No. _____

In The
Supreme Court of the United States

LUIS ARNALDO BAEZ,

Petitioner,

v.

LORIE DAVIS, Director, Texas Department of Criminal Justice (Institutional Division),

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

GEORGE W. ARISTOTELIDIS
Tower Life Building
310 S. St. Mary's Street
Suite 1910
San Antonio, TX 78205
(210) 277-1906
jgaristo67@gmail.com

Counsel of Record for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED FOR REVIEW

1. Whether a jury instruction that permits conviction on proof of extraneous and propensity evidence, rather than on proof of all of the elements of a charged offense, violates the due process and jury trial protections of the constitution;

2. Whether the Petitioner has made a substantial showing of the denial of a constitutional right within the meaning of Section 2353(c)(2) of Title 28 of the United States Code. That is, whether jurists of reason could disagree with the district court's resolution of Petitioner's constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.

PARTIES TO THE PROCEEDING

All parties to the proceedings in the court below are named in the caption of the case.

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Petitioner asks that a writ of certiorari issue to review the order and judgment entered by the United States Court of Appeals for the Fifth Circuit on March 26, 2019.

OPINIONS BELOW

The order of the United States Court of Appeals for the Fifth Circuit denying Baez's application for a certificate of appealability was entered on March 26, 2019. The unpublished order is appended to this petition. *See* App. 1.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This petition is filed within 90 days after the court of appeals denied Baez's request for a certificate of appealability. *See* SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "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 pertinent part: "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[.]"

STATEMENT

> *. . . the question a reviewing court must ask is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedures and standards required by the Constitution.*
>
> *Justice Felix Frankfurter*

Bollenbach v. United States, 326 U.S. 607, 614 (1946)

Petitioner Luis Arnaldo Baez (Baez) challenges the constitutionality of a trial process that resulted in two consecutive life sentences against him. The jury was instructed that, in reaching its verdict, it could use evidence concerning Baez's extraneous acts as substantive evidence of guilt *See* App. 23-26. Tex. Crim. Pro. Art. 38.37 Sec. 2(b). Under Art. 38.37, a Texas jury can now convict by considering evidence of uncharged conduct that is similar to the crime(s) alleged in the indictment, a procedure and result that runs contrary to the constitutional, structural requirement that each charged offense be proven to a jury beyond a reasonable doubt.

The error in Baez's charge was created by the statute's failure to provide, and the trial court's failure to instruct, that the jury could consider the extraneous evidence *only* if it was *first* convinced beyond a reasonable doubt, that Baez was guilty of the offenses that were specifically charged in the indictment. Armed with this structural omission in Baez's jury charge, the prosecutor argued in closing arguments that *all* the

jury needed to convict on the charged offenses was evidence beyond a reasonable doubt that Baez committed extraneous and uncharged, similar criminal acts. The jury charge error is structural because it violated Baez's interrelated Sixth Amendment and Due Process rights to a jury finding of proof beyond a reasonable doubt on all elements of the offense, as provided by this Court's well-established precedent.

The Fifth Circuit mischaracterized Baez's arguments in support of a COA, by observing without more, and as determinative of Baez's request for a COA, that the extraneous act instruction that Baez challenged required the jury to find those other acts by the same reasonable doubt standard that was applied to the charged offenses, before it would be used by the jury in helping determine his guilt, and that this Court has never found such an instruction unconstitutional. This was an incomplete analysis of Baez's arguments. Baez's COA application did not simply argue that there existed a natural incompatibility between this Court's mandate in *In re Winship*, 397 U.S. 358 (1970), which requires that the jury convict only by way of evidence beyond a reasonable doubt of the charges actually charged in the indictment, and allowing a jury to convict by considering extraneous and propensity evidence as substantive evidence of guilt. Baez went further. He argued that the failure to instruct the jury to *first* determine Baez's guilt as to the charged offenses, *before* the jury could transition into considering whether the uncharged, extraneous act testimony presented by the complainant who was not named in the

indictment (BM) otherwise supported his guilt, violated this Court's teachings.

Baez argued that he has satisfied this Court's well-established COA standard, because he has demonstrated jury charge error that is structural. To support his COA request, Baez provided the Fifth Circuit with a history of significant federal and state precedent that shows, at the very least, that reasonable jurists could debate whether Baez's 28 U.S.C. § 2254 petition can be resolved in a different manner, or that the issues he presented were adequate to deserve encouragement to proceed further.

