23-7000

No. _____

ORIGINAL

FILED
MAR 08 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

JEREME LEE ESCOBEDO — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN, DIR., TDCJ-CID RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JEREME LEE ESCOBEDO
(Your Name)

2661 FM 2054
(Address)

TENNESSEE COLONY, TEXAS 75884-5000
(City, State, Zip Code)

NONE/INCARCERATED
(Phone Number)

QUESTION(S) PRESENTED

QUESTION ONE:

Does a criminal defendant charged with sex-crimes have the same Constitutional rights as a defendant charged with non-sex-crimes?

QUESTION TWO:

Does a criminal defendant charged with a sex-crime have the constitutional right to: 1) "effective assistance of counsel;" 2) "to be tried by a jury free from potential bias from family relationships to the parties;" and 3) "to be the master of his own defense including voir dire?"

QUESTION THREE:

Did the Fifth Circuit Court of Appeals "side-step" the COA inquiry by holding: "He has not made the necessary showing" that reasonable jurists would find the District Court's assessment of the constitutional claims debatable or wrong?"

LIST OF PARTIES

[XX] 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

Escobedo v. Lumpkin, 2023 U.S. App. Lexis 29235 (5th Cir.)(denying certiifcate of appealability)

Escobedo v. Dir., Tex. Dep't of Crim. Justice, 2023 U.S. Dist. Lexis 83190 (N.D. Tex)(denying Writ of Habeas Corpus and adopting the magistrate's recommendation)

Escobedo v. Dir., Tex. Dep't of Crim. Justice, 2023 U.S. Dist Lexis 83769 (N.D. Tex.)(Magistrate's recommendation and conclusions of law)

Ex parte Escobedo, WR-91, 190-01, (02) (Texas Court of Criminal Appeals denying state habeas corpus)

Escobedo v. State, 2019 Tex. App. Lexis 1763 (Tex. App.--Amarillo no pet.)(denying direct appeal)

Escobedo v. State, 2018 Tex. App. Lexis 6774 (Tex. App.--Amarillo no pet.)(deny-

ing motions of Appellant requesting access to the sealed volume of the reporter's record for purposes of appeal.)

State of Texas v. Jereme Lee Escobedo, Case No. CR-18A-001, March 22, 2018. In the District Court of Deaf Smith County, Texas, 222nd Judicial District. (Convicting court for Counts 1 and 2: sexual assault of a child assessing life sentence.

TABLE OF CONTENTS

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED

OTHER: PAGE #3:

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

[XX] For cases from **federal courts**:

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[XX] is unpublished.

The opinion of the United States district court appears at Appendix D to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[XX] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits 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 N/A 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.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 02, 2023.

[X] 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.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including March 31, 2024 (date) on January 09, 2024 (date) in Application No. 23 A 635.

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 N/A. A copy of that decision appears at Appendix N/A.

[ ] A timely petition for rehearing was thereafter denied 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. N/A A N/A.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, ARTICLE III, SECTION 2, CLAUSE 3: (2020): "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

UNITED STATES CONSTITUTIONAL, AMENDMENT VI:(2020): "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 committetd, 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."

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1 (2020): "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."

TITLE 28 U.S.C., SECTION 2253(1)(A) (2020): "Unless a Circuit Justice or Judge issues a Certificate of Appealability, an appeal may not be taken to the Court of Appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court."

TITLE 28 U.S.C., SECTION 2254(d) (2020): "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted with respect to any claim that was adjudicated on

the merits in State Court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal Law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceedings."

TITLE 28 U.S.C., SECTION 2254(e) (2020): "(1) in a proceeding instituted by an application for a writ of habeas corpus ny a person in custody pursuant to the judgment of a State Court, a determination of a factual issue made by a State Court shall be presumed to be correct. The Applicant shall have the burden of rebutting the presumption of correctness by clear and convencing evidence. (2) If the Applicant has faled to develope the factual basis of a claim in State Court proceedings, the court shall not hold an evidentiary hearing on the claim unless the Applicant shows that—(A) the claim relies on—(i) a new rule of Constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not ahve been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convencing evidence that but for Constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

STATEMENT OF THE CASE

On March 22, 2018, in the 222nd Judicial District Court, Deaf Smith County, Texas, Cause No. CR-18A-001, petitioner was convicted of a two count indictment alleging sexual assault of a child with an enhancement for a prior conviction for aggravated sexual assault of a child on May 18, 2001 in Cause CR-99J-088. Punishment was assesed at life in prison. See Appendix G. An appeal was taken to the Seventh Judicial District Court of Appeals, in Amarillo and the Court affirmed the trial Court's judgment on March 06, 2019. See Appendix F. Petitioner then filed his state writ of habeas corpus and the Texas Court of Criminal Appeals denied the writ without written order on March 10, 2021. See Appendix E.

On April 13, 2021, the petitioner challenged the effectiveness of trial Counsel during his Voir Dire proceedings. The Petitioner was denied his Constitutional rights to effective assistance of Counsel when trial counsel failed to object and challenge the facts of Ms. Villegas remaining on the jury, as the following facts took place during voir dire selection:

> **Prosecution:** "Now, let me ask about the Defendant, does anybody know the Defendant? His name is Jereme Lee Escobedo. Either him or his family, does anybody know them?" RR4, 39.
>
> **Defense:** "Let me read the names to you one more time, and if anybody has a relationship with one of these people, would you be kind enough to just raise your hand and say, you know, 'I know this person,' I have this kind of relationship with this person. Jaimi Moreno (defendant's common-law wife) anybody know her? No. Okay. She is just a local citizen I believe ... RR4, 183-88.

Juror Ms. Villegas remained silent to the above questions posed by the State and Defense during their voir dire. RR4, 38-188.

Ms. Villegas's failure to disclose information violated this Court's precedents, and Petitioner's right to an impartial jury, voir dire, and his Sixth Amendment. During the first day of trial, after a video was played, Ms. Villegas sent a note to the judge "asking to speak with him." The colloquy bears below in actual form:

The Court: Attorneys, please approach. Yes, ma'am. I understand you wanted to talk to me about something.

Juror Villegas: Yeah. Whenever they said about the witnesses, they didn't mention Jaimi Escobedo. Well, I didn't know that she was -- I know her by Jaimi Luna, and she is my cousin's daughter.

The Court: Who is your cousin's daughter?

Juror Villegas: Jaimi Escobedo

The Court: The Defendant?

Juror Villegas: No, his girlfriend.

Mr. Strowd(state): Moreno, Jaimi Moreno.

Mr. Hill(defense): The girl in the video.

Mr. Strowd: Jaimi Moreno. What was the name -- the last name you knew her by?

Juror Villegas: Luna.

Mr. Strowd: Luna.

Juror Villegas: Yeah. Because that's my cousin's daughter. Yeah. That's where he lives here. That big house in front of it, that's where he lives right there, my cousin.

The Court: Its your cousin's daughter?

Juror Villegas: Uh-huh.

The Court: Who is your cousin?

Juror Villegas: Felipe Luna.

The Court: Well, is there any reason you can't serve on

this jury and be fair and impartial?

Juror Villegas: No. I mean, I don't know her -- we don't communicate that good, but, you know, I just know who she is.

