

19-7724

No. _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

BYRON RAY BARKER - PETITIONER

vs.

Supreme Court, U.S.

FILED

DEC 12 2019

OFFICE OF THE CLERK

THE STATE OF TEXAS - RESPONDENT

PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF
CRIMINAL APPEALS, CASE NO. PD-0614-19

PREPARED By:

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SUPREME COURT, U.S.

QUESTIONS PRESENTED

- I. Does the introduction of extraneous offenses, pursuant to Texas Code of Criminal Procedure Article 38.37 violate the right to a fair trial and shift the burden of proof?
- II. Is the balancing test conducted pursuant to Texas Rules of Evidence, Rule 403 sufficient to prevent the unfair prejudice of extraneous offenses?

LIST OF PARTIES}*

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

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IN THE SUPREME COURT OF THE UNITED STATES

Petition for Writ of Certiorari

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

OPINIONS BELOW

For cases from state courts'

The opinion of the highest state court to review the merits appears at Appendix "A" and is unpublished.

The opinion for the First Court of Appeals of Texas appears at Appendix "B" to the petition and is also unpublished.

JURISDICTION

The date on which the highest state decided my case was
October 9, 2019.

A copy of that decision appears at Appendix "A"

No timely Petition for Rehearing was filed

The jurisdiction of this court is invoked under 28 USC § 1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime... nor be deprived of life, liberty, or property without due process;

AMENDMENT XIV

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; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXAS CODE OF CRIMINAL PROCEDURE

ARTICLE §38.37

Section 2(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) or (2) for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.

Section 2-a Before evidence described by Section 2 may be introduced the trial judge must:

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

Section 3 The state shall give the defendant notice of the state's intent to introduce in the case in chief evidence described by Sec. 1 or 2 not later than the 30th day before the date of the defendant's trial.

STATEMENT OF THE CASE

The Petitioner was tried before a petite jury for Continous Sexual Assault of a Child in violation of Texas Penal Code § 21.02. Prior to trial, the State provide notice of intent to introduce extraneous sexual offenses, allegedly committed by the Petitioner, pursuant to Texas Code of Criminal Procedure § 38.37.

As required by the rule, the trial court performed a balancing test, pursuant to Texas Rules of Evidence, Rule 403 and determined the extraneous offense testimony was more probative than prejudicial. Over objection of the Petitioner, a child was permitted to testify about sexual offense allegations extraneous to the indictment.

The jury convicted the Petitioner and sentenced him to 70 years imprisonment without the possiblity of parole, an effective life sentnece.

The Petitioner raised as an issue on appeal that the extraneous offense testimony violated the right to a fair trial, an impartial jury, lowered the presumption of innocence and shifted the burden to prove himself innocent; and the court erred admitting evidence as more probative, than prejudicial.

All violations were presented as violations of the right to due process of law as protected by the United States Constitution, V and XIV Amendments.

The First Court of Appeals of Texas considered the challenges to the constitutionality of the introduction of extraneous offenses and determined that the statute contained numerous procedural safeguards that protect the right to fair trial. Also, that the extraneous offense testimony was more probative and relevant

than prejudicial because the Rule 403 balancing test normally does not favor the exclusion of evidence. See Exhibit "B"

The Petitioner advanced the constitutionality issue to the Criminal Court of Appeals of Texas in a Petition for Discretionary Review. The court denied review without written opinion. See Exhibit "A".

This timely Petition for Writ of Certiorari follows.

REASON FOR GRANTING PETITION

A. These questions are important to protect the right to a fair trial and due process of law as protected by the United States Constitution.

The introduction of extraneous offense evidence, pursuant to Texas Code of Crim. Proc. Art. 38.37 renders a trial so fundamentally unfair that it denies an accused citizen a fair and impartial trial as recognized in Estelle v. Williams, 425 U.S 501, 503 96 S.Ct. 1691 (1976).

The Fifth Amendment to the United States Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. The Due Process Clause requires that the State prove, beyond a reasonable doubt every element of the crime charged. See Jackson v. Virginia, 443 U.S. 307, 316 99 S.Ct. 2781.

