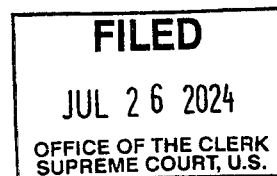


No. 23 A1117

24-5182 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



Kevin Fahrni — PETITIONER
(Your Name)

vs.

Bobby Lumpkin "et al" — RESPONDENT(S)
T.P.C.F. Director

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

Kevin Fahrni No. 1941419
(Your Name)

Estelle Unit 264 FM 3478
(Address)

Huntsville, Texas 77320-3322
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Is it not cruel and unusual punishment to imprison a person with no evidence to the charged crime?
2. If statute of limitation had expired to charge a person of an alleged offense, can the state amend its law as a vehicle, for the court and jury to find the separate offense was committed as evidence to the charged offense?
3. A.E.D.P.A. was designed for applicants to raise all issues in the first writ. Are the courts abusing the writ system not addressing all the issues on the first writ?
4. Is it not an abuse of discretion for the U.S. District Magistrate Judge to Grant sufficient equitable tolling time, in which applicant used to file his §2254 writ of habeas corpus, then the magistrate judge recommends to time bar the §2254 writ based on due diligence not shown, when due diligence should not be a factor when adequate time was Granted?
5. Does the A.E.D.P.A. §2254(d)(1)(3) still apply to the Issue: Insufficient evidence to prove the essential element in the indictment, that was not adjudicated on the merit with facts and conclusion of law by the trial court as 'ORDERED' by Texas Supreme Court of Criminal Appeals?
6. §1651(a) provides that "all courts established by congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principle of law. Fed. R. App. P. 21(b)(4) provides "The Court of Appeals may invite or order the trial judge to address the petition. If the writ of Mandamus was first presented in state court and exhausted, Does the federal court have jurisdiction to entertain and Grant the writ of Mandamus when the issue has merit and applicant is entitled to relief?

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:

Robert W. Schroeder, Jr. - U.S. District Court, Eastern District of Texas 500 Stateline Avenue, Texarkana, Texas 75501
Bill Miller, T.J. - Bowie County, New Boston, Texas 75570 710 James Bowie Dr. New Boston, Texas 75570
Jerry Rochelle, District Attorney - Texarkana, Texas 601 Main St. Texarkana, Texas 75501
Kelley Crisp, Assistant District Attorney, Texarkana, Texas 601 Main St. Suite A Texarkana, Texas 75501-5504

RELATED CASES

5th District of Bowie County Texas Trial cause No. 10 F484065 June 3-6, 2014.
--

Court of Appeals Sixth District of Texarkana No. 06-14-00148 CR Fahrni v. State 473 S.W.3d. 486 Decided August 31, 2015
--

Court of Criminal Appeals PD-1265-15 refused February 3, 2016. In re Fahrni 2016 Tex. crim. App. Lexis 236

Texas Supreme Court of Criminal Appeals §11.07 Ex Parte Fahrni 2018 Tex. crim. App. Unpub. Lexis No. WR 87,675-01 192, 2018 WL 117,9698 Tex. Crim App. March 7, 2018.

U.S. District Court §2254 Fahrni v. Dir, 2020 U.S. Dist. Lexis 234096 (E.D. Tex. sept. 24, 2020). Dismissed January 20, 2021.
--

5th Circuit Court of Appeals No. 21-40030, C.A.A. denied November 17, 2021
--

5th Circuit Court of Appeals No. 23-40552, Denied March 15, 2024.

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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 A to the petition and is

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

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

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

☐ For cases from **state courts**:

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

[X] reported at 405 S.W.2d 405; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the 10th Circuit Court of Appeals court appears at Appendix F to the petition and is

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

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 15, 2023.

☒ 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 August 12, 2024 (date) on June 26, 2024 (date) in Application No. 23 A 1117.

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 June 26, 2024. A copy of that decision appears at Appendix 1.

