

22-6335 ORIGINAL

No. 22A253

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

TIMOTHY MICHAEL UNZUETA — PETITIONER
(Your Name)

vs.

TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TEXAS COURT OF CRIMINAL APPEALS

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

PETITION FOR WRIT OF CERTIORARI

TIMOTHY MICHAEL UNZUETA #02209195

(Your Name)

2665 PRISON RD 1

(Address)

LOVELADY, TEXAS 75851

(City, State, Zip Code)

n/a

(Phone Number)

QUESTION(S) PRESENTED

Is it not clear error to allow a void conviction to continue (i.e., to not be vacated) knowing that a material (date-range essential) element was improperly represented before the Grand Jury making the charged crime no crime at all?

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

Ex parte Unzueta, WR-93,893-01 Texas Court of Criminal Appeals, Judgment entered on 07/13/2022.

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OTHER

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 _____ 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 is unpublished.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 United States district court appears at Appendix _____ to the petition and is

reported at _____; 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 is unpublished.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 A 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 is unpublished.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 Texas Court of Criminal Appeals court appears at Appendix A 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 is unpublished.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 _____

[] 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: _____, 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 _____ (date) on _____ (date) in Application No. 22 A 253.

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

[X] For cases from state courts:

The date on which the highest state court decided my case was 7/13/2022. A copy of that decision appears at Appendix A.

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

[X] An extension of time to file the petition for a writ of certiorari was granted to and including 12/10/2022 (date) on 09/23/2022 (date) in Application No. 22 A 253.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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 defence.

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 protections of the laws.

TEXAS PENAL CODE § 21.02

STATEMENT OF THE CASE

On January 4, 2018, Timothy Michael Unzueta ("Unzueta") was indicted in Cause No.27556-A, Taylor County, Texas charged with Texas Penal Code ("PC") §21.02(b) Continuous Sexual Abuse of a Child, 2nd Count: Indecency with a Child by Contact.

Unzueta erroneously pled guilty on the advice of court appointed counsel Paul Hanneman ("Hanneman") and was sentenced by Honorable Judge James Eidson ("Hon. Eidson") of the 42nd Judicial District Court ("42nd") to 35 years without parole in TDCJ.

On March 28,2022 Unzueta filed his 11.07 challenging his conviction on three grounds: (1) The judgment is void in violation of Due Process and prohibition of Ex Post Facto Laws, (2) Involuntary Plea based on ill-advice from counsel, and (3) Ineffective Assistance of Counsel for not filing a Motion to Quash/Dismiss Indictment pre-trial.

On April 20, 2022 ADA Arimy Beasley ("Beasley") filed a 2 page affidavit (see EX "1")² in which she offered: "Where the record establishes numerous sexual contacts between an accused and a victim that exceed the scope of the indictment, a jury may rationally infer that date range element of continuous sex abuse has been met." Moreno [v. State], 619 S.W.3d [754] at 759-60 [(Tex.App.-San Antonio 2022, no pet.)] (citing Kuhn, 393 S.W.3d at 525; Martin, 335 S.W.3d at 876). This is nothing more than a subtle attempt to try the case by affidavit and to interject facts not contained in the record. Following this, Beasley goes on to state (in pertinent):

"Mr.Unzueta states that during the time period alleged in the indictment, March 24,2017 to October 26,2017 that the victim PSEUALN, his [step-] daughter, was 14 years of age and not under 14 years of age as required by the continuous sexual abuse statute. Mr.Unzueta is correct about the victim's age during that period... The time period alleged in the indictment is a typographical error; the first date should have been March 24, 2013."

At the plea hearing Hon.Eidson states on the record (1RR5,8-13):

THE COURT: Now, Mr.Unzueta, you've signed a number of pages. I'm going to go over those with you, some of them. You signed a stipulation of evidence and you understand that's like a confession. It will give me all the evidence I need to find you guilty; do you understand that?

It is fact that the Stipulation of Evidence (see EX"5") that the judge uses for "all the evidence [he] needs to find [Unzueta] guilty" states in relevant:

² Exhibits will be listed by EX followed by the number= EX "1"
Reporter's Record will be listed by Vol. followed by RR followed by page number
then line number(s) example= 3RR22,1-5.

"That on or about the 26th day of October, 2017 in Taylor County, Texas, I, TIMOTHY MICHAEL UNZUETA did then and there, during a period that was thirty (30) days or more in duration, to-wit; from on or about the 24th day of March, 2017 through the 26th day of October, 2017, when the said TIMOTHY MICHAEL UNZUETA was seventeen (17) years of age or older, commit two or more acts of sexual abuse against PSEUALN, a child younger than (14) years of age, namely, Aggravated Sexual Assault by causing penetration of the female sexual organ of the said PSEUALN by the said TIMOTHY MICHAEL UNZUETA's male sexual organ, and,..."

