

22-5199

No. \_\_\_\_\_

FILED

JUL 15 2022

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ISRAEL MANUEL RIOS

— PETITIONER

(Your Name)

vs.

STATE OF TEXAS

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS OF TEXAS FOR THE FIFTH DISTRICT, AT DALLAS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ISRAEL MANUEL RIOS

(Your Name)

2661 FM 2054

(Address)

TENNESSEE COLONY, TEXAS 75884-5000

(City, State, Zip Code)

NO PHONE

(Phone Number)

**QUESTION(S) PRESENTED**

QUESTION 1: Certiorari should be granted to determine whether the purpose of Rule 403 is to exclude relevant but substantially prejudicial evidence, that outweighs the probative value of extraneous sexual offenses? Page 11

QUESTION 2: Certiorari should be granted to determine whether the Dallas Court of Appeals' decision conflicts with Old Chief v. U.S., when J.R.'s sexual ~~extraneous~~ offense's probative value is outweighed by its prejudicial effect on the jury? Page 13

QUESTION 3: Is this Court convinced that several sexual assaults occurred in a four bedroom home with people living in it and one adult usually being at the home, without anyone catching Petitioner in the act and without anybody ever knowing about the allegations? Page 13-14

QUESTION 4: Certiorari should be granted to determine whether the jury was overwhelmed by the substantial amount of sexual extraneous offenses of J.R., who was not named in the indictment, renders Petitioner's trial fundamentally unfair by the danger of the unfair prejudice against him? Page 15-16

QUESTION 5: Certiorari should be granted to determine whether Due Process Clause affords relief where the sexual extraneous evidence concerning J.R. had been the principle focus at trial? Page 16

## **LIST OF PARTIES**

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## **RELATED CASES**

- State of Texas Vs. Irsael Manuel Rios, Cause No. F-18-75738-V, 292 Judicial District Court of Dallas County, Texas.
- Israel Manuel Rios Vs. State of Texas, Cause No. 05-20-00420-CR, Affirmed on October 29, 2021. Court of Appeals for the Fifth District of Texas, at Dallas.
- Israel Manuel Rios Vs. State of Texas, Cause No. PD-0862-21. Court of Criminal Appeals of Texas, at Austin. Refused on February 16, 2022.

## TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	4
REASONS FOR GRANTING THE WRIT .....	11
CONCLUSION.....	17

## INDEX TO APPENDICES

**APPENDIX A :** Judgment of Conviction, 292 Judicial District Court of Dallas, County, Texas. Cause No. F-18-75738-V.

**APPENDIX B :** Court of Appeals Opinion for the Fifth District of Texas, at Dallas Texas. Affirmed on October 29, 2021.

**APPENDIX C :** Court of Criminal Appeals of Texas, at Austin. Refusal of Petition for Discretionary Review. Refused on February 16, 2022.

**APPENDIX D**

**APPENDIX E**

**APPENDIX F**

## TABLE OF AUTHORITIES CITED

<b>CASES</b>	<b>PAGE NUMBER</b>
<u>Cooper v. Sowders</u> , 837 F.2d 284 (6th Cir. 1988)	17
<u>Delaware v. Van Arsdall</u> , 475 U.S. 673 (1986)	11
<u>Gigliobianco v. State</u> , 210 S.W.3d 637 (Tex.Crim.App. 2006).	9,11,12,14
<u>Lisenba v. California</u> , 314 U.S. 219 (1941)	15
<u>Maurer v. Dep't of Corrs.</u> , 32 F.3d 1286 (8th Cir. 1994)	17
<u>Menzies v. Procunier</u> , 743 F.2d 281 (5th Cir. 1984)	16
<u>Michelson v. U.S.</u> , 335 U.S. 469 (1948)	13,15
<u>Montgomery v. State</u> , 810 S.W.2d 372 (Tex.Crim.App. 1990)	12
<u>Montilla v. State</u> , 78 S.W.3d 352 (Tex.Crim. App. 2002)	15
<u>Old Chief v. U.S.</u> , 519 U.S. 172 (1997)	9,12,13,14,15
<u>Snowden v. Singletary</u> , 135 F.3d 732 (11th Cir. 1998)	17

Cont'd on Page vi...