A. Amendment to Tex. Crim. Pro. Art. 38.37 Sec. 2(b)

The source of the structural error in Baez's jury charge was conceived on May 16, 2013, when the Texas Legislature drafted a "HOUSE RESEARCH ORGANIZATION bill analysis" (bill analysis) to Senate Bill 12 (SB 12), which developed into the current amendment to Art. 38.37. Proponents wanted to give prosecutors additional resources to prosecute sex crimes committed against children. Those opposed to the statute warned that it diluted the presumption of innocence, lowered the burden of proof, and increased the likelihood of wrongful convictions. On September 1, 2013, the Legislature amended Tex. Crim. Pro. Art 38.37, as follows:

> Sec. 2. (a) Subsection (b) applies only to the trial of a defendant for
>
> (1) an offense under any of the following provisions of the Penal Code:
>
> * * *
>
> (B) Section 21.02 (Continuous Sexual Abuse of Young Child or Children);
>
> * * *
>
> (b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence, and subject to Section 2-a, evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2) may be admitted in the trial of an alleged offense described by Subsection (a)(1) . . . 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.

The opponents of the bill correctly pointed out that the application of 38.37 Sec. 2(b) would be a significant change from the predecessor statute, which required that extraneous offenses had to be either connected to the same child victim or, under the Texas Rules

of Evidence, the extraneous conduct must have had some link to the current offense, such as motive or opportunity. The change would also allow convictions with weak evidence, largely (or even entirely) based on character evidence, which would eliminate the presumption of innocence. Directly relevant to the issue in Baez's petition, the opposition also presciently observed that SB 12 "would lower the burden of proof in these cases," and "would violate the constitutional requirements of due process." As Baez argues below, he submits that this is exactly what 38.37 Sec. 2(b) now allows Texas juries to do, what the prosecutor in Baez's case argued the jury could and should do, and what the jury probably did.

B. Trial Facts

Baez was tried for the continuous sexual abuse of two children, DI and DR, under Texas Penal Code § 21.02, titled "Continuous Sexual Abuse of Young Child or Children" (CSAC). At a pretrial hearing, the state presented testimony from two witnesses, AD and BM, who were not named in the indictment and who alleged that Baez had sexually abused them. After hearing their testimony, the trial court determined that only BM's testimony was credible beyond a reasonable doubt, under the procedure outlined in Tex. Crim. Pro. Art. 38.37 Sec. 2-a. The court ruled that BM's testimony would be admissible at Baez's trial as extraneous act evidence of sexual abuse.

At trial, DI and DR testified that Baez abused them sexually. The State then called BM, who testified about sexual abuse that she suffered at the hands of Baez. At the conclusion of the guilt-innocence phase of trial,[1] the trial court prepared a jury charge that gave separate and proper reasonable doubt instructions for each of the two offenses alleged in the indictment. App. 21-23. At the conclusion of the second reasonable doubt instruction, the jury charge transitioned into an instruction that tracked the language in Art. 38.37 Sec. 2(b), and provided:

> In this case, evidence has been introduced to the effect that there may have been an alleged act or acts of sexual misconduct between the defendant and the complainants ([DI and DR]), and between the defendant and another child ([BM]), other than what is alleged in the indictment. The State has identified the specific instances, if any, on which it is relying to substantiate each of the allegations in the indictment. Evidence of any other alleged act or acts is not to be considered unless you believe that other act or acts, if any, was or were committed beyond a reasonable doubt. With regard to the other act or acts, if any, *you are instructed that said evidence was admitted for any bearing it has on any relevant matters, including the character of the defendant and such act, if any, performed in conformity with the character of the defendant*, the state of mind of the defendant and each complainant, and the

[1] Texas has a bifurcated jury trial process that separates the guilt-innocence and punishment phases.

> previous and subsequent relationship between the defendant and each complainant.

App. 23-24 (emphasis by Baez). But while the 38.37 Sec. 2(b) instruction followed the traditional, beyond a reasonable doubt instruction, the charge did not contain a limiting instruction to separate the reasonable doubt requirement that, to convict Baez, each of the charged offenses had to be proved with evidence beyond a reasonable doubt, as a wholly independent, and preliminary constitutional requirement under *Winship*, before the jury could consider the merits of the 38.37 Sec. 2(b), extraneous-act instruction. Without the limiting instruction, the jury was allowed to consider wholesale Baez's alleged sexual misconduct against BM (for any bearing that it had on relevant matters, to include Baez's character, and any acts in conformity with Baez's character), together with evidence of the charged offenses. The failure to separate the jury's independent consideration of the charged and extraneous evidence allowed it to determine Baez's guilt by considering none or something less than evidence beyond a reasonable doubt of the charged offenses, with evidence of the extraneous, uncharged conduct, to convict him of the charged offenses. This was fully advocated by the prosecutor, who in summation to the jury argued:

> Your job as jurors is to decide the facts. You are the sole judge of the facts and the evidence before you. So what is the evidence in this case? The evidence in this case is what [DI] told you. The evidence in this case is what [DR] told you, *and it is what [BM] told you*.

