

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DENNIS MAYES _____ — PETITIONER
(Your Name)

vs.

THE STATE OF TEXAS _____ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Appeals, Fifth District of Texas at Dallas

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

PETITION FOR WRIT OF CERTIORARI

Dennis Mayes, Pro Se Petitioner

(Your Name)

9601 Spur 591 (No. 2062242)

(Address)

Amarillo, Texas 79107

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

- 1) Is Article 38.37 (See appendix) unconstitutional, in violation of the Fourteenth Amendment, in that it allows character evidence of prior bad acts/extraneous offenses in the trial of child sex offenders specifically, but generally does not allow such evidence in the criminal trials of all other classes of defendants generally? Is a defendant in such a case deprived of the right of equal protection? Should not the laws of a State be applied to all classes of defendants equally?
- 2) If Article 38.37 is constitutional, does it violate the Fifth, Sixth, and Fourteenth Amendments when it is applied in an unconstitutional manner?
- 3) Is it fundamental error when a prosecutor misdefines a mens rea term during voir dire and also misdefines the charged offense during the definition portion of the jury charge? Is the burden of proof lowered in such a case?
- 4) Does the cumulative effect of a misdefinition during voir dire, the allowance of hearsay testimony by and improper outcry witness, the allowance of inadmissible prior bad acts/extraneous offense evidence during the guilt/innocence phase of trial, and misdefinition of the charged offense during the jury charge lower the state's burden of proof and rob the defendant of due process?

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:

TABLE OF AUTHORITIES CITED

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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 _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

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

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

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

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

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

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

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was 10/25/17.
A copy of that decision appears at Appendix A.

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

☐ 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, Amendment V.

"No person shall...be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..."

United States Constitution, Amendment VI.

"In all criminal prosecution the accused shall enjoy the right to...be confronted with the witnesses against him..."

United States Constitution XIV.

"...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not 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."

Texas Penal Code §21.11 (See appendix. p. 4)

Texas Penal Code §22.021 (See appendix, p. 5)

Texas Code of Criminal Procedure, Article 38.072 (See appendix, p. 6-7)

Texas Code of Criminal Procedure, Article 38.37 (See appendix, p. 8)

Texas Rules of Evidence 404 (See appendix, p. 9)

STATEMENT OF THE CASE

From July to October 2015, the State filed nine separate outcry notices relating to seven different possible outcry witnesses. The State filed two outcry notices for April Washington (the Victim, A.M.'s , mother). (CR1:30,65). The first notice, filed on July 9, 2015, summarized the outcry as follows: "[t]hat [Petitioner], as a continuous course of conduct, made her pull her pants down and he touched her in her privates." (CR1:30). The second notice, also for April was filed on October 30, 2015, and summarized the outcry as follows:

In a continuing course of conduct, [Petitioner] made contact and penetrated the complainant AM's middle part (vagina) with [Petitioner]'s middle part (penis).

In a continuing course of conduct, [Petitioner] kissed Complainant AM in a way she was not comfortable with.

~~In a continuing course of conduct, [Petitioner] told the Complainant AM~~
In a continuing course of conduct, [Petitioner] told the Complainant AM not to tell anyone about the acts [Petitioner] was committing against AM.

(CR1:65). The same day, the State filed an identical notice of outcry, substituting Carmen Bray, AM's school counselor as the outcry witness. (CR1:68).

Immediately before trial, the court held an outcry hearing. At the hearing, April testified that in February of 2012, AM called her at work and said that Petitioner made her pull her pants down. (RR3:9). April understood AM's statements to mean "that he touched her" on the "vagina" with his hand. (RR3:9). Additionally, April wrote a statement memorializing the outcry in which she stated that AM had told her that while her grandmother is gone, Petitioner made her pull down her pants and he touched her on the

vagina. (RR3:15). April could not recall the exact words AM used to describe what Petitioner did to her. (RR3:15). April suggested that AM talk with her school counselor about the allegations she made against Petitioner. (RR3:7; RR3:114).

The school counselor, Bray, also testified at the outcry hearing. (RR3:10-16). Bray testified that AM told her "that her father was touching her in the wrong spots" and pointed to her private parts. (RR3:11). AM told Bray this happened about five times while her grandmother was at church. (RR3: 12). Additionally, Bray testified that AM told her that Petitioner rubbed his penis on the outside of her vagina. (RR3: 12). However, she understood that Petitioner had made contact with AM's vagina with his hand. (RR3: 15).

The State submitted Bray, as opposed to April, as the proper outcry witness. (RR3: 16). The defense argued that April was the proper outcry witness:

MS GRINTER: Judge, in order to be the outcry witness it has to be the first person over the age of 18 who describes the offense discernibly. That's the mother. What she understood from what her daughter told her was sexual assault. She is the outcry witness.

(RR3: 16). The trial court determined that Bray was the proper outcry witness, thereby overruling the defense objections. (RR3: 17). The defense later renewed its objection during Bray's trial testimony; that objection was overruled. (RR3: 34).

During the course of the trial, AM herself testified that she told her mother "everything": "I tell her [April] everything that happened. She seemed like she was upset, so I thought she was angry with me." (RR3: 79-80). AM's testimony in this regard con-

tradicts April's testimony at the outcry hearing while confirming the defense arguments that April was the proper outcry witness.

