No. 19-8421

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM OF 2020

****

GILBERTO TELLO

VS.

BRYAN COLLIER, DIRECTOR OF THE

TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CORRECTIONAL INSTITUTIONAL DIVISION

****

ON PETITION FOR WRIT OF CERTIORARI TO

THE TEXAS COURT OF CRIMINAL APPEALS

STATE OF TEXAS SUPREME COURT

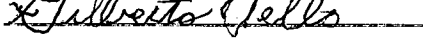
****

PETITION FOR WRIT OF CERTIORARI

FOR REVIEW OF STATE COURT

****

Respectfully Submitted



GILBERTO TELLO #2182783

899 F.M. 632 Connally Unit

Kenedy, Texas 78119

ISSUES FOR REVIEW PRESENTED

ISSUE NO. ONE ; whether the trial court violated petitioners right to a speedy and public trial, Where petitioner was held in Webb County Jail for almmost seven and a half year pending a trial by jury, with an outrageous 450.000 dollar bound, where he spent seven and a half years before a actual jury was enpanaled for a jury trial.

ISSUE NO. TWO; Whether the trial court errored and denied petitioners right to a fair sentencing trial of his affirmative defense taken and then rejected by the jury, and for sentencing petitioner in accordance with the jurys verdict however ussing this same jury to impose a 70 year prison sentence, however on the recomended sentence of the prosecutor, ten years for every bullet he fired tell the jury he fired 7 bullets, the jury and the judge then impossed a strait 70 year sentence for murder.

ISSUE NO. THREE Whether Petitioner recieved Ineffective assistance of trial counsel who aided the state in stalling the case, where then after a trial by jury seven and a half years later, trial counsel fails to file Motion for new trial of a murder conviction and 70 year prison sentence of February 24, 2018. And ineffective assitance of appeal counsel who was same counsel of jury trial, where in his direct appeal brief counsel states that a timely notice of appeal was filed on **February 24, 2017,** an entire year earlier then his trial date had even started on February 26, 2018 ending in March 5, 2018.

ISSUE NO. FOUR: whether the court of appeals has errored in not reversing the 70 year prison sentence, where petitioner was entitled to reversal after direct appeal was final, where the goverment mental records of petitioner mental status confirms petitioner was entitled to a special sentence such as a ten year sentence for the murder, not a ten year sentence for every bullet fired 7 bullet 70 years strait sentence, a affirmative defense rejected by the jury at actual arraignment federal stage proceeding for murder for affirming a Domestict violance of an extraneous offense submitted to jury over objection.

ISSUE NO. FIVE Main issue for granting writ, whether the goverment trial court jury, court of appeals errored when conspirring with the federal stage proceedings in the rejection of his Temporarily Insanity defense, for dispossing of a federal stage , and impossing an illegal 70 year prison sentence for murder, Petitioner was diagnosed with PTSD by the goverment in 1992, And worked as a Border Patrole agent for 12 year permitted to carry a gun, and that due to his wrongfull termination cause undue stress and petitioner to shoot and kill his wife. However rejects his affirmative defense to except no liability of the federal goverment, reevaluating petitioner by Rusk State Hospital in 2013 after the murder had accurred.

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NO. _____

IN THE

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_____ TERM 2020

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GILBERTO TELLO

VS.

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CORRETIONAL INSTITUTIONAL DIVISION

RESPONDANT

****

ON PETITOIN FOR WRIT OF CERTIORARI

TO THE TEXAS COURT OF CRIMINAL APPEALS

STATE OF TEXAS APPEALS COURT

****

TO THE HONORABLE JUSTICE OF SAID COURT:

Comes Now Gilberto Tello, Petitioner in the above styled cause, presenting this his Petition for Writ of Certiorari Seeking a Review of the Texas Court of Criminal Appeals Refusal of Petitioners Petiton for Discretionary Review. Denial of his Motion for Rehearing, And the affirming of his illegal conviciton and 70 year prison sentence of conviction abtained in violation of the U.S. Constitutions. And his Unconstitutional confinement and restraint from judgment of the 14th Judicial District Court of Webb County, Texas cause number 2012-CRN-000013-D1. Affirmed by the Fourth Court of Appeals San Antonio Texas. Case Number 04-18-00220-CR. Petitioner had clearly made a showing of the Denial of a Constitutional Right. And the Texas Court of Criminal Appeals has refused his PDR. In support Petitioner would present the following.