> Remember that the law says *you can convict the defendant based on the testimony of one witness alone based on what they told you*. I'm not suggesting that you only use what they tell you, *but I am telling you that the law says that is enough to convict the defendant*.
>
> * * *
>
> How do you use what [BM] told you? First, you have to believe beyond a reasonable doubt what [BM] told you. There is sufficient, more than enough, evidence for you to believe [BM] beyond a reasonable doubt. The details she gave you, the things that she told Dr. Kellogg, the things that she told you. There is more than enough evidence to believe [BM].
>
> And when you believe beyond a reasonable doubt that [BM] is telling you the truth, *when you believe [Baez] sexually assaulted [BM], you can then say because he sexual [sic] assaulted [BM], he sexually assumed [sic][2] [DR] and he sexually assaulted [DI]. You can say he acted in conformity with his character. He sexually assaulted her; he sexually assaulted those two. That is how you use [BM]'s testimony*.

App. 25-27 (emphasis by Baez). Baez was convicted of the two charges, and was sentenced to consecutive life terms in the Texas Department of Criminal Justice.

Baez appealed his convictions to the Fourth Court of Appeals of Texas, which affirmed them. *Baez v. State*, 486 S.W.3d 592 (Ct. App. San Antonio – 2015). He then

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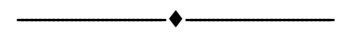
[2] "[A]ssumed" should be "assaulted."

filed a petition for discretionary review with the Texas Court of Criminal Appeals. The petition was refused without opinion. Baez filed a petition for a writ of certiorari (Cause No. 16-172), which was denied on October 11, 2016.

Having exhausted his appeals, Baez filed a 28 U.S.C. § 2254 petition before the United States District Court for the Western District of Texas. The district court denied relief and denied Baez's request for a COA. App. 3. Baez appealed and sought a COA from the Fifth Circuit, which was denied on March 26, 2019.



REASONS FOR GRANTING THE WRIT

I. Whether Baez's Jury Instructions Misstated The State's Burden Of Proof By Allowing Conviction On Less Than Proof Of All Elements Of The Charged Offense Raises A Question Debatable Among Jurists Of Reason

Baez's petition urges a response and resolution to the question left open by this Court in *Estelle v. McGuire*, 502 U.S. 62, n.5 (1991), 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, and if so, whether a jury instruction is necessary to salvage the age old tenet that a conviction can only obtain from evidence beyond a reasonable doubt of the offenses with which the

accused is actually charged, as promulgated in *In re Winship*, 397 U.S. 358 (1970).

The instructions given in this case concerning what was permitted the jury under Art. 38.37 Sec. 2(b) allowed the jury to convict Baez because it found that the State had proved the extraneous acts against BM, to the exclusion of, or with something less than evidence beyond a reasonable doubt that he had committed the charged act. The instructions created the type of situation that this Court has explained as constitutionally impermissible. The government must, precedent makes clear, prove each and every element of a charged offense beyond a reasonable doubt. *See generally Winship*, 397 U.S. 358 (1970). The jury must make its findings based on instructions that make clear that requirement and that do not reduce the government's burden of proof. *See generally Sullivan v. Louisiana*, 508 U.S. 275 (1993). The constitutional error was fleshed out during the state's closing arguments, when the prosecutor argued that the jury was free to convict Baez by considering and believing BM's extraneous act evidence, all on its own, and independently of the charged offenses.

In this case, reasonable jurists could debate whether the instructions impermissibly lowered the burden of proof and resulted in structural error. *See generally Slack v. McDaniel,* 529 U.S. 473 (2000). The Fifth Circuit's failure to acknowledge this issue renders its claims about the instructions inapt. The Court should therefore grant certiorari and remand the case to the court of appeals with instructions to grant a

certificate of appealability and hear the merits of Baez's claims.

II. This Court Should Grant Baez A COA

A. The COA Standard

A § 2254 petitioner merits a COA when he makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2254(d)(1), (2); *Slack*, 529 U.S. at 483-484. An applicant makes that showing by demonstrating "reasonable jurists could debate whether" the constitutional claims he presented in the court below "should have been resolved in a different manner" or were claims "'adequate to deserve encouragement to proceed further.'" *Slack,* 529 U.S. at 484 (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 & n.4 (1983)); *Miller-El v. Cockrell,* 537 U.S. 322, 342 (2003) (that issue is debatable is what COA standard requires). Baez satisfies the COA standard.

Baez's case raises questions that go to the foundation of the Court's criminal justice jurisprudence and the integrity of our criminal justice system. The failure in the jury charge to require that a jury convict only after it was satisfied that the charged offenses were independently proved beyond a reasonable doubt constitutes structural error that violates Baez's intertwined Due Process rights under *In re Winship*, 397 U.S. 358 (1970), and his Sixth Amendment right to have his guilt determined by a jury's proper true verdict of guilt under *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

B. The Protections Afforded Under *Winship* and *Sullivan*

It is well settled that "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." *In re Winship*, 397 U.S. 358, 364. It is equally well settled that the instructions given to the jury must ensure that this reasonable-doubt standard is met. "[T]he essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional [jury charge] error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings." *Sullivan*, 508 U.S. at 281.