☒ A timely petition for rehearing was thereafter denied on the following date: June 7, 2024, and a copy of the order denying rehearing appears at Appendix 1.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ 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 c/3

United States Constitution Article IV

United States Constitution Article VI

United States Constitution Article XIV

United States Constitution Article I section 9 and section 10

Texas Constitution Art. I section 16

Texas Constitution Art. IV section 8

STATEMENT OF THE CASE

The alleged offense was reported October 31, 2008. There is no DNA, physical evidence, or eyewitnesses. Petitioner was indicted by a grand jury of Bowie County, Texas on a charge of aggravated sexual assault of a child by a summary report of a detective, August 12, 2010, that pertained false information not in the investigation. This charge carries a sentencing range of five to ninety-nine years on life imprisonment. The District Attorney, Jerry Rochelle, notified petitioner, defense counsel, Joe Tyler (deceased) and assistant prosecutor, Kelley Crisp, that trial on June 3, 2014, will be called for the purpose of Jury selection for the offense of Indecency with a Child which carries a sentencing range of two to ten years on a third degree felony or two to twenty years on a second degree felony, [Appendix R]. It was even in the local paper, Indecency trial to start today, [Appendix R]. The day trial commenced, the court ruled that the state can use the amended text of Texas Code of Criminal Procedure Article 38.37, allowing the state to present a separate alleged offense as character evidence, and instructed counsels not to voir dire the panel on the law that just came into effect September 1, 2013, [Appendix Q]. A directed verdict was requested by trial counsel twice and was denied both times by the trial court whom stated, "There is enough evidence in this case for the jurors to make a determination one way or the other." Petitioner was found guilty of aggravated sexual assault of a child and sentenced to fifty years confinement in the Texas Department of Criminal Justice with "No Evidence". A Motion for New Trial (Clerk Records pg. 225-26) was filed June 6, 2014 stating, "The evidence was legally and factually insufficient to convict the defendant". The motion was never ruled on.

Petitioner appealed his conviction and it was affirmed on August 31, 2015. Appellate counsel challenged the interpretation of the enactment paragraph [Appendix Q] as to which form of law as it is written in 1995 [Appendix Q] or 2013 [Appendix Q] should govern the trial, but neglected to challenge the sufficiency of evidence and didn't challenge the fact the indictment presented in court was not filed. A petition for discretionary review was refused on February 3, 2016.

On May 1, 2017 petitioner filed his §11.07 writ of habeas corpus in state court, presenting twelve (12) issues, preserving only six (6) days of toll time due to misconduct of a previous counsel that was founded by the state bar. A motion to amend four more issues [Appendix O] was filed November 13, 2017, that included a challenge to the sufficiency of evidence. It has been long standing that a challenge to the sufficiency of evidence was not cognizable on a writ of habeas corpus. Texas had enacted Article 11.074 of the Code of Criminal Procedure effective 2015 and made retroactive, that the evidence of the case may only support the lesser included offense and relief could be granted.

Texas Supreme Court of Criminal Appeals 'ORDERED' the trial court to address sixteen (16) issues with facts and conclusion of law, [Appendix N]. The trial court failed to address issue no. thirteen (13) on sufficiency of evidence to prove the element of penetration to support the conviction, [Appendix M]. The §11.07 writ of habeas corpus was denied without written order without a hearing, May 2, 2018, based on the trial court's recommendation, [Appendix L]. Motion for reconsideration / rehearing on the four grounds amended, was dismissed June 6, 2018, [Appendix K].

