RECORD NO. _____

IN THE
Supreme Court of the United States

JOHN VIGNA,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In this criminal case, the Maryland court, in a trial for sexual abuse of a child, excluded evidence of the petitioner's character trait of appropriate interaction with children in his care, saying that the trait was too narrowly defined and irrelevant. The Maryland Court of Appeals disagreed with the trial court and held that, while this category of character evidence was relevant, the exclusion of it was harmless error beyond a reasonable doubt under Maryland statutory review and federal constitutional review.

The question to this Court is whether the denial of an accused request to introduce credible and relevant evidence that directly rebuts and contradicts the prior bad acts evidence introduced by the State violates the defendant's fundamental right to a fair trial under the Bill of Rights and the due process clause of the 14th Amendment. Petitioner also questions the use of harmless error analysis in current appellate jurisprudence and the extent to which, as in this case, Appellate Courts are standing firmly in the role of both triers of fact, analyzing what jurors would think about evidence that was never introduced, as well as triers of law.

PARTIES TO THE PROCEEDINGS

The Petitioner, John Vigna, was the Defendant and Appellant below. The United States was the Plaintiff and Appellee below.

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PETITION FOR WRIT OF CERTIORARI

John Vigna, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the Maryland Court of Appeals, the highest court in the state of Maryland.

OPINION BELOW

The Maryland Court of Appeals published their opinion, (*State v. Vigna*, No 55, September Term, 2019 (August 18, 2020), finding that the trial court's error in failing to admit relevant defense character evidence was harmless. The Court also held that Mr. Vigna's Due Process claim was waived, but, even on the merits, his claim failed. The opinion of the Maryland Court of Appeals is published. (Attached as Exhibit A)

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(1) and Part III of the Rules of the Supreme Court of the United States. The Maryland Court of Appeals affirmed Mr. Vigna's conviction on August 18, 2020 and therefore this petition is timely under Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. VI

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a 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 offense 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. VI.

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 defense.

U.S. Const. amend. XIV

Section 1.

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.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Rules of Criminal Procedure 52. Harmless and Plain Error.

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

The Trial.

John Vigna was charged in the Circuit Court for Montgomery County with various sex related offenses accusing him of having inappropriate sexual contact with five students at the school where he taught. Mr. Vigna had been a well-loved and award-winning teacher there for many years. These charges alleged various counts of Child Sexual Abuse, Sex Offense Third Degree, and Sex Abuse of a Minor. He was originally charged in case 129932C and a second indictment was filed in 130781C. In 932C, the State went to trial on one count of Sex Abuse of a Minor and one count of Third-Degree Sex Offense as to victim GG. In case 781C, the State

went forward on two counts for victim LD, four counts for victim AC, three counts for victim AS, and three counts for victim JS.

Vigna filed a pretrial motion to allow him to introduce character evidence of the pertinent character trait of "appropriate interaction with students." This motion was denied. The State filed a motion to admit 404(b) evidence. This motion was granted over defense objection. The State, at trial, requested to admit "prompt disclosure" evidence. This request was granted over defense objection.

On June 9, 2017, after 4 days of jury trial, John Vigna was found guilty on nine counts. On August 4, 2017, Vigna was sentenced to 45 years. He filed a timely Notice of Appeal on August 15, 2017.

The general theory behind the State's case was that Mr. Vigna touched students in his classroom inappropriately. Because they charged him with sexual abuse against multiple students at the same trial, every piece of relevant evidence that Mr. Vigna could present was critical in raising reasonable doubt. Mr. Vigna had multiple witnesses that would have testified that. in their opinion, he possessed the character trait of acting appropriately with students. Witnesses would have also testified that he had a reputation for appropriate interaction with children in his care. The Maryland Court of Appeals found the exclusion of this relevant character evidence to be erroneous, but "agree[d] with the Court of Special Appeals' assessment of the record" that "[u]ltimately, very little of the testimony that Mr. Vigna offered did not find its way to the jury." **A36.**

This assertion simply is not supported by the record. At no point was Mr. Vigna allowed to present opinion or reputation evidence that was specifically relevant to the elements of the crimes he was charged with.

