No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FREDDY GARCIA
Petitioner
v.
THE STATE OF TEXAS
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A jury convicted Freddy Garcia for a felony arising from a different incident than the one for which he was indicted. The State gave no pretrial notice of its intent to present the unindicted incident to the jury; not even as a potential extraneous offense. The Texas Court of Criminal Appeals found this to be constitutional error, but harmless beyond a reasonable doubt.

1. When a defendant is convicted of an offense for which he was not indicted, and has preserved the issues of constitutional error, what factors should a reviewing court consider when determining whether the error was harmless beyond a reasonable doubt?

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BASIS FOR JURISDICTION IN THIS COURT

On November 20, 2019, the Texas Court of Criminal Appeals entered the opinion and judgment for which Petitioner seeks this Court's review. There was no motion for rehearing. There was no motion for extension of time to file the petition for writ of certiorari.

This petition for a writ of certiorari is filed within 90 days of the judgment and opinion by the Court of Criminal Appeals in this case. Therefore, the petition for a writ of certiorari is timely. *See* SUP. CT. R. 13(1).

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

SIXTH AMENDMENT

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; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

FOURTEENTH AMENDMENT

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

U.S. CONST. amend. XIV, § 1.

TEXAS CODE OF CRIMINAL PROCEDURE art. 38.37 §§ 1., 2. (pertinent parts)
EXTRANEOUS OFFENSES OR ACTS

Sect. 1. [In a prosecution of a defendant for an offense under Chapter 21 (Sexual Offenses) of the Texas Penal Code]:

(b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence, evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters, including:

(1) the state of mind of the defendant and the child; and

(2) the previous and subsequent relationship between the defendant and the child.

Sect. 2. (a) [In the trial of a defendant under Texas Penal Code Sections 22.021(a)(1)(B) and (2) (Aggravated Sexual Assault of a Child)]

(b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence … 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 [after a hearing before the judge to determine whether there is sufficient evidence for the jury to find he committed the separate offense beyond a reasonable doubt].

Sect. 3. The state shall give the defendant notice of the state's intent to introduce in the case in chief [the evidence described above] not later than the 30th day before the date of the defendant's trial.

TEXAS PENAL CODE § 21.021(a)(1)(B)

[A person commits an offense if the person]:

(B) intentionally or knowingly:

(i) causes the penetration of the anus or sexual organ of a child by any means;

(ii) causes the penetration of the mouth of a child by the sexual organ of the actor:

(iii) Causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;

(iv) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or

(v) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor; and

[if] (B) the victim is younger than 14 years of age.

STATEMENT OF THE CASE

In 1987, a grand jury indicted Petitioner Freddy Garcia for aggravated sexual assault of a child. The indictment alleged:

> FREDDY GARCIA, hereafter styled the Defendant, heretofore on or about AUGUST 16, 1987, did then and there unlawfully intentionally and knowingly cause the penetration of the female sexual organ of [B.G.], hereafter styled the Complainant, a person younger than fourteen years of age and not his spouse by placing his sexual organ in the female sexual organ of the Complainant.

(Clerk's Record at 14).

1. The alleged offense

The charge arose in August, 1987, when Freddy Garcia's wife told her apartment manager that she caught him attempting to sexually assault her 12-year-old daughter – his step-daughter – behind a closed door in a bedroom of their apartment. She threw him out. The next day, August 17, 1987, the wife reported the incident to police. An officer interviewed her and her daughter, and a brief investigation followed. Mr. Garcia was arrested the same day. The courts below refer to this as "the bedroom incident."

Neither the complainant nor her mother reported any other incidents to police. On August 28, 2017, a grand jury indicted Mr. Garcia on that single count of aggravated sexual assault of a child, *supra*.

2. No notice of an alleged earlier offense

After making bond, Mr. Garcia fled the state. Nearly 30 years later, in 2015, a cold-case investigator in the Harris County Sheriff's Office located him in Florida, where he was arrested and extradited to Texas.

The State never sought an amended indictment to allege any other criminal acts. Specifically, Mr. Garcia was never indicted for the alleged sexual assault that was submitted to the jury and resulted in his conviction. This unindicted incident allegedly occurred a year or two prior to the indicted offense, in the bathroom of a different apartment, where the family lived when the complainant was about 10 or 11 years old. The courts below refer to this as "the bathroom incident."

When trial began, then, Mr. Garcia and his lawyer had notice that they were defending against the single accusation the complainant and her mother had lodged against him on August 17, 1987 – that he sexually assaulted the complainant in her bedroom on August 16, 1987.