During the pendency of the state writ, petitioner filed a motion to the U.S. District Court to enlarge equitable tolling, September 24, 2017, [Appendix J], in which it was 'Granted' October 10, 2017, [Appendix I], based on the State Bar's finding of a counsel's misconduct who was retained to investigate and file the §11.07 writ of habeas corpus in a timely manner by contract. The §2254 writ of habeas corpus was filed with the U.S. District Court September 19, 2018, and counsel neglected (refused) to challenge the sufficiency of evidence as well, focusing only to challenge the Ex Post Facto Laws. As pro se, petitioner amended the §2254 writ of habeas corpus with the issue on sufficiency of evidence, October 29, 2018, [Appendix H]. When respondent replied to petitioner's §2254 writ, the sufficiency of evidence was ignored. Petitioner filed a motion for Court Order to direct respondent to reply to the issue on sufficiency of evidence, January 6, 2020 [Appendix G]. No 'Order' or response was made. Now the magistrate judge made her report and recommendation to the U.S. District Court to time barr the §2254 petition, taking back all the time 'Granted', stating that petitioner did not file his petition once he completed his state collateral review and did not show due diligence, [Appendix F]. The §2254 writ of habeas corpus was denied by the U.S. District Court, December 11, 2020, [Appendix E]. An application for a Certificate of Appealability was denied by the United States Court of Appeals for the Fifth Circuit November 17, 2021, [Appendix D]. Petitioner next filed a motion, pro se, under Rule 60 b [Appendix C], not only relitigating that equitable tolling was 'Granted', but also was pursuing an Actual Innocence claim that no state or federal court had addressed.

The Fifth Circuit Court of Appeals dismissed the motion stating time expired under 5th Cir. R. 27 and petitioner cannot file motions with attorney of record, [Appendix B]. This court did not consider when the certificate of appealability was denied, it ended counsel's representation. This court also did not consider the date petitioner was notified by counsel and the mailbox rule for filing, not to mention that a motion under Rule 60 has its own statute of limitations of less than a year within reasonable time to file, Rule 60(c), (1).

With questions of law, petitioner tried three (3) times to file his writ of certiorari to the United States Supreme Court within ninety (90) days with failure because of a procedural rule, to get past the clerk. The clerk of the United States Supreme Court would not file the writ of certiorari on 8 1/2" x 11" paper by an inmate who was paying the \$300 filing fee. Informa pauperis only means that petitioner cannot pay filing fee or court cost. An inmate should not be forced to do booklet format forms when he has no access to office equipment and proceeds pro se, especially since courts do not recognize ineffective assistance of counsel on writs, (Trevino v. Thaler 569 U.S. 413 citing Martinez v. Ryan 566 U.S. 1 at 9, 132 S.Ct. 1309, 182 L.Ed. 2d 272, 278, 282). From the U.S. Supreme Court perspective not recognizing ineffective assistance of counsel on post conviction writs is the reason petitioner had presented the issue of insufficient/no evidence to prove the essential element in the indictment in every stage available to file writs, pro se, behind attorney's representation.

After 90 days had expired with no success to get the Writ of Certiorari filed and accepted in the United States Supreme Court, Petitioner presented a motion for leave, accompanied with an application of a Writ of Mandamus challenging the sufficiency of evidence to the Texas Supreme Court of Criminal Appeals, that was never adjudicated on the merit by the 'ORDER'

[Appendix N], raising this issue for the second time May 23, 2023. The Motion for Leave was denied without written order, and petitioner was notified by Texas Department Criminal Justice mailroom August 2, 2023.

A Writ of Mandamus challenging the sufficiency of evidence was filed in the Fifth Circuit Court of Appeals September 23, 2023.

Motion to Reinstatement the Writ of Mandamus was 'Granted' January 5, 2024. This Writ of Mandamus No. 23-40552 was denied March 15, 2024, declining to accept and reopen jurisdiction. Even after this court denied a Certificate of Appealability and the Motion 60b, this Court stated: In his mandamus petition, Fahrni contends that the state and federal habeas courts refused to address the merits of his assertion that there was no evidence to support an element of the offense, even though the claim was properly raised and would entitle him to relief. [Appendix A]

Motion Requesting Court of Appeals For The Fifth Circuit To Accept Jurisdiction was filed/mailed March 29, 2024 and a Motion For Leave to refile the \$2254 on the issue of evidence was filed April 1, 2024. As of today July 10, 2024, well over 90 days, these motions have not been addressed. On June 26, 2024, Honorable Justice Alito extended the time to file the Writ of Certiorari in the United States Supreme Court On or Before August 12, 2024, given the Application No. 23A1117. The writ of Certiorari was postmarked June 6, 2024 and received June 12, 2024.