Direct Appeal

Court of Special Appeals.

On July 31, 2019, the Court of Special Appeals affirmed the conviction and held that Mr. Vigna's reputation for appropriate interaction with children in his care was not appropriate character evidence because the evidence was not relevant. *Vigna v. State*, 241 Md. App. 710 (2019)(reported). The Court joined the minority line of cases on, what was then, an issue of first impression. *Id.* at 679, 718. The minority line of cases have declined to acknowledge sexual morality as a character trait because character witnesses "lack the required foundation" to form an opinion because sexual crimes are undertaken "furtively." *Id.* at 678 (citing *State v. Graf*, 143 N.H. 294, 299 (1999).

Idaho, which is among the overwhelming majority of jurisdictions that recognize sexual morality as a character trait, counters that argument by holding that, "the same can be said, however, of many types of criminal activity." *State v. Rothwell*, 294 P.3d 1137, 1142 (Idaho App. 2013).

Mr. Vigna also challenged the fairness of excluding his proffered "positive" character evidence in the context of the trial court allowing the state to submit his prior reprimands as "bad acts" character evidence under Rule 404(b). Mr. Vigna claimed this combination violated his right to a fair trial under the Sixth

Amendment to the United States Constitution and the Maryland Declaration of Rights.

The Court of Special Appeals held that Mr. Vigna's right to a fair trial under the Sixth Amendment was not violated. *Id.* at 685. Further, the Court held that, when it can decide an issue on non-constitutional grounds, the Court will do so. *Id.*

Petition for Writ of Certiorari to Maryland Court of Appeals.

On September 24, 2019 Mr. Vigna filed a Petition for Writ of Certiorari to the Maryland Court of Appeals. The petition raised two arguments:

> **I. In this case of first impression, whether the Court of Special Appeals erred by contradicting the majority of other jurisdictions in holding that appropriate interaction with children is not a pertinent character trait under Maryland Rule 5-404(a)(2)(A).**
>
> **II. Did the Court of Special Appeals err when it failed to recognize that denying Mr. Vigna the ability to introduce relevant character evidence, while at the same time allowing the state to introduce non-criminal 404(b) "bad acts" character evidence, denied him the right to a fair trial under the Sixth Amendment of the United States Constitution?**

That petition was granted on November 6, 2019.

On this issue of first impression, the Maryland Court of Appeals reversed the substantive decision of the Maryland Court of Special Appeals and held that:

> character evidence of appropriateness with children in one's custody or care (or of similar character traits, such as trustworthiness with children) may be admissible in a criminal case where a defendant is accused of sexually abusing a child.

A2-A3.

However, after reviewing the record, the Court found that any, "any error by the trial court in excluding such character evidence in Vigna's case was harmless beyond a reasonable doubt." **A3.**

Second, as to the argument of Mr. Vigna's that, denying him the ability to introduce relevant character evidence, while at the same time allowing the state to introduce non-criminal 404(b) "bad acts" character evidence, denied him the right to a fair trial under the Sixth Amendment of the United States Constitution, the Court held that Mr. Vigna waived that argument and failed to preserve any argument regarding his Due Process rights. **A38.**

The Court held this because it found that, with respect to the federal constitutional argument, Mr. Vigna's switched between a fair trial argument based on the Sixth Amendment, to one based on the Due Process Clause of the Fourteenth Amendment. *Id*. Despite holding that the argument was not preserved, the Court found that Mr. Vigna "received due process, regardless of any harmless error that resulted from the exclusion of the character evidence Vigna sought to introduce." **A41.**

REASONS FOR GRANTING THE PETITION

Introduction.

This case presents an issue of nationwide importance. Can a trial court deny a criminal defendant the right to present positive relevant character evidence, while also allowing negative 404(b) evidence, and still preserve a defendant's right to a fair trial? This Court should answer in the negative.