OPINION BELOW

The unpublished written opinion of the Fourth Court of Appeals San Antonio Texas Affirming Petitioners Convicvtion of Murder Appears in **Appendix A**

The White Card from Texas Court of Criminal Appeals on filing of Petition For Discretionary Review PDR by Counsel Appears in **Appendix B.**

The White Card from the Court of Criminal Appeals informing Counsel ten copies is required per rule or Petition may be refused Appears in **Appendix C.**

White Card from Texas Court of Criminal Appeals Refusing Petition for Discretionary Review PDR in **Appendix D.**

Pro se Petitioners timely filed motion for rehearing, and Court of Criminal Appeals refusing white Card denying rehearing appears in **Appendix E.**

Mandate Issued by Court of Appeals appears in **Appendix F.**

JURISDICITON

The Fourth Court of Appeals Opinion was Issued and Signed on August 28, 2019. On OCtober 28, 2019. Counsels filed Petition for discretionary Review was filed. Then on February 5, 2020, The Texas Court of Criminal Appeals Refused Counsel's Petition For Petition For Discretionary Review. And the Mandate was Issued on Not None in accordance with Court's Opinion of this date, the Judgment of the Trial Court is Affirmed, Fourth District of Texas with the seal of the court affixed. The Petitioner has 90 days from date of the Last State Court denying relief or motion for rehearing, to Petition this court for a Writ of Certiorari for Review of the Lower State Courts Denial of his Constitutional Rights. Thus this Supreme Court's Jurisdiction is Invoked under Title 28 U.S.C. 1257(A).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVLOVED

1. 5th Amendment to the United States Constitutin.
2. 6th Amendment to the United States Constitution.
3. 14th Amendment to teh United States Constitution.

STATEMENT OF THE CASE

Petitioner Gilberto Tello was arrested by the Webb County on one count of Murder on October 23, 2011, it was alleged that he had been indicted on one count of murder in the 49th Judicial District Court of Webb County, Texas. Petitioner is a disabled veteren fromn the U.S. Marine Corps from Desert Storm in combat role. He was diagnosed by the Federal Government with PTSD in 1992 or 1993. He was arrested for the murder of his comman law wife. He remained in the Webb County jail on an outrageous bond of $450,000.00 Thousand Dollars, where he spent over a year half time in the county pending trial for a murder indictment.

He was arrested on October 23, 2011 and stayed in jail a year and a half time in the Webb County jail. And before having to enpanal a jury for a jury trial for the alleged murder indictment. The Petitioner is sent to the Rusk State Hospital in Austin Texas, on April 18, 2013 where he stayed until August 8, 2013. He was returned to the Laredo county jail on a second booking number 2013-6883 when arriving back to the county jail from Rusk State Hospital. Accepted by the Sheriff of Webb County jail on August 18, 2013, where he now remained pending jury trial for this murder of his wife, where finally then on Feb. 26, 2018. On this date a jury was picked and enpanaled for a jury trial for the alleged offense of murder.

A trial that took almost seven years from the time of his arrest on October 23, 2011, unitl jury trial date of Febuary 26, 2018. Then on March 5, 2018 Petitioner was alleged to have been found guilty and this same jury assessed punishment at 70 years and a fine of $8,000.00. The trial court sentenced Petitioner in accordance with the verdict of the jury, based on the prosecutors recommedation to the jury that they impose ten years for every bullet he fired, informing the jury that he fired seven bullets and the jury imposed a flat 70 year sentence. The trial court judge pronounced upon petitioner sending him to prison for 70 years. Petitioners trial counsel did not file a motion for new trial. But states in his Direct appeal brief that a "timely notice of appeal was filed on "Febuary 24, 2017'", a year and two days earlier than his trial date even started on February 26, 2018 ending March 5, 2018.

The Petitioner filed a direct appeal brief through hired appeal counsel Jose Eduardo Pena, in the Fourth Court of Appeals in San Antonio Texas on January 14, 2019. The Fourth Court of Appeals delivered and filed it's Opinion August 28, 2019. Where the court of appeals overruled appellant's counsel's two points of error raised in direct appeal brief. And affirmed the trial court's judgment.

Appeal counsel Jose eduardo Pena informed the Appellant the court of appeals had affirmed his case on August 28, 2019. And that Appellant could file a Pro se Petition for Discretionary Review PDR in the Texas Court of Criminal Appeals Petitioner not knowing how to do a Pro se Petition for Discretionary review then hired Jose Eduardo Pena to file the Petition for Discretioary Review PDR. Jose Eduardo Pena then filed a Petition for Discretionary Review in the Texas Court of Criminal Appeals PD-1085-19, transmitted on October 28, 2019 Accepted October 28, 2019. However, Appeal counsel intentionally failed to send the required Ten copies and was sent a white card from the Texas Court of Criminal Appeals stating the court requires Ten copies of the document to be filed in the court within three days pursuant to Rule 9.3(b). Failure to send copies will "Result in the Refusal of the Petition."

Then on February 5, 2020 the appeal counsel Jose Eduardo Pena received a White Card from the Texas Court of Criminal Appeals stating that on this dayte the Appellants Petition for Discretionary Review has been refused.

Petitioner's appeal counsel did not send him the white card of the Texas Court of Criminal Appeals refusing the PDR until after the fifteen days for filing a motion for rehearing had expired. He then informed Petitioner his PDR has been refused.