During voir dire, the State's attorney discussed the mens rea term "intentionally":

(BY MR. MITCHELL): Another element is intentionally or knowingly...(addressing a venireperson)...What's an intentional act mean to you?

VENIREPERSON: Something that was done on purpose with intent.
(BY MR. MITCHELL): Does everybody understand that? Okay. It is not an accident. Is that fair? I mean, it's not a complicated process here. If something is not an accident, someone meant to do something, that's an intentional act, right?

(RR2: 30-31). Defense counsel objected to this definition as follows: "...object to the characterization of the mens rea term.

These are the two highest mens rea terms, and they are statutorily defined. Saying something is not an accident, that doesn't mean it's intentional. We have negligence and we have reckless." (RR2: 31). The trial court overruled this objection and instructed the prosecutor to "proceed". (RR2: 31).

The prosecutor then asked the venire panel, "Does anybody have a question about that? Okay." (RR2: 31). The State's voir dire continued with the dialogue between the prosecutor and venire-members about the circumstances when an act would be more likely to be viewed as an intentional act. (RR2: 31-35).

Prior to trial, the State filed a notice of extraneous offenses under Article 38.37 seeking to admit numerous bad acts and/or extraneous offenses during its case-in-chief. (CR1: 31-33). In

response, Petitioner filed a written objection seeking to exclude these bad acts on grounds that Article 38.37 (Section 2), which permits the introduction of prior bad acts and/or extraneous offenses during the State's case-in-chief, is violative of the Fifth, Sixth, and Fourteenth Amendments to the federal constitution, both facially and as applied to Petitioner. (CR1: 125-131). This same written objection sought exclusion on the grounds that these same prior bad acts and/or extraneous offenses constituted inadmissible character evidence under TES. R. EVID. 404 and 405. (CR1: 129-130). An extensive pre-trial hearing was held on this motion. (RR2: 6-11). At the conclusion of this hearing, the trial court overruled the defense's objections on all grounds, but granted the defense a running objection. (RR2: 10-11).

Petitioner was charged with aggravated sexual assault of a child, in pertinent part, as follows: "intentionally and knowingly caused the contact of the female sexual organ of...(AM)..., a child ...by an object, to wit: the sexual organ of said defendant..." (CR1: 11). This indictment charged an offense under TEX. PENAL CODE §22.021.

The trial court subsequently found the State's special issue regarding a prior sexual offense to be true and automatically sentenced Petitioner to life imprisonment. (CR1: 153; RR4: 156-158); see also TEX. PENAL CODE §12.42(c)(2). Judgment was entered on April 20, 2016. (CR1: 153).

REASONS FOR GRANTING THE PETITION.

Petitioner Dennis Mayes' request for certiorari is due mainly to the Texas Legislature's enactment of laws that discriminate against child sex offenders at trial, in violation of the Fourteenth Amendment U.S. CONST.. By its actions, Texas has enacted a two-tier criminal justice system: one for child sex offenders and another for all other class of similarly situated defendants. The settlement of this important question of law has not been, but should be, settled by this Court.

Texas Rules of Evidence provides in part (1) "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait" and (2) "[e]vidence of a crime, wrong or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." TEX. R. EVID. 404. Further, under rule of evidence 405, (1) when evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion; (2) on cross-examination of the character witness, inquiry may be made into relevant specific instances of the person's conduct; and (3) when a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

However, for certain crimes relating to sexual misconduct

involving a child, article 38.37 expressly abrogates the application of rules of evidence 404 and 405. TEX. CODE CRIM. PRO. ANN. art. 38.37. Petitioner does not argue the constitutionality of Section 1(b) of article 38.37, which provides that in child sex offenses, "notwithstanding Rules 404 and 405, evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters." Id. § 1(b). Petitioner does question the constitutionality of Section 2 of article 38.37, amended in 2013, which allows. notwithstanding rules 404 and 405, evidence of certain extraneous offenses by the defendant against a third person who is not the victim in the charged offense. Id. § 2(B). Section 2 allows such evidence "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." Id.

The admission of character evidence only in the trials of child sex offense defendants, but generally not in the trials of all other criminal defendants, violates the very spirit of the Fourteenth Amend. U.S. CONST.: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...nor deny to any person within its jurisdiction the equal protection of the laws."

All defendants should have the inalienable Constitutional right to equal protection of the law, irrespective of race, creed, sexual orientation, or class of crime committed. Equal protection

is defined as "the Fourteenth Amendment guarantee that the government must treat a person or class of persons the same as it treats other persons or classes in like circumstances." BLACK'S LAW DICTIONARY (Emphasis Added). Class is defined as "a group or peoples, things, qualities, or activities that have common characteristics or attributes." Id. (Emphasis Added). The characteristic, or character of a person, is defined as "a distinctive trait, quality, etc.; characteristic...behavior typical of a person or group." WEBSTER'S NEW WORLD DICTIONARY, 2002.

If child sex offense defendants represent a separate class of criminal defendants because of their character and/or character traits and they are treated differently at trial; then, Section 2 of article 38.37 TEX. CODE CRIM. PRO. is by its own definition, discriminates against child sex offense defendants as a distinguishable class of criminal defendants. The Texas Legislature's enactment and the trial court's enforcement of article 38.37 permitted (in Petitioner's case and permits in the case of all other similarly situated child sex offense defendants) the introduction of otherwise inadmissible character evidence which showed only that Petitioner was a criminal generally and specifically a rapist/sexual abuser.