Before trial, the State provided a Notice of Intention to Use Extraneous Offenses and Prior Convictions, as required by TEX. CODE CRIM. PROC. ANN. art. 38.37 § 3 (West 1995), *but this notice did not include the bathroom incident* (Clerk's Record at 58). Instead, it listed as potential extraneous offense evidence eight types of sexual assault or sexual contact offenses, each of which purportedly occurred on or about August 18, 1987, and multiple other unspecified occasions.

In light of the many incidents listed in the State's disclosure of extraneous offenses, defense counsel filed a motion for the State to elect which offense it would submit to the jury, and the specific date of offense the State would rely on (Clerk's Record at 88). The motion noted:

III.

> In Texas, the State may allege in the indictment than an offense occurred "on or about" a particular date but may prove that the conduct

> charged occurred any time on or before the date of presentment of the indictment within the statute of limitations. Tex. Code Crim. Proc. art. 21.02, § (6); *Ex parte Goodbread*, 967 S.W.2d 859, 860 (Tex. Crim. App. 1998).

The motion also included a request for a jury charge "that they must find beyond a reasonable doubt that the particular offense elected occurred on a particular date."

The motion specifically described the potential constitutional issues that would arise if the State were not required to give Mr. Garcia notice of the particular offense it intended to submit to the jury:

> The Defendant would show the Court that if the State is not required to elect which act that it relies upon and the date of that act, then the Defendant is not given adequate notice of the charge against him/her and is not protected from being held twice in jeopardy for the same offense, in derogation of his rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, Article 1, Sections 10 and 19 of the Texas Constitution and Articles 1.04 and 1.05 of the Texas Code of Criminal Procedure. *Phillips v. State*, 193 S.W.3d 904 (Tex. Crim. App. 2006); *Scoggan v. State*, 799 S.W.2d 679 (Tex. Crim. App. 1990); *O'Neal v. State*, 746 S.W.2d 769 (Tex. Crim. App. 1988); Bates v. State, 305 S.W.2d 366, 368 (Tex. Crim. App. 1957); *O'Clair v. State*, 364 S.W.2d 375 (Tex. Crim. App. 1963); *Yzaguirre v. State*, 957 S.W.2d 38, 40 (Tex. Crim. App. 1997); *Wilson v. State*, 976 S.W.2d 254 (Tex. App.—Waco 1998).

This was the first, but not the only, time Mr. Garcia asserted his constitutional rights to notice and a fair trial.

3. Trial begins

After the jury was selected and sworn, defense counsel requested a probable cause hearing on the extraneous offenses the State listed in its notice, as authorized by TEX. CODE CRIM. PROC. ANN. art. 38.37 § 2-a (West 1995). By that time, the complainant was over 40 years old. The complainant testified that she never thought

about the abuse in the years following. As soon as Mr. Garcia was gone, it was a big relief, she said (Reporter's Record Vol. 3 at 146).

At the probable cause hearing, the complainant testified about a history of escalating sexual conduct by Mr. Garcia, including the alleged rape in the bathroom as well as the August 16 sexual assault in the bedroom (Reporter's Record Vol. 3 at 12). *This is the first time the record makes any reference to the unindicted bathroom incident, which became the incident submitted to the jury*.

During opening statements, the State talked about both the bathroom incident and the indicted bedroom incident (Reporter's Record Vol. 3 at 27). When the complainant testified, she again described both the bathroom incident and the bedroom incident, as well as other sex assaults Mr. Garcia committed by touching her and other means (Reporter's record Vol. 3 at 120). After each incident she described, defense counsel renewed his motion for the State to elect the offense it would submit to the jury. Each time, the trial court denied the motion.

4. Jury charged solely on unindicted bathroom incident

Finally, during the initial charge conference, defense counsel again requested an election by the State. The prosecutor responded that he was looking at jury charge language to describe the incident jurors would consider, but he did not say which incident it would be. He offered to forward a draft charge to defense counsel when it was complete. The conference ended without a ruling (Reporter's Record Vol. 4 at 112).

Ultimately, the jury charge instructed jurors on the bathroom offense, not the

indicted offense (Clerk's Record at 112). They found Mr. Garcia guilty and assessed punishment at 45 years in prison (Clerk's Record at 133).

5. Direct appeal

The Fourteenth Court of Appeals, following nearly a century of Texas precedent, held that the trial court's failure to order a timely election by the State was federal constitutional error, and that the error was not harmless beyond a reasonable doubt. It reversed Mr. Garcia's conviction and remanded the case to the trial court. The State filed a motion for rehearing. The court of appeals denied the motion but issued a substitute opinion, the outcome of which was the same (Appendix B).

6. Discretionary review by the Court of Criminal Appeals

The State filed a petition for discretionary review in the Texas Court of Criminal Appeals, which was granted. On review of the merits, the court reversed the court of appeals. It held the trial court's action to be constitutional error, because it denied Mr. Garcia his due-process right to receive adequate notice and his due-process right to present a defense. *Garcia v. State* at *3.

