

19-5537
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

Benjamin Escobedo — PETITIONER
(Your Name)

vs.

THE STATE OF TEXAS — RESPONDENT(S)

Supreme Court, U.S.
FILED

AUG 01 2019

OFFICE OF THE CLERK

ON PETITION FOR A WRIT OF CERTIORARI TO

Fourth Court of Appeals

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

PETITION FOR WRIT OF CERTIORARI

Benjamin Escobedo #02194525
(Your Name)

9601 SPUR 591

(Address)

Amarillo, Texas 79107

(City, State, Zip Code)

X1/A

(Phone Number)

QUESTION(S) PRESENTED

1. Did the Trial court err when it overruled Appellants MOTION to Quash the Amended indictment? (C.R.36,38, R.R.4,7).
2. Did the court of Appeals err by not handing down a written opinion on Appellants MOTION to Quash The Amended indictment.?
3. Is a MOTION to Quash the indictment a proper vehicle for alerting the trial court of defects on face of indictments?
4. Did the trial court violate defendants United state's Constitutional Right. Amendment VI.?
5. Did the trial court violate defendants 14th Amend. U.S. CONST. Due Process of Law by denieing Petitioners Motion to Quash?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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INDEX TO APPENDICES

APPENDIX A State court decision, court's judgment with regard to Appellants conviction for continuous abuse child is Affirmed Counts II, IV and V, are Reversed and Vacated. 12/27/18. APPENDIX B decision from the Texas Court of Criminal Appeals was refused / White card. 5/8/19.

APPENDIX C Motion to amend the Judgment of December 27, 2018. Court of Appeals issued a mandate on June 17, 2019.

APPENDIX D Appellant filed a motion En Banc Reconsideration on June 28, 2019. Appellant received notification from Court of Appeals, stating motion is filed. - Pending -

APPENDIX E On July 15, 2019 court of Appeals issued a dismissal for the en banc reconsideration due to lack of Jurisdiction.

APPENDIX F

ON July 26, 2019, Petition filed a P.D.R reconsideration to the Court of Criminal Appeals. . . Pending.

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
1. McFarland V. STATE 930.S.W.2d 99 at 100 (Tex. Crim App 1996).	5
2. Garza V. STATE 715 S.W.2d.642. (Tex. Cr. App. 1986).	5
3. Foster V. STATE 635 S.W.2d.710,717 (Tex. Cr. App 1982).	5
4. Mararaves V. STATE 996.S.W.2d. 290 (Tex. App-Houston 1999).	5
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6. State V. Castorena, 486 S.W.3d.630,632 (Tex. App 2016)	
7. State V. Brousseau, 396 S.W.3d.550,555 n.6 (Tex. Crim. App. 2013).	
8. Curry V. State, 30.S.W.3d.394,398 (Tex. Crim. App. 2000).	

STATUTES AND RULES

1. Texas Code of Criminal Procedure. Art. 21.01 - 6
2. Vernon's Ann. Tex. C.C.P. Art. 27.08, 27.09. ~~5~~ 5
3. Vernon's Ann. Tex. C.C.P. Art 28.01 § 2. .6
4. Texas Rule. App. Pro. Rule 90(a) referred to Rule 47.1
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6. United States Constitution. Amendment VI.
7. Texas Constitution. Art. I § 1D.
8. Texas Code of Criminal Procedure. Art 21.02 (7).
9. Texas Code of Criminal Procedure. Art. 21.03.
10. Texas Code of Criminal Procedure. Art. 21.04.
11. United States Constitution. Amendment 14th.

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix *N/A* to the petition and is

[] reported at _____ *N/A* ; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix *N/A* to the petition and is

[] reported at _____ *N/A* ; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix *B* to the petition and is

[] reported at _____ ; or,
[] has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the *fourth court of appeals* court appears at Appendix *A* to the petition and is

[] reported at _____ ; or,
[] has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was N/A.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 5/8/19 ~~12/27/18~~.
A copy of that decision appears at Appendix B.

A timely petition for rehearing was thereafter denied on the following date: 6/17/19, and a copy of the order denying rehearing appears at Appendix C.

An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Texas Code of Criminal Procedure, Art. 21.01: An indictment is the written statement of a grand jury accusing a person therin named of some act or omission which by law is declared to be an offense.
2. Texas Rule, App. Pro. Rule 90(a) referred to Rule 47.1
Written Opinions: The court of appeals must hand down a written opinion that is brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.
3. Vernon's Ann. Tex. C. C. P. Art. 28.01 § 2: The rule requiring that a motion to set aside, dismiss, or quash an indictment be presented to the trial court prior to announcement by that party ready for trial serves the salutary purpose of preventing unnecessary trials and deterring the interruption of a trial on the merits for any objection relating to the institution and presentation of the charge.
4. Vernon's Ann. Tex. C. C. P. Art. 27.08 Exception to substance of indictment: There is exception to the substance of an indictment or information except:
(3) That it contains matter which is a legal defense or bar to the prosecution, (4) That it shows upon its face that the court trying the case has no jurisdiction thereof.
5. Vernon's Ann. Tex. C. C. P. Art 27.09(3): Exception to the form of an indictment or information may be taken for the following causes only:
(3) that it was not returned by a lawfully chosen or empaneled grand jury.
6. ~~T.R.A.P. 9.4(l)(2)(D)~~: ~~Certificate of compliance with the type face requirements for hand-written Petition for Discretionary Review no longer than 15 pages if it is hand-written.~~