The ubiquitous quote of the Brady Court rings true that, "Society wins not only when the guilty are convicted but when trials are fair." Brady v. Maryland, 373 U.S. 83, 87 (1963). "An accused person is entitled to be tried on the accusations made in the state's pleadings and not on some collateral crime or

for being a criminal generally." Cantrell v. State, 731 S.W.2d 84, 88 (Tex.Crim.App.1987). For this reason, extraneous offense evidence which shows the character of the defendant and acts performed in conformity with the character or trait are impermissible in even the most heinous non-sex offense cases; and only then, at the punishment phase of a trial is evidence of prior bad acts/extraneous offenses admissible. TEX. CODE CRIM. PRO. art. 37.07. As with capital crimes, the history of jurisprudence has shown that the more serious the nature of an offense and its consequences, the greater the demand for a fair and impartial trial.

Allowing the use of character evidence in the guilt/innocence phase of child sex offense trials, where it would otherwise not be admissible in the trials of other criminal defendants, deprives child sex offense defendants not only of the equal protection of the law, guaranteed by the Fourteenth Amend. U.S. CONST.; it also violates Petitioner's Fifth and Fourteenth Amend. U.S. CONST. rights to due process and to due course of law. The use of character/extraneous offense evidence during the guilt/innocence phase only of child sex offense defendants, unfairly switches the burden of proof from the State to the defendant and demands higher court scrutiny.

The unhindered general character attack allowed by article 38.37 § 2 only in the trial of child sex offense defendants is not permitted by the U.S. Constitution. Denial of due process, as applied to a criminal trial, is the "failure to observe that fundamental fairness essential to the very concept of justice."

Lisenba v. California, 314 U.S. 219, 236 (1941).

Within the United States, there has been a consistent and rigorous preference for excluding extraneous acts in criminal trials so as not to put a defendant on trial for being a criminal generally. See, e.g. Boyd v. United States, 142 U.S. 450 (1892); Brinegar v. United States, 338 U.S. 160, 174 (1949). Almost all courts agree that extraneous acts are not admissible to show character:

[C]ourts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to 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.

Mickelson v. United States, 335 U.S. 469, 475 (1948). Due process rights are at stake when extraneous acts are permitted to show general character, "evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause." Spencer v. Texas, 385 U.S. 554, 573-575 (1967)(Warren, C.J., dissenting in part and concurring in part).

From its plain language, Article 38.37(2)(b) permits exactly what the Due Process Clause of the Fifth and Fourteenth Amendment prohibits: admitting extraneous acts "for any bearing the evidence had on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant." Article 38.37 is therefore unconstitutional as it violates the (federal) right to due process of law.

In the case at bar, some of the most powerful evidence against

Petitioner was the fact that he had been previously convicted of indecency with a child by contact, had been previously been convicted of rape of an adult in another state, and other bad acts/offenses. This evidence showed Petitioner to be a rapist/sexual abuser generally. Moreover, the jury charge instructed that the prior conviction may be considered for any reason, effectively focusing the jury on this evidence. (CR1: 148-149). The introduction of this evidence in this case prevented Petitioner from having a fair trial because it placed his character on trial.

Petitioner was charged with a single offense of aggravated sexual assault. The State could have based its case on A.M.'s testimony alone, according to Texas law, yet chose to introduce over Petitioner's objections prior bad acts/extraneous offense evidence to bolster the victim's testimony. This constituted a dangerous invitation to the jury to decide this case on an improper, emotional basis.

The only issue in this case was whether Petitioner committed the offense charged. Petitioner was entitled to a trial on the strengths and weaknesses of the charged offense alone. The jury should be permitted to decide this case based on the facts of this case alone. Admission of the prior bad acts/extraneous offenses undermined this determination and resulted in extreme prejudice which mandates reversal and a new trial.

If this Court finds that Section 2 of article 38.37 TEX. CODE CRIM. PRO. is constitutional, Petitioner would argue that

not only is the article unconstitutional on its face, but also in the way the article was applied by the trial court, in violation of the due process clause of the Fifth Amendment and the confrontation clause of the Sixth Amendment, made applicable to the states by the Fourteenth Amendment. U.S. CONST. amends. V, VI, and XIV.

It is firmly established "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime which he is charged." In Re Winship, 397 U.S. 358, 363-364 (1970). Also, the Fifth and Sixth Amendments require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged. United States v. Galdon, 515 U.S. 506 (1995). Equally well founded is "the companion right to have the jury verdict based on proof beyond a reasonable doubt." Apprendi v. New Jersey, 550 U.S. 468 (2000). "The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' This right is secured for defendants in state as well as federal criminal proceedings under Pointer v. Texas, 380 U.S. 400 (1965). Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right to cross-examination.' Douglas v. Alabama, 380 U.S. 413, 418 (1965)."