When the Texas Legislature enacted Art. 38.37 Sec. 2(b) of the Texas Code of Criminal Procedure on September 1, 2013, it unleashed an evidentiary tsunami that eviscerates *Winship's* mandate. Petitioner Baez's convictions and his two consecutive life sentences are the product of the Texas Legislature's mission to maximize the number of criminal convictions involving allegations of sexual abuse against children. The statute requires that the trial court give a jury instruction that allows the jury to consider uncharged criminal conduct by Baez that was similar to the criminal allegations alleged in his indictment, for any bearing that the evidence had on relevant matters, including his character and acts performed by him in conformity with his character. Without an instruction requiring the jury to first determine Baez's guilt as to the charged offenses, beyond a reasonable doubt, the

addition of the Art. 38.37 Sec. 2(b) instruction in the jury charge violated *Winship's* mandate because it allowed the jury to convict Baez if it believed that he acted in conformity with similar uncharged conduct, and therefore, on less than evidence beyond a reasonable doubt of his guilt, as to the charged offenses. The error was compounded when the prosecutor argued that Baez could be convicted if the jury believed he committed extraneous acts of misconduct against BM, whose allegations, and name as a complainant, were not part of the indictment.

The type of error in Baez's jury charge was first identified as "structural," in *Sullivan v. Louisiana*, which held that "the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional [jury charge] error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings." *Sullivan*, 508 U.S. at 281. In explaining the structural error caused by a faulty reasonable-doubt instruction, the Court remarked "[i]t is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated."

Sullivan was charged with first-degree murder in the course of committing an armed robbery at a New Orleans bar, convicted, and sentenced to death. *Sullivan*, 508 U.S. at 276. "In his instructions to the jury, the trial judge gave a definition of 'reasonable doubt' that was . . . essentially identical to the one held unconstitutional in *Cage v. Louisiana,* 498 U.S. 39, 112

L. Ed. 2d 339, 111 S. Ct. 328 (1990) (*per curiam*)." *Id*. In *Cage*, this Court discussed the specific language in the instruction:

> In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole. *Francis v. Franklin*, 471 U.S. 307, 316, 85 L. Ed. 2d 344, 105 S. Ct. 1965 (1985). **The charge did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it then equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty.** It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that was required by the Due Process Clause.

Cage, 498 U.S. at 41 (emphasis added). *Sullivan* elaborates that "[w]hat the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause." *Sullivan*, 508 U.S. at 277. "The prosecution bears the burden of proving all elements of the offense charged, *see, e.g., Patterson v. New York*, 432 U.S. 197, 210 (1977); *Leland v. Oregon*, 343 U.S. 790, 795 (1952),

and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements." *See, e.g*., *In re Winship*, 397 U.S. 358, 364; *Cool v. United States*, 409 U.S. 100 (1972) (*per curiam*). *Sullivan*, 508 U.S. at 277-278. "This beyond-a-reasonable-doubt requirement, which was adhered to by virtually all common-law jurisdictions, applies in state as well as federal proceedings." *Sullivan*, 508 at 278 (citing *Winship*, 397 U.S. at 364). *Sullivan* expounds that "[i]t is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." *Id*. "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt." *Id*. "In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Id*. In *Sullivan*, the court concluded that its "*per curiam* opinion in *Cage*," which it accepted as "controlling, held that an instruction of the sort given [in *Sullivan's* trial did] not produce such a verdict." *Id*. "[Sullivan's] Sixth Amendment right to jury trial was therefore denied." *Id*.

Sullivan further counsels that "the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings." *Sullivan,* 508 U.S. at 281. Explaining why the instruction faulty reasonable-doubt instruction could not be subjected to harmless

error analysis, Justice Scalia wrote that "[t]here being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless," since "[t]here is no *object*, so to speak, upon which harmless-error scrutiny can operate." *Id*. at 280 (emphasis in *Sullivan*). The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt – not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. *Id*. (emphasis in *Sullivan*) (citation omitted). "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." *Id*. at 280 (citing *Bollenbach*, 326 U.S. at 614 (1946)).

The jury charge error in *Sullivan's* is conceptually identical to the one in Baez's jury charge. As in Baez's jury charge, the jury charge in *Cage* "did at one point instruct that to convict, guilt must be found beyond a reasonable doubt." App. 21-23. However, the instruction in *Cage* was rendered unconstitutional when its language thereafter equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and then required a "moral certainty" that the defendant was guilty. *See supra*. In similar fashion, the reasonable-doubt instruction in this case were nullified by the subsequent 38.37 Sec. 2(b) subsequent

instruction, which allowed the jury to convict Baez, based solely on his character, and his uncharged criminal conduct found to be in conformity with that character, without first determining that Baez's was guilty on the charged offenses, beyond a reasonable doubt. App. 23-24. Baez's jury charge thus created a situation in which no court could say that the jury had found the necessary elements beyond a reasonable doubt. The instructions contained no limiting instruction that attempted to reconcile the need to discharge *Winship's* mandate as to the charged offenses with the Art. 38.37 Sec. 2(b) instruction that stated that prior offenses alone could establish the current offense charged.