### STATUTES AND RULES

#### United States Constitution:

<u>Amendment V</u>	3
<u>Amendment XIV, Section 1</u>	3
<u>28 U.S.C. § 1254(1)</u>	2
<u>28 U.S.C. § 1257(a)</u>	2
<u>Federal Rule of Evidence 403</u>	3, generally
<u>Texas Criminal Procedure article 38.07</u>	13
<u>Texas Rule of Evidence 403</u>	3, generally

### OTHER

<u>J. McLaughlin, et al., Weinstein's Federal Evidence § 403.02[1][a]</u> (2006 rev.)	11
--	----

Cont'd on Page vi...

CASES	PAGE NUMBER
<u>U.S. v. Aramony</u> , 88 F.3d 1369 (4th Cir. 1996)	16
<u>U.S. v. Gaurdia</u> , 135 F.3d 1326 (10th Cir. 1998)	16
<u>U.S. v. Lemay</u> , 260 F.3d 1018 (9th Cir. 2001)	16
<u>U.S. v. Merriweather</u> , 78 F.3d 1070 (6th Cir. 1995)	15
<u>Walker v. Engle</u> , 703 F.2d 959 (6th cir. 1983)	16
<u>Young v. State</u> , 159 Tex. Crim. 164 (Tex. Crim. App. 1953)	11

OTHER

<u>K. Broun, et al., McCormick on Evidence</u> § 185 (6th ed. 2006)	12,13
<u>S. Goode, et al., Texas Practice: Guide to the Texas Rules of Evidence</u> § 403.2 (3rd ed. 2002)	12,13

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

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

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix N/A to the petition and is

reported at N/A; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix N/A to the petition and is

reported at N/A; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the Fifth District (Dallas) court appears at Appendix B to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was N/A.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from state courts:

The date on which the highest state court decided my case was Feb. 16, 2022. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.  
\_\_\_\_\_

An extension of time to file the petition for a writ of certiorari was granted to and including July 16, 2022 (date) on March 10, 2022 (date) in Application No. 21A 491.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### UNITED STATES CONSTITUTION, AMENDMENT 5:

No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment 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.

### UNITED STATES CONSTITUTION, AMENDMENT 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.

### FEDERAL RULE OF EVIDENCE 403:

The Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

### TEXAS RULE OF EVIDENCE 403:

The Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, or needlessly presenting cumulative evidence.

## STATEMENT OF THE CASE

The State of Texas indicted Petitioner with continuous sexual abuse by "contact between the mouth of [S.F.] and the sexual organ of the [Petitioner], AND by the contact between the hand of the [Petitioner] and the genitals of [S.F.] with the intent to arouse and gratify the sexual desire of the [Petitioner], AND by the contact between the hand of the [Petitioner] and the genitals of [S.F.] with the intent to arouse and gratify the sexual desire of the [Petitioner], AND by the contact between the genitals of the [Petitioner] and the buttocks of [S.F.] with the intent to arouse and gratify the sexual desire of the [Petitioner]."CR, 8.<sup>o</sup>

Amanda Gomez lived with her family in a small house. Her family consisted of her husband, her daughter S.F., her son J.F., and two younger twin daughters. RR3, 126; RR4, 98-99.<sup>o</sup> Sometime in 2014, the Rodriguez family moved in with Amanda Gomez and her family. RR3, 158. The Rodriguez family consisted of Sharon Rodriguez, her son R.R., her daughter J.R., her daughter RL.R., her son RM.R. and her youngest daughter M.R. RR3, 126. Sharon Rodriguez had met Amanda Gomez through the mother of Israel Rios. RR3, 166. Israel and Amanda were cousins. RR3, 198; RR4, 67, 70. Although, the exact dates were disputed, at some point in 2014, Israel Rios also came to live in the house of Amanda Gomez. RR4, 135. Israel was 17 in 2014. RR4, 24.

Amanda Gomez' house had four bedrooms and two living rooms. Amanda and her husband had one bedroom, Sharon Rodriguez had one, the girls shared one, and the boys shared the fourth bedroom. RR4, 126-128. Amanda and her husband worked

---

<sup>o</sup> CR, 8 means Clerk's Record, page #. RR3, 126 means Reporter's Record, Volume Number, and Page #.

during the day, but Sharon was usually at the home. However, there would be occasions when all the adults went somewhere, leaving Israel and R.R. to babysit the younger children. RR3, 129, 191, 223; RR4, 136.

