accidental injuries. 502 U.S. at 64-66. The evidence was admitted to show the child was a victim of "battered child syndrome" and that her fatal injuries were not accidental. *Id.* at 68. After the state court upheld the murder conviction, the Ninth Circuit granted habeas relief on grounds that the prior injury evidence violated due process. This Court reversed, holding that due proocess was not violated because "the prior injury evidence was relevant to an issue in the case." *Id.* at 70. "We need not

explore further the apparent assumption of the Court of Appeals that it is a violation of the due process guaranteed by the Fourteenth Amendment for evidence that is not relevant to be received in a criminal trial." *Ibid.* This Court also held that there was no reasonable likelihood that the jury considered the evidence of prior injuries as propensity evidence. *Id.* at 74-75. "Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime." *Id.* at 75, n. 5.

In Petitioner's case, the court admitted evidence of the uncharged deaths to enable the prosecution to prove that she had knowledge her patients were dying of overdoses yet did nothing to change her prescribing practices. (2 RT F-15.) However, four of the prior six deaths admitted under Evidence Code § 1101(b) were completely irrelevant as she had nothing to do with their deaths. Both Chambers and Gomez died of heroin overdoses and Katsnelson died of a heart condition. Latham died by suicide. As to the two deaths elicited in violation of the court's order, Mata and Huggard, those men died after the last charged murder count and even the trial court held they were irrelevant to prove knowledge.

Given the jury's obvious emotional reaction to these deaths, their admission was highly inflammatory. It is beyond cavil that the jury viewed the deaths of these patients as propensity evidence. As such it violated "those fundamental conceptions of justice which lie at the base of our civil and political institutions, which define the community's sense of fair play and decency." *Dowling v. United States*, 493 U.S. 342, 353 (1990).

B. California and federal law both hold that evidence of uncharged misconduct may never be introduced to show that a defendant is a bad person

California Evidence Code §1101(a) provides in pertinent part that "evidence of a person's character or a trait of his or her character ... is inadmissible when offered to prove his or her conduct on a specified occasion." Section 1101 (b) allows:

> the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident ... other than his or her disposition to commit such an act.

"[E]vidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan." *People v. Ewoldt*, 7 Cal.4th 380, 401–402 (1994).

Under Evidence Code § 210, relevant evidence is that which has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

Under Evidence Code section 352, the trial court:

> in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

The admission of any evidence that involves crimes other than those for which a defendant is being tried has a "highly inflammatory effect" on the trier of fact. *People v. Thompson,* 27 Cal.3d 303, 314 (1980). The admissibility of such evidence must therefore be "scrutinized with great care." *Ibid*. Because this type of evidence can be so damaging, "[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded." *People v. Felix,* 14 Cal.App.4th 997, 1004 (1993).

> The prejudicial effect of this evidence is heightened by the circumstance that defendant's uncharged acts did not result in criminal convictions. This circumstance increased the danger that the jury might have been inclined to punish defendant for the uncharged offenses, regardless whether it considered him guilty of the charged offenses, and increased the likelihood of 'confusing the issues' [citing Evid. Code, § 352] because the jury had to determine whether the uncharged offenses had occurred.

People v. Ewoldt, 7 Cal.4th at 405.

The prosecution must prove the uncharged act by a preponderance of evidence. *People v. Carpenter*, 15 Cal.4th 312, 382 (1997). The appellate court reviews the admission of uncharged misconduct evidence for abuse of discretion. *People v. Ewoldt*, 7 Cal.4th at 405. "Erroneous admission of other crimes evidence is prejudicial if it appears reasonably probable that, absent the error, a result more favorable to the defendant would have been reached." *People v. Felix*, 14 Cal.App.4th at 1007–1008.

In *People v. Falsetta*, 21 Cal.4th 903, 903, 913 (1999), the California Supreme Court recognized that § 1101 was a longstanding rule necessary to assure due process. *Falsetta* recognized that this Court has "expressly left open the question whether a state law permitting admission of propensity evidence would violate due process principles. *Ibid*, citing *Estelle v. McGuire,* 502 U.S. 62, 75 (1991).

"The rule excluding evidence of criminal propensity is nearly three centuries old in the common law." *Falsetta*, 21 Cal.4th at 913, citing e.g. *Wigmore,* Evidence (3d ed. 1940) § 194, pp. 646-647 and *People v. Ewoldt,* 7 Cal.4th at 392 (rule excluding evidence of criminal disposition derives from early English law and is currently in force in all American jurisdictions by statute or case law); see also *United States v. Castillo,* 140 F.3d 874, 881 (10th Cir. 1998) (ban on propensity evidence dates to 17th century England and

early United States history); *McKinney v. Rees,* 993 F.2d 1378, 1380-138, and fn.2 (9th Cir. 1993) (rule of exclusion for propensity evidence has persisted at least since 1684 to the present day and is established in every United States jurisdiction).

> 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. Not that the law invests the defendant with a presumption of good character (citation) but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. 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. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise, and undue prejudice.

Michelson v. United States, 335 U.S. 469, 475-476 (1948).

See also *Old Chief v. United* States, 519 U.S. 172, 191 (1997) (there is "no question that propensity evidence would be an 'improper basis' for a conviction"); *Marshall v. Longberger*, 459 U.S. 422, 448 n.1 (1983) (Stevens, J., dissenting) ("the common law has long deemed it unfair to argue that, because a person has committed a crime in the past, he is more likely to have committed a similar, more recent crime"); *Boyde v. United States*, 142

U.S. 450, 458 (1892) (proof of prior bad acts is prejudicial and however depraved in character a person is entitled to be tried only on evidence for the offense charged).

C. The issue of whether propensity evidence admitted in a state trial violates federal due process is frequently raised and should be decided

The issue of whether state law error could rise to the level of a federal due process violation is frequently raised on federal habeas corpus. See *e.g. Alberni v. McDaniel*, 458 F.3d 860, 865-866 (9th Cir. 2006) (cases cited therein). This Court has also denied certiorari numerous times on this issue. See e.g. *Id*. at 866, n.1.

Given the frequency with which the issue comes up, this Court should definitively rule whether propensity evidence admitted in a state trial gives rise to a Fourteenth Amendment due process claim. The lower state and federal courts are in need of much guidance on this recurring due process claim. The facts in Petitioner's case make it the ideal vehicle to resolve this question. This is particularly so, when opioid overdoses have become a nationwide crisis and when the majority of opioids are prescribed by general practitioners. Because the blame for this epidemic is difficult if not

impossible to pinpoint, what kind of evidence may be used to convict physicians of murder without violating due process is a matter of some urgency.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court grant the petition for certiorari.

DATED: June 18, 2019 Respectfully submitted,

VERNA WEFALD
Counsel for Petitioner