The election by the jury is of course indecipherable since its verdict in Baez's – and all Texas criminal trials – was a general one. As observed in *Sullivan*, because "[i]n the typical case . . . a jury does not make explicit factual findings," but "rather, it simply renders a general verdict on the question of guilt or innocence . . . the reviewing court is usually left only with the record developed at trial to determine whether it is possible to say beyond a reasonable doubt that the error did not contribute to the jury's verdict . . . [and therefore] necessarily engages in some speculation as to the jury's decision making process; for in the end no judge can know for certain what factors led to the jury's verdict."). *Sullivan*, 508 U.S. at 284.

III. The Prosecutor's Closing Argument Demonstrates The Inevitable Understanding Of The 38.37 Sec. 2(b) Instruction

The jury instructions allowed Baez to be convicted solely based on his prior offense and character, and without a unanimous verdict that he was guilty beyond a reasonable doubt as to the charged offenses. That this is the natural and reasonable understanding of the instruction is shown by the prosecutor's use of the instruction. Armed with the 38.37 Sec. 2(b) instruction, the prosecutor argued in closing that the jury could convict Baez solely because he acted in conformity with his character, specifically, that if the jury believed Baez sexually assaulted BM, then they could assume that he acted in conformity with that conduct, and thus, could then convict him of assaulting DI and DR. Because, as recognized in *Sullivan*, Baez was convicted by way of a general verdict, it is impossible to know whether Baez was convicted because the jury was convinced that he committed each charged offense beyond a reasonable doubt, or whether, *in lieu of*, or even short of that burden, the jury convicted Baez simply because they believed that he acted in conformity with his prior abuse of BM. Thus, it is conceivable that the jurors convicted Baez on the basis of the 38.37 Sec. 2(b) instruction, 1. to the complete exclusion of the reasonable doubt instruction as to the charged offenses, 2. where some jurors considered the reasonable doubt instruction as to the charged offenses, and others did not, or 3. that all of the jurors considered the reasonable doubt instructions as to the charged

offenses, but were less than unanimous as to whether Baez was guilty beyond a reasonable doubt, and filled the conviction gap, as it were, with evidence of Baez's character. Any such scenario would fail to satisfy the well-established, minimum standard required to sustain a guilty verdict, as mandated by the Due Process Clause under *Winship*.

IV. A Natural Incompatibility Between Character And Propensity Evidence And *Winship's* Mandate That Must Be Resolved By This Court

The problem with evidence of other crimes for which defendant has not been charged or convicted is not that the evidence lacks probative value but rather that the evidence is so powerful that it may deny the defendant the opportunity to defend against the charged offense. *Michelson v. United States*, 335 U.S. 469, 475-476, 69 S. Ct. 213, 93 L. Ed. 168 (1948). As explained in the following commentary, this appears highly unlikely:

> . . . In criminal cases, it is well-settled that due process requires that the accused be acquitted unless the state can prove the defendant's factual and legal guilt "beyond a reasonable doubt." (citing *Winship*, *supra*, at 161). Even if one assumes that the admission of other-misconduct evidence for propensity purposes does not shift the entire burden of proof from the state to the defendant by undermining the presumption of innocence, the

> admission of such evidence invariably lowers the state's burden of persuasion. Every trial lawyer knows from personal experience what a sea change may occur in a jury's attitude toward the accused's case even when other-misconduct evidence is legitimately admitted for a non-propensity purpose.

See "ON A COLLISION COURSE: PURE PROPENSITY EVIDENCE AND DUE PROCESS IN ALASKA," at 194; Drew D. Dropkin & James H. McComas, Alaska Law Review (2001). But Art. 38.37 Sec. 2(b) specifically allowed the jury in Baez's trial to do just that. As this Court has observed, the jury's critical task of ensuring that a guilty verdict falls within the parameters of the Due Process Clause becomes largely impossible when propensity evidence appears:

> In his prescient opinion in *Spencer* [*v. Texas*, 385 U.S. 554 at 575 (1967)], Chief Justice Warren also recognized that the admission of propensity evidence for propensity purposes threatened to lighten the state's burden of persuasion, noting that "[r]ecognition of the prejudicial effect of prior convictions evidence has traditionally been related to the requirement of our criminal law that the State prove beyond a reasonable doubt the commission of a specific criminal act." (citing *Spencer* at 575). Almost 25 years later, Justice O'Connor echoed Chief Justice Warren's concerns about the jury's misuse of propensity evidence. In response to a jury instruction that encompassed propensity language, Justice O'Connor observed that this language may "relieve[ ] the

> State of its burden of proving the identity of [the] murderer beyond a reasonable doubt." (citing *Estelle v. McGuire*, 502 U.S. 62, at 76 (1991) (O'Connor, J., concurring in part and dissenting in part.).