According to article 38.37 TEX. CODE CRIM PRO., the trial

court must "determine that the evidence likely to be admitted at trial will be adequate to support a finding by a jury that the defendant committed the separate offense beyond a reasonable doubt; and conduct a gearing out of the presence of the jury for that purpose." Section 2(a). Also, "[a]s a threshold matter for admissibility, evidence of an uncharged crime or other act must be sufficient to support a finding that the uncharged crime or other actually occurred." Rule 404 (b) TEX. RULES EVID. Also, FED. RULES EVID. 104(b) -- U.S. V. Guiterrez-Mendez, 752 F.3d 418 C.A. 5 (Tex.) 2014 (Prior bad act evidence is only conditionally relevant, Court of Appeals has to ascertain whether the jury was presented with sufficient evidence that the putative bad act actually occurred; if not, then testimony as to it would be irrelevant, and it would have been error to admit it).

During cross-examination, the State inquired of Petitioner whether in 2007, a thirteen year-old resident claimed that he kissed and licked her neck, felt her breasts, and tried to "go down" in her pants. (RR4:100). As a result of this alleged incident, Petitioner was issued a misdemeanor ticket for Simple Assault by Contact. Petitioner was never tried for this alleged incident and the State never introduced into evidence any oral or written evidence to support its question and later arguments that suggested the incident actually occurred.

Additionally, Petitioner was questioned about a 2012 Simple Rape conviction in Louisiana and four 1990 Aggravated Robbery convictions. Petitioner's daughter and alibi witness, Zekeiya

Washington, was also questioned during cross-examination about the Louisiana rape. Prosecution did not offer any factual evidence or witnesses for Petitioner to confront concerning these extraneous offences. If Texas is allowed to introduce evidence of prior convictions and uncharged offenses in the guilt/innocence phase of trials of child sex offenders, then the evidence of said acts must be beyond a reasonable doubt and defendants must be allowed to confront the allegers of these acts in a jury trial. If not, the introduction of such acts without evidence beyond a reasonable doubt and confrontation at trial would violate the Fifth and Sixth Amendments of the Constitution.

Additionally, the Court will find that the trial court abused its discretion in allowing the introduction of extraneous bad acts/offenses not allowed by article 38.37.

Only the crimes listed in Subsection a(1) or (2) of Section 2 of article 38.37 TEX. CODE CRIM. PRO. qualify for the admission of extraneous offense evidence in a child sex offense trial. Also, FED. RULES EVID. 414 (a): "In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation."

Petitioner's Louisiana Simple Rape conviction, nor any similar Texas offense, is described and/or listed in article 38.37 as a crime admissible in a child sex offense trial. The simple rape of an adult woman unknowingly under the influence of Xanax is not similar to sexual contact with a child not under the influence of a controlled substance. Therefore, Petitioner's out of state

rape charge was inadmissible and an abuse of the trial court's discretion in admitting it.

For the same reasons, Petitioner's 1990 robbery convictions should not have been admitted during the guilt/innocence phase of trial because Aggravated Robbery does not meet the statutory criteria for admittance of extraneous offense evidence in a child sex offense trial; and, is not similar to charge of Aggravated Sexual Assault/Child for the purpose of character evidence.

Likewise, concerning the alleged Simple Assault of a thirteen year-old, a misdemeanor; no misdemeanor crimes are described in article 38.37 that qualify to be admitted in the trial of a child sex offense for its bearing on relevant matters. Section 2 (a) and (b) article 38.37 TEX. CODE CRIM. PRO. Only felony offenses are listed in this article. Petitioner's alleged touching of a thirteen year-old child on the breasts, licking/kissing her neck, and attempting to go in her pants is not sufficiently similar to the charged offense of pulling down the pants of a nine year-old and allegedly rubbing her vagina with his penis to justify its admittance as extraneous offense character evidence. It is the cumulative effect of admitting dissimilar evidence that Petitioner claims confused jurors in light of a false definition of "intentional" in the voir dire and an incorrect definition of the charged offense in the jury charge, thus lowering the burden of proof of offense in the jury charge, thus lowering the level of proof required for conviction.

Petitioner also argues that it was harmful error to admit the above extraneous act with the thirteen year-old accuser when

the State failed to give proper notice of its intent to introduce evidence of the putative bad act at trial. Section 3 of article 38.37 requires that: "The State shall give notice of the State's intent to introduce in the case in chief evidence described by Section 1 or 2 not later than the 30th day before the date of the defendant's trial." Petitioner was surprised at trial when the State asked him at trial concerning the alleged 2007 incident when he was not given notice from the State that it would do so.

The cumulative effect of all off the above errors harmed Petitioner. Inadmissible extraneous offense evidence was admitted for no other reason than to show that Petitioner was a criminal and rapist generally and at worse a child molester. The trial court's allowance of the introduction of this evidence was not only a violation of the Fifth, Sixth, and Fourteenth Amendments, it was an abuse of the trial court's discretion that shifted the burden of proof from the State to Petitioner, forcing him to give up his constitutional right to remain silent in a suicidal attempt to "rebut" the State's inadmissible extraneous offense character evidence.

Additionally, Petitioner argues that the trial court abused its discretion and ciolated his Sixth Amendment right to Confrontation when it allowed inadmissible hearsay evidence to be given at trial, when it named the school counselor Bray as the proper Outcry Witness.