The Petitiner then filed a Pro se motion for Rehearing in the Texas Court of Criminal Appeals explaining it was timely if it was counted from the time he recieved the White Card from his appeal counsel. However, the Texas Court of Criminal Appeals denied Petitoners Pro se motion for Rehearing as untimely on _____. And Now State Jurisdiction was returned to court of Appeal as of the date denying motion for Rehearing as untimely

STATEMENT OF FACTS

The Petitioner Gilberto Tello a Disabled war veteren was charged with the murder of his common law wife Marisella Florez. Petitioner had been diagnosed with PTSD by the Federal government in 1992 or 1993. And had been receiving Mental Health since his diagnosis. After his Diagnosis he further worked for the United States Postal Service as a Mail carrier fro 10 years. After thet job he worked as a Border Patrol Officer with the United States DHS CBP U.S. Border Patrol for 12 years. Where he was authorized to carry a Gun. The Petitoner was wrongfully terminated as a Border partol agent prior to the murder of his wife for a unknown reason other than erratic behavior was alleged that he was terminated as a Border Patrol officer. This wrongful termination of his job as a Border patrol officer caused the petitioner undue stress and family problems due to his now unemployment.

The Petitioner and his common law wife marisella Florez were romantically involved, but their status as a couple appeared to fluctuate after the wrongful termination of his job as a border patrol agent. On October 23, 2011 Petitioner and his wife had a heated arguement at a McDonalds near Florez home. A few hours later, Petitoner shot Florez outside the front door of there home. When officer responded to the shooting they encounted Tello who admitted he had shot Florez because she "Practiced Witchcraft". He then showed the officers where he had put the gun he used. He also told the officers he did not want the children to see their mother's body. The Officers discovered Florez body near the front door. Officers escorted Petitioner to the Laredo Police Station where he spoke with Detective Richard Reyes. while walking Tello to an interview room, Tello voluntarily told Detective Reyes that St. Micael had tasked him to rid the world of all evil. Detective Reyes informed Tello of his Miranda Rights. Tello invoked his rights to an attorny and Detective Reyes terminated the interview before asking any questions. Tello then asked Detective Reyes if he could go free is he killed Florez for "Biblical reasons.'

At trial Tello did not consent whether he killed Florez. Rather he claimed he was not guilty by reason of insanity. In presenting his insanity defense, the trial court admitted medical records into evidence showing his diagnosis of Psychosis and paranoid delusions. Tello also called Dr. Michael Jumes and Dr, Jogn Fabian as Expert witnesses to testify that they believed Tello was legally insane at the time he committed the murder. The State called Dr. Timothy Proctor as a rebuttal expert witness Dr. Proctor testified that in his professional opinion, Tello was not legally insane at the time he committed the murder. The State also introduced evidence, over Tello's objection of one instance of Tello's violence against Florez. The jury rejected Tello's insanity defense and alleged to have found him guilty of murder. And Tello Appealed.

The Petitioner would show this court that he was arrested for the murder of his wife. He never denied shoting and killing her. He even flagged down the police, showed them where the gun was,. He was arrested and held in the Webb County jail from the time of his arrest on October 23, 2011 prior to October 23, 2011 before the murder had even happened he had been in a nd out of mental health clinics for alleged erratic behavior. However after the murder occurred he was arrested and held in the Webb County jail from October 23, 2011 until April 10, 2013, He was denied a trial by jury from time of his arest on October 23, 2011. All through April 10, 2013. And held on a $450,000.00 Thousand Dollar bond. Whereas it was well known to the trial court that Petitioner was incompetant to stand trial for the offense charged Finally on April 10, 2013 the trial judge then sends Petitoner to the Rusk State Hospital where he stayed until August 8, 2013. Where Petitioner is then returned to the Webb county jail. And then remains in the Webb County jail until his alleged trial by jury on February 26, 2018 thur March 5, 2018. Seven and a half years after his arrest on October 23, 1011.

However, the petitioner would make it clear for the record that he had no prior felony convictions, and a clean record. However, prior to the murder arrest on April 23, 2011 approximately three years prior to the The Petitioner would show that he had been pulled over for a Traffic violation. he was pulled over bya State Trooper whom ran a criminal check, and it all came back clean and in good standing order. He then goes on to say that he was

smeling alcohol on my person. And wanted to conduct a field expediate test on the side of the highway. I ~~arrested~~ asserted my right under the 6th amendment not to self incriminate who in turn decided to take me in to the Webb County jail. He impounded my vehicle and I was later released within less than Eight hours. Whereby returning back to work as a Border patrol agent. I was ordered to appear before a State Judge for this appearant speeding violation and possibly a suspension of driving privileges.