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

6. TEX. CODE CRIM. PRO. art 21.02(7). "Everything should be stated, The offense must be set forth in plain and intelligible words."
7. TEX. CODE CRIM. PRO. art. 21.03. " Everything should be stated in an indictment which is necessary to be proved"
8. TEX CODE CRIM PRO. art 21.04. "The certainty required in an indictment is such that will enable the accused to plead the Judgment that may be given upon it in bar of any prosecution of the same offense."
9. Six Amendment. U.S.A CONSTITUTION.
Rights of the accused: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial Jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation.
10. TEXAS Constitution I § 10 Rights of accused in Criminal prosecutions: In all criminal prosecutions the accused shall have a speedy public trial by an impartial Jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof.
11. Fourteenth Amendment. U.S.A. Constitution.
citizens of the United States in no state shall make or enforce any Law which shall abridge the privileges or immunities of citizens of the United States., nor shall any state deprive any person of life, liberty, or property without due process of Law.

STATEMENT OF THE CASE

The record contains a number of pro se motions filed by Mr. Escobedo. One of these was a motion to quash. The motion states that "The indictment fails to allege all essential acts and omissions by Defendant necessary to constitute a violation of Section 21.02 of the Texas Penal / Health & Safety Code; and that "The indictment is insufficient in law in that it is so vague and indefinite, that if Defendant were found guilty, a Judgment based on said indictment would not be such as could be used as a plea and bar of a subsequent prosecution for the same offense." (CP, 36-38). The trial court conducted a pretrial hearing immediately prior to the start of the State's case-in-chief. The court addressed several motions, including the motion to quash. The following occurred during that hearing:

MR. HAJEK: Motion to quash. They don't agree.

THE COURT: Motion to quash based on?

MR. HAJEK: That's his motion Judge.

THE COURT: I'll tell you what, after hearing those allegations in the indictment, I think they have put everything in there. It's obvious - I don't think there is [sic] any omissions as far as the charging document that I can see. I have no idea what the evidence might show, but it seems like they've charged them with everything they could. I'm going to deny that at this time. Obviously, he will have an opportunity to ask for a directed verdict at the appropriate time or something to mandate. (RH4, 6-7).

Written opinions: Petition For Discretionary review is refused. On direct appeal, Court of Appeals does acknowledge the issue for the motion to quash the but does not hand down a written opinion and failed to investigate the improper Amended indictment.

The purpose of a motion to quash is to object to the form or validity of an indictment. *Margraues v. State* 996 S.W. 2d 290 (Tex. App-Houston [14 Dist] 1999).

REASONS FOR GRANTING THE PETITION

The court of appeals erred by not handing down an opinion on appellant's motion to quash the indictment. The court of appeals acknowledge the issue, but failed to investigate the improper amended indictment. The court of appeals passed on to double Jeopardy only declaring that appellants issue was not preserved. The record shows Appellant has preserved this issue with the motion to quash the indictment.

An applicant court must always address challenges to the [legal] sufficiency of the evidence (see) Garza v. State 715 S.W.2d 642 (Tex. Crim. App 1986). This court has held that an applicant court must examine and decide a sufficiency challenge even if the conviction must be reversed on other grounds. Foster v. State 635 S.W.2d 710 717 (Tex. Cr. App 1982).

The appellants motion to quash the indictment was presented before the start of the case-in-chief (RH4, 6-7). The "rule" requiring that a motion to quash to set aside, dismiss, or quash an indictment be presented to the trial court prior to announcement by that party is ready for trial serves the salutary purpose of preventing unnecessary trials and deterring the interruption of a trial on the merits for any objection relating to the institution and presentation of the charge. Vernon's Ann. Tex. C. C. P Art. 28.01 § 2. Appellants motion to quash the indictment is a proper vehicle for alerting the trial court of the defects that were on the face of the amended indictment.

The motion to quash hearing was held before any evidence was presented to the Jury. The trial court viewed the indictment without benefit of hearing any testimony, and because of that the trial court should of granted the motion to quash.

A motion to quash must be decided on defects based on defects in the indictment itself not on evidence produced at the pretrial hearing, and certainly not on evidence later presented at trial 548 S.W.3d 751, 756, (Tex. App. - Corpus Christi 2018, no pet).

REASONS FOR GRANTING THE PETITION

An appellate court reviews a trial court's order denying a motion to quash de nova. STATE V. Castorena, 486 S.W.3d 630, 632 (Tex. App. San Antonio, 2016 no pet.) (citing STATE V. — Rousseau, 396 S.W.3d 550, 555 n. 6 (Tex. Crim. App. 2013)). Both the U.S. Constitution and the Texas Constitution guarantee the accused the right 'to be informed of the nature and cause of the accusation' against him.

The charging instrument must convey sufficient notice to allow the accused to prepare a defense." CURRY V. STATE, 30 S.W.3d 394, 398 (Tex. Crim. App. 2000) (citing U.S. CONST. amend. VI, TEX. CONST. art I, § 10).

From what was available to the court at the time of the hearing in this case, there was no reasonable alternative but to grant the Motion to Quash.

The Texas code of Criminal Procedure addresses what is required in a proper indictment. "The offense must be set forth in plain and intelligible words." TEX. CODE CRIM. PRO. art 21.02 (7). "Everything should be stated in an indictment which is necessary to be proved." TEX. CODE CRIM. PRO. art. 21.03. "The certainty required in an indictment is such that will enable the accused to plead the Judgment that may be given upon it in bar of any prosecution of the same offense." TEX. CODE CRIM. PRO. art 21.04.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Benjamin Escobedo

Date: July 29, 2019