An outcry statement is a statement about the offense made by

the child against whom the offense was allegedly committed to the first person, 18 years of age or older, other than Petitioner. TEX. CODE CROM. PRO. article 38.072. A proper outcry must be more than words which give a general allusion of sexual abuse and describe the alleged offense, or an element of the offense, in some discernible manner. Garcia v. State, 792 S.W. 2d 88. 91 (Tex.Crim. App. 1990).

According to Texas law, Aggravated Sexual Assault occurs when the defendant knowingly and intentionally "causes the sexual organ of a child to contact or penetrate the...sexual organ of... the actor." TEX. PENAL CODE §22.021 (a)(1)(B)(iii).

The record affirmatively reflects that April was the proper outcry witness because she was the first person to whom A.M. made a discernible allegation of the offense. A.M. told April all necessary elements of the offense:

- the "what": that Petitioner pulled her pants down and touched her;
- the "where": at her grandmother's house;
- the "who": Petitioner;
- the "when": in early January - March 2012.

(RR3: 9-13). Moreover, April heard A.M.'s outcry at least twice (before A.M. talked to Bray); first on the phone, and later when they spoke in person. (RR3: 9, 15). Both A.M. and April confirmed these conversations. (RR3: 7, 79-80, 114). Including A.M.'s testimony at trial that she told April "everything that happened." (RR3: 79-80)(Emphasis Added). Finally, April's written statement

that: "[Petitioner] made contact and penetrated the complainant A.M.'s middle part (vagina) with [Petitioner]'s middle part (penis)," (CR1: 65), memorialized A.M.'s outcry. (RR3: 15).

The Fifth Court's reliance solely on April's perjured trial testimony that Petitioner pulled down A.M.'s pants and touched her vagina with his hand (RR3: 9), without also considering her October 15, 2015 summarized outcry statement above, denied Petitioner a proper review. The statement made by A.M. to April that Petitioner contacted and penetrated her vagina with his penis clearly described the offense of Aggravated Sexual Assault in a discernible manner that was more than words which gave a general allusion that something in the area of child abuse was going on.

If A.M. made similar statements to both April and Bray and the record shows that April was the first person the statement was made to, any subsequent outcries made to any other person, including Bray, is inadmissible hearsay evidence according to article 38.072 TEX. CODE CRIM. PRO.

There are only two conclusions: a) April's outcry statement was true and that she was the proper outcry witness, meaning that she knowingly perjured herself at trial in order to allow Bray to testify as the Outcry Witness (and the State knowingly allowed her to give false testimony); or, b) the pretrial notice of A.M.'s outcry statement to April was false and the State knowingly filed false evidence to obtain an illegal trial advantage. Either way, the State stands in violation of Brady v. Maryland, 373 U.S. 83 (1963) and Napue v. Illinois, 360 U.S. 264 (1959) for suppression

of favorable evidence and failure to correct false testimony.

The Petitioner was also denied due process of law when the outcry notice filed by the State failed to describe any act for which Petitioner was indicted and tried or that Bray testified about at trial.

An outcry statement "is not inadmissible because of the hearsay rule if...the party intending to offer the statement... provides the adverse party with a written summary of the statement." Article 38.072 Section 2(b)(1(B) TEX. CODE CRIM. PRO.

The State alleged in its outcry notice that Bray would testify that Petitioner made contact and penetrated her vagina with his penis. Here, the allegation that Petitioner made contact with A.M.'s vagina with his penis is subsumed by the allegation that he penetrated her vagina with his penis. Thus, the allegation in the State's Notice of Outcry Statement(s) alleged the single act of penetration.

At trial, Bray testified that A.M. told her that Petitioner "~~had rubbed his penis on the~~ outside of [A.M.]'s vagina" while her pants and underwear were down." (RR3: 12). This testimony, concerning the single act of contact (without penetration) was not protected by the exclusion to the hearsay rule, when Bray testified to an act different from the act falsely summarized in the State's outcry notice.

Here, the trial court's error improperly bolstered the State's case to Petitioner's detriment. Bray was the first witness to profer A.M.'s allegation to the jury. All evidence and infer-

ences from the record reveal Bray to be a disinterested, presentable, and refined professional, who had no prior relationship to Petitioner and only a cursory relationship with A.M. If April had been deemed the outcry witness, virtually all of Bray's testimony would have been properly excluded as inadmissible hearsay. The trial court's erroneous ruling allowed Bray to spear-head the State's case even though the jury should have never heard her testimony. In contrast, the defense attacked April's credibility on cross-examination for her slow and half-hearted response to her daughter's outcry against Petitioner. (RR3: 128-135).

It was April's outcry testimony that should have been presented to the jury, instead of the powerful and disinterested testimony of Bray. Bray's testimony gave A.M.'s allegation credibility that A.M.'s own mother did not. By permitting Bray's testimony, the trial court abused its discretion. This error injured Petitioner's substantive rights and mandates a new trial.

Finally, Petitioner argues that the above errors cumulative with the State's incorrect definition of "intentionally" at voir dire and failure to give a correct definition of aggravated sexual assault during the jury charge violated Petitioner's right to a fair trial, in violation of the Due Process Clause. V Amend. U.S. CONST.

A jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt. Cage v.