The Court: You just know who she is?

Juror Villegas: Yeah, but I knew her by Jaimi Escobedo until I saw that video.

The Court: Well, do you think that would create any problems with you being fair and impartial on this jury?

Juror Villegas: "I don't think so."

The Court: All right. Thank you ma'am, I appreciate you letting us know. Ma'am. What was your name?

Juror Villegas: Viola Villegas.

The Court: Thank you. All right. Let's take a break.

(Recess)

(Open Court, Defendant Present)

The Court: Folks, any reason not to bring in the jury?

Mr. Strowd: No, sir.

Mr. Hill: No, sir.

The Court: All right. Bring them in.

Jury in

RR5, 57-59 (Trial on the Merits). At this time, defense counsel should have objected to Ms. Villegas remaining on the jury. However, the Court should have excused the juror because the Court is ultimately responsible for ensuring that a defendant receives a fair trial and a fair voir dire. The Court could have done so by allowing the alternate juror to take her place. The State Court's decision unreasonably applied Strickland's effective assistance of counsel standard when it held: "Trial Counsel, Mr. Hill was satisfied after the hearing with

the identified juror that the juror would be fair and impartial. Furthermore, [Petitioner] has not provided any evidence that the juror was not impartial when considering the evidence or rendering her verdict." See Trial Court's Findings of Fact and Conclusions of Law, Pg. 3. Also, [Petitioner] failed to prove that but for trial counsel's alleged deficient performance the jury would have returned a different verdict in both guilt and punishment phases of the trial. The Court of Criminal Appeals adopted this unreasonable application when it held: "Denied without written order the application for writ of habeas corpus." See Appendix E.

On May 11, 2023, District Judge Matthew J. Kacsmaryk adopted the magistrate's findings, conclusions, and recommendation to deny relief. See Appendix C. Judge Kacsmaryk held: In his second ground, Escobedo argues that he was denied effective assistance of counsel because his trial counsel should have objected to Villegas remaining on the jury. These claims are without merits for a number of reasons. The contention that Escobedo was harmed by Villegas remaining on the jury and that the outcome would have been different had she been released is wholly conclusory, unsupported, and frivolous. Trial Counsel was not required to make frivolous objections. As stated before, Villegas indicated to the trial Court twice that she could be fair and impartial.

In denying state habeas relief, the Court of Criminal Appeals necessarily accepted as true the affidavits of Escobedo's trial counsel and rejected Escobedo's allegations. Escobedo has not shown that the state court's application of the **Strickland** standard was unreasonable. See Appendiz D.

On August 29, 2023, the Petitioner made a substantial showing of a constitutional violation because a reasonable jurists would find the district court's decision debatable or wrong due to the presence and participation of a biased juror that should have been excused to protect the jury room.

On November 02, 2023, Justice Jerry E. Smith side-stepped the COA inquiry by denying his motion due to Petitioner not able to succeed on the merits of his claims. See Appendix A.

On January 09, 2024, Justice Alito, extended the time to file Petitioner's writ of certiorari to and including March 31, 2024.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION:

"It is this Honorable Court's responsibility to say what the Constitution means, and once this Court has spoken, it is the duty of the other Courts to respect that understanding of the governing rule of law." **James v. City of Boise**, 136 S.Ct. 685 (2016). The framers of our Constitution found the institution of the jury so important that they made certain to preserve the jury through no less than four protections in the foundational document, making the jury the most frequently named safeguard of our freedom in the Constitution and its Amendments. **See Juries and the Criminal Constitution**, 65 Ala. L. Rev. 849, 850-51 (2014)(citing **U.S. Const. Art. III, § 2**,("The trial of all crimes, except in cases of impeachment, shall be by jury..."); **U.S. Const. Amend. V** ("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..."); **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..."); **U.S. Const. Amend. VII** ("In suits at common law, where the value in controversey shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the

U.S., then according to the rules of the common law.")).

Moreover, this Court has spoken and declared that a criminal defendant has a fundamental right to a fair, impartial, and indifferent jury, being the cornerstone of our American Justice System, who will verbally state that he or she can lay aside his or her impression or opinion and render a verdict based on the evidence presented in court. Cf. Duncan v. Louisiana, 391 U.S. 145, 149 (1968)("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."); Irvin v. Dowd, 366 U.S. 717, 722 (1961)(citing In re Oli Oliver, 333 U.S. 257 (1948) and Tumey v. Ohio, 273 U.S. 510 (1927))("[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of Due Process); and Patton v. Yount, 104 S.Ct. 2884, 2891 (1984)(juror impartiality is plainly a historical fact to question: 'did a juror swear that he or she could set aside any opinion [relationship] he or she might hold and decide the case on the evidence[.]'").

This Court has recently overturned landmark decisions and it is time the Court explicitly holds that "propensity" evidence violates the Due Process Clause as it has suggested previously. The ultimate question in this certiorari today is this: "Does a criminal defendant charged with sex-crimes have the same Constitutional rights as a defendant charged with non-sex-crimes?" I can assure in Texas they do not nor do they in federal courts. Federal Rules of Evidence 413, 414, and 415 strip these constitutional protections away like a raging river. See American Bar Association Criminal Justice Section Report to the House of Delegates, reprinted in 22 Fordham Urb. L.J. 343, 343-45 (1995). The failure to observe fundamental fairness, which is essential to the concept of justice, results in a denial of due process. See e.g., Lisenba v. California, 314 U.S.

219, 236 (1941). The Supreme Court has acknowledged that the very integerity of the judicial system depends on a fair trial. See Powers v. Ohio, 499 U.S. 400, 413 (1991)(noting integerity of judicial system depends on convictions or acquittals given by persons who are fair.).

QUESTION ONE

DOES A CRIMINAL DEFENDANT CHARGED WITH SEX-CRIMES HAVE THE SAME CONSTITUTIONAL RIGHTS AS A DEFENDANT CHARGED WITH NON-SEX-CRIMES?

Congress promulgated Federal Rules of Evidence 413, 414, and 415 pursuant to the Violent Crime Control and Law Enforcement Act of 1994. The new Rules, which became effective on July 09, 1995, requires courts to admit "propensity" evidence whenever a prosecutor or plaintiff offers such evidence in sexual assault and child molestations cases. The rules are mandatory in that they state without qualification that propensity evidence is admissible. Thus, the rules require admission of propensity evidence without regard to other rules of evidence, particularly the prejudice/probativeness balancing test set forth in Rule 403. Act of 1994, Pub. L. No. 103-322, 320935(c), 108 Stat, 1796, 2135-37.

The above rules strip away the same constitutional rights afforded to criminal defendant's charged with sex-crimes versus non-sex-crimes. Prosecuting sex crimes is a sensitive and challenging process, and most people who perpetrate these crimes go unpunished. In the 1990s, concern over the difficulty of prosecuting sexual assault and rape cases led Congress to Reform the Federal Rules of Evidence in order to allow introduction of evidence that defendants charged with sexual assault and child molestation had been accused or convicted of similar crimes in the past.