The Indictment (EX "3") and the Stipulation (EX "5") is what Hon. Eidson uses to find Unzueta guilty and to accept his plea. Neither Exhibit 3 or 5 state PSEUALN's birthdate March 24, 2003 (see ATT.1) the material/essential element of younger than 14 in this statute does not exist.

Beasley says (see EX "1"):

"It is my usual practice to check dates on indictments, notes and police reports prior to trial, and I feel confident that had the case proceeded to trial that the typographical error in the indictment would have been caught prior to trial and amended."

It is fact that Exhibit 3,5, and 8 (Indictment, Stipulation, and Probable Cause Affidavit) all have this (state proclaimed) "typographical error." Also fact, on Unzueta's Judgment Sheet (EX "6") signed by Hon. Eidson it says:

The age of the victim at the time of the offense was 14 years.

At the state habeas hearing Hon. Eidson in his response to the application ("FFCL") states in applicable part:

"The state does not dispute this contention, but instead maintains that the error would have been discovered and corrected had the case gone to trial (Exhibit 1). Further, the State maintains that it had ample evidence to support a conviction if the indictment had been corrected."

The indictment was never corrected, nor did it ever go to trial. Being concise Hon. Eidson says "the State possessed sufficient evidence to establish Applicants guilt for the offense..." (FFCL @2). And that "Applicant did not receive ineffective assistance of counsel [,]" (FFCL @3) and ultimately recommending denial.

REASONS FOR GRANTING THE PETITION

Texas Penal Code §21.02(b)(1)(2) lists the essential [material] elements as follows:

(b) A person commits an offense if:

(1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and

(2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age; regardless of whether the actor knows the age of the victim at the time of the offense.

Unzueta's condensed version interprets the essential material elements as:

- 1) 30 or more days in duration;
- 2) two or more acts of sexual abuse;
- 3) actor is 17 years of age or older
- 4) victim is a child younger than 14 years of age.

This Honorable Court said in Williams v. United States, 458 U.S. 279, 102 S.Ct. 3088, 73 L.Ed.2d 767(1982) "The starting place for any determination of whether the charged conduct proscribed by such a statute is a reading of the language of the charging instrument and the statute itself." (Quoted in U.S. v. Morales-Rosales, 832 F.2d 1359 (5th Cir.1988)).

The statute clearly states that an offense is committed when a person (1) during a period that is 30 or more days in duration; (2) the person commits two or more acts of sexual abuse (3) the actor is 17 years of age or older and; (4) the victim is a child younger than 14 years of age. The indictment charges Unzueta with all four essential elements but the fourth element (material/essential) is erroneous and wants substantiation.

Unzueta bases the argument on the authority in DeMoss v. State, 12 S.W.3d 553 (Tex.App.—San Antonio 1999):

"The evidence in this case established that DeMoss had numerous sexual contacts with the complainant beginning in November 1994, and that the sexual contacts occurred in Bexar County beginning in January 1996 and continued until DeMoss was arrested in July of 1996. Therefore, the evidence in this case is not tied to the specific dates alleged in the indictment, but to the time from January 1996—July 1996. If the evidence shows that DeMoss committed the alleged criminal acts in Bexar County during this time his convictions under this indictment were proper. See Id. Mireles v. State, 901 S.W.2d 458, 459-61 (Tex.Crim.App.1995).

The specific dates in Unzueta's indictment are March 24, 2017 through October 24, 2017. The first date is the alleged victim's 14th birthdate, both the second and first date are outside the date-range limitation period for Continuous Sexual

*Assault of Child, (see ATT.1).

The State Court's must have missed what is said in Awan v. Lumpkin³³:

"The TCCA has determined that unless time is a material element of an offense, an indictment is not required to specify the precise date when a charged offense occurred, nor a window of time within which the offense must have occurred, in order to satisfy constitutional notice requirements."

In DeMoss the specific dates are January 1996–July 1996. In Unzueta the specific dates are March 24, 2017–October 26, 2017. The State persuades the 42nd by stating (see State's Response @15):

"Even had that not been the case, case law states that the "on or about" language in the charging instrument allows the State to prove a date other than the one alleged as long as the date proven is anterior to the presentment of the indictment and within the statutory limitation period. See Sledge v. State, 953 S.W.2d 253, 265 (Tex.Crim.App.1997)."

In fact time is a material element in the case at bar so specificity is required and by using the incorrect dates in the indictment failed to charge a valid offense.

The Fifth Circuit says in United States v. London, 550 F.2d 206, 211 (1977) "An information [indictment] that fails to allege each material element [younger than 14] of an offense fails to charge that offense."