S.F. testified that when she was 8 or 9 years old until she was 11, "some bad stuff happened" with Israel. RR3, 199. S.F. said it happened about 15 times. RR3, 209. She had trouble remembering specifics because "they all ran together." RR3, 200. She remembered the last time something happened when she was 11. She and Israel were sitting in the back living room. He touched her vagina with his hands. She remembers seeing his penis and said it was hard. RR3, 201-203. On another occasion, she was sitting on his lap and he put his hand on her vagina. RR3, 211. On another occasion, in the dryer room, Israel made her perform oral sex on him. This happened more than once. RR3, 212. She also recalled that he would pull out his penis and "rub it on her butt." RR3, 220. One night, he pulled down her pants and took photos of her backside. RR3, 216. When S.F. was 11, Israel moved out of the house. RR3, 223. S.F. finally told her younger brother J.F. what Israel had done, but she asked him not to tell anyone. She was afraid she would get in trouble. RR3, 221.

Over defense objections, J.R. also told the jury that in 2014, when she was 11 and living in Amanda's house, Israel had also abused her. She recalled that in 2012, her grandfather died on December 8th. Every year thereafter, the family would go put flowers on his grave on that date. She recalled that it was after that date in 2014, that something happened with Israel. RR3, 107-108. All of the kids were in the back living room watching movies. Israel asked J.R. if she wanted to accompany him to go get some snacks out of her brother's room. Apparently, her brother kept a stash of snacks in his bedroom closet. RR3, 108-109, 132. J.R. went to the closet. Israel was behind her. He told her to put her hands on the shelf. He pulled down her pants and put his "penis inside her butt".

RR3, 112-114. Afterwards, when J.R. went to the bathroom, there was blood. RR3, 121. J.R. did not say anything to anyone about what happened for three years. RR3, 130.

The jury also learned that J.R. was a troubled child. she was held back in third grade and then again in fifth grade. RR3, 159. She had problems with incontinence and her weight mushroomed from 120 pounds in 2013 up to 240 pounds by 2015. RR3, 160, 179. She began cutting herself in fourth grade. RR3, 140. She was sent to counselors but refused to talk to them. RR3, 143.

In April of 2018, J.R. became upset and was crying at school. She was taken to the office of a school secretary, Jessica Avalos. J.R. finally revealed to Ms. Avalos that she was having nightmares about a family friend hurting her younger sister. RR3, 92. she told Ms. Avalos that this family friend had done inappropriate things to her a few years ago, and now there was a possibility he was coming to live with them again. RR3, 93. She was afraid he would hurt her younger sister like he had hurt her. RR3, 120-121. Ms. Avalos alerted the authorities. J.R. was taken for a sexual assault exam even though the abuse had happened several years ago. her exam was normal which was to be expected. A normal exam does not rule out abuse. RR4, 12-13. After J.R.'s outcry, Amanda Gomez questioned her daughter S.F. about whether she had ever been abused. Only then did S.F. disclose what had happened to her. RR3, 222.

After S.F.'s outcry, she was taken to the child advocacy center where she was interviewed by Megan Peterson. RR4, 137. Ms. Peterson explained that in Dallas they conduct "informed" forensic interviews, meaning that she is informed of the allegations prior to interviewing the child. RR4, 32-33. During the interview, Ms. Peterson looks for sensory details and periphery details. RR4, 35. when she interviewed S.F., the details were consistent with abuse for her developmental level. Ms. Peterson did not observe any "red flags." RR4, 39. Ms.

Peterson said she typically did not ask the child to recount every incident. She will ask them about the first time, the last time, or the time they remember the most. RR4, 42. She acknowledged that sometimes the child will testify differently in court. RR4, 40. In her interview, S.F. disclosed that Israel made her touch his penis with her hand and her mouth. S.F. said that Israel threatened to kill her if she told anyone. RR4, 45. One night she woke up to find him taking pictures of her butt. RR4, 46. One time he pulled her out of bed and took her to the living room where he rubbed her vagina. She could feel his penis and it felt like a big rock. RR4, 58. Ms. Peterson did not ask S.F. how many times she had been assaulted. RR4, 61.