Id. The Court in *McGuire* "express[ed] 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) leaving the issue unresolved with this Court. Until that question is answered by this Court – and Baez's petition presents the perfect vehicle for doing so – it will be necessary to apply an instruction band-aid to preserve *Winship's* mandate, and prevent *Sullivan* error. While Texas is relatively new to the conviction-by-character evidence game, the dilemma faced by Baez was long ago tackled by a number of state and federal courts in California, and by the Ninth Circuit, which has published opinions that have both sustained and rejected Baez's challenge, also *via* the 2254, federal habeas process.

V. Both State And Federal Courts Have Recognized That Instructions Regarding Propensity Evidence Can Lower The Burden Of Proof And Confuse The Jury

Texas is not the only jurisdiction that has enacted an extraneous-offense statute that impinges upon the constitutional protection of proof beyond a reasonable doubt to a jury. California courts have addressed the arguments Baez makes head-on, and provide useful

illustrations of the difficulties these extraneous-offense act statutes raise. In *People v. Vichroy*, 76 Cal. App. 4th 92, 100 (Cal. App. 2d Dist. 1999), which involved a sexual abuse trial that was infused with evidence of similar extraneous acts, the jury was presented the following analogue instruction to Art. 38.37 Sec. 2(b):

> Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense [on one or more occasions] other than that charged in this case. "Sexual offense" means a crime under the laws of a state or of the United States that involves: [Any conduct made criminal by Penal Code section 647.6(a). The elements of [this crime] are set forth elsewhere in these instructions.] If you find beyond a reasonable doubt that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit [the same or similar type] of sexual offenses. If you find that the defendant had this disposition, **you may, but are not required to, infer that [he] was likely to commit and did commit the crime [or crimes] of which [he] is accused**. [Y]ou must not consider this evidence for any other purpose. Appellant contends this instruction undermines the presumption of innocence and the reasonable doubt standard.

Vichroy, 76 Cal. App. 4th at 98-99 (original emphasis). The court observed:

> The due process clause requires proof beyond a reasonable doubt of every fact necessary to constitute the charged crime [citing *In re Winship* [at], 364 [citation omitted]].
>
> We do not believe proof beyond a reasonable doubt of a basic fact, that appellant committed prior sexual offenses, may act as proxy or substitute for proof of the ultimate fact, *i.e.*, appellant's guilt of the currently charged offenses. The constitutional infirmity arises in this case because the jurors were instructed that they could convict appellant of the current charges based solely upon their determination that he had committed prior sexual offenses. [The extraneous offense instruction], as given, required no proof at all of the current charges.

Id. at 99. The court then considered whether there was a reasonable likelihood that the constitutional infirmity was eliminated, if the jury charge were considered *in toto*, but remained unconvinced. *Id.* at 99-100. The court determined that, the instruction violated *Winship's* mandate, explaining that, "[b]ecause [it could not] assume the jury followed the constitutionally correct conflicting instruction, the judgment must be reversed." *Id*. at 100-101 (emphasis added); *see also People v. Orellano*, 79 Cal. App. 4th 179 (Cal. App. 2d Dist. 2000) (stating, because "we have no way of knowing whether the jury applied the correct burden of proof, the convictions must be reversed"); *People v. Rubio*, No. B119521, 2007 Cal. App. Unpub. LEXIS 598 (Jan. 25, 2007) ("The jurors were specifically told they

could infer appellant's disposition, and his guilt of the current charges, from his commission of the prior crimes. . . . The danger that the jury leaped to a verdict of guilty is too great for us to confidently assume the jurors arrived at a verdict beyond a reasonable doubt by a careful reasoning process involving all the other instructions." (agreeing with *Vichroy* and *Orellano*)).

The Ninth Circuit has also considered the issues raised by the California extraneous-offense statute and concluded that they run afoul of constitutional requirements. *Gibson v. Ortiz*, 387 F.3d 812, 821 (9th Cir. 2004). The *Gibson* court affirmed the granting of a federal, 28 U.S.C. § 2254 petition because the jury instructions in Gibson's case 1. allowed the jury to consider extraneous offense evidence to infer Gibson's guilt on the charged offenses, and 2. compounded the problem by allowing the jury to establish the extraneous offenses by a preponderance of the evidence. In *Doe v. Busby*, 661 F.3d 1001 (9th Cir. 2011), the Ninth Circuit reaffirmed *Gibson's* holding, in sustaining that part of the district court's decision that reversed a state conviction based on structural, jury charge error, reasoning that "[w]hen the jury heard the preponderance instruction in tandem with the reasonable doubt instruction and without a reconciliation from the trial court, the jurors were left to guess which standard to apply." *Busby*, 661 F.3d at 1023 (citing *Gibson*, 387 F.3d at 823-824) ("We are unpersuaded by the warden's argument that the jury would be able to discard that portion of CALJIC No. 2.01 providing that each fact that supports an inference must be based upon a

reasonable doubt (as CALJIC No. 2.50.01's standard negates), but would nevertheless follow the portion of CALJIC No. 2.01 that requires all facts essential to establishing guilt to be found beyond a reasonable doubt."). The Court in *Busby* concluded:

> While we presume jurors follow the instructions they are given, we cannot equally assume they can sort out legal contradictions. The instructions directed the jury to consider evidence of Doe's prior unadjudicated acts of domestic violence, most of which were wholly unrelated to the crimes with which he was charged, to convict him, among other things, of first-degree murder. This was error under *Sullivan* and *Gibson*, and we affirm the district court's issuance of a conditional writ.