The trial court only used the Stipulation of Evidence (EX "5") to find Unzueta guilty. The 42nd did not have evidentiary facts within the Stipulation nor the Indictment (EX "3"). This is similar to Mireles v. State, 901 S.W.2d 458 (Tex.Crim.App. 1995):

"The instant case is clearly like Klasing. In Klasing, the jury [Hon. Eidson] had no evidence as to when the marihuana offense was committed. So this Court held it could not presume that the offense was committed within the applicable statute of limitations period."

The specific dates listed in the Indictment are dates when PSUEALN is 14 and OVER (emphasis added)(see ATT.1). "Moreover, the statute does not apply to an offense committed against a child fourteen years of age or older. See Tex.Penal Code Ann. §21.02(b)(2)(WEST Supp.2014)." Gomez v. State, 459 S.W.3d 651 (Tex.App.–Tyler[12th Dist.]2015). How is it possible for the judgment sheet (EX "6") to clearly reflect: The age of the victim at the time of the offense was 14 YEARS: and still have the offense listed as Continuous when there is no valid Penal Code that this would fall under? It is fact that in the Written Plea Admonishments (EX "4@5#2") the Section portion for the Penal Code number is left blank (emphasis added), because there

³³ 2020 U.S. Dist. LEXIS 234018 (N.D. Tex.)

is no Continuous Sexual Abuse of a Child OVER 14 Section. How did the judge know PSUELAN was 14 years at the time , this is not in the record anywhere.

This Court said in Hamling v. United States, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed. 2d 590 (1974):

"The indictment should "Inform the court of the facts alleged" and will generally be sufficient if it "set[s] forth the offense in the words of the statute itself," as long as those words set forth all the elements of the offense without any uncertainty or ambiguity."

What is certain is that the alleged victim was 14 years old at the time of the alleged offense, there is nothing ambiguous about this.

On page 2 of the 42nd's FFCL it states "The State does not dispute this contention [not under 14], but instead maintains that the error would have been discovered and corrected had the case gone to trial (Exhibit 1)." The so called "typographical error" started with the Probable Cause Affidavit (EX "8") then was brought to the Grand Jury in the Indictment (EX "3") and finally carried over to the Stipulation of Evidence (EX "5"). How could the State be able to amend on the day of trial? Unzueta cites U.S. v. Arlen, 947 F.2d 139 (5th Cir. 1991):

"The Fifth Amendment guarantees that a criminal defendant will be tried only on charges alleged in a grand jury indictment.

The indictment cannot be "broadened or altered" except by the grand jury. United States v. Chandler, 858 F.2d 254, 256 (5th Cir. 1988) citing Stirone v. United States, 361 U.S. 212, 215-17, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960)."

Hon. Eidson states ("FFCL@2") "Because the Applicant voluntarily entered his plea of guilty to a legally sufficient indictment (Exhibit 3) the conviction is not void and Applicant's first ground of error should be DENIED." Is the indictment sufficient, or contrary to what is said in U.S. v. White, 258 F.3d 374 (5th Cir. 2001):

"To be sufficient an indictment must allege each material element of the offense; if it does not, it fails to charge that offense. U.S.C.A. Const. Amend. 5... The Government cites no authority, and we are aware of none, that holds that a defendant can waive his substantive right "to be free of prosecution under an indictment that fails to charge an offense..." U.S. v. Meachum, 626 F.2d 503, 509-10 (5th Cir. 1980)."

Unzueta cites U.S. v. Ratcliff, 488 F.3d 639 (5th Cir. 2007):

"This court has noted that although practical, not technical, considerations generally govern the validity of the charging instrument, the failure of an information to charge an offense is a jurisdictional defect that is not waived by a guilty plea."

Leaving the space blank for a valid Penal Code (see EX "4@5") number rebuts the claim of typographical error, inferring deliberate human action as the driving force. In a case similar, vacated and remanded in favor of petitioner, Unzueta closes with U.S. v. Garcia-Paulin, 627 F.3d 127 (5th Cir. 2010):

"The error was therefore clear or obvious. In addition, it affected Garcia-Paulin's substantial rights and the government does not argue to the contrary. We are satisfied that Garcia-Paulin would not have pled guilty to a statutory offense that subjected him to a prison sentence if he had realized that the factual basis relied on by the court violated the statute. See McCarthy v. U.S., 394 U.S.459, 89 S.Ct.1166,1171(1969); U.S. v. Dominguez-Benitez, 542 U.S. 74,80-83,124 S.Ct. 2333(2004).

Unzueta's confinement is not legal and needs to be vacated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: November 20th 2022