After the state rested, Violet Kamrath told the jury that she was Israel rios' cousin. They were very close. RR4, 67. In 2014, Violet was turning 21 on December 13th. She recalled that Israel had come to visit and stay with her to help her celebrate her birthday. She thought he arrived on December 10th. Violet and her father picked up Israel from his mother's house, not from Amanda Gomez'. RR4, 70. On her birthday, Violet jumped off a roof in high heels onto a trampoline and fractured her ankles. Since she could not walk, her cousin Israel stayed with her to help take care of her. RR4, 89. Violet said Israel was with her everyday and did not leave until after New Year's. RR4, 73. Violet never told anyone in the District Attorney's Office what she knew. At the time she was also dealing with an abusive boyfriend. She had filed charges against him and knew the prosecutors were trying to contact her, but did not know if it was about Israel's case or her boyfriend's. RR4, 78. Either way, she did not cooperate with the prosecutor's attempts to contact her. RR4, 86.

Amanda Gomez testified that she owned the house on Granger where the offense allegedly occurred. RR4, 99. She acknowledged that appraisal district records showed that the house was 1476 square feet, but she did not know if that was

correct. there was other information on the form - such as the number of rooms - that she knew was not correct. RR4, 102-03. She also acknowledged that Child Protective Services (CPS) had investigated her home twice. RR4, 115. Outside the jury's presence, the defense stated that they wanted to ask Ms. Gomez about the other investigations. The State objected under relevance grounds and Rule 403. RR4, 119-20. Apparently in one of these previous investigations, Ms. Gomez made a statement to CPS that her daughter, S.F., was not credible. The Court ruled that the defense could not get into the specific allegations of the previous investigations, but could ask Ms. Gomez if she had an opinion on S.F.'s credibility. The State still objected under Rule 608(b). 403, and 405. RR4, 127. The Court then noted that once the defense attacked S.F.'s credibility, the entire forensic interview of S.F. would be admitted. RR4, 30. The defense objected that the interview would be unfairly prejudicial, and in light of the Court's proposed ruling, declined to question Ms. Gomez about S.F.'s credibility. RR4, 131. At the conclusion of the evidence, the defense requested an instruction on the lesser included offense of sexual assault. The court denied this request. RR4, 142-43. The jury convicted Israel Rios as charged in the indictment. RR4, 6.

On Appeal, the Petitioner argued the trial court abused its discretion by admitting evidence of the extraneous offense of sexual abuse against J.R. because it was more prejudicial than probative under Rule 403. The Petitioner argued that the potential for J.R.'s testimony to confuse the jury, which the state presented first, was high and created a substantial risk of a verdict based on the "inherently inflammatory and prejudicial nature of crimes of a sexual nature committed against children."

On October 29, 2021, the Fifth District Court of Appeals at Dallas recognized "the record indicates the trial court conducted an article 38.37 hearing,

conducted a Rule 403 balancing test, and ruled that a jury could find the extraneous offense occurred beyond a reasonable doubt and was relevant under Rule 403. Petitioner is not challenging the admissibility of the extraneous evidence under article 38.37, but instead argues the inadmissibility of the evidence under Rule 403." See Appendix B, Pgs. 11-12.

The Dallas Court of Appeals reasoned that J.R.'s extraneous sexual offense "could have reasonably concluded the inherent probative force of the extraneous evidence, coupled with the State's need for the evidence, was considerable." While we agree the development of the extraneous offense evidence took sometime and more than one witness, it was not so overwhelming as to distract the jury from the charged conduct." Therefore, "nothing in the record indicates the jury might have given undue weight to the evidence without being equipped to evaluate the probative force of the evidence, such as in the case of scientific evidence, that might mislead a jury (citing Gigliobianco v. State). Rather, J.R.'s testimony concerned matters easily comprehensible by all people." Finally, "we conclude the trial court did not abuse its discretion by admitting the extraneous sexual assault against J.R." Appendix B, Pgs. 12-14.