I hired criminal attorney Sergio (Keko) Martinez from Laredo Texas who represented me in this State court proceeding who argued against any type of punishment. I never plead guilty to any offense. However, the State judge went on to impose a six month temporary suspension of my Driver's License with the rioght to apply for a temporarily driving permit which I applied and recieved this permit before the said suspension had taken place. This tem,porarily driving permit was opnly to work or to school to go grocery shopping and back to the house only. I was basically on a house arrest for a six month suspension of drivers license where as I never plead guilty to any DWI whether a misdemeanor or felony.

Upon completing the punishment of this temporarily six moth limited driving suspension. I recieved back my full driving privileges from the State and all this matter had ended "at least that was what I thought." Not realizing that at this point was where the Governments and State authorities would all conspire against me for my wrongful termination of a Border patrol agent.

So for the record; Their was no DWI charge or any type of test that supported a formal DWI charge. At the State court proceeding for suspension of driving privileges, no DWI was ever mentioned. Further if I would have had a DWI felony charge on my revord when this incident occurred. I would have been fired immediately from the U.S. Border Patrol. And this never happened as for any DWI conviction.

However, the petitioner would show that he is a war veteren who was diagnosed with PTSD by the federal government in 1992 or 1993, and was under mental care since diagnosed with PTSD. He worked for the United States Postal Service as a letter carrier for 10 years. and after that job he worked as a Border patrol agent for 12 years, and was permitted to carry a gun with his well known PTSD diagnosis by the federal government. At the time of his employment

as a Border patrol agent. The government opposed his hiring as a Border patrol agent. However, later hired him based on the results of a civil action against the Border Patrol Agency.

So therefore, Petitoner can show that he was a war veteren from the Desert Storm who was diagnosed with PTSD in 1992 or 1993 by the federal government. Abnd worked as a Border patrol agent for 12 years. where he was permitted to carry a Gun. And did not want to be hired in the first place by the government as a Border Patrol agent. However, they ghad a change of mind after a lawsuit. And therefore, Petitioner would show that the government had a motive in his wrongful termination as a Border patrol agent and conspired with State authorities to even fabricate a DWI charge, and a wrongful murder conviciton, whereas such a charge could result in termination of a Border patrol agent. A false charge that resulted three years prior to his wrongful termination as a Border Patrol agent. However, the government alleged he was terminated for his erratic behavior.

The petitioner would show that when he was arrested for the murder of his wife in October 23, 2011, where he remained in the county jail alleged to be pending trial for this alleged murder indictment from October 23, 2011. Until April 18, 2013 with a bond of $450,000.00 Thousand Dollars. The Petitioner had already been wrongfully terminated as a Border Patrol agent prior to any murder of his wife and therefore, when arrested for the murder of his wife, for which he remained in the Webb County jail from October 23, 2011 until April 18, 2013 when he was then sent to Rusk State Hospital based on his public defenders defense of Temporarily insanity for the alleged murder. Petitioner would submit he prevailed for the charged offense whether the actual murder indictment alleged. Or the government pending indictment the petitoner actually spent over a year in the county jail from October 23, 2011 the alleged murder date until Apriil 18, 2013 when he was then sent to Rusk State Hospital. Therefore, petitioner would submit that when he was sent to Rusk State Hospital, he was sent on a governments pending indictment such as a felony DWI, Whereas no jury had even been enpanaled for the alleged murder indictment of his wife. And was not enpanaled until he is returned to the Webb County jail from the Rusk State Hospital, just after a 120 days in the State Hospital. He is then held from his return to Webb county until his trial date of February 26, 2018, where a Grandjury was finally enpanaled and such proceeding trial by jury lasted until March 5,th, 2018. Where this

same jury a federal stage proceeding the actual arraignment, then alleged to have found the Petitioner guilty of the murder. And a sentencing phase trial proceeded where this same jury sentenced petitioner to a straight 70 year prison sentence. However, based its 70 year prison sentence imposed on the prosecutors recommendation that they give him ten years for every bullet he fired. Informing the jury that he fired seven bullets. This same jury in this actual arraignment proceeding, a federal stage proceeding hands down a straight 70 year prison sentence. For which the trial judge then reads to the defendant sending him to the Texas Department of Criminal Justice to imprison him for 70 years.

The trial court and the appeals court have infact errored in this case, in the denial of relief of his illegal 70 year prison sentecne imposed by this jury in there federal stage proceeding. For an alleged indictment of of murder conviction. However, such illegal federal jurisdicitonal sentence holds the petitioner in State Custody under federal jurisdiction; a war veteren that had been diagnosed with PTSD by the federal government, who's defense was rejected by the government for sending him to State prison for 70 years.

