**No. 19-6910**

In the Supreme Court of the United States

**Alfred T. Moliere**
*Petitioner*

*v.*

**The State of Texas**
*Respondent*

*On Petition for Writ of Certiorari to the Court of Appeals for the Fourteenth District of Texas*

# Respondent's Brief in Opposition


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## Questions Presented

The petitioner set out the following question in his petition:

> Generally, *Apprendi v. New Jersey* requires that any fact serving to increase a criminal penalty be found by a jury. Article 42.013, Texas Code of Criminal Procedure, requires judges (not juries) to make family-violence findings—even in jury trials. In Texas, a finding that an offense involves family violence augments statutorily-prescribed criminal penalties by making possession of a firearm unlawful. Does Article 42.013 contravene *Apprendi* thereby rendering the statute unconstitutional?

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## Opinion Below

A panel of the Court of Appeals of Texas for the Fourteenth District of Texas affirmed the petitioner's conviction and sentence in a published opinion on direct appeal. *Moliere v. State*, 574 S.W.3d 21 (Tex. App.—Houston [14th Dist.] 2019, pet. ref'd). That court denied the petitioner's motion for *en banc* reconsideration and the Court of Criminal Appeals of Texas denied the petitioner's petition for discretionary review.

## Statement of the Case

The petitioner was charged by information with assaulting an individual with whom he had a dating relationship. (CR 7). The petitioner pleaded not guilty. (2 RR 88-89). A jury found him guilty as charged. (CR 107). The trial court assessed punishment at a year's confinement in the county jail. (CR 108).

## Summary of the Argument

This Court should reject the petition because the complained-of statute does not affect the petitioner's rights. Also, the state court opinion was decided on state law grounds, as the petitioner admits.

## Reasons to Refuse the Petition

**The family-violence finding on the judgment does not have the legal effect the petitioner claims it does. Striking down Article 42.013 as unconstitutional and removing the family violence finding from the judgment will not alter the petitioner's ability to lawfully possess a firearm under state or federal law.**

The petitioner's entire *Apprendi* claim hinges on the belief that entry of a family violence finding on the judgment bars him from possession of a firearm. He is incorrect. It is the nature of the conviction—not the judge's description of it—that determines whether a defendant is prohibited from possessing firearms. And some offenses require entry of a family violence finding but do not create a prohibition on firearm possession under state law.

Texas Code of Criminal Procedure Article 42.013 requires the trial judge to make a finding on the judgment for conviction of an assaultive offense if the offense involved "family violence," which is defined in another statute. TEX. CODE CRIM. PROC. art. 42.013. Texas Penal Code 46.04(b) makes it an offense for an individual to possess a firearm within five years of being convicted of Class A assault "involving a member of the person's family or household." TEX. PENAL CODE § 46.04(b).

Section 46.04 never mentions an Article 42.013 family violence finding. Even if the trial court did not make a finding under Texas Code of Criminal Procedure Article 42.013 the State, in a future prosecution, could still prove an offense under Section 46.04 using extrinsic evidence.

Federal law illustrates this point. Section 46.04(b) is much like 18 U.S.C. § 922(g)(9)—commonly called the Lautenberg Amendment. That statute prohibits firearm possession by anyone who has been convicted of "a misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(9). This Court has held that "the domestic relationship [for the predicate offense], although it must be established beyond a reasonable doubt [in a prosecution under the Lautenberg Amendment] need not be a defining element of the predicate offense." *United States v. Hayes*, 555 U.S. 415, 418 (2009). That is, there is no requirement of a finding at the first trial—either by the judge or jury—that it was a "crime of domestic violence." The nature of the first conviction is an element at the second trial.

Though the State can find no case applying the rule in a Section 46.04(b) prosecution, that section's language is like Texas Penal Code Section 22.01(b)(2)(A), which elevates to a felony assault of a family

member, household member, or individual with whom the defendant had a dating relationship if the defendant had a prior conviction that falls into that category. TEX. PENAL CODE § 22.01(b)(2)(A). Neither 46.04(b) nor 22.01(b)(2)(A) refer to Article 42.013.