Prosecutors have been emboldened by trial courts that are increasingly permissive of negative character evidence. Any limitation with respect to relevant positive character evidence, as will be discussed in more detail, leaves the playing field incredibly imbalanced in favor of the state. Here, like in *Chambers v. Mississippi*, the combination of an otherwise valid rule, along with a series of facts that obstructs a defendant the ability to put on a fair defense is a violation a defendant's right to due process of law. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

The state of Maryland has decided that the right to present relevant positive character evidence does not exist as part of a defendant's right to a fair trial under the federal constitution. This Court has never addressed whether such a federal right exists but should amid the rising tide of permissive 404(b) evidence rulings across this country.

Mr. Vigna argued on appeal a very simple and straightforward fairness issue: whether the prosecutor should have been allowed to introduce 404(b) negative character evidence, painting the petitioner as someone who had a propensity to commit these sex crimes, while at the same time not allowing the petitioner to tell the jury about his good character for not doing such things.

The Maryland Court of Appeals held that petitioner should have been able to present the good character evidence regarding appropriate interaction with children

in his care, but failure to allow him to do so was harmless error and did not violate any fair trial right:

As discussed above, any error in the exclusion of character evidence was harmless beyond a reasonable doubt. By definition, then, Vigna received a fair trial. It may not have been a perfect trial, given the limitation on Vigna's ability to elicit the more specific character evidence he proffered, but fairness, not perfection, is the constitutional standard.

A40.

The right to a fair trial is as equally rooted in the Due Process Clause of the 14th Amendment as it is the Sixth Amendment. The petitioner was not allowed to defend himself with relevant character evidence in the face of 404(b) negative character evidence and so the trial was unfair from either constitutional vantage point.

I. With the Current Overuse and Abuse of 404(b) Bad Character Evidence the Right to a Fair Trial Must Include the Right of the Defendant to Present Positive Relevant Character Evidence Either Through the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment.

a. The Admission of Positive Character Evidence is Deeply Rooted in Our Jurisprudence.

Character evidence has been part of legal systems throughout recorded history and the character of the accused has always been central to the determination of guilt. *See generally* Justin Sevier, *Legitimizing Character Evidence*, Emory Law Journal 442, Vol. 68:441 (2019). (providing overview of history of character evidence). In previous legal systems, often the entire judgment of the convening authority rested on the accused's character. *Id.* at 451.

In federal court, good character evidence is admissible regardless of whether the accused takes the stand on her own behalf. This right, the right to prove good

character is "so deeply imbedded in our jurisprudence as to assume almost constitutional proportions." *See* Fed. R. Evid. 404(a)(1) advisory committee's notes.

The ability to put on good character evidence joins the presumption of innocence, proof beyond a reasonable doubt, and the right to confront one's accusers, as one of the hallmarks of a system designed to protect the accused. Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* § 4.12 (1999); *See* also Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 101 (2d ed. 1994).

With respect to the format of such evidence, Federal 404 limits character evidence to either reputation or opinion evidence, specific instances of good character are not allowed. Fed. R. 405. Maryland law regarding character evidence mirrors that of the federal rules.

Md. Rule 5-404(a)(2)(A) allows a defendant to present good character evidence that is a "trait of character" and if that trait is "pertinent," i.e., relevant to the trier of fact's consideration of the charged offenses. *Vigna* at 29. The Maryland Court of Appeals acknowledges that this rule is derived from Fed. R. Evid 404(a)(2)(A). *Id*. at 30. The Maryland Court of Appeals goes on to add that there is, if contested, a probative vs. prejudice balancing test. *Id.* at 33.[1]

The truth of the matter is that the use of bad character evidence has, despite alleged protections against over-use, become a staple, almost a given, in most criminal trials across this country. And, "[n]otwithstanding the seemingly rigorous four-step analysis of other acts evidence articulated by the Supreme Court, federal courts have grown increasingly permissive in allowing the admission of other-acts

[1] The Md. Rule 403 is modeled after Fed. R. Evid 403.

evidence."[2] Scholars have written extensively against the expanded use of bad character evidence[3].

b. Good Character Evidence is a Minefield.