Louisiana, 498 U.S. 39 (1990). Structural error cannot be harmless regardless of how overwhelming the evidence of guilt. Sullivan v. Louisiana, 508 U.S. 275, 283 (1993). The harmless error standard is whether "the flaw in the instruction had substantial and injurious effect or influence in determining the verdict." Brecht v. Abramson, 507 U.S. 619 (1993).

At trial, the prosecutor misstated the law by defining "intentionally" as simply "not an accident". (RR2: 30-31). This definition provided by the State (twice) is lower even than that of criminal negligence. TEX. PENAL CODE 6.03(d). The prosecutor compounded the error by asking the panel if everyone understood that something which was not an accident was an intentional act. (RR2: 31).

Further, the trial court compounded the prosecutor's error by overruling defense counsel's objection and telling the prosecutor to proceed; this effectively told the jury that the legal definition of "intentionally: was the equivalent of "not an accident". (RR2:31). While the jury was later given the full definition of "intent" in the jury instructions, the damage had been done as the jury selected was pre-disposed to accept a different, non-statutory definition, At worse, the jury was confused by the improper definition at voir dire and the correct definition given at the end of trial and based its decision on the first definition given to it at the beginning of trial.

The incorrect characterization of "intent" in voir dire injured Petitioner's substantive fundamental rights, mandating that

the conviction should be reversed. TEX. RULES APP. PRO. 44.2(b).

The term "intentionally" was improperly defined by the prosecutor in voir dire. Because the definition of aggravated sexual assault was also incorrect in the jury charge, the error at voir dire was further compounded and resulted in harm. The jury charge never contained a full definition of the offense with which Petitioner was charged. Indeed, the jury charge defined only one "offense": "A person commits the offense of a sexual assault of a child if the person intentionally or knowingly causes the contact of the female sexual organ of a child by any means." (CR1: 144). This is not the definition of aggravated sexual assault of a child. Indeed, it does not define an offense under the Texas Penal Code at all.

Petitioner believes this error to be fundamental despite defense counsel's failure to object to the incorrect definition at trial.

The charge in this case should have defined the offense with which petitioner was charged in the following terms: "A person commits the offense of a sexual assault of a child if the person intentionally or knowingly causes the sexual organ of a child to contact the sexual organ of another person, including the actor." See TEX. PENAL CODE §22.021 (a)(1)(B)(iii). As written, the jury charge contains the error of failing to define the essential elements of sexual assault.

Indecency by contact is a less serious offense than sexual assault of a child. A conviction for indecency by contact may be

had by merely providing that the defendant made contact with the sexual organ of the victim. In contrast, Petitioner was convicted of aggravated sexual assault of a child, which as indicted requires proof that the sexual organ of the defendant made contact with the sexual organ of the victim. Yet, that conduct was not defined in the jury charge as a criminal offense. The failure to correctly define the offense in the jury charge is error.

The error in the trial court's jury charge effectively lowered the State's burden of proof and denied Petitioner a fair trial. The definitional portion defined only the portion of a different offense which allowed the jury to convict Petitioner for aggravated sexual assault on mere proof that there was contact with "the female sexual organ of a child by any means." The definitional portion of the charge effectively led the jury to believe that any contact with A.M.'s sexual organ constitutes aggravated sexual assault. This could have confused the jury since there was testimony that, at one point, it was believed that Petitioner made contact with A.M.'s vagina, if he did, with his hand (RR3: 9,15); that, he kissed and licked a thirteen year-old's neck, felt her breasts, and tried to put his hand in her pants (RR4: 100); that, he had sex with an adult female under the influence of Xanax (RR4: 65, 80, 109); that, he was convicted of indecency with a child by contact of a fully-clothed child; and that, he allegedly rubbed both C.W. (April's other daughter)'s leg and vaginal area (RR4: 123-124). Instead of limiting the error from the definitional portion of the charge, the application

paragraph actually bolstered the error cumulative to the fact that the jury charge also instructed that the above prior bad acts/ extraneous convictions may be considered for any reason, effectively focusing the jury on this evidence and the erroneous assertion that a conviction on the present charge could be had on mere proof that there was contact by any means.

The definitoinal portion exclusively defined, in part, indecency by contact and yet called that definition "sexual assault of a child." The two offenses here sound similar but are very different with veryu different penalty ranges. indecency by contact is a second degree felony that requires less proof because it permits a conviction based on any contact with the sexual organ of the victim, instead of the very specific requirements of aggravated sexual assault.

The cumulative effect of an improper definition at voir dire, allowing carmen Bray to testify as Outcry Witness in violation of hearsay rules, the introduction of inadmissible character evidence which described prior bad acts/extraneous offenses of contact, and the improper definition of the charge at the jury charge effectively lowered the burden of proof which allowed Petitioner to be convicted for aggravated sexual assault by touching by any means that was not an accident, which does not define the charged offense.

At issue is whether child sex offenders have the same rights as all other class of criminal defendants. When a state is allowed to make laws and its trial courts enforce laws in a way different than it applies to others, all citizens of the United States' liberties are at stake. Here the laws of Texas and the way the trial court has enforced them, deprived Petitioner of a fair review on the merits of his guilt or innocence. No matter how socially depraved a defendant's offense, he must be given a trial equal to that of any other - just as the poor cannot be treated different from others, nor the black or white or straight or gay.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "D. C. [unclear]", written over a horizontal line.