However, evidence of prior crimes or bad acts is generally impermissible to prove that a person has acted in conformity with the character those prior acts

demonstrate, FRE & TRE 413-415 are exceptions to this rule. Rule 413 permits the introduction of prior convictions or accusations of sexual assault crimes against a defendant who is currently charged with a sexual assault. Rule 414 permits the introduction of evidence that the defendant committed prior acts of child molestation in cases where the defendant is being tried for the crime of child molestation. FRE 414(a)(Like Rule 413, "child molestation" is defined broadly so that it encompasses a wide range of inappropriate sexual conduct carried out with a child under the age of 14 (FRE414(d))).

A. DUE PROCESS CHALLENGES TO RULES PERMITTING PRIOR SEXUAL MISCONDUCT EVIDENCE IN STATE COURT'S.

In the wake of Congress's enactment of Rules 413 and 414, a number of commentators argued that these new rules violated the Due Process Clause of the Constitution. See, e.g., Louis M. Natali, Jr. & Stephen Stigall, "Are You Going To Arraign His Whole Life?" How Sexual Propensity Evidence Violates the Due Process Clause, 28 Loy. U. Chi. L.J. 1 (1996); Mark A Sheft, Federal Rules of Evidence 413: A Dangerous New Frontier, 33 Am. Crim. L. Rev. 57 (1995).

Two state Superme Courts have overturned laws permitting the admission of prior-act evidence in sexual-assault cases. The Iowa Supreme Court addressed whether a rule permitting evidence of prior sexual crimes violated Due Process in State v. Cox, 781 N.W.2d 757 (Iowa 2010), and the Missouri Supreme Court addressed this in State v. Ellison, 239 S.W.3d 603 (Mo. 2007)

The Iowa Supreme Court, in considering the Due Process challenge, pointed out that it would "invalidate an evidentiary rule only if it violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, which define the community's sense of fair play and dencey." Id., at 764. The Court then noted that a ban on propensity evidence was a long standing feature of Iowa common law. Id. (citing State v. Vance, 94 N.W. 204

(Iowa 1903)). The Court admitted that a "lewed disposition" exception had been discussed in prior Iowa cases, and under this exception, courts had admitted prior sexual abuse evidence to establish that the defendant had a lewed disposition to commit sexual crimes. But the Court pointed out that evidence of prior sexual abuse had only been admitted under this exception when it involved the same victim the defendant was presently charged of abusing. After considering other cases involving propensity evidence in sex assault cases, the court concluded that Section 701.11 was an unconstitutional violation of due process because it permitted evidence of prior sexual abuse involving people other than the victim in the present case.

In State v. Ellison, the Missouri Supreme Court held that Section 566.025 violated the Missouri Constitution. Id. 239 S.W.3d 603, 607-08 (Mo. 2007). In Ellison the defendant had been charged with first-degree child molestation after raping the child of a longtime friend. Id., at 605. At trial, the prosecution introduced evidence that the defendant had previously been convicted of first-degree child molestation.

In evaluating the defendant's claim that the introduction of his prior conviction violated his constitutional rights, the court noted that longstanding Missouri case law established a "general prohibition against the admission of evidence of prior crimes out of concern that '[e]vidence of uncharged crimes, when not properly related to the case at trial, violates a defendant's right to be tried for the offense for which he is indicted.'" Id., at 606 (quoting State v. Burns, 978 S.W.2d 759, 760 (Mo. 1998)(en banc).

This Court should find the same as the state court's above that the admission of such evidence violates due process and render's a trial fundamentally unfair and strips the constitutional rights of a fair trial due to the sex-crime charged versus non-sex-crimes.

B. THE ENACTMENT OF RULES 413, 414, AND 415 OF FRE (TEXAS ADOPTED IN TEXAS RULES OF EVIDENCE 413, 414, AND 415.

The enactment of these rules stripped away the constitutional rights of defendants charged with sex-crimes. The legislative history reveals several reasons that prompted Congress to enact the Rules. First, sponsers of the House and Senate bills believed that prosecutors desired similar-offense type evidence in sexual assault and child molestation cases. Second, the sponsers expressed a desire to protect the public from rapists and child molesters, when the sponsers asserted were typically recidivists, by obtaning more convictions through admitting propensity evidence without a "protracted legal battle" of whether such evidence is admissible. Third, the sponsers commented that the rules would bolster the credibility of sexual assault victims in the face of defenses of consent and false accusation, and bolster the credibility of child molestation victims whose credibility is often weak in the absence of corroborating evidence. Moreover, the supporters of the rules suggested that propensity evidence in sexual assault and child molestation cases is typically relevant, probative, and not outweighed by any prejudice or adverse effects the evidence may cause. Finally, because sexual assault and child molestation offenses are typically state crimes, the sponsers desired to cause the states to change their evidence codes to reflect the federal rules. This is exactly what the states did.

Congress did not enact Rules 413-415 without vigorous dissent. Several members of Congress voiced strong opposition to the new rules. Argument against the rules included, among others, that the rules were highly prejudicial and unconstitutional. See e.g., 140 Cong. Rec. H8990(daily ed. Aug. 21, 1994)(statement inserted into the record by Rep. Hughes)(noting that rules would raise "very serious constitutional questions."); 140 Cong. Rec. H5439(daily ed. June

29, 1994)(statement of Rep. Schumer)(objecting to Rules 413-415 on grounds that they violate due process).

For example, in a scathing criticism of the Rules, Rep. Hughes remarked: The proposed rules are not only seriously suspect on constitutional grounds, but they are extremely bad public policy. If the primary evidence in a prosecution's case-in-chief is evidence of prior acts ... we would be sinking into the star chamber procedures that have long been rejected by civilized societies everywhere... This is a question of protecting our system of justice and fair trials. 140 Cong. Rec. H8990.

Also in the House, New York Rep. Schumer explicity objected to Rules 413-415 on grounds that they violate due process. 140 Cong. Rec. H5439-40. President Joe Biden (previously Senator Biden) a tough-on-crime drafter of the Crime bill, adamantly opposed the new rules as well, asserting that the new rules violate "every basic tenet of our system." 140 Cong. Rec. 510, 277.

C. THE PROHIBITION AGAINST ADMITTING PROPENSITY EVIDENCE AS EMBEDDED IN THE CONCEPT OF DUE PROCESS.

The many justifications against the use of propensity evidence reflect the common theme in American Jurisprudence that the admission of propensity evidence prevents a fair trial and this violates the Due Process Clause of the Constitution. U.S. Const. Amend IV. & XIV, 1. The failure to observe fundamental fairness, which is essential to the concept of justice, results in a denial of due process. e.g., Lisenba v. California, 314 U.S. 219, 236 (1941). The Supreme Court has acknowledged that the very integerity of the judicial system depends on a fair trial. See Powers v. Ohio, 499 U.S. 400, 419 (1991)(noting integerity of judicial system depends on convictions or acquittals given by persons who are fair.

Applying the foregoing historical test, it is clear that the exclusion of

propensity evidence at trial constitutes due process. The settled mode of proceeding in Anglo-American Jurisprudence is prohibition of propensity evidence to prove action in conformity with a particular character trait. This ban on propensity evidence has been firmly and historically established since at least the seventeeth century in England and, as evidenced in case law and state and federal rules of evidence, has had continuing validity to the present. This centuries-old rule has therefore become firmly embedded in the principles underlying the Due Process Clause. It is a fundamental conception of how defendants should be tried in American courtrooms.