It would appear from the law that defendants have the upper hand when it comes to character evidence. Josephine Ross, *""He Looks Guilty": Reforming Good Character Evidence to Undercut The Presumption of Guilt."* University of Pittsburgh Law Review 20, 243 (2004).

By a plain reading of rule 404, and 405 it appears that the defendant has much more of an opportunity to introduce character evidence since 404(b) does not allow the introduction of evidence to "show action in conformity therewith." The appearance of this advantage is illusory because there is a great deal more evidence of bad character than good character introduced into criminal prosecutions. *Id*. at 236.

A defendant cannot use specific instances of good character. However, the prosecutor can in rebuttal. He is limited to presenting opinion or reputation evidence. In almost no other area of law is opinion testimony encouraged over specific instances observed by a witness.

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[2] Daniel Capra and Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(B) to Protect Criminal Defendants*, 118 Colum. L. Rev. 769 (2018). *See* Imwinkelried et al., 1 Edward J. Imwinkelried et al., *Courtroom Criminal Evidence* § 907 LexisNexis (6th ed. 2016) (noting liberal use of "plan" purpose by courts to admit similar acts that are merely bad character evidence).
[3] See, e.g., Robert D. Dodson, *What Went Wrong With Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 Drake L. Rev. 1 (1999); Russell L. Jones, *"If It Ain't Broke, Don't Fix It!": An Unnecessary Tampering With A Well Established Rule: Louisiana Code of Evidence Admits Criminal Propensity Evidence*, 48 Loy. L. Rev. 17 (2002); David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial By Character*, 73 Ind. L.J. 1161 (1998); Miguel A. Méndez, *Character Evidence Reconsidered: "People Do Not Seem to be Predictable Characters"*, 49 Hastings L.J. 871 (1998); Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 Hastings L.J. 663 (1998); Richard A. Posner*, An Economic Approach to the Law of Evidence*, 51 Stan. L. Rev. 1477, 1544-45 (1999).

Not only can a defendant not introduce specific instances of conduct, in many instances, like in this case, a defendant is not allowed to introduce evidence that is specifically relevant to his defense.

Finally, once any good character evidence is introduced, the door is opened to specific instances of bad character. In petitioner's case not only was he not allowed to introduce the most relevant character evidence, but he was also forced to introduce only good character for lawfulness and truthfulness. These areas of inquiry are so broad as to be made meaningless. Neither of these traits get to the elements of the crimes Petitioner was accused of.

To illustrate how ridiculously unhelpful that type of character evidence was, after petitioner's witnesses testified to Mr. Vigna's law-abiding nature, the state presented specific instance evidence that Mr. Vigna had smoked marijuana. *Vigna* at 14.

c. 404(b) Evidence is Before Juries to Show Bad Character Under the Guise of Non-Propensity Grounds for Admission.

Despite its origin as part of a rule with exclusionary purpose, Rule 404(b) has been characterized by many federal circuit courts as a rule of inclusion. *See, e.g., United States v. Geddes*, 844 F.3d 983, 989 (8th Cir. 2017). In fact, it has been suggested that, "the character rule is steadily losing ground and is perhaps on its way to disappearing" as a result of this cavalier approach to prior bad-acts evidence. Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47

Ga. L. Rev. 775, 777 (2013). Multiple renown constitutional scholars, including Edward J. Imwinkelried, have lamented the ease with which prosecutors can sway a jury by parading a defendant's misdeeds before it.[4]

This is precisely the argument that petitioner raised on appeal. It is plain as day from the reading of the transcript. The State's Attorney kept the case in the media's eye. The trial court, through its rulings, set an impossibly unfair playing field. The State was permitted to argue to the jury that the petitioner committed the "bad act" of allowing children to sit in his lap while at the same time denied Mr. Vigna the right to defend himself with pertinent character evidence that would directly challenge the state's 404(b) evidence.