ARGUEMENT WITGH AUTHORITIES

The petitioner would argue that his rights toa Speedy Trial have been violated. The petitioner spent seven and a half years in the Webb County jail awaiting trial by jury with a $450,000.00 Thousand dollar bond. After 7 and a half years a actual Grandjury was enpanaled, where the government presented a murder offense. And the actual arraignment began on February 26, 2018 lasting through March 5th 2018. With an alleged guilty verdict for murder, and sentenced of 70 years. The petitioner would argue that Arraignment is not part of a trial by jury. **4222 S.2d. 469, 473, (Tex.Crim.App. 1976).** And is one of the proceedings that can be disposed of by a pre-trial hearing. See **V.A.C.C.P. Art. 28.01** And therefore, the Petitioner would show that this was what occurred after this actual arraignment stage/indicting proceeding, for the offense charged and on trial for, and the petitioners defense for which governmental records supported in this stage of the proceeding.

The purpose of arraignment is to read the indictment to the accused, hear his plead and to fix his identity, **V.A.C.C.P. Art. 26.02.** And it usually is the point in the criminal proceeding at which the trial court determines if the accused has counsel and if appointment of counsel is necessary. Therefore,

unless arraignment is waived, most careful trial judges make every effort to see that arraignment occurs as early in the proceedings as possible. Not 7½ years later

The Petitioner would show that he was alleged to have been arrested and indicted by a Grandjury for murder, prior to any actual grandjury even being enpanaled to hear the States case. Petitioner was arrested for the murder on October 23, 2011 and remained in the county til April 18, 2013 before he was sent to the Rusk State Hospital . At no time during October 23, 2011 thru April 18, 2013 was the actual grandjury enpanaled for a murder indictment, although it was alleged he was in jail for murder indictment, and $450,000.00 thousand dollar bond. The very purpose of arraignment has already been served in most instances when arraignment is delayed until after both sides have announced ready at the trial on the merits, and a jury has been selected and sworn. When arraignment is so delayed it is usually an oversight or an omission and then is performed merely because Statute **V.A.C.C.P. Art. 26.01** requires the same.

Petitioner would further argue that the actual arraignment is required by statute for the full closure of a case. And when one whom is charged can not legally be held competent to stand trial for the charged offense. The actual arraignment the indictment proceeding is required to determine any lesser offense or special sentence based on his affirmative defense. Such as in this case, a temporarily Insanity defense.

And therefore, the petitioner would show and argue that after the actual arraignment a proceeding that was required in this case, that the trial court then used this same jury in a sentencing phase trial to impose a illegal 70 year prison sentence for the alleged murder indictment conviction. A sentencing phase trial by this same jury that was returning a indictment for any lesser offense. However, the prosecutor strategy in the sentencing phase with this same jury he tells the jury to impose a ten year sentence for which petitioner would show is a special sentence. And one that could be suspended, and a probation imposed, being petitioner was a first time offender with no criminal record. However, the stratgy was to have the jury impose a ten year sentence. However, as he recommended to this jury to impose a 10 year sentence fro every bullet petitioner had fired. And informed the jury that petitioner had fired 7 bullets. This same jury the actual grandjury now used in the sentencing phase stage trial sentences petitioner to 70 years for the alleged murder conviction.

The trial court imposes the jury's 70 year prison sentence and sends petitioner to prison for 79 year judgment for murder. Petitoner would argue that this was no justification for conducting the arraignment in the presence of the jury. However, the petitioner would further show that any inadvertant remark or innocent inquiry, ect. in the jury'shearing easily could become the basis for a mistrial or even a trial court strategy for disposing of a case after the actual arraignment, a federal stage proceeding.

In the instant case, petitioner contends the second reading of the murder indictment before the jury to satisfy the requirements of **V.A.C.C.P. Art. 36.01** repetitiously chips at the presumption of innocence of the petitioner based on rejected defense of temporarily insanity, in this satge of the proceeding. No form of jury instruction to the effect that the indictment is no evidence of guilt can remove the psychologcal effect of the repetition upon the juey.

Petitioner would argue that the court of appeals has infact errored in failing to reverse the trial courts judgment of 70 years, for which has denied the petitioner's right to trial by jury on the True-bill of Indictment. And is denying the petitioner to fairly challenge the governments conviction in Habeas Corpus proceedings for the alleged conviction affirmed by the court of appeals, such as family violence that the court of appeals affirmed and based there affirmative opinion on, And therefore, the court of appeals has errored in failing ot order a new sentencing phase trial.

The court of appeals opinion states Gilberto Tello was convicted by a jury of Murder. And that on appeal direct appeal of this murder conviction he argues insufficient evidence supports the jury's rejection of his insanity defense. And that he also contends the trial court erred when it admitted evidence of a prior act of domestic violence over his objection. However, goes on to affirm a judgment of conviction of the trial court.