The Writ of Certiorari was returned and the clerk's letter dated June 28, 2024, stated reasons for corrections to be made and the new due date for the Writ of Certiorari will be August 27, 2024.

REASONS FOR GRANTING THE PETITION

Evidence of a separate alleged offense cannot prove any elements in the indictment. In 1995, Texas Legislature enacted Article 38.37 of the Code of Criminal Procedure [Appendix Q], which renders "evidence of a defendant's other crimes, wrongs, or acts" admissible, notwithstanding Rule 404 and 405 in the prosecution of that defendant for certain criminal offenses, including aggravated sexual assault of a child. In its original form and its 2008 form, when petitioner was alleged to have sexually assaulted Arlette, only extraneous offenses committed against the complaining child victim were admissible under Article 38.37. In 2013, the Legislature again amended Article 38.37 by adding the current section 2, which notwithstanding Rules 404 and 405, allows evidence of separate alleged offenses committed by the defendant including aggravated sexual assault of and indecency of a child, admissible for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant in the guilt and innocence stage of trial. See Tex. Code Crim. Proc. Ann. Art. 38.37 §2 [Appendix Q].

From all the state's witnesses, none of the evidence is sufficient to support this conviction. The state is required to produce the testimony of the complaining witness to be sufficient evidence for there to be a finding of guilt beyond a reasonable doubt by Article 38.07 of Code of Criminal Procedure [Appendix Q] to sustain a conviction. (Mantinez v. State 178 S.W. 3d 806, 812 (Tex. crim. App. 2005)).

Arlette, the complaining witness, testified to this in her own words at the age seventeen in trial.

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STATE Q: Can you tell the ladies and gentlemen of the jury what happened that night?

A: We were watching TV at night and I was on the floor and he was laying on his back and I was on my stomach, and during the show, I felt him like touch me between the legs, and I looked up and he said I thought you were asleep and so I got up and went to my room.

Vol. 4 pg. 200, 13-19

"Touch me between the legs" by itself does not prove the element of penetration listed in the indictment or even sexual contact occurred. The U.S. District Court appropriately determined that a reasonable jury drawing all inferences in favor of the state, could have relied on other testimony giving by the complaining witness to find beyond a reasonable doubt that the requisite "Sexual Contact" occurred. (Blaney v. Ballard 2014 U.S. District Lexis 42190 at C, 3). In this case the complaining witness gave no more testimony in her own words to the alleged offense, "Touch me between the legs" is not even sufficient evidence to support the lesser included offense of Indecency with a child. Penal Code § 21,11, Indecency with a child, requires evidence of touching the anus, breast, or any part of the child's genitals. The state's complaining witness, Arlette did not testify to touch me on my private part, as she stated at age twelve (12) in the forensic interview, [Appendix S].

To really confuse and mislead the jury, State and defense counsels repeatedly asked by leading questions in the form of penetration as listed in the following, that Arlette never testified to or even stated in the forensic interview of the investigation. The district attorney's letter [Appendix R] corroborates this issue.