However, courts that follow the common law tradition almost unanimously have come to disallow the prosecution to present any kind of evidence of a defendant's evil character to establish the probability of his guilt ... The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. See Michelson v. United States, 335 U.S. 469, 475-76 (1948).

This Court reaffirmed the ban on propensity evidence in Huddleston v. United States, 485 U.S. 681, 685-87 (1988)(discussing how FRE 404(b) prohibits the introduction of evidence of extrinic acts that might adversely reflect on the defendant's charcater, unless the evidence bears upon a relevant issue in the case, such as the defendant's motive or opportunity.).

Moreover, Chief Justice Warren in Spencer v. Texas commented that the use of prior convictions to show propensity is fundamentally at odds with the polices underlying due process. He reasoned that the use of prior convictions

"needlessly prejudices the accused." Justice Warren also explained that evidence of prior crimes to show action in conformity with a particular character trait jeopardizes the constitutionally mandated presumption of innocence. He stated that previous decisions by the Supreme Court, federal Courts of Appeals, and State Courts suggested that evidence of prior crimes in order to show criminal disposition would violate the Due Process Clause. Id. 385 U.S. 554, 570, 575, 573-74, 575 (1967). No other justice disagreed with Justice Warren's propositions.

The Court in **Estellee v. McGuire**, Justice O'Connor suggested that in certain circumstances admitting evidence of prior crimes in order to show disposition to commit the crime charged may violate the Due Process Clause. Justice O'Connor commented that the fundamental fairness requirement of the Due Process Clause mandates proof of guilt beyond a reasonable doubt. She asserted that the principles underlying the Due Process Clause prohibit presumptions that have the effect of relieving the prosection of its burden to persuasion of proof of guilt beyond a reasonable doubt on every element of the crime. Justice O'Connors analysis suggests that propensity evidence creates a mandatory presumption that the accused committed the crime charged because he was involved in prior similar offenses. Id., 502 U.S. 62, 78 (1991).

Although the Supreme Court has never explicitly held that propensity evidence violates due process, its decision in **Burnham v. Superior Court of California** suggests that admission of such evidence to prove action in conformity with a specific character trait would violate the Due Process Clause and strips Constitutional rights from defendant's charged with sex-crimes, but allows the defendant's charged with non-sex-crimes to enjoy all their constitutional protections to include fundamentally fair trial's. Id. 495 U.S. 604 (1990).

Indeed, State and Federal case law and various codes of evidence indicate

that the proscription against admitting propensity evidence as substantive evidence is embedded in the Due Process Clause of the Constitution. The propensity rule, which is one of the most fundamental conceptions of justice, was developed over several centuries, and defines the community's sense of fairness. See Dowling v. United States, 493 U.S. 342, 352-53 (1990)(discussing parameters for determining what constitutes "due process"). This is evidenced by the settled usage and mode of proceeding that existed in English common and statutory law. Cf. Burnham v. Superior Court, 495 U.S. 604, 619 (1990)(defining what constitutes due process by referring to historical and continuing legal traditions); Hurtado v. California, 110 U.S. 516, 528 (1884)(same); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276-77 (1855)(same). The admission of propensity evidence in sexual assault and child molestation cases violates due process because once the factfinder hears the evidence it will never leave their thoughts or deliberations. It is a thorn in the factfinder's side and they will send an innocent man to prison than risk letting a guilty one go free!

These evidentiary rules give the government a blank check to present any type of evidence they wish in sexual assault and child molestation cases. The burden of the governemnt has, gets shifted to the defendant to prove his innocence and violates the presumption of innocence. Therefore, this Honorable Court must take a leap and resolve the issue that no one wants to do. No one wants to deal with anything that has to deal with sex-crimes, due to the public importance of the issue. Truly, this is exactly what this Court is to do, Grant Certiorari, order brief's on the merits, and appoint counsel for Petitioner.

QUESTION TWO

DOES A CRIMINAL DEFENDANT CHARGED WITH SEX-CRIMES HAVE THE CONSTITUTIONAL RIGHT TO: 1) "EFFECTIVE ASSISTANCE OF COUNSEL;" 2) "TO BE TRIED BY A JURY FREE FROM POTENTIAL BIAS FROM FAMILY RELATIONSHIPS TO THE PARTIES;" AND 3) "TO BE THE MASTER OF HIS OWN DEFENSE INCLUDING VOIR DIRE?"

The answer to this question is YES! However, due to the Petitioner being charged with a sex-crime he was not afforded these very rights that are without a doubt afforded to defendant's charged with non-sex-crimes. There is not an reasonable person that could be impartial in this factual situation. Think ... could you be impartial knowing the victim is your cousin's common-law husband's daughter? Of course you couldn't! Who actually could lay aside this relationship, and then the nature of the offense?

The jury-selection process "goes to the very integerity of the legal system." Gray v. Mississippi, 481 U.S. 648, 668 (1987)(noting that the fairness of the jury-selection process is essential "because the impartiality of the adjudicator goes to the very integerity of the legal system."). The exercise of peremptory strikes, or the ability of a party to remove prospective jurors for any reason, originated from a desire to ensure an impartial jury. See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 633 (1991)("By allowing the litigant to strike jurors for even the most subtle of discerned biases, the peremptory challenge fosters both the perception and reality of an impartial jury."). Although parties can move to remove prospective jurors for cause if the prospective jurors exhibit bias, thereby demonstrating they cannot be fair, peremptory strikes serve the function of removing prospective jurors when their bias is not clear enough to support a for-cause challenge. Swain v. Alabama, 380 U.S. 202, 220 (1965)("While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the

peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstratable.").

The judiciary clearly believes in the "jury mystique." The case law is filled with grandiose and idealistic descriptions of the jury system. But of course, the jury system is not ideal; it is prone to the same passions and prejudices that effect the rest of humanity, including dishonesty. Perhaps this tension between judicial rhetoric and human reality helps to explain why courts have had a difficult time explaining their decisions in cases of dishonest jurors.

The vast majority of courts begin their analysis by looking for juror misconduct. In this context, juror misconduct means the intentional concealment of material information during voir dire. The states vary, however, in their approach to determining intential concealment; some us an objective test, while others use a subjective test. States using an objective test will look to see whether a reasonable juror would've disclosed the information during voir dire. Williams v. Barnes Hosp., 736 S.W.2d 33, 36 (Mo. 1987). States using a subjective test will look to see whether the juror in question acted honestly and in and in good faith. Gainesville Radiology Group v. Hummel, 428 S.E.2d 786, 789 (Ga. 1993). This distinction is critical and is not altogether apparent from the language used by the same court's. For example, Utah claims to follow the test annunciated by Justice Rehnquist in McDonough Power Equip. Inc. v. Greenwood, 464 U.S. 548, 553, 556 (1984). The Utah precedent is State v. Thomas, 830 P.2d 243, 245 (Utah 1992). Justice Rehquist clearly advocates a subjective test for determining intentiional concealment. See McDonough, 464 U.S. at 553 (Stating there is no "average juror."). Utah, however, believes that "the better-reasoned approach mandates that a juror's 'honesty' or dishonesty be termined from an objective perspective." Thomas, 830 P.2d at 246.