The state was permitted the ability to introduce 404(b) evidence that petitioner, a trusted schoolteacher for decades, had allowed children to sit on his lap despite being reprimanded for allowing children to sit on his lap on two occasions in previous years. **A4-A5.** The Petitioner never denied having children sit in his lap, in fact he readily admitted to it when he testified. **A12.** The Maryland Court of

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[4] *See* Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575, 578 (1990) (noting how courts have expanded the admissibility of uncharged misconduct to the point of substantially undermining the character-evidence prohibition); David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 Ind. L.J. 1161, 1164 (1998) (arguing that expanding admissibility of other-acts evidence under Rule 404(b) is inconsistent with the moral foundations for the rule); Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 Rev. Litig. 181, 184 (1998) ("[C]ourts routinely admit bad acts evidence precisely for its relevance to defendant propensity."); Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 Temp. L. Rev. 201, 214 (2005) ("Typically, the courts use . . . Rule 404(b) as a window to permit bad character evidence to be proved against the accused."); David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45Creighton L. Rev. 215, 216–17 (2011) (arguing that admitting other-acts evidence as probative of intent is inherently problematic).

Appeals went to great lengths to summarize the good character evidence that was admitted. **A13-A14.** This was done to justify refusing Mr. Vigna a new trial.

With the ever-permissive introduction of negative 404(b) evidence, this was a case of character assassination and the petitioner was not allowed a fair fight. What possible harm could occur by allowing the petitioner to present credible and relevant positive character evidence. Petitioner has attached the jury instruction given on 404(b) evidence. *See* MPJI-CR 3:23. *A78.* Despite this instruction, Mr. Vigna was helpless to clear his good name.

Mr. Vigna never presented the defense that the lap-sitting was an accident. The only real purpose for introducing this type of character evidence was to paint the petitioner as a sexual predator.

d. Due Process Demands Admission of Pertinent Character Evidence.

Defendants have fair trial rights that extend past the Bill of Rights. "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. . . . What is fair in one set of circumstances may be an act of tyranny in others." *Snyder v. Massachusetts*, 291 U.S. 97, 116, 117 (1934). *See also Buchalter v. New York*, 319 U.S. 427, 429 (1943). Conversely, "as applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it . . . [the Court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." *Lisenba v. California*, 314 U.S. 219, 236 (1941).

Due Process violations that cause unfair trials have been found in all manner of situations: bias or prejudice either inherent in the structure of the trial system or imposed by external events[5], public hostility toward a defendant[6], lack of judicial impartiality[7], and, most importantly in this case, cases where the combination of otherwise acceptable rules of criminal trials in some instances deny a defendant due process. In *Davis v. Alaska*, this Court held that refusal to permit defendant to examine prosecution witness about his adjudication as juvenile delinquent and status on probation at time, to show possible bias, was due process violation, although general principle of protecting anonymity of juvenile offenders was valid. 415 U.S. 308 (1974). In *Crane v. Kentucky* this Court held that exclusion of testimony as to circumstances of a confession can deprive a defendant of a fair trial when the circumstances bear on the credibility as well as the voluntariness of the confession, 476 U.S. 683 (1986).

This Court has also held that a state may not enforce its rules of evidence, such as rules excluding hearsay, in a manner that disallows a criminal defendant from presenting reliable exculpatory evidence and thus denies the defendant a fair trial. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

In this case, we have an otherwise valid rule of evidence in Maryland, Rule 5-404(a)(2)(A). However, despite finding that the petitioner should have been allowed to introduce good character evidence regarding appropriate interaction with

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[5] *Tumey v. Ohio*, 273 U.S. 510 (1927).
[6] *Frank v. Mangum*, 237 U.S. 309 (1915); *Moore v. Dempsey*, 261 U.S. 86 (1923).
[7] *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

children in his care, the Maryland Court of Appeals found that the denial of that ability was harmless and that no federal right to a fair trial was implicated. This situation is just as it was in *Chambers*. The valid Maryland rule combined with a lack of recognition to a fair trial robbed petitioner of admitting an entire category of opinion evidence.