The Petitioner presented a Petition for Discretionary Review (PDR) to the Court of Criminal Appeals. See Appendix C. The Petitioner argued that the Dallas Court of Appeals' decision is in conflict with state and federal Rules 403, and the Supreme Court's decision in Old Cheif v. U.S. because it improperly used a post hoc reattribution that upheld the clear prejudicial effect of another complainant not named in the charged offense, rendering Petitioner's trial fundamentally unfair. Cf Appendix C, and the reasons to grant relief as detailed in the argument herein.

Taken together, on February 16, 2022, the Court of Criminal Appeals decided not to hear this issue. Appendix C. On March 10, 2022, Justice Alito extended

the time to and including July 16, 2022. Therefore, this Petition is timely.

## REASONS FOR GRANTING THE PETITION

Question One: CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE PURPOSE OF RULE 403 IS TO EXCLUDE RELEVANT BUT SUBSTANTIALLY PREJUDICIAL EVIDENCE, THAT OUTWEIGHS THE PROBATIVE VALUE OF EXTRANEous SEXUAL OFFENSES?

The central purpose of a criminal trial is to decide the factual question of the Petitioner's guilt or innocence. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). For this reason, the Court of Criminal Appeals reasoned that "an accused is entitled to be tried on the accusation made in the state's pleading and not on some collateral crime, or for being a criminal in general." Young v. State, 159 Tex. Crim. 164 (Tex. Crim. App. 1953).

Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." As one treatise explained: "Rule 403 recognizes that relevance alone does not ensure admissibility. A cost/benefit analysis must often be employed. Relevant evidence may be excluded if its probative value is not worth the problems that its admission may cause. The issue is whether the search for truth will be helped or hindered by the interjection of distracting, confusing, or emotionally charged evidence. In making this determination, the [Trial] court must assess the probative value of the proffered item as well as the harmful consequences specified in Rule 403 that might flow from its admission." J. McLaughlin, et al., Weinstein's Federal Evidence § 403.02[1][a] at 403-6 (2006 rev.) (discussing Rule 403 of the Federal Rules of Evidence.). Rule 403 of the Federal Rules of Evidence is essentially identical to Rule 403 of the Texas Rules of Evidence. See Gigliobianco v. State, 210 S.W.3d 637, 641 n.7 (Tex.Crim.App. 2006).

The Court of Criminal Appeals having explained in general terms the purpose and requirements of Rule 403, this Court should turn next to the specific meaning of the Rule's key phrases. The Rule's first key phrase, "probative value," means more than simply relevance. Old Chief v. United States, 519 U.S. 172, 184, 117 S.Ct. 644 (1997). Rather, "probative value" refers to the inherent probative force of an item of evidence—that is, how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation—coupled with the proponent's need for that item of evidence. Gigliobianco, 210 S.W.3d at 641. The Court of Criminal Appeals in Montgomery v. State, 810 S.W.2d 372, 390 (Tex.Crim.App. 1990)(op. on reh'g), held "[w]hen the proponent [of an item of evidence] has other compelling or undisputed evidence to establish the proposition or fact that the [item of evidence] goes to prove, the [probative value of the item of evidence] will weigh far less than it otherwise might in the probative-versus-prejudicial balance."

The Rule's second key phrase, "unfair prejudice," refers to a tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. Gigliobianco, 210 S.W.3d. at 641 (citations omitted). Evidence might be unfairly prejudicial if, for example, it arouses the jury's hostility or sympathy for one side without regard to the logical probative force of the evidence. K. Broun, Et al., McCormick on Evidence § 185 at 737 (6th Ed. 2006).

The Rule's third key phrases, "confusion of the issues," refers to a tendency to confuse or distract the jury from the main issues in the case. S. Goode, et. al., Texas Practice: Guide to the Texas Rules of Evidence § 403.2 at 165 (3rd ed. 2002). Evidence that consumes an inordinate amount of time to present or answer, for example, might tend to confuse or distract the jury from the main issues. Gigliobianco, 210 S.W.3d at 641.

The Rule's fourth key phrase, "misleading the jury," refers to a tendency of

an item of evidence to be given undue weight by the jury one other than emotional grounds. Id. For example, "scientific" evidence might mislead a jury that is not properly equipped to ~~judge~~ the probative force of the evidence. K. Broun, et al., McCormick on Evidence § 185 at 738.