However, the court concluded the error was harmless beyond a reasonable doubt. In particular, the court found: "… the trial judge's violation of Garcia's right to adequate notice did not contribute to his conviction." *Garcia* at *7. It based the finding on the State's argument that Mr. Garcia's defensive strategy was merely a "blanket denial." The court said, "We have held in previous cases that these kinds of "blanket denial[s]" may render any violation of the defendant's right to adequate

notice harmless." It concluded: "We are ultimately unconvinced that if the trial judge had put the State to its election at the appropriate time, Garcia's defensive strategy would have been meaningfully different." *Garcia* at *8.

7. Texas factors for harmless error review in election cases

Texas common law has required, for nearly 100 years, that if a defendant requests it, a trial court must order the State to elect – after it rests its case in chief – which offense it intends to submit to the jury. The Texas Court of Criminal Appeals has approved a four-part rationale for requiring the state to elect its primary offense at the close of its case in chief:

> 1) to protect the accused from the introduction of extraneous offenses;
>
> 2) to minimize the risk that the jury might choose to convict, not because one or more crimes were proved beyond a reasonable doubt, but because all of them together convinced the jury the defendant was guilty;
>
> 3) to ensure unanimous verdicts; that is, all of the jurors agreeing that one specific incident, which constituted the offense charged in the indictment, occurred; and
>
> 4) to give the defendant notice of the particular offense the state intends to rely upon for the prosecution and afford the defendant an opportunity to defend.

See Phillips v. State, 193 S.W.3d 904, 909-10 (Tex. Crim. App. 2006) (approving *Phillips v. State*, 130 S.W.3d 343 (Tex. App. – Houston [14th Dist.] 2004).[1] According to the Court, the failure to require an election violates the constitutional principles of

[1] *But see Dixon v. State*, 201 S.W.3d 731, 734 (Tex. Crim. App. 2006) (constitutional law standard applies, but election error was harmless when child did not distinguish between acts that allegedly occurred 100 times, in the same manner).

adequate notice and an opportunity to defend – that is, due process and due course of law. *See* U.S. CONST. AMEND. V, XIV; TEX. CONST. ART. 1 § 19. *Id.* at 913-14.

On these facts, the Texas Court of Criminal Appeals erred to find that the denial of Mr. Garcia's constitutional rights to notice and to prepare a defense was harmless beyond a reasonable doubt.

REASONS FOR GRANTING THE PETITION

1. Old law, new problems

The due-process principle that a criminal defendant cannot be charged with one crime and convicted of another has been well-settled for more than 200 years:

> The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced.
>
> The reasons for this rule are,
>
> 1st. That the party accused may know against what charge to direct his defence.
>
> 2d. That the Court may see with judicial eyes that the fact, alleged to have been committed, is an offence against the laws, and may also discern the punishment annexed by law to the specific offence. These reasons apply to prosecutions in Courts of admiralty with as much force as to prosecutions in other Courts. It is therefore a maxim of the civil law that a decree must be *secundum alegata* was well as *secundum probata*. It would seem to be a maxim essential to the due administration of justice in all courts.

The Hoppet, 7 Cranch 389, 394-5 (1812) (reversing in part and affirming in part an admiralty case for forfeiture of a vessel and its contents). As obvious as these principles may have seemed 200 years ago, they are becoming less and less clear today. The Court in *The Hoppet* did not even conduct a harm analysis; it simply reversed the forfeiture of the parts of the cargo that were not both alleged and proven to be illegal – both *secundum alegata* and *secundum probate*.

Similarly, in a 1960 case, this Court emphasized the rule that "a court cannot

permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone v. U.S.*, 361 U.S. 212, 217 (1960). The Court reversed a defendant's conviction after the trial court gave the jury the option to convict for either of two offenses, one described in the indictment and one unindicted. Again, no harm analysis was needed.

Chapman v. California, however, set in motion a series of changes by instructing the lower courts that not all constitutional errors are reversible. *Chapman v. California*, 386 U.S. 18 (1967). Since that time, appellate courts at both the state and federal levels have continued to struggle with how to decide when a constitutional error is "structural," and therefore per se reversible, when it is subject to harmless error analysis.

2. Defending against an unknown charge.

Mr. Garcia's case is an example of how a trial court's error in denying a request for election results in a constructive amendment or a variance between pleading and proof that frustrates the constitutional principles of notice and an opportunity to defend against criminal charges. The prohibition on constructive amendment exists to preserve the defendant's Fifth Amendment right to indictment by grand jury, to prevent re-prosecution for the same offense in violation of the Sixth Amendment, and to protect the defendant's Sixth Amendment right to be informed of the charges against him. *See United States v. Vavlitis,* 9 F.3d 206, 210 (1st Cir.1993).