STATE DIRECT EXAMINATION

Vol. 4 pg. 202, 3-6, 9-20
pg. 210, 11-17

DEFENSE CROSS EXAMINATION

Vol. 4 pg. 219, 14-20
pg. 220, 4-9

STATE Re-DIRECT EXAMINATION

Vol. 4 pg. 231, 1-4
pg. 232, 13-16
pg. 234, 22-25
pg. 235, 18-21

DEFENSE Re-CROSS EXAMINATION

Vol. 4 pg. 236, 6-18

The state and defense counsel constantly stated these inflammatory words of: In, Inside, Insert, Insertion, and Penetration in leading questions to Arlette, whom gave no testimony to had been penetrated in her sexual organ, (Vol. 4 pg. 202-236). The trial court stated these instructions to the jury pool before the voir dire began: "What lawyer say is not evidence" and "The evidence

will be presented in the form of testimony from witnesses," (Vol. 3, pg. 23-24). "You must not consider testimony or exhibits to which an objection was sustained or that I instruct you to disregard," (Vol. 4 pg. 55, 4-6). The objection in this trial are located at (Vol. 4 pg. 202-206). This was the beginning of the direct examination by the state of the complaining witness, Arlette. State counsel made the first statements to penetration. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness, Texas Rules of Evidence 611(C). Even though Arlette's testimony was developed many times in leading questions, Arlette still did not give any testimony in response to penetration or even sexual contact as she stated in the forensic interview five years and six months prior to trial, [Appendix 5].

The charge of the court, clerk records pg. 198, gives instructions to the jury, under Evidence. Statements made by the lawyers are not evidence. The questions asked by the attorneys are not evidence. Evidence consist of the testimony of the witness and materials admitted into evidence. Arlette answering "Yes" to leading questions are not testimony. Testimony consist of statement of words. The Supreme Court has recognized that a conviction based upon a record wholly devoid of any relevant evidence of an element of the offense charged is unconstitutional, (Thompson v. Louisville 362 U.S. 199, 41 L. Ed. 2d 654, 80 S.Ct. 624, 80 ALR 2d 1355 (1960)).

Evidence of penetration the state did produce cannot support the conviction. The day trial commenced, the trial court ruled that the amended

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text section 2 of Article 38.37 Code of Criminal Procedure [Appendix Q], will govern this trial, allowing Ashley Bartell to testify to her alleged offense in Arkansas, 1999-2000.

STATE Q: Okay, please continue.

Ashley A: And I remember feeling my underwear come off and feeling him stick his finger inside my vagina and that's the last thing I remembered from that.

Vol. 5 pg. 24, 12-14

Allowing the jury to view such evidence did not mean that they could rely solely on the uncharged acts to convict, as nothing in rule provided that such evidence would suffice to prove all of the elements of a violation of the charged offense, (*Ledesma v. Government of Virginia Islands* 159 F. Supp. 2d 863, 869-70 (D. Virginia Islands 2001)), but the state told the jury otherwise in their closing arguments.

"Do you know why the law allowed Ashley to come in here and testify, even though this isn't Ashley's case, so when they called Arlene a liar or Arlette a liar ya'll can be like, well, what about Ashley?"

Vol. 5 pg. 121, 4-8

Trial courts should be particularly weary of evidence of defendant's other similar bad acts where bad acts did not result in criminal conviction. (U.S. v. Gibson 55 F.3d, 173). The Court of Appeals of Texas, Third District Austin No. 03-1400-329-CR January 7, 2016 determined that § 2 does not allow extraneous offense evidence to be offered as substantive evidence of guilt, and the state must still satisfy its burden of proof as to each element of the crime, (Reporter 483 S.W. 3d, 205, (2016) Tex. App. Lexis 66).

Petitioner was brought to trial by an indictment with one charge of penetration of the sexual organ by defendant's finger. There is no DNA, physical evidence, or eye witnesses to the offense. Arlette's testimony is the required evidence to sustain this conviction, (Martinez v. State 178 S.W. 3d, 806, 812 (Tex. crim. App. 2005)). The amended section (b) of Article 38.37 Code of Criminal Procedure (2013), [Appendix Q] allowed Ashley to testify to penetration of her sexual organ of an unchanged separate alleged offense in 1999-2000. With the admissibility of this propensity evidence, it created a great danger that juries convicted on this type of evidence and because he had committed similar acts before, and was thus an established sodomite, he should be convicted of the instant charge, (Boatwell 719 S.W. 2d, 174-179, Id. at 177). When the jurors hear that a defendant has an earlier occasions committed essentially the same crime as that for which he is on trial for, the information unquestionably has a powerful and prejudicial impact (United States v. Ashers 910 F.3d, 854 (6th Cir. 2018)). What the jury was not allowed to do is rely on the prior allegation of an separate offense as an excuse to