Once misconduct has been shown, most states then require a sowing of juror

bias. The classic juror bias case involves an appeal of a denied challenge for cause. In this context, however, no challenge for cause can be made because the juror has withheld the potentionally challengable information. Therefore, the typical remedy is a post-trial hearing in which the juror's potential bias can be explored by defense counsel. In Petitioner's case, juror Villegas came forward the next day. See Appendix E. The Supreme Court has implied that a hearing is a due process minimum. See Smith v. Phillips, 455 U.S. 209, 217 (1982)("Due Process means ... a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made in a hearing ...."). States very on what level of prejudice must be shown at such a hearing. Some require possible bias, T.K. Stanley Inc. v. Carson, 614 S.O.2d 942, 949 (Miss. 1992); State v. Freeman, 605 S.O.2d 1258, 1260 (Ala. Crim. App. 1992)(same); State v. Messelt, 518 N.W. 232, 238 (Wisc. 1994)(same); and some require that the juror would have been struck for cause had the information been known at voir dire. Gainesville Radiology Group v. Hummel, 428 S.E.2d 786, 789 (Ga. 1993)

However, a few states recognize that defendant's can suffer prejudice even when there is no juror bias: Jurors who conceal information deny defendant's the chance to a full and complete voir dire, there by limiting defendant's ability to intelligently exercise peremptory strikes. Wright v. Bernstein, 129 A.2d 19, 25 (NJ 1957). Many courts will use a similar rationale to grant a new trial when the trial judge has been too draconian in his limitation of voir dire questioning. But a select few states also recognize that false answers by jurors during voir dire just as effectively impairs the rights of defendants.

A. PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Today we return to critical issues attending the difficulties of jury selection. A cornerstone of the fair trial, it is the last chance for the court to expose prejudice and potential bias before the jurors repair to a virtual vault where deliberations are sealed, not to be opened except in the most egregious cases. See Pena-Rodriguez v. Colorado, 137 S.Ct. 855, 871 (2017)(characterizing voir dire as a "safeguard to protect the right to an impartial jury" and highlighting the "advantage of careful voir dire" in preventing bias in jury deliberations). This "no-impeachment rule" grew out of our common-law heritage and is now codified in the Federal Rules of Evidence and entrenched in the laws of every state. See FRE 606(b); Pena-Rodriguez, 137 S.Ct. at 865 ("Some verison of the no-impeachment rule is followed in every State and the District of Columbia."). Shielding the jury's deliberations from scrunity protects the finality of the process, enables jurors to deliberate honestly, and ensures, as best can be done, their willingness to return a true, if unpopular, verdict. Id., at 867. But this sealing canon comes at a great cost: the courts cannot probe the effects of a juror's bias in the jury room, and in those rare cases when the court can and does, remedies for the unfairness are elusive.

As jury selection is the lynchpin of an impartial jury, it ought never be a hasty minuet or check-the-boxes exercise; it must always be as exacting and careful a process as the case demands, especially in sexual cases. As in this case, potential jurors often come with personal experiences, relationships, and grasping emotions bottled in memory and easily set off. These realities bind the trial judge in the interest of true verdicts and bind the attorneys in meeting their adversarial duty to identify and exclude biased jurors. When a juror evidences a potential bias, the selection process must root it out with specific

and direct questioning, with the judge resolving uncertainty in favor of exclusion. These demands on the court and counsel advance the bedrock principles of procedural fairness crafted to deliver the right to trial by jury. Yet they only ask that the Court and Counsel do their job.

Here, Juror Ms. Villegas during voir dire did not disclose she is the cousin of Petitioner's common-law wife, and the charge of sexual assault of a child he was on trial for, was the sole reason for Jaimi leaving the Petitioner. Villegas sent a note to the judge the next day after "seeing a video." The following colloquy took place during voir dire:

> **State:** "Now, let me ask about the defendant. does anybody know the defendant? His name is Jereme Lee Escobedo. Either him or his family, does anybody know them?" RR4, 39.
>
> **Defense:** "Let me read the names to you one more time, and if anybody has a relationship with one of these people, would you be kind enough to just raise your hand and say, you know, I know this person, I have this kind of relationship with this person. Jaimi Moreno anybody know her? No. Okay. She is just a local citizen I believe ... RR4, 183-88.

Juror Villegas remained silent during these questions posed by the State and Defense Counsel. The colloquy below occurred the next day:

> **Court:** Attorneys, please approach. Yes ma'am. I understand you wanted to talk to me about something?
>
> **Villegas:** Yeah. Whenever they said something about the witnesses, they didn't mention **Jaimi Escobedo**. Well, I didn't know that she was -- I know her by **Jaimi Luna**, and she is my cousin's daughter.
>
> **Court:** Who is your cousin's daughter?
>
> **Villegas:** **Jaimi Escobedo.**
>
> **Court:** The Defendant?
>
> **Villegas:** No, his girlfriend.
>
> **State:** Moreno, Jaimi Moreno.

Defense: The girl in the video.

State: Jaimi Moreno. What was the name -- last name you knew her by?

Villegas: Luna.

State: Luna

Villegas: Yeah. Because that's my cousin's daughter. Yeah, That's where he lives here. That big house in front of it, that's where he lives right there, my cousin.

Court: Its your cousin's daughter?

Villegas: Uh-huh.

Court: Who is your cousin?

Villegas: Felipe Luna.

Court: Well, is there any reason you can't serve on this jury and be fair and impartial?

Villegas: No. I mean, I don't know her -- we don't communicate that good, but, you know, I just know who she is.

Court: You just know who she is?

Villegas: Yeah, but I **knew** her by Jaimi Escobedo until I saw that video.

(At this point, the juror admits she knew an individual by the last name as the defendant, but did not think it was important to bring up when she was asked if "she knew the defendant or his family.").

Court: Well, do you think that would create any problems with you being fair and impartial on this jury?

Villegas: "I don't think so." (equivocal answer)

Court: All right. Thank you ma'am, I appreciate you letting us know. Ma'am. What was your name?

Villegas: Viola Villegas.

Court: Thank you. All right. Let's take a break.

(Recess)

(Open Court, Defendant Present)

Court: Folks, any reason not to bring in the jury?

State: No, sir.

Defense: No, sir

(This was defense counsel's opportunity to object and/or challenge juror Villegas remaining on this jury. There would've been no delay in the trial with the alternate juror taking her place)

Court: All right. Bring them in.

Jury in

RR5, 57-49. The trial continued and petitioner was convicted and sentenced to an automatic life sentence in prison.

Juror Villegas' first response to the question of impartiality was: "No. I mean, I don't know her -- we don't communicate that good (doesn't get along with Jaimi), but, you know, I just know who she is." Second response: "I don't think so." This equivocal answer is not sufficient for impartiality.

The Petitioner has argued that he was denied a fundamentally fair trial by her failure to disclose her relationship during voir dire, and the record above proves by her own admission's she knew Jaimi Luna by Jaimi Escobedo before voir dire, during voir dire, and trial.