When the state rested, defense counsel re-urged his motion for an election (4 RR at 69). It is at this juncture that the defense needs notice so that it can put forward

a vigorous defense and present to the jury evidence that challenges some or all of the elements of the State's case, according to the Texas Court of Criminal Appeals. *See Phillips*, 193 S.W.3d at 912. However, that same court found the error in Mr. Garcia's case to be harmless. In fact, it was harmful in multiple ways throughout the trial.

Defense counsel's hands were tied in cross-examination and in preparing and presenting his defense because he learned about the previously-undisclosed incident during a pretrial hearing, immediately before opening statements. This gave him no time to investigate the incident or prepare to defend it: no time to confer with his client, no time to investigate for possible witnesses or evidence, no time to conduct any legal research. He was already in trial.

Counsel's ability to provide an effective defense was further damaged by the State's deliberate destruction of the physical evidence gathered in the 1987 investigation into the bedroom incident. The only defense he could pursue was a flat denial that the bathroom incident happened, along with cross-examination to challenge the State's rather sloppy work on the case. Counsel's efforts to provide a "vigorous defense" (in the words of *Phillips*) for Mr. Garcia were constrained by the trial court's failure to follow century-old constitutional law.

The best counsel was able to do for his client was to get the jury question and application paragraph limited to the single alleged sexual assault that occurred some unspecified time prior to August 16, 1987, and to get a limiting instruction regarding the other alleged offenses. Thus, jury unanimity was not an issue, as it was in *Phillips*. The other three rationales that the Court identified in *Phillips*, however,

were issues in Mr. Garcia's case: 1) the State introduced multiple alleged offenses, but the defense had no way of knowing which were extraneous and which was the offense for which Mr. Garcia faced 5-99 years in prison; 2) nothing mitigated the risk that the jury might choose to convict because all of the alleged offense together convinced the jury Mr. Garcia was guilty; and 3) without notice, Mr. Garcia was not afforded an opportunity to defend.

3. This Court should provide clarity for lower courts applying the *Chapman* harmless-error standard to constitutional errors.

This case presents the ideal framework for consideration of how to review a case for harmless error, the standard of review for constitutional errors in the federal court system as well as in Texas and other states. *See*, *e.g.*, TEX. R. APP. PROC. 44.2(a). Despite all the ways Mr. Garcia's defense was hamstrung by the lack of notice, the Court of Criminal Appeals still found the trial court's rulings on election harmless beyond a reasonable doubt.

While it might not appear that what Texas calls an election case – like this one – is all that common, it really is just another name for a constructive amendment or a variance case. Whatever such cases are called, they involve defendants who, like Mr. Garcia, were indicted for one offense and convicted of another. They also involve repeated questions about what kind of harm analysis to apply. *See, e.g., U.S. v. Brandao*, 534 F.3d 44, 57-58 (1st Cir. 2008) (comparing federal appellate courts' decisions on whether constructive amendments are a form of structural error that are per se prejudicial, or whether unpreserved issues are subject to plain error review).

The problem especially highlighted here is that "harmless-error analysis … presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury. *See Delaware v. Van Arsdall,* 475 U.S. 673, 681 (1986) (constitutional errors may be harmless "in terms of their effect on *the factfinding process at trial* ") (emphasis added); *Chapman, supra,* 386 U.S., at 24, 87 S.Ct., at 828 (error is harmless if, beyond a reasonable doubt, it "did not *contribute to the verdict* obtained") (emphasis added)." *Rose v. Clark*, 478 U.S. 570, 576-77 (1986). In Mr. Garcia's case, that presupposition is contrary to the facts. At his trial, he could *not* present evidence and argument on the offense he ultimately would be convicted for, because he did not learn about that offense until the first day of trial.

Yet it was exactly this problem that led the Court of Criminal Appeals to conclude the error was harmless. The State argued – and the court agreed – that because Mr. Garcia raised only a "blanket denial" in response to the State's case, the lack of notice was harmless. Having completely shut off any opportunity for defense counsel to prepare to defend against the bathroom incident, the State then blamed Mr. Garcia for not having a defense tailored to that allegation. Neither the State nor the Court of Criminal Appeals explained how counsel could have possibly raised any other defense.

This is the type of gamesmanship that erodes public confidence in our system of justice. It turned Mr. Garcia's trial into something akin to "Pin the Tail On the Donkey," complete with a figurative blindfold. This Court should grant the petition

to instruct the lower courts that an analysis for harmless error must not ignore the realities of jury trials, and must be based on facts rather than presuppositions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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