find him guilty of the charged offense. Evidence of an extraneous prior offense committed by the defendant is usually excluded during the guilt/innocence phase of trial, because such evidence is inherently prejudicial tends to confuse the issue in the case, and forces the accused to defend himself against collateral charges, (Albrecht v. State 486 S.W. 2d, 97, 100 (Tex. crim. App. 1972).

In Joshua Jacobs v. State of Texas No. PD-1411-16, Yeary, J. filed a concurring opinion in which Hervey, J. joined stating:

"What the jurors were not authorized to do however, was to rely on Appellant's prior conviction as an excuse, to find him guilty of the charged offense in the event that the state's evidence failed to convince them of his guilt to that heightened level of confidence, just because he has been convicted of such an offense before"

Footnote: (1) This is not to suggest that character conformity evidence that is admissible under Article 38.37 could suffice by itself, to provide legally sufficient evidence in satisfaction of Jackson v. Virginia 443 U.S. 307 (1979).

Jacobs v. State 506 S.W. 3d, 127, 132 (Tex. App. Texarkana 2016).

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The Court of Criminal Appeals has recently held that the Jackson legal sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the state is required to prove beyond a reasonable doubt, (Brooks v. State 323 S.W.3d, 873 (Tex. crim. App. 2010)).

To sum up the legal arguments presented in this Writ of Certiorari. The trial and appellate court had interpreted that "a criminal proceeding" in the enactment paragraph (2013) [Appendix B] refers to defendant's trial giving it retroactive effects. The theory they give, applying it to all cases retroactively does not have any logic with the last sentence, "The former law is continued in effect for that purpose". The correct interpretation should have been that "a criminal proceeding" referred to the first criminal proceeding of the criminal action. The former law can continue in effect with this common sense. The state argues that the change of law to allow different testimony of character evidence does not change the burden of proof. A federal court had made a ruling eight months prior to petitioner's trial had commenced, that the change of rules of evidence to allow a separate alleged offense as character evidence in the guilt/innocence stage of trial does not violate the Ex Post Facto Clause, (Banks v. Gibson October 2013 U.S. Dist. Lexis 146,347). It has been recognized in *Carmell v. Tex.* 529 U.S. 513, referring to *Calden v. Bull* 3 U.S. 386, 391 L. Ed. 648 (1798), 4th category, the state can't

convict on less testimony than what the law required at the time of the alleged offense. With the change of law in this case, Texas used different testimony to secure a conviction. There is "No" (less) evidence to prove the essential element in the indictment.

There had been many discussing among lower courts that theoretically Sec. 2-a of Article 38.37 (2013)

[Appendix Q] requires a prior conviction. Ashley testified, the different testimony, to have been sexually abused by petitioner in 1999-2000 in the state of Arkansas which was founded unsubstantiated by the preponderance of the evidence, petitioner did not commit the sexual assault or abuse Ashley, [Appendix T]. This is considered a class Y felony under Arkansas law. This separate alleged offense had a six (6) year statute of limitation to charge or arrest petitioner.

(Ark. Code 5-1-1090 (b) and 2001 ARK. H.B. 1423). Since the statute of limitation had expired years before trial, No court or jury can make a finding that petitioner committed the separate offense under Sec. 2-a of Article 38.37 Code of Criminal Procedure [Appendix Q]. This shows that the state enforced a new law to get around statute of limitations in order to secure a conviction. The United States Navy Marine Corps, Court of Military Review stated: If the enforcing law takes away or impairs the defense which the law had provided the defendant at the time, it is ex-post facto and inoperative, (United States v. Marsh 11 MJ 698 (1981) NMCM 80, 1281.