Date: 1/22/18

IN THE
SUPREME COURT OF THE UNITED STATES

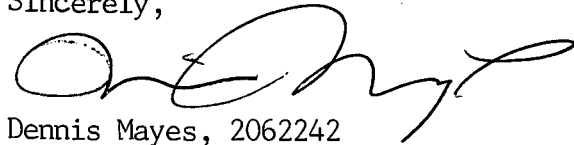
January 22, 2018

To the Clerk of the Court:

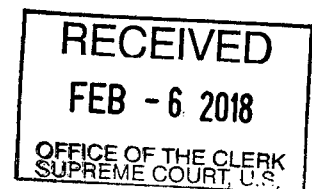
Please find enclosed a Motion to Proceed in Forma Pauperis and Petition for a Writ of Certiorari.

I swear under penalty of perjury that the above have been placed in the prison mailbox at 8 Building, Bill Clements Unit, Amarillo, Texas on the 23rd day of January 2018.

Sincerely,



Dennis Mayes, 2062242
Clements Unit
9601 Spur 591
Amarillo, Texas 79107



12 April 2018

Lisa Nesbitt, for
Scott S. Harris, Clerk
Office of the Clerk
Supreme Court of the United States
Washington, DC 20543-0001

RE: Dennis Levece Mayes v. Texas
TX COCA No. PD-0661-17

Dear Ms. Nesbitt/Scott S. Harris:

Received 2 March 2018 your letter returning my previously mailed petition for writ of certiorari.

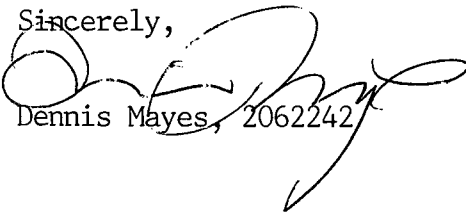
I have attached AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS at Appendix B. I have included a sworn declaration attached, which is an acceptable form of notarization by prisoners.

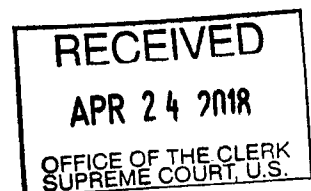
I have appended the lower court's opinion at Appendix A.

I have mailed a copy of this petition to the Attorney General of Texas, Ken Paxton. See Appendix D.

No changes have been made to the substance of the original petition other than typographical retype (to afford a copy to the Attorney General) and the instructed corrections in your previous letter.

Sincerely,


Dennis Mayes, 2062242



ATTACHED TRUTHFUL AFFIDAVIT

IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Dennis Mayes, Petitioner in this cause, declares that he is an indigent income with no ability to earn gainful income. The \$1144.37 that he has in the Inmate Trust Fund is offset by \$1050 in owed court costs. Petitioner has no family/friends who can afford to assist him with legal costs.

If the Court determines that Petitioner is not indigent, he gives the clerk of this court authorization to electronically retrieve the court costs in relation to this action from his Inmate Trust Fund account, either in installments or payment in full. It would take Petitioner 2-3 months to manually deduct these funds, which would exceed the time he has to file this petition.

Petitioner gives the Texas Department of Criminal Justice authorization to deduct the \$300 filing fee in part or full from the account of Dennis Mayes, TDCJ-ID # 2062242.

I declare under penalty of perjury that the above is true and my willful intentions.

Executed on this 12 day of April 2018


(Signature)

Location...: 0372 - 01
Salesperson: GN00036

Commissary & Trust Fund
CLEMENTS UNIT 'B'
Commissary Purchase Receipt

Date: 3/29/18
Time: 12:57:19
Page: 1

Purchaser: MAYES,DENNIS LEVECE
ID Number: 02062242

Housing: BLDG 8-J-2 ROWCELL45
Begin Spend Limit: \$95.00
Spend Limit

Item Number	Item Description	Beginning Account	Unit Price	Quantity	Balance:	Ext.Amt	Class	Spend Limit
00823	CLEARTECH-LIFT OFF TAPE		.35	3		1.05	REGU	
01351	BLK INK PEN/OFFENDER PROPERTY		.30	2		.60	CORR	\$94.40
01338	#10 BUSINESS ENVELOPE		.03	10		.30	CORR	\$94.10
01326	MANILA ENVELOPES 10X15-2PK		.52	1		.52	CORR	\$93.58
00094	DIAL BAR SOAP 1.25 OZ		.20	5		1.00	HYGN	\$92.58
00119	ANTIPERSPIRANT DEODORANT		2.50	1		2.50	HYGN	\$90.08

Transaction Total: 22 \$5.97
Sales Tax included in above amount: \$.46
Ending Account Balance: \$1,144.47 End Spend Limit: \$90.08

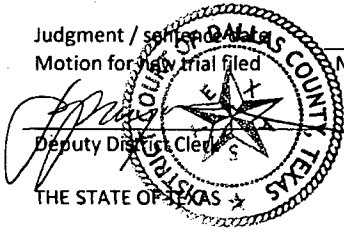
OFFENDERS MUST FILL OUT TWO IDENTICAL COMMISSARY SLIPS
IF YOU ARE BEING PRESSURED FOR MONEY, PROPERTY, OR SEXUAL FAVORS, CONTACT A STAFF MEMBER IMMEDIATELY FOR HELP!!
YOU MUST PUT YOUR NAME AND TDCJ NUMBER ON YOUR STAMPS AND ENVELOPES WITHIN ONE HOUR OF PURCHASE
SIGNATURE _____ THUMBPRINT _____

APPENDIX B

Judgment / sentence entered
Motion for new trial filed

No ☐ Yes ☒

Date 4-20-16



THE STATE OF TEXAS

CAUSE NO. F 12-53766

VS.