Moreover, counsel rendered constitutionally ineffective assistance to a fundamental degree by his failure to challenge and/or object to Villegas remaining on the jury. The alternate juror should have replaced her at this point. Considering the special circumstances involved in this case, which, is the crime charged "aggarvated sexual assault of a child" there is not a reasonable

jurists or attorney that would agree with leaving a juror in place in this situation. Stricklasnd v. Washington, 466 U.S. 668 (1984).

POINT #1: TRIAL COUNSEL'S POST-HOC EXPLAINATION IN HIS AFFIDAVIT IS IN DIRECT CONFLICT WITH THE RECORD, SUPREME COURT AUTHORITY, AND THE CONSTITUTION.

Truly, offense[s] of any sexual nature, especially involving children are extremely emotional in all aspects of the trial, and its almost impossible to obtain an true impartial jury. This is true regardless of the answers during voir dire. Counsel's post-hoc explaination of why he did not challenge and/or object to Villegas remaining on the jury, even though petitioner instructed counsel to do so is unreasonable performance according to Strickland, 466 U.S. at 688-95; Patton v. Yount, 104 S.Ct. 2884 (1984); Irvin v. Dowd, 366 U.S. 717 (1961).

The District Court's decision that Counsel was not constitutionally ineffective is contrary to, and unreasonable to, clearly established federal law as determined by this court, and its decision is an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

Although the court, asked the attorneys: "Folks, is there any reason not to bring in the jury?" Counsel failed to take his only opportunity to prevent this juror from serving on the jury. The alternate juror would have replaced her and therefore no delay in the trial. The Petitioner instructed counsel to simply do his job and get rid of the juror, but contrary to petitioner's wish to conduct his defense counsel did not object. Counsel violated his right to be the master of his own defense. McCoy v. Louisiana, 584 U.S. 414, 421-22 (2018); Faretta v. California, 422 U.S. 806, 819-20 (1975); See Gannett Co. v. Depasquale, 443 U.S. 368, 382, n.10 (1976)(the 6th Amend. "contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense"). Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions

such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence. But not voir dire or what juror's to accept and to strike and challenge.

Moreover, Villegas was concerned enough during the first day of trial to notify the bailiff she needed to speak to the Judge after seeing a video from an officer's body cam. Also, Villegas was extremely clear that she knew Jaimi as Jaimi Escobedo during and before voir dire. All of the answers by Villegas were equivocal or they were followed by equivocal statements. The jury was impaneled with 12 jurors and 1 alternate. Had counsel done his job to remove the juror, there would have been no delay. Truly, the Judge should also have excused the juror sua sponte.

Taken together, trial counsel rendered ineffective assistance to a fundamental degree and the end result is a life sentence for petitioner and the denial of his right to an impartial jury and one of his choosing. This Court must grant certiorari.

POINT #2: APPLYING THE RIGHT TO PRESENT A DEFENSE TO JUROR BIAS: THE ANTI-IMPEACHMENT RULE TO ALLEGATIONS OF RACIAL, RELIGIOUS, OR OTHER BIAS VIOLATES THE RIGHT TO PRESENT A DEFENSE.

The right to present a defense is the right to present evidence, whether at an initial trial, a direct appeal, or in support of a motion for new trial, or petition for a writ of habeas corpus. This rule in the Fifth Circuit would prevent petitioner from submitting an affidavit from Villegas.

In Williams v. Price, the Third Circuit Court of Appeals reversed and remanded for an evidentiary hearing based on juror misconduct. Williams did not raise the right to present a defense himself, Justice Alito wrote the opinion and began by noting that the court's standard of review was governed by 28 U.S.C. § 2254(d)(1), meaning that he could not award federal habeas relief

unless the PRCA court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States." In this regard, William's chance of success seemed dim.

However, while Williams did not raise the right to present a defense himself, Jusitce Alito rounded up the usual suspects- Washington v. Texas, Chambers v. Mississippi, Crane, Rock, and Scheffer- and concluded that "none of these cases clearly established just how far a jurisdiction may go in excluding evidence of juror misconduct." Justice Alito, however, was able to construe these opinions "as" clearly establishing ... that a state evidence rule may not severly restrict a defendant's right to put on a defense if the rule is entirely without any reasonable justification." According to Justice Alito, he noted that the Third Circuit's role in Price was "not to interpret Rule 606(b) or any other verison of the no impeachment" rule but merely to determine whether the state courts contravened or unreasonably applied clearly established Federal Law, as determined by the Supreme Court.

Consider the Fifth Circuit's published and now precedent opinion in Canfield v. Lumpkin, 998 F.3d 242 (5th Cir. 2021), denying relief for actual bias when the juror stated: "I probably will," when asked if the State doesn't prove guilt beyond a reasonable doubt will you still find the defendant guilty? The State, Defense, nor the Court followed up to remove the juror and she was seated as juror number 12, Canfield received a 50 year sentence without parole. Justice Higginbotham wrote a 16 page dissenting opinion stating Canfield's punishment was fundamentally unfair, Counsel was ineffective, and the Court failed to do their job and protect the jury room. According to Rule 606(b) an affidavit would not have helped and there is no way the conservative Fifth Circuit would have accepted it.

Plainly, when courts apply **Rule 606(b)** to preclude jurors from impeaching their verdicts based upon allegations of juror racial, religious, or other bias, they deprive appellants from presenting evidence of juror bias. Some courts hold that courts can only violate the right to present a defense by applying per se rules of evidence to exclude appellants from presenting evidence and not by excluding evidence under discretionary Rules, such as **Rule 702**. Because **Rule 606(b)** is a per se rule of exclusion, even the courts reading the right to present a defense in this manner would find that the Rule's application implicates the first factor of the analysis.

In deciding whether the subject evidence implicates the second factor, courts alternatively have considered whether the evidence is material and favorable **Gov't of the Virgin Islands v. Mills**, 956 F.2d 443, 446 (3rd. Cir 1992), critical **Chia v. Cambra**, 281 F.3d 1032, 1037 (9th Cir. 2002), or "creates a reasonable doubt that did not otherwise exist." **United States v. Agurs**, 427 U.S. 97, 112 (1976). In essence, however, these courts all consider basically the same factors, and all of these factors could or necessarily would support a finding that evidence of juror racial, religious, or other bias implicates the second factor of the analysis.

In the vast majority of cases, except **Canfield v. Lumpkin**, juror testimony would be the sole evidence that an appellant could present after trial to establish that jurors made biased statements during trial. Usually, only jurors are privy to jury deliberations, rendering juror testimony "the only available evidence ... to establish juror misconduct." [illegible] Moreover, it is well established that the presence of a biased juror is a structural defect not subject to harmless error analysis and necessitates "a new trial without a showing of actual prejudice." **Dyer v. Calderon**, 151 F.3d 970, 973, n.2 (9th Cir. 1998). Put another way, "even if only one member of a jury

harbors a material prejudice, the right to a trial by an impartial jury is impaired." And to put it even more simply, "one racist juror would be enough" to require the reversal of a verdict. United States v. Henley, 238 F.3d 1111, 1120 (9th Cir. 2001). Because the presence of a bias juror can never be harmless error, evidence of juror bias during trial is ipso facto probative of a central issue. See State v. Santiago, 715 A.2d 1, 20 (Conn. 1998)("Allegations of racial bias on the part of a juror are fundamentally different from other types of juror misconduct because such conduct is, ispo facto, prejudicial.").