Finally, the Rule's fifth and sixth key phrases, "undue delay" and "needless presentation of cumulative evidence," are, the [Court of Criminal Appeals] think, self-explanatory and concern the efficiency of the trial proceeding rather than the threat of an inaccurate decision. S. Goode, et. al., Texas Practice: Guide to the Texas Rules of Evidence § 403.2 at 166-67. Taken together, this Court should reconsider the rule 403 analysis in its decision to grant certiorari as reflected in Old Chief v. United States, 519 U.S. 172 (1997).

Question Two: CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE DALLAS COURT OF APPEALS' DECISION CONFLICTS WITH OLD CHIEF V U.S., WHEN J.R.'S SEXUAL EXTRANEous OFFENSE'S PROBATIVE VALUE IS OUTWEIGHED BY ITS PREJUDICIAL EFFECT ON THE JURY?

The Petitioner presented evidence suggesting the assaults could not have occurred in a small home with so many people and days present. Although the Petitioner's defense was that the allegations against S.F. were untrue and fabricated, the particular need of J.R.'s sexual extraneous offense was unnecessary to present its case-in-chief because in a sexual offense all that is needed is the victim's testimony, S.F. Tex. Crim. Proc. art. 38.07 (one testimony without any support and corroboration is evidence enough to uphold a conviction). The State's use of J.R.'s extraneous sexual offenses only suggested a conviction on an improper basis to the jury and for no other reason. Michelson v. U.S., 69 S.Ct. 213, 223, 335 U.S. 469 (1948)(We do not overlook or minimize the consideration that "the jury almost surely cannot comprehend the judge's limiting instruction which disturbed the Court of Appeals.). Question Three: IS THIS

COURT CONVINCED THAT SEVERAL SEXUAL ASSAULTS OCCURRED IN A FOUR BEDROOM HOME WITH 14 PEOPLE LIVING IN IT AND ONE ADULT USUALLY BEING AT THE HOME, WITHOUT ANYONE CATCHING PETITIONER IN THE ACT AND WITHOUT ANYBODY EVER KNOWING ABOUT THE ALLEGATIONS? The answer should be no. The Petitioner spent most of his trial defending against the sexual abuse of J.R. who was not even named in the indictment. The State began their presentation of evidence with witnesses that spoke to the alleged assault on J.R. In fact, the first 100 pages of trial testimony dealt with the assault on J.R. without any mention of any assault on S.F. RR3, 82-195. The SANE nurse who testified examined J.R., not the alleged victim S.F. RR4, 6-18. No SANE nurse testified about any examination of S.F. One of the most contested issues in the trial was the timeline for the assault on J.R. J.R. was certain that the assault happened after placing flowers on her grandfather's grave on December 8, 2014. RR3, 108. But Violet Kamiyah testified that Israel could not have assaulted J.R. then because he was caring for her at her home after she fractured her ankles in December of 2014. RR4, 68-74. If this Court were to read the trial transcripts without looking at the indictment, this Court would think this was a trial on the sexual assault of J.R., rather than S.F. Therefore, this Court should grant certiorari because the extraneous offenses concerning J.R. should have been excluded under Rule 403. Gigliobianco v. State, 210 S.W.3d 637 (Tex.Crim.App. 2006); Old Chief v. U.S., 519 U.S. 172 (1997).

Contrary to the Dallas Court of Appeals' conclusion that the trial court did not abuse its discretion due to the extraneous offenses not being prejudicial to Petitioner. See Appendix B, Pg 12. The Sexual extraneous offenses concerning J.R. created a substantial risk of a verdict based on an improper basis of the inherently inflammatory and prejudicial nature of crimes of a sexual nature committed against children.

Compare United States v. Merriweather, for instance, where the Sixth Circuit concluded that "the conversations on the Jones tapes showing that Merriweather was involved in a separate, uncharged drug conspiracy, even if admitted for the ostensible purpose of proving only that the voice on the Bender tape was Merriweather's, particularly in light of the court's erroneous instructions, was more substantially prejudicial than probative and should not have been admitted. U.S. v. Merriweather, 78 F.3d 1070, 1078 (6th Cir. 1995).