The petitioner would show that the court of appeals has errored by not reversing his 70 year sentence for murder, whereas the petitioner was entitled to a reversal after direct appeal. And to be tried and or sentenced for the

offense the court of appeals has affirmed. The court of appeals states the jury convicted him of murder. And that the jury rejected his insanity defense the petitoiner would argue that this jury was the actual grandjury, who heard the case against the Petitioner. And could have infact came to the conclusion that the petitioner was not guilty based on his insanity defense for which federal governmental Mental records supported. Thereby acquitting the petitioner of the murder indictment of the prosecutor wildly charging him with murder.

Whereas petitioner would shopw that when on a direct appeal appeal counsel raises a claim of insufficient evidence on direct appeal, would be based on counsel review of the record, the verdict of the jury cannot constitutionally stand. Whereas on direct appeal counsel clearly argued insufficient evidence supports the jury's rejection of his insanity defense. And therefore, petitioner would argue and show that it was error for the court of appeals not to reverse the jurys 70 year sentence judgmenbt of conviction whereas he was entitled to a reversal of his 70 year sentence after this direct appeal. Became final the petitioner would show that the jury rejected his insanity defenbse, on the trial courts admitted evidence of a prior act of domestic violence. And is what the court of appeals has affirmed on a conviction of domestic violence. However, has errored in not reversing this grandjury guilty verdict for murder and 70 year sentence imposed in a sentencing phase trial by this same jury, of the federal stage.

Whereas the court of appeals review of the case was under factual sufficiency standard o review. Where the court of appeals states in the federal sufficiency review of a rejected affirmative defense, an appellant court views the "Entirety of the evidence in a neutral light, but it may not usurp the function of the jury by submitting its judgment in place of the jury's assessment of the weight and creditability of the witnesses testimony. **MATLOCK** 392 S.W.3d. at 671.

The court of appeals has infact erred in not reversing his 70 year sentence for murder conviction whereas petitioner is entitled to reversal and remand for a new sentencing phase trial for the conviction it has affirmed. In this actual arraignment the indicting proceeding, two factors for the defense

who evalauted Petitoner including a Dr. for the defense, all three testified petitioner was mentally ill at the time of the offense charged.

And petitioner would show that the fact this was the actual arraignment proceeding a federal stage proceeding, the jury could have infact found that Tello was not guilty of the offense charged ending this federal stage proceeding. However, finding that petitoner was guilty of Family Violence rejecting his insanity defense based on Family violence, returning a indictment for Family Violence. Authorizing the State with Jurisdiciton for a conviction of Family Violence. However, after the return of any indictment for family violence. The trial court goes into a sentencing phase stage with this same jury, the federal stage proceeding grandjury, where this jury imposes a 70 year prison sentence with instruction recommendation from the prosecutor to impose a ten year sentence for each bullet he fired, and that he had fired seven bullets. This jury did just that and imposed a straight 70 year Null and Void judgment actually turning petitoiner over to the State Jurisdiciton for seven ten year sentences a total of 70 years, the court of appeals has infact errored in not reversing this jury's 70 year judgment and ordering a new sentencing trial.

The petitoner would show that the court of appeals has infact errored in not reversing his 70 year prison sentence, that holds him illegally confined And as of today he has not been tried on any true-bill of indictment. The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....." In **DUNCAN V. LOUISIANA** 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d.491 (1986), we found this right to trial by jury in serious criminal cases to be "**fundamental** to the American scheme of Justice". And therefore, applicable; in State proceedings. The right includes of course as its most important element the right to have the jury rather than the judge reach the requisite finding of "guilty" See **SPARF AND HANSEN V. UNITED STATES** 156 U.S. 51, 105-106, 15 S.Ct. 273, 294-295, 39 L.Ed. 343 (1895). Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt. He may not direct a verdict for the State, no matter how overwhelming the evidence. Ibid. See Also **UNITED STATES V. MARTIN LINEN SUPPLY CO.** 430 U.S. 564, 572-573, 97 S.Ct. 1349,1355-1356, 51 L.Ed.2d. 642 (1977) **CARPENTERS V. UNITED STATES** 330 U.S.,410,67 S.ct. 775,783,91L.Ed.973 (1947).

What the fact finder must determine to return a verdict of guilty is prescribed by the Due Process Clause. 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, 97 S.Ct. 2319,2327,53 L.Ed.2d. 281(1977), **LELAND V. OREGON** 343 U.S. 790, 795 72 S.Ct. 1002-1005, 96 L.Ed. 1302(1952). And must persuade the fact finder beyond a reasonable doubt of the facts necessary to establish each of these elements, See e.g. **IN RE WINSHIP** 397 U.S. 358,364, 90 S.Ct. 1068,1072, 25 L.Ed.2d. 368 (1970). **COOL V. UNITED STATES** 409 U.S. 100,104, 93 S.Ct. 354, 34 L.Ed.2d. 335(1972)(Per.curiam). This beyond-a-reasonable-doubt requirement, which was adhered to by virtually all common law jurisdictions, applies in State as well as federal proceedings. **WINSHIP SUPRA.**

It 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. 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. Our per curiam opinion in cage, which we accept as control ling, held that an instruction of the sort given here does not produce such a verdict. Petitoner's Sixth Amendment right to jury trial was therefore, denied.