The aforementioned opinons in Washington v. Texas and Rock v. Arkansas, both of which this court reaffirmed in Holmes v. South Carolina as addressing applications of rules of evidence that were arbitrary or disproportionate to the process that they were designed to serve, set forth three ways in which the application of Rule 606(b) to allegations of juror bias implicates the third factor of the right to present a defense analysis.

It is past time for this Court to decide the issues of juror bias, and how the rights of the constitution are not being afforded to defendant's charged with sex-crimes just as was the case in Canfield v. Lumpkin, where the Fifth Circuit actually created a new rule of law. If Canfield cannot get relief, then no one can! Id. 998 F.3d 242, 243, 248-49, 252-58 (5th Cir. 2021)(Higginbotham dissenting).

POINT #3: CONFLICT AMONG THE CIRCUIT'S WHEN ADDRESSING PREJUDICE ACCORDING TO THE STRICKLAND STANDARD.

The ineffective assistance of counsel standard in Strickland v. Washington, 466 U.S. 668 (1984) assessing prejudice is not applied equally in the Circuit Court's of Appeals. See Article: III. Trials, 52 Geo. L.J. Ann. Rev. Crim. Proc. 617, 644-654 (2023)(If prejudice is not presumed, defendant must show that counsel's errors were prejudicial and deprived defendant of a "fair trial,

a trial whose result is reliable.")Strickland, 466 U.S. at 687. Unlike the performance prong of the Strickland test, which is analyzed at the time of trial, the prejudice prong is examined under the law at the time the ineffective-assistance claim is evaluated. For example the Fifth Circuit analyzed the prejudice prong under Weaver v. Massachusetts, 137 S.Ct. 1899 (2017) in their decision in Canfield v. Lumpkin, 998 F.3d 242, 248-49 (5th Cir. 2021). However, Canfield's claim of ineffective assistance due to counsel failing to protect the jury room from bias, which, denied his constitutional right to an impartial jury was raised first in his State writ of habeas corpus, well before the holding in Weaver by this Court. According to Strickland, the law at the time the ineffective assistance claim is evaluated is during the state court proceedings. This does not change during each advancement in the post-conviction procees, see § 2254(d)(1)(2) whatever the law was at the time the state court denied a claim points to the "clearly established federal law" that a court unreasonably applied. Lockhart v. Fretwell, 506 U.S. 364, 372 (1993).

This burden (prejudice) is met by showing a reasonable probability that the outcome could've been different but for counsel's errors. See 52 Geo. L.J. Ann. Rev Crim Proc. at 652, FN 1693, showing the conflict among the Circuit's. However, due to concerns about fundamental fairness, the court also may examine whether Counsel's ineffective assistance "deprive[d] the defendant of a substantive or procedural right (like the right to an impartial jury) to which the law entitles [the defendant]." See Williams v. Taylor, 529 U.S. 362, 393 (2000).

In Williams, the Court stated, "there are situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice.'" Id., at 391-92. Only in cases where the defendant is deprived of something other than an actual substantive or procedural right owed to the defendant will this additional analysis into fundamental fairness be appropiate.

Id., at 392-93.

This Court held in Arizona v. Fulminante, "at the core of the structural-error doctrine is the idea that some Constitutional errors damage the framework of the trial so thoroughly that no aspect of the trial is reliable any longer. Id., 499 U.S. 279, 309-10 (1991). No one can say what a jury's verdict would be without the biased juror on that jury. It only takes one juror to hold out and cause a mistrial and it only takes one biased juror to render that jury partial violating the defendant's constitutional rights.

This Court has had the perfect case to settle juror bias issues in Canfield v. Lumpkin, 998 F.3d 242 (5th Cir. 2021)however, this very Court denied Certiorari to Canfield. See Canfield v. Lumpkin, 142 S.Ct. 2781 (June 06, 2022); Rehearing denied at 143 S.Ct. 54 (August 01, 2022). This Court had Roe v. Wade at this time, and it was overruled by Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2242 (June 24, 2022).

The Court held that, "absent mechanical rules, 'the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.' We focus on ferreting out 'unreliable' results caused by 'a breakdown in the adversarial process that our system counts on to produce just results.'" Strickland, 466 U.S. at 696. Therefore, prejudice is not only shown by a different outcome, but rather, fundamental fairness and the ultimate reliability of the proceeding.

The Court's in Petitioner's case has held the same analysis regarding the prejudice standard: "Escobedo cannot show that the result of the proceeding would've been different." See Appendix D. This Court must grant certiorari to resolve this conflict concerning the prejudice standard in Strickland.

POINT #4: THE DEFERENCE TO STATE COURT'S AND HOW THE CIRCUIT COURT'S ARE APPLYING THIS DIFFERENCE.

A State court's determination of a factual issue is presumed correct and may be rebutted only by clear and convencing evidence. See 28 U.S.C. § 2254(e)(1)(on federal habeas review, state court's findings of fact are "preseumed to be correct," and petitioner can rebut that presumption only "by clear and convencing evidence." See **Article: V. Review Proceedings**, 52 Geo. L.J. Ann. Rev. Crim. Proc. 1041, 1161, FN 2908. This Court has presumed state courts' factual findings to be correct on issues of juror exclusion for cause, juror partiality, witness identification, competency to stand trial, competency to waive post-conviction proceedings, culpability, and validity of peremptory challenges. See Id., at 1162-1165, FN's 2909, 2910, 2911, 2912, 2913, 2914, and 2915 showing the different treatment among the U.S. Circuit Court of Appeals.

However, this presumption of correctness does not apply to "questions of law" or "mixed questions of law and fact." See **Miller v. Fenton**, 474 U.S. 104, 113-14 (1985)("Any principle that can be given meaning only through its application to facts of a case is generally regarded as a legal question and will not be accorded the presumption of correctness.)Id., at 114. Conversely, a factual issue "does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." Id., at 113: **Field v. Hallett**, 37 F.4th 8, 16, n.1 (1st Cir. 2022)(Presumption of correctness not afforded to ineffective-assistance-counsel-claim because mixed question of law and fact); **U.S. v. Hunter**, 32 F.4th 22, 31 (2nd Cir. 2022)(presumption of correctness not accorded to state court's determination if evidence prosecution withheld was material under Brady because mixed question of law fact); **Abdul-Salaam v. Sec'y of Pa. Dep't of Corr.**, 895 F.3d 254, 265-66 (3rd Cir. 2018)(presumption of correctness not accorded to state court's prejudice determination under **Strickland**

because prejudice is a legal question); U.S. v. Ragin, 820 F.3d 609, 617 (4th Cir. 2016)(presumption of correctness not afforded to state court's Strickland determination if "counsel's performance was constitutionally adequate" because mized question of law and fact."); Jefferson v. GDCP Warden, 941 F.3d 452, 473-74 (11th Cir. 2019)(presumption of correctness not afforded to state court's determination of performance or prejudice competent of Strickland claims because mized questions of law and fact.).