Petitioner submits that this issue is of grave importance. It is an exception not the rule when a sexual offense trial does not include some form of 404(b) evidence. If petitioner's conviction is not reversed prosecutors will continue to boldly present negative character evidence under the guise of admissible grounds and there will be no commiserate constitutional guarantee that a defendant can rebut that evidence with valid and relevant character evidence of his own.

Rule 404(b) on paper, both in federal court and Maryland state court, was drafted to include safeguards to make sure that this provision was no abused or overused. However, those protections are not working in our criminal justice system[8].

II. Affirming A Conviction on Harmless Error Grounds When an Entire Category of Relevant Character Evidence is Excluded Places a State High Court Squarely in the Role of the Jury.

a. Brief History of Harmless Error.

It has been 50 years since the seminal harmless error case, *Chapman v. California*, was decided by the Supreme Court. 386 U.S. 18, 22–24 (1967). As Professor Greabe has written, the "lack of clarity about *Chapman*'s pedigree has had the predictable consequence of leaving harmless-error doctrine in an

[8] Capra and Richter, *supra* at 831.

unsatisfactory state." John M. Greabe, *The Riddle of Harmless Error Revisited*, 54, 59 Hous. L. Rev, 59 (2016).

Leading up to *Chapman*, American courts were far more protective of defendants in the criminal justice system. Recognizing the stakes in a criminal trial, harmless error was not a concept to be applied. In the late nineteenth and early twentieth centuries, American appellate courts behaved much like their English counterparts, applying a rule approximating automatic reversal. *Id.* at 67. In *Distinguishing the Righteous from the Roguish: The Arkansas Supreme Court 1836-1874,* J.W. Looney reviewed hundreds of 19th century Arkansas cases. After reviewing cases from 1853-1860 he discovered that the court "during this time period, still spent considerable time on technical procedural questions, on evidentiary issues, and in protecting the rights of the accused." 226 (Univ. Ark. Press 2016).

Professor Friedman, in reviewing 19th century jurisprudence more broadly, found the same to be true. That "the message was this: our system is dedicated to fairness: it is absolutely obsessed with the rights of the defendant." *See* Lawrence M. Friedman, *Crime and Punishment in American History* 257 (Basic 1993). Things then began to change.

In the early 20th century, there were several developments in federal and state law to curtail reversals of convictions. *Greabe* at 67. The Courts were determined to limit the number of reversals through passage of various harmless error rules. The extent of this legislation is well documented in one of *Chapman*'s

predecessors, *Kotteakos v. United States*, 328 U.S. 750, 758-760 (1946). In *Kotteakos*, the Supreme court found that if the court cannot determine that the error did not sway the judgment with substantial assurance then the error is not harmless. *Id.* at 765.

During the intervening 20 years between *Kotteakos* and *Chapman*, the Warren Court made several landmark decisions that gave teeth to the Bill of Rights and expanded federal constitutional protections for criminal defendants.[9] Although almost all of these cases still stand as good law in substance, from a practical standpoint, their assistance to criminal defendants has been limited. From *Chapman* and through the harmless error development to present day, many of these substantive advancements have been rendered meaningless as a method to protect the rights of defendants.

In 1979, a law review article studied the dramatic rise in the consideration of the harmless error doctrine in federal circuit appeals. Donald A. Winslow, *Harmful Use of Harmless Error in Criminal Cases*, 64 Cornell L. Rev. 538 (1979). In studying cases from 1960-1978, the author found that harmless error cases as a percent of total cases increased from .63-2.62 percent, a 400 percent increase. *Id.* at 545. Edwards, studying cases from 1979-1994, found that between 1.38%-2.15% of all reported federal appellate decisions mention harmless error. Harry T. Edwards, *To*

[9] *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that state courts must exclude evidence obtained in violation of the Fourth Amendment); *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963) (holding that indigent criminal defendants have a fundamental Sixth Amendment right to assistance of counsel); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that the Fifth Amendment privilege against self-incrimination requires law enforcement officials to apprise those in custody of certain rights).

Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?, 70 N.Y.U. L. Rev. 1167, 1181 n.52 (1995).

Practitioners and academics recognize that harmless error is likely the most oft-cited doctrine in all criminal appeals. William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. Legal Stud. 161, 161 (2001).

Finding harmless error lessens any incentive for prosecutors or police to follow the law. A lenient rule encourages a prosecutorial team to "trifle with a defendant's rights and is no more desirable than one which would reverse for trivial errors." Donald A. Winslow, *Harmful Use of Harmless Error in Criminal Cases*, 64 Cornell L. Rev. 538 (1979).

b. The Maryland Court of Appeals First Guessed the Jury.

Perhaps the most troubling portion of the opinion below is this:

> Moreover, the opinion testimony of multiple defense witnesses that Vigna was law-abiding, although broader than the excluded opinion evidence Vigna sought to elicit, ultimately served the same purpose.

A37.

It is one thing for an appellate court to determine that a particular type of erroneously excluded or included evidence was of little consequence. It is yet another thing for a state high court to review the excluded evidence and determine that already-entered evidence served the same purpose as the excluded. This is a deep invasion into the role of the jury. Our state and federal courts have seemingly united on one justification for invading province of the jury: to preserve criminal convictions.

Many historians trace the developments of harmless error to the 1835 English case of *Crease v. Barrett*. 149 Eng. Rep. 1353. In *Crease*, a civil case, the Court of the Exchequer "Evinced its resolve not to invade the province of the jury." *See* Roger J. Traynor, *The Riddle of Harmless Error* 6 (1970). The Court declined to find harmless the erroneous exclusion of evidence that was unlikely to change the result. *Crease*, 149 Eng. Rep. at 1359.

Courts around the country, both state and federal, have treated their duty to protect the province of the jury rather situationally in the last fifty years. The common thread seems to be to preserve convictions. This Court has said it is the jury's role "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). However, that point of view changes when there is an error before an appellate court. In those situations, our appellate courts are comfortable with first-guessing a jury and acting as jurors themselves.

As Fairfax points out, "first-guessing" improperly substitutes the appellate court's judgment for that of the jury. Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 Fordham L. Rev. 2027 (2008). It is considered first-guessing because harmless error requires appellate judges to consider situations that the jury never once was allowed an opportunity to ponder. This first-guessing, a justified invasion of the province of the jury to preserve convictions, will eventually lead to the jury's irrelevance:

> The willingness of the Supreme Court to permit such first-guessing of a jury's verdict through harmless error review of elemental omissions is evidence of a

profound lack of regard for the jury's institutional existence, an existence that will be eroded beyond recognition unless the Court corrects course.

Id. at 2031.

In petitioner's case, the jury never heard petitioner's witnesses testify about their opinion of petitioner with respect to acting appropriately with children in his care. It is impossible, in such a highly charged prosecution, to say beyond a reasonable doubt that credible testimony about how the petitioner behaved appropriately around children was harmless beyond a reasonable doubt. Especially in a case like this where, as the Maryland Court of Appeals pointed out, Mr. Vigna was acquitted on 5 of the fourteen charges even without the erroneously excluded relevant character evidence being presented to the jury. *Vigna* at 40.

Petitioner has a right to a fair trial. This includes to present evidence on his behalf to negate his guilt. Although never formalized this Court has consistently agreed that admission of good character evidence is crucial to a good defense. This Court has said that "character evidence alone, in some circumstances, may be sufficient to raise a reasonable doubt as to guilt." *Michelson v. United States*, 335 U.S. 469, 476, 69 (1948).

This Court should address the issue of whether a criminal defendant has a right to present positive relevant character evidence in his defense as part of his right to a fair trial either under the Sixth Amendment, or the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

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