In petitioner's case the jury rejected petitioners affirmative Insanity Defense and alleged to have found petitioner guilty of murder, in this actual arraignment trial a federal stage proceeding. And the trial court erred when it admitted evidence of a prior act of Domestic violence over his objection. Where the trial court permitted evidence of Domestic violence through testimony States witnesses, and for allowing the jury to indict/find him guilty of Domestic violence for rendering a guilty verdict, and having a sentencing phase trial by jury for the alleged murder conviction and 70 year prison sentence on his rejected defense. And therefore, the trial judge failed to instruct the jury that if they reject the defense of Insanity for the murder offense, it could not apply to Domestic violence, for a affirmative defense and guilty verdict of Domestic violence. And therefore, the court of appeals has erred in not ordering a new sentencing trial.

The petitioner would show that in his second point of error on direct appeal the court of appeals opinion states Tello argues the trial court erred when it allowed testimony about an incident of Domestic Violence between Tello and Florez approximately a year before Tello killed Flores. He argues the testimony was irrelevant because it was not material to the case and was there by inadmissible under **TEXAS RULES OF EVIDENCE 401 and 402**. In the alternative, Tello argues the testimony was inadmissible under **Rule 403, and 404(b)** of the Texas Rules of evidence.

Petitioner would show that the court of appeals has erred in the affirming of a Domestic Violence, The courts standard of review used was **Cameron V. State** 241 S.w.3d. 15,19 (Tex.Crim.App.2007). The Court of appeals states we review the trial court's decision to admit the evidence an abuse of discretion standard. We will uphold the trial court's decision unless it is outside the Zone of reasonable disagreement.

The petitioner would argue and show that the trial court did abuse its discretion in allowing the evidence testimony of State witness to family violence although the evidence was proper under the **Rules of Evidence** the court of appeals cites. For which such evidence of Domestic violemnce was relevant evidence is admissible unless prohibited by Constitution, Statute, the Texas rules of Evidence, or any other rules promulgated by Statute. **Texas R. Evidence 402** evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would without the evidence, and (b) the fact is of consequence in determining the action, **GARCIA V. STATE**, 201 S.W3d. 695,703(Tex.Crim.App.2006). Whether an issue is material depends on the theories of the prosecution and defense. In Murder case, the relationship between the victim and the accused is material issue as stated in the court of appeals opinion affirming the trial court judgment.

However, petitioner would argue that the trial court abused its discretion, in admitting this evidence, and the cvourt of appeals has erred in affirming where the court of appeals states it will uphold the trial court's decision unless it is outside the Zone of reasonable disagreement. Whereas petitioner would show three months before the killing charge evidence was submitted to the jury of other ectraneous offenses for which petitioner was involuntary committed at the Valley Baptist Medical Center, and examining reports, which was written by two different Doctors, stated "the patient appears psychetic and paranoid" at times alert and oriented" at other times. This involuntary com-

mitment by the government occurred after he contacted the FBI from his college campus claiming the Virgin Mary contacted him a week earlier and that [she informed him] there was going to be an attack.... on the world." This incident statement petitioner had made to the FBI whom arrested him for this statement, whereas petitioner is a Cathic in religion and believes in the virgin mary. At the San Antonio State Hospital prior to any murder charge he was evaluated by other psychatrist who concluded "Tello had a new on set of Psychosis with auditory hallucinations, paranoia, and gradiose and diagnosed him® with an "unspecified psychotic disorder." The petitioner would submit that this unspecified disorder would be his 1992 diagnosis by the federal government of his PTSD diagnosed in 1992 or 1993.

Petitioner would further show that prior to his involuntary commitment, the jury was presented evidence of an extraneous other act, where the Petitioner was arrested on federal property where in his vehicle he was transporting an AR-15 Assault Rifle in its transport case he had legally purchased. He was informed by a letter of an investigation to his wrongful termination of Border Patrol agent. A job he held for twelve years. While arriving to this federal building he is arrested for having the AR-15 Assault Rifle in his vehicle on federal property.. And again he is involuntarily committed, upon this illegal arrest.