Generally, an accused must be tried for the offense with which he is charged and may not be tried for a collateral crime or being a criminal generally. See Stafford v. State, 813 S.W.2d 503, 506.

The essential guarantee of the Due Process Clause is that the government may not imprison or otherwise physically restrain a person except in accordance with fair procedures. See Long v. State, 742 S.W.2d 312, 320.

In accordance with traditional notions of Due Process, evidence of extraneous offenses is usually excluded because it is inherently prejudicial, tends to confuse the issues in a case and forces the accused to defend himself against collateral charges. See Atbrecht v. State, 486 S.W.2d 97, 100.

Also, evidence of an extraneous offense is not admissible to prove a person's character to show on a particular occasion, the person acted in accordance with that character. Tex. R. Evid. 404(b).

However, the enactment of Tex. Code Crim. Proc. Art. 38.37 creates a statutory exception to Rule 404(b). prohibition, but only for certain offense, typically sexual offenses.

When applicable as in the instant case, Art. 38.37 § 2 allows the trial court to admit evidence that the defendant committed a prior sexual offense for "any bearing the evidence has on relevant matters, including the character of the defendant and act performed in conformity with the character of the defendant". (propensity evidence)

The ban against propensity evidence in our jurisprudence is over three hundred years old dating back to seventeenth century cases. See U.S. v. Castillo, 140 F.3d 874, 881 (10th Cir. 1998), citing Hampton's Trial 9 How St. Tr. 1053 1103 (K.B. 1684)

This apparent shift in the admission of propensity evidence violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency" See Dowling v. US, 493 US 342, 353 110 S.Ct. 668, 674 (1990).

Texas Courts following examples set in US Court of Appeals have held that the procedural safeguards of the statute, such as the balancing test conducted pursuant to Rule 403 of Texas Rules of Evid. adequately protects a defendant's right to fair trial. See Harris v. State, 475 S.W.3d 395, 401 quoting U.S v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998)

But the balancing test is inadequate to protect the constitutional rights of the Petitioner because, A rule 403 analysis favors the admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial. See Booker v. State, 103 S.W.3d 521, 533

The Texas Courts have considered other acts of sexual abuse to be straightforward and directly relevant to the only issue in the case, whether the defendant abused the complaint. See Gayton v. State, 331 S.W.3d 218, 228

Further, because the evidence of prior sexual abuse of children was especially probative of the defendant's propensity to sexually assault children, the rule 403 balancing test will not factor the exclusion of evidence of the defendant's prior sexual assaults of children. See Belcher, 474 S.W.3d 848

B. These questions directly involve the honor of the government public confidence in the fair administration of justice and the overall integrity of the judicial system.

A citizen has a right to expect fair dealing from his government. See Vitatelli v. Sexton, 359 US 535, 79 S.Ct. 968 (1959) This includes the right to a fair trial free from extraneous offense evidence.

C. The appellate courts have decided an important question of federal law, that has not been but should be settled by this court.

The Supreme Court of the United States typically reserves unto itself important questions of federal law affecting the substantive constitutional rights of citizens.

There are a large number of persons in the State of Texas. Proportionally, a large number of criminal defendants are being subjected to trials wherein extraneous offense evidence is being introduced. The rule, more often than not, also induces a large number of guilty pleas to avoid harsher punishment.

Although, the constitutionality of Texas Code of Criminal Procedure, Article 38.37 has been decided in various courts, there have been over 20 challenges within the last 2 years. While the argument varies, the challenges persist.

A review of these questions presented will protect similarly-situated defendants and prevent repetition by establishing clear and compelling precedent.

CONCLUSION

As demonstrated, the introduction of extraneous offense evidence unfairly prejudices the jury and tends to make the defendant prove himself innocent. Furthermore, the departure from the longstanding precedent barring the introduction of propensity evidence is intolerable. The right to a fair trial is inviolate. The Petitioner prays the Honorable Court to grant review of the Texas statute and appoint counsel for a full briefing of the issues to once-and-for-all settle this important question of federal law.

Respectfully Submitted,



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