Id.[3] The Texas Art. 38.37 instruction presents similar difficulties. The instruction does not clearly require that the jury make the necessary constitutional findings and, as this case shows, invites the government to invite convictions based solely on evidence of extraneous acts, and not on evidence of the charged offenses.

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[3] *Busby* also explained the incorrectness of *Byrd v. Lewis*, 566 F.3d 855 (9th Cir. 2009) overruling of *Gibson's* application of a structural error analysis to an AEDPA case, explaining: "We agree with Judge Wallace that *Byrd*'s post-hoc observation about *Gibson* was pure dictum, by which we are not bound, and to which we give no deference." *Id*. at 1022 (citation omitted). *Gibson* and Baez's case concerned instructional errors which vitiate the jury's findings by lowering the ultimate burden of proof below a reasonable doubt, and by allowing a conviction solely on proof of extraneous offenses, without requiring evidence beyond a reasonable doubt of the charged offenses, respectively.

VI. Absence Of A Limiting Instruction

After *Vichroy*, and since the 2254 writ was granted in *Gibson*, California courts appear settled on the position that a three-pronged limiting instruction is the remedy that cures the incompatibility between *Winship's* mandate and propensity evidence that is admissible to prove guilt. As in *Gibson*, in *Perez v. Duncan*, 2005 U.S. Dist. LEXIS 21291 at *35 (N.D. Cal. Sept. 19, 2005), a California district court distinguished the instructions in *Gibson*, because the case before it included a limiting instruction which read as follows:

> If you find that the defendant committed a prior sexual offense you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused. *However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime. You must not consider this evidence for any other purpose.*

Perez, at *28-30 (emphasis by Baez). More recently, in *Rodriguez v. Wanda*, 2013 U.S. Dist. LEXIS 173489 (N.D. Cal. Dec. 11, 2013), a federal district court reaffirmed the importance of the "last three sentences," of the instruction to prevent *Sullivan* error (*Id*. at 14-16) (citing the approval of the "last three sentences" in *People v. Reliford*, 29 Cal. 4th 1007, 62 P.3d 601 (Cal. 2003), and *People v. Cromp*, 153 Cal. App. 4th 476 (Cal. App. 3d Dist. 2007)), and discussed how this language, while similar to the one in *Gibson*, "contain[ed] some language which, if read in isolation, could lead the jury to find the defendant guilty based on the uncharged offense." (*Rodriguez*, at *20-21).[4]

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[4] The State Bar of Texas's Committee on Criminal Jury Charges (of which the undersigned counsel is a member), has drafted its own instruction to address the application of Tex. Crim. Pro. Art. 38.37 Sec. 2(b):

> **EVIDENCE OF ANOTHER OFFENSE DEFENDANT POSSIBLY COMMITTED**
>
> During the trial you heard evidence that the defendant may have committed [an offense/offenses] [against [name of extraneous victim]/other than the one he is currently accused of in the indictment]. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit [the offense[s] against [name of extraneous victim]/the other offense[s]]. Those of you who believe the defendant committed [that offense/those offenses] may consider it.
>
> You may consider this evidence for any bearing this evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant. Even if you consider it, however, the defendant is not on trial for any offenses not alleged in the indictment. You must

The subject of how, and to what degree a jury may determine a defendant's guilt when caught between the gravitational pull of a proper reasonable doubt instruction, and pull of an instruction that allows an unlimited consideration of character and propensity evidence as direct evidence of guilt was debated in a California state decision, which also involved a sex abuse conviction, and California's own 38.37 Sec. 2(b) variant. Disagreeing with the majority in *People v. Reliford*, Justice Joyce L. Kennard, of the California Supreme Court explained:

> According to the majority here, the ambiguity in the instruction cannot cause jury confusion because to convict a defendant of a sexual crime based solely on evidence of a defendant's prior sexual offense is a "'logical impossibility.'" (citing Maj. opn., *ante*, at p. 1014.) Not true, as this example illustrates: A man sexually assaults a woman. She cannot identify her assailant because, for example, the assault occurs at night in an unlit room, she is blind or blindfolded, or the assailant wears a mask. The prosecution offers proof that the defendant, who is charged with the offense, has committed an uncharged sex crime, but it presents no evidence that the jury finds credible that he committed the

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determine if the state proved all the elements for the offense alleged in the indictment.

See State Bar of Texas, Texas Pattern Criminal Jury Charges, Sexual Offenses, CPJC 84.3, p. 68. For a discussion of the committee's research behind the instruction, including its determination of the final instruction language, *see* CPJC 84.1, ps. 53-56.