The state of Texas presented no evidence to prove the essential element of "penetration" listed in the indictment and they used *Teague v. Lane* 489 U.S. 288 as a trump card in response to petitioner's issue on violation of the Ex Post Facto Laws. The trial record shows the state relied on their new law to secure a conviction using different testimony, because they had no evidence in their own case as petitioner was charged.

While trial was being delayed by the state and court. The state made several offers of plea bargains over the course of years off the record. Refusal of plea bargains were accention to have a speedy trial. Trial was not set until after the new law came into effect. First pretrial after the law came into effect September 1, 2013, court noted and stated to counsels to get ready for trial. This court stated that retroactive procedural statutes violate the Ex Post Facto Clause unless they leave untouched all the substantial protection with which the existing law surrounds... accused, "the court held that respondents right to a new trial under former Texas law was a substantial protection," (*Thompson v. Utah* 170 U.S. 393, 42 L. Ed. 1061, 18 S.Ct. 620). Although this case was overruled by (*Collins v. Youngblood* 497 U.S. 37), saying it is a mistake to stray from beyond *Caulder's* four Categories, Petitioner had always relied on *Caulder's* 4th category in which his alternative description, chase traced these four categories back to Parliament's earlier abusive acts as follows:

Category 4. At other times, they violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness when the existing law requires two; by receiving evidence without oath;

or the oath by a wife against the husband, or other testimony, which the court justice would not admit. 3 Dall at 389, 1 L.Ed. 648 (emphasis altered from original).

The state of Texas amended the Code of Criminal Procedure Article 38.37 in order to secure conviction, but character evidence admitted in guilt/innocence stage of trial does not support the conviction. However, depraved in character and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence and only for the offense charged, (*Boyd v. United States* 142 U.S. 450, 12 S.Ct. 292, 295, 35 L.Ed. 1077, on page 458). In this case, the statute of limitation had passed on the separate alleged offense. The statute of limitations are intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. They provide security and stability to human affairs, (internal quotations and citation omitted) (*Gabelli v. S.E.C.* 568 U.S. 442, 448, 133 S.Ct. 1216, 185 L.Ed. 2d 297 (2013) citing *Order of R. telegraphers v. Railway express agency INC.*, 321 U.S. 342 (1944)). Also statute of limitations tell people when they no longer need to fear prosecution for crimes which they may or may not have committed. After a statute of limitations for a crime has [***90] run, all persons, guilty or innocent having any reason to anticipate that they might have been subject to prosecution for that crime may throw away documents or other items that might have been subject to prosecution for that crime may throw away documents or other items, that might

have been useful to support a defense, secure in belief that prosecution is no longer a possibility, (United States v. Marion (1971) 404 U.S. 307, 322, 92 S.Ct. 455, 464, 30 L.Ed. 2d 468), significantly, a statute of limitations reflects a legislative judgment that after a certain time, no quantum of evidence is sufficient to convict, (United States v. Marion 404 U.S. 307, 322, 30 L.Ed. 2d 468, 92 S.Ct. 455 (1971)).

It doesn't matter if petitioner's trial was governed by Texas Code of Criminal Procedure Article 38.37 as it was written in 1995 or 2013. Character evidence can not prove any elements in the indictment. Texas Code of Criminal Procedure Article 38.07 is the substantive law. This is the quantum proof required to support the conviction. A trial court's failure to comply with the requirement of Article 38.07 by contrast, results not in a remand for a new trial, but a reversal of conviction and remand for entry of an order of acquittal see e.g., (Scoggan v. State 799 S.W. 2d 679 June 13, 1990 No. 1209-87, (note: since corroboration or outcry requirement were not met in this case, the evidence is insufficient to support Appellant's conviction)), The issue in this case is the testimony by the alleged victim does not support the conviction as required by Texas Code of Criminal Procedure Article 38.07

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Herin Jahuri

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