Considering the manner in which J.R.'s sexual extraneous evidence who was not named in the indictment was introduced by the prosecution's direct examination, rather than on re-direct or rebuttal, the focus of the prosecution's admission of the extraneous evidence was to portray Petitioner as a sexual predator, child abuser against multiple children, and a child pornographer.

Id. Compare, Motilla v. State, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002).

Certiorari should be granted because it should be difficult for this Court to imagine how a jury could have considered this inflammatory and prejudicial evidence for any other purpose but to convict Petitioner for being a child abuser in general, rather than consider evidence to support the charged instrument against S.F. See Old Chief, 519 U.S. at 181 (It is said to weigh too much with the jury and to so over persuade them as to prejudice [Petitioner] with a bad record and deny him a fair opportunity to defend against a particular charge). In light that in a sexual abuse context, the jury almost surely cannot comprehend the judge's limiting instructions (Michelson v. U.S., 335 U.S. at 484), the aim of the requirement of Due Process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of relevant evidence, Lisenba v. California, 314 U.S. 219, 236 (1941).

Question Four: CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE JURY WAS OVERWHELMED BY THE SUBSTANTIAL AMOUNT OF SEXUAL EXTRANEous OFFENSES OF J.R.,

WHO WAS NOT NAMED IN THE INDICTMENT, RENDERS PETITIONER'S TRIAL FUNDAMENTALLY UNFAIR BY THE DANGER OF THE UNFAIR PREJUDICE AGAINST HIM?

The answer is Yes. The jury substantially used J.R.'s extraneous evidence to convict based on an improper basis of the inherently inflammatory and prejudicial nature of crimes of a sexual nature committed against children. Menzies v. Procunier, 743 F.2d 281, 288-89 (5th Cir. 1984)(due process is violated where numerous errors and prosecutorial misconduct "crippled the ability of Petitioner's lawyer to present an effective defense on his behalf."); Walker v. Engle, 703 F.2d 959, 963-69 (6th Cir. 1983)(due process is violated by cumulative effect of errors allowing admission of prejudicial and inflammatory evidence).

This Court should be reminded that the 10th Circuit said that, " in a sexual assault case, a court should take into account the charge that a jury will convict of crimes other than those charged—or that, uncertain of guilt (as is in Petitioner's situation), it will convict anyway because a bad person deserves punishment. U.S. v. Gaurdia, 135 F.3d 1326, 1330-31 (10th Cir. 1998)(citations omitted); See also, U.S. v. Aramony, 88 F.3d 1369, 1378 (4th Cir. 1996)(undue prejudice occurs when there is a genuine risk that the emotions of a jury will be excited to irrational behavior). The 9th Circuit emphasized that (Code of Criminal Proc. art. 38.37) should not be a blank check entitling the government to introduce whatever sexual extraneous offense it wishes, no matter how minimally relevant and potentially devastating to the Petitioner. U.S. v. Lemay, 260 F.3d 1018, 1022 (9th Cir. 2001).

Question Five: CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER DUE PROCESS CLAUSE AFFORDS RELIEF WHERE THE SEXUAL EXTRANEous EVIDENCE CONCERNING J.R. HAS BEEN THE PRINCIPLE FOCUS AT TRIAL? The answer is yes. The 11th Circuit declared where "the heart of the case" is testimony by three allegedly abused children due process was violated by improper expert opinion that 99.5% of children tell

the truth about sexual abuse. Snowden v. Singletary, 135 F.3d 732, 737-39 (11th Cir. 1998). The 8th Circuit, declared a due process violation when the prosecutor bolstered rape victim's testimony by asking four other witnesses whether she seemed sincere. Maurer v. Dep't of Corrs., 32 F.3d 1286, 1288-91)(8th Cir. 1994). The 6th Circuit declared a due process violation when the cumulative effect of trial judge incorrectly stating that police opinion on defendant's guilt and allowing police informant to bolster credibility by discussing his testimony in past cases. Cooper v. Sowders, 837 F.2d 284, 286-88 (6th Cir. 1988). Therefore, relief must be granted because the Due Process Clause requires it in this situation.

### **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: July, 15, 2022