Further prior to these extraneous acts and before the wrongful termination of his job as a Border Patrol agent, he is arrested for a traffic violation and for refusing to take a DWI test on the side of the road by a State Trooper. Petitioners only criminal record, whereas he was only given six months of a suspended drivers license offense. Nor was he ever charged with any felony DWI. For which Petitioner would now nelieve was the actual result of his wrongful termination as a border patrol agent by the federal government whereas Petitioner was a liability to the government whom had diagnsed him a veteren with PTSD in 1992 and was working as a Border patrol agent whom carried a gun for his 12 years as a Border Patrol agent. All of these incidents was extraneous offense, acts presented to the jury, and no one testified as witness to these acts of the government against petitioner. The appeals court has infact errored in upholding the trial court's decision, all the above extraneous acts occurred before the murder charged petitioner went to trial

for murder, and the court of appeals affirmative finding based on Domestic Violence holding. And therefore, it can not be concluded that the trial court did not abuse its Discretion when it went on to submit evidence from witness of the State on the domesttic violence. For allowing the jury to return a guilty verdict based on other extraneous acts of the government not on trial for by jury, or related to the murder on trial for.

The petitioner would show that the court of appeals has errored whereas all it had done is affirm the trial courts actions in this case. His acquittal not guilty by temporarily insanity defense for such federal government records support. for the offense on trial for and acquitted of murder. Whereas petitioner would show that the court of appeals opinion is clear where the court states a trial court may exclude relevant evidence of its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence. **Tex. R. Evid. 403 Rule 404(b)** Prohibits the use of prior bad acts to prove the defendant acted in conformity therewith, butallows that evidence to be used "for another purpose, such as proving motive, opportunity, intent, preparation, plan knowledge, identity, absence of mistake, or lack of accident." Id. **R.Evidence 404(b)(2).**

However, the appeals court goes on to state Evidence otherwise admissible under **Article 38.36 and Rule 404(b)** may still be excluded under **Rule** 403 if the appellant demonstrates the damaging nature of the evidence outweighed its probative value, **CHAVEZ 399 S.W.3d. at 173 (citing Garcia 201 S.W.3d at 703-04).** The purpose in excluding relevant evidence under **Rule 403** is to prevent a jury that has a reasonable doubt of the defendant's guilt in the charged offense from convicting him anyways based solely on his criminal character or because he is generally a bad person. **GARCIA 201 S.W.3d. at 704,** As previously discussed, the prior act of Domestic Violence was relevant in assessing a material issue in the case and whether Tello had a motive to kill Florez. Nothing in the record suggests the jury had a reasonabledoubt that Tello murdered Florez or that he lacked the mental capacity to commit murder but convicted him based on the evidence of the prior Domestic Violence. Citing **Chavez 399 S.W.3d. at 173.**

The petitioner would show that for this reason the appeals court states that had Domestic Violence not been submitted there was no doubt that the jury would have convicted petitioner of the murder, whereas petitioner is capable, whereas he is a war veteren from Desert Storm, diagnosed with PTSD, and was not denying he shot and killed Florez because she practiced witchcraft. And the federal government and State mental records of petitioner support petitioner's insanity defense. Thereby acknowledging petitioner was convicted of Domestic violence. And for which petitioner would submit court of appeals could have affirmed conviction of domestic violence of the governments charge of any prior bad acts prior to the murder charge on trial and acquitted of. Therefore, the court of appeals has infact errored in upholding the trial court did not abuse its discretion, for rendering a 70 year prison sentence for murder. Whgereas the evidence of family domestic violence was solely to prove he had a propensity for violence, and that he acted in conformity with that propensity on the day of the murder.

The court of appeals has infact errored in not reversing the jury 70 year sentence, a 70 year sentence for an alleged murder conviction, after actual arraignment a federal stage proceeding. A 70 year sentence imposed by this same jury hom was instructed by a prosecutor to actually impose a specific sentence of ten years for a lesser offense of Dmoestic Violence, in such a way as he stated to the jury the federal stage impose a ten year sentence for "each bullet he fired." Informing the jury he fired Seven Bullets. And this same jury imposed a straight 70 year sentence for the alleged conviciton of murder.

And therefore, petitioner would show the court of appeals has infact errored in not reversing the jury judgment of conviction for 70 years for murder. Not reversing the case back to the trial court for new sentencing phase trial. And or order his 7 ten year sentence, a ten year sentence for every bullet he fired to run concurrent in a flat ten year sentence. Entering a new judgment the appellant can fairly challenge by writ of Habeas Corpus, the method for challenging the governemnts conviction.

CONCLUSION

For all the reasons set forth above a Writ of Certiorari should issue to review the judgment sentence, and opinion of the State Court of Appeals Fourth District. The issues raised are of importance. And of Public interest. Any denial of Petitioners Writ of Certiorari would only show this court has chosen not to accept such important issues of the case for review. But does not express the court view of the merits of the case.

Executed on this 12 day of April 2020.

Gilberto Tello

Gilberto Tello 2182783
Connally Unit
899 F.M. 632
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OATH

I, Gilberto Tello, TDCJ 2182783, Do declare under penalty of Perjury that the above and foregoing contents stated with in this Writ of Certiorari to be true and correct to the best of my knowledge. And Texas Civil And Practice and Remedies code. 132.001 thur 132.003. Executed on this 22 day of April 2020.

Gilberto Tello

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