Texas courts have held that a finding under Article 42.013 is not a prerequisite for a felony prosecution under Section 22.01(b)(2)(A). *See, e.g., State v. Eakins*, 71 S.W.3d 443, 444 (Tex. App.—Austin 2002, no pet.) ("There is nothing in the language of either statute that requires an article 42.013 affirmative finding in the previous assault judgment in order to invoke section 22.01(b)(2)."); *see also Ledet v. State*, No. 14-04-00739-CR, 2006 WL 461498, at *2 (Tex. App.—Houston [14th Dist.] Feb. 28, 2006, pet. ref'd) (mem. op. not designated for publication) (upholding felony assault of a family member conviction where conviction for prior judgment did not include Article 42.013 finding, but other facts proved nature of prior conviction). Given the similarity of how the statutes are worded, there is no obvious reason why an Article 46.013 finding would be a prerequisite for conviction under Section 46.04(b) but not Section 22.01(b)(2)(A).

Another reason to interpret Section 46.04(b) as not needing an Article 42.013 finding is that the Article 42.013 finding encompasses

many situations that would not render one subject to a Section 46.04(b) prosecution. Section 46.04(b) prohibits firearm possession to those convicted specifically of misdemeanor assault "involving a member of the person's family or household." But the Article 42.013 finding applies to any conviction involving "family violence, as defined by [Texas Family Code] Section 71.004."

Family Code Section 71.004 defines "family violence" to include, *inter alia*, "dating violence, as that term is defined by Section 71.0021." TEX. FAMILY CODE § 71.004(3). That section describes many situations that do not necessarily involve a family member or household member. A defendant's conviction for assaulting his girlfriend (or his ex-girlfriend's new boyfriend) would trigger a family violence finding under Article 42.013, but, unless the victim was the defendant's family member or household member, that conviction could not be a predicate offense for a Section 46.04(b) prosecution. *See* TEX. FAMILY CODE § 71.0021. Thus, an Article 42.013 finding is not necessary for barring possession of a firearm under Section 46.04(b), and there are circumstances where it is not even sufficient.

The Article 42.013 finding does not impact the petitioner's rights in the way he claims. This Court should deny the petition for lack of

standing. *See County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 154-55 2223 (1979) ("A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights.").

**As the petitioner admits, the state court resolved this matter by holding the petitioner procedurally defaulted his facial challenge. The "holding" the petitioner complains of is an alternate holding not essential to the state court's judgment.**

The petitioner did not raise this facial challenge in the trial court. Texas courts require facial challenges be raised in the trial court. *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009). The State argued, and the state court agreed, that this matter was not preserved. *Moliere*, 574 S.W.3d at 25. This Court respects the power of states to set reasonable limits on the presentation of federal issues, and will not review a state court's rejection of a procedurally defaulted federal claim. *Beck v. Washington*, 369 U.S. 541, 549-50 (1962); *In re Lamkin*, 355 U.S. 59, 59 (1957).

The petitioner tried to skirt the preservation requirement by presenting this as an illegal-sentence claim. The state court held that this was inappropriate: To raise an illegal-sentence claim based on the un-

constitutionality of a statute, the defendant must either raise the constitutional challenge in the trial court, or the statute must have already been declared unconstitutional in a prior case. *Moliere*, 574 S.W.3d at 25 (citing *Ex parte Beck*, 541 S.W.3d 846, 855 (Tex. Crim. App. 2017)).

The petitioner complains about the state court's discussion of whether a prohibition of firearm ownership was punitive (Petition at 21-23), but that was an alternate holding, as the petitioner admits. (Petition at 14 ("The [state court] rejected the petitioner's] argument first and foremost because he did not preserve the error in the trial court.")). This Court should deny the petition because the state court's holding on preservation is an adequate and independent state ground for rejecting the claim. *See Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.").

## Conclusion

The respondent asks this Court to deny the petition for writ of certiorari.

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**Respondent's Brief in Opposition**

The undersigned counsel for the respondent is a member of the Bar of this Court and hereby certifies that on January 30, 2020, a true and correct copy of the Respondent's Brief in Opposition was mailed via first-class postage-prepaid service to petitioner's counsel:

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Furthermore, all parties required to be served have been served.

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