> charged offense. If given the instruction at issue here, a jury hearing such evidence might well conclude – although improperly so – that it could convict the defendant based solely on the uncharged crime, so long as that offense was proven beyond a reasonable doubt. Thus, contrary to the majority's view, a conviction of a sexual offense based solely on proof of a defendant's prior sexual offense is not a "logical impossibility."

People v. Reliford, 29 Cal. 4th 1007, 1017-1018 (Cal. 2003). Ultimately, however, Justice Kennard concurred with the majority, explaining:

> In this case, however, there is no reasonable likelihood that the ambiguous language in CALJIC (California Criminal Jury Instructions – Criminal) No. 2.50.01 misled the jury. (citation omitted). **The prosecution relied primarily on the testimony of the victim, M.S., rather than on evidence that defendant had committed a prior sex offense. Defendant did not deny having sexual relations with M.S., claiming only that she consented. The prosecutor never suggested that the jury could find defendant guilty based solely on his prior offense if it found beyond a reasonable doubt that he committed that offense.** On these facts, the ambiguous language in CALJIC No. 2.50.01 could not have prejudiced defendant.

Reliford, 29 Cal.4th at 1018 (emphasis by Petitioner). Unlike the facts in *Reliford*, at Baez's trial the

prosecutor argued that BM's testimony was as viable a basis as DR's and DI's testimony to find Baez guilty of the charged offenses, and the prosecutor actually argued that the jury could convict Baez on the weight of BM's testimony *alone*. In any event, Justice Kennard's decision to uphold Reliford's conviction, after surmising what the jury considered when determining guilt, is the same "reading of the tea leaves" approach that was flatly rejected in *Sullivan*. The ambiguities of how, and to what degree, a jury would consider guilt when faced with a defective reasonable doubt instruction, a task hopelessly complicated by the shroud of a general verdict, prompted the *Sullivan* Court to reject a harmless-error analysis as "illogical." *Sullivan*, 508 U.S. at 279. It is debatable among jurists of reason that the instructions in this case created the same danger of conviction upon a lesser standard that was created in *Sullivan*. Such a trial process is flatly at odds with *Winship's* mandate, and *Sullivan's* holding.

VII. This Court Should Clarify The State Of The Law As It Pertains To The Use Of Extraneous Evidence As Substantive Evidence Of Guilt

The practice of permitting prosecutions that allow the introduction of extraneous-offense, and character and conformity evidence, as substantive evidence of guilt, strays well beyond the reach of Due Process that was contemplated by this Court in *McGuire*, and presents a clear challenge to the well-settled Due Process and Sixth Amendment guarantees in *Winship*, and

Sullivan. Baez submits that *Winship's* mandate cannot be harmonized with an instruction that allows a jury to openly consider character and propensity evidence, simply by reminding the jury that a defendant is not on trial for the extraneous conduct. As noted in *Busby*, *supra*, while we can presume that jurors follow the instructions they are given, we cannot equally assume they can sort out legal contradictions, such as the one created by an unbridled application of Art. 38.37 Sec. 2(b) in Baez's criminal jury charge. It is unreasonable to expect a jury to convict only with evidence beyond a reasonable doubt of the charged offenses, when the jury is instructed, without any limiting instruction that reconciles and preserves *Winship's* mandate, and when a prosecutor, with the full backing of the statute openly argues, that the jury may consider character evidence, for any purpose, in its guilt deliberations. The wound festers with the unlimited application of Art. 38.37 Sec. 2(b).

The Court should remand to the Fifth Circuit with an instruction to grant Baez's COA, and allow him to directly appeal the district court's denial of his federal habeas petition. A COA should be issued when a person has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Baez has clearly demonstrated that reasonable jurists considering the issue he raises in both state and federal courts, can and do "debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *See Miller-El*, 537 U.S. at 336

(internal quotation marks and alterations omitted) (quoting *Slack*, 529 U.S. at 484); *see also Buck v. Davis*, 137 S. Ct. 759, 773 (2017). To obtain a COA, Baez does not have to prove that he wins on the merits. "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims," but instead requires "an overview of the claims in the habeas petition and a general assessment of their merits." *Id*. It is indisputable that there exists extensive and on-point disagreement between jurists in the Ninth Circuit opinions that determined each of the above-referenced Section 2254 petitions, as to whether the instructions in Baez's case constituted structural error under *Sullivan*.

The time has come to resolve the questions left open in *McGuire*, whether, and to what extent juries should be allowed to consider character and propensity evidence as substantive evidence of guilt without nullifying *Winship's* mandate, and whether and to what extent a limiting instruction can be the remedy that preserves the fundamental fairness of our criminal jury trial process.

CONCLUSION

For these reasons, Petitioner asks that this Honorable Court grant a writ of certiorari, vacate the judgment of the court of appeals, and remand the case with instructions to grant a certificate of appealability.

Respectfully submitted,

GEORGE W. ARISTOTELIDIS
Counsel of Record
for Petitioner

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