Moreover, although the presumption of correctness does apply to state court fidnings of fact underlying the voluntariness of a defendant's statements or waiver of rights, it does not apply to ultimate conclusions of law regarding the voluntariness of those statements or waivers. Similary, although the presumption of correctness applies to state court findings of fact underlying an ineffective-assistance-of-counsel-claim, it does not apply to ulitmate conclusions of law regarding the ineffective assisatnce. See Strickland, 466 U.S. 668, 698 (1984)(for ineffective-assistance-of-counsel claim, issues of counsel's performance and defendant's prejudice are mixed questions of law and fact not entitled to presumption of correctness.). Under AEDPA, state court determinations of law and mixed questions of law and fact are subject to the deferential standards of review of Section 2254(d).

Taken together, this Court must grant certiorari to set the standards and reaffirm standards for criminal defendant's charged with sex-crimes. The Circuit's are split when comes to sex-crimes and non-sex-crimes. Even a capital defendant has a better chance at receiving a fundamentally fair trial than a defendant charged with a sex-crime. See 52 Geo. L.J. Ann. Rev. Crim. Proc. 1041, 1161-67, FN's 2909-2918.

QUESTION THREE

DID THE FIFTH CIRCUIT COURT OF APPEALS "SIDE-STEP" THE COA INQUIRY BY HOLDING: "HE HAS NOT MADE THE NECESSARY SHOWING" THAT REASONABLE JURISTS WOULD FIND THE DISTRICT COURT'S ASSESSMENT OF THE CONSTITUTIONAL CLAIMS DEBATABLE OR WRONG?"

A state prisoner whose petition for writ of habeas corpus is denied by a federal district court does not enjoy the absolute right to appeal. Buck v. Davis, 580 U.S. 100, 115 (2017). Federal Law requires that he first obtain a COA from a Circuit Justice or Judge. Id. (Citing 28 U.S.C. § 2253(c)). A COA may issue "only if the [Petitioner] has made a substantial showing of the denial of a cosntitutional right." Id. (citing Miller-El v. Cockrell, 537 U.S. 322, 336 (2003)).

However, exactly what's required to meet the standard for obtaining a COA has taken much of this Court's time since the AEDPA revised the statutes governing COA. And most of the time, the Court has held that the lower courts has used a standard that was too harsh in denying a COA to a habeas petitioner. Repeatedly in these cases, this Court has held that the COA standard is only a "threshold" inquiry into whether a COA should be granted for an appeal. That is, it's not about the likelihood of petitioner being able to demonstrate entitlement to relief. Slack v. McDaniel, 529 U.S. 473 (2000).

The Court came up with the "debatable among reasonable jurists" standard in evaluating whether a COA should be granted for an appeal. Miller-El. That's the measuring stick a court should use in deciding whether to grant a COA. It's not a high bar. Under this standard, the Petitioner does not have to prove that his claim[s] would succeed on appeal or that he would be entitled to relief.

Obtaining a COA does not require a showing that the appeal will succeed, and a Court of Appeals should not decline the COA application merely, because it believes the applicant will not demonstrate an entitlement to relief. Webb v.

United States, 136 S.Ct. 1257 (2016).

Moreover, the actual standard for granting a COA largely depends on the substance of a prisoner's claim[s]. A COA may be granted "only if the petitioner has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Court has also defined this as a showing that, "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Tennard v. Dretke, 542 U.S. 274 (2004). The key word here is "constitutional." A prisoner's claim[s] must have a constitutional basis to be granted a COA. Even if a claim has a mixed basis of statutory and constitutional concerns, this is enough to meet the constitutional requirement of the COA statute -- § 2253(c)(2). United States v. Mulay, 805 F.3d 1263 (10th Cir. 2015).

Indeed, this does not mean that a Court can dig into the merits of a Petitioner's claim[s] in deciding whether to grant or deny a COA. If the Court does this, this Court held in Miller-El that this constitutes deciding an appeal -- without jurisdiction. If a court decides the merits of a claim[s] to see if its worthy of an appeal, it is effectively deciding the merits of the appeal without a COA. Since a COA is a jurisdictional bar, a court of appeals is prohibited from doing this whatsoever. Id.

The Court held in Johnson v. Vandergriff, "issuing a COA requires that the prisoner make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make that showing, the prisoner need only demonstrate that "reasonable jurists could debate whether ... the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000)(internal quotation marks omitted). Id. 143 S.Ct. 2251, 2553 (2023).

The Court also held in Hernandez v. Peery, that "Under the AEDPA, a COA "may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). To make that showing a habeas petitioner must demonstrate "that reasonable jurists could debate whether ... the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack, 529 U.S. at 484. AEDPA does not "require petitioner'[s] to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Miller-El, 537 U.S. at 338. Rather, "[a]t the COA stage, the only question is whether" the "claim is reasonably debatable." Buck, 580 U.S. at 115.

In Petitioner's case the Fifth Circuit held: "To obtain a COA, Escobedo "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000); see 28 U.S.C. § 2253(c)(2). He has not made the necessary showing. Accordingly, the motion for COA is DENIED. See Appendix A.

The Fifth Circuit stated: "He [Petitioner] contends that his trial counsel was ineffective for failing to challenge the trial court's decision to allow a juror to remain on the jury after the juror informed the court (during trial) after seeing a video showing Escobedo's girlfriend, Jaimi Moreno that Moreno is the juror's cousin's daughter and that the juror knew Moreno by a different name. See Appendix A.

Petitioner actually raised in his COA, that "Counsel was constitutionally ineffective for failing to challenge and/or object [had the challenge failed] to Juror Villeags remaining on the jury, after she disclosed that she knew "Jai... Jaimi as Jaimi Escobedo before voir dire, during voir dire, and at trial. See RR5, 57-59. When considering the colloquy, facts of the case, and nature of the case juror Villeags should have been removed and the alternate juror take

her place. Further, had the defense known this fact during voir dire Petitioner would have instructed counsel to strike her (even though a reasonable attorney would on their own), just as Petitioner instructed counsel to do during the colloquy. RR5, 57-59. Counsel failed to do as petitioner instructed, denying petitioner's Sixth Amendment secured autonomy. McCoy v. Louisiana, 584 U.S. 414, 421-22, 427-28 (2018)(The choice is all or nothing: To gain assistance, a defendant need not suurender control entirely to counsel. For the Sixth Amendment, in "grant[ing] to the accused personally the right to make his defense," "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." Faretta v. California, 422 U.S. 806, 819-20 (1975; see Gannett Co. v. Depasquale, 443 U.S. 368, 382, n. 10 (1979)(the Sixth Amendment "contemplat-[es] a norm in which the accused, and not a lawyer, is the master of his own defense"). Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." Gonzales v. United States, 553 U.S. 242, 248 (2008).

Taken together, the facts and record, a reasonable jurist could find this claim debatable or wrong or that the issues deserve encouragement to proceed further. Therefore, this Court must grant certiorari to resolve these issues.

CONCLUSION

This Court must GRANT certiorari to resolve the Constitutional and Public Importance of the questions presented herein. The framers of our great Constitution drafted the rights to apply to all equally, and therefore the Court's must apply the rights equally to all criminal defendant's.

Respectfully Submitted,

Jereme Lee Escobedo

Jereme Lee Escobedo
TDCJ# 02190183
H.H. Coffield Unit
2661 FM 2054
Tennessee Colony, Texas 75884-5000
Pro se Litigant.