Criminal DISTRICT COURT 4

Dennis Mayes

DALLAS COUNTY, TEXAS

**DEFENDANT'S NOTICE OF APPEAL AND PAUPER OATH
APPOINTMENT OF ATTORNEY ON APPEAL**

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Defendant in the above cause and states: I am the defendant in the above cause; I was convicted in this cause and now give Notice of Appeal to the Texas Court of Appeals for the Fifth Supreme Judicial District of Texas of Dallas, Texas, and that I am penniless, destitute and indigent person, too poor to employ counsel to represent me on the appeal, and too poor to pay for or give security for the Statement of Facts and a true copy thereof herein. WHEREFORE, I pray that the Court will appoint an attorney to represent me in this appeal and that the Court will order the Court Reporter of this Court to prepare and deliver me or my appointed Counsel the original and a true copy of the Statement of Facts in this case, together with all exhibits attached thereto if practical.

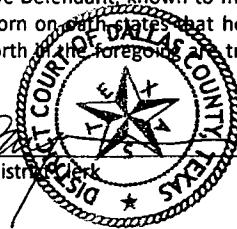
Dennis Mayes
Defendant

BEFORE ME, the undersigned authority, personally appeared the above Defendant, known to me to be the person whose signature appears above, and after being duly sworn on oath, stated that he is the defendant in the above cause, and that the matters and things set forth in the foregoing are true and correct in all things.

Felicia Pitre
District Clerk
Dallas County, Texas

By

Felicia Pitre
Deputy District Clerk



ORDER

The Defendant having requested the Court to appoint Counsel, it is Ordered the Honorable

Patrice Delus Address: _____

a regular licensed and practicing attorney of Texas, be, and he/she is hereby appointed to represent Defendant in prosecuting his/her appeal herein, and it is further Ordered that the Court Reporter is hereby directed to transcribe all of the notes as same may appertain to his cause and as taken during the trial of this cause which began on 4-20-16 and make Statement of Facts in duplicate and furnish same to defendant or his appointed Counsel.

[Signature]
Judge

FILED
2016 APR 21 PM 3:29
FELICIA PITRE
DISTRICT CLERK
DALLAS CO., TEXAS
DEPUTY

APPENDIX C

APPENDIX C
PEN §21.11
TEXAS PENAL CODE

(a) A person commits an offense if, with a child younger than 17 years of age, whether the child is of the same or opposite sex, the person:

(1) engages in sexual contact with the child or causes the child to engage in sexual contact; or ...

APPENDIX C
PEN§22.021
TEXAS PENAL CODE

- (a) A person commits an offense:
 - (1) if the person:
 - (A)...
 - (B) intentionall or knowingly:
 - (i) causes the penetration of the anus or sexual organ of a child by any means;
 - (ii) causes the penetration of ttle mouth of a child by the sexual organ of the actor;
 - (iii) causes the sexual organ of a child to contact ~~or~~penetrate the mouth anus, or sexual organ of another person, including the actor;
 - (iv) causes the anus of a child to contact the mouth, ands, or sexual or- gan of avother person, including the actor; or
 - (v) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor; and
 - (2) if:
 - (A) the person
 - (B) the victim is younger than 14 years of age; or....

APPENDIX C
ARTICLE 38.072
TEXAS CODE OF CRIMINAL PROCEDURE

Section 1. This article applies to a proceeding in the prosecution of an offense under any of the following provisions of the Penal Code, if committed against a child younger than 14 years of age or a person with a disability:

- (1) Chapter 21 (Sexual Offenses) or 22 (Assaultive Offenses);
- (2) Section 25.02 (Prohibitive Sexual Conduct);
- (3) Section 43.25 (Sexual Performance by a Child);
- (4) Section 43.05(a)(2) (Compelling Prostitution);
- (5) Section 20A.02(a)(7) or (8) (Trafficking of Persons); or
- (6) Section 15.01 (Criminal Attempt), if the offense attempted is described by Subdivision (1), (2), (3), (4), or (5) of this section.

Sec. 2. (a) This article applies only to statements that:

- (1) describe:
 - (A) the alleged offense; or
 - (B) if the statement is offered during the punishment phase of the proceeding, a crime, wrong, or act other than the alleged offense that is :
 - (i) described by Section 1;
 - (ii) allegedly committed by the defendant against the child who is the victim of the offense or another child younger than 14 years of age; and
 - (iii) otherwise admissible as evidence under Article 38.37, Rule 404 or 405, Texas rules of Evidence, or another law or rule of evidence of this state;
- (2) were made by the child or person with a disability against whom the charged offense or extraneous crime, wrong, or act was allegedly committed; and
- (3) were made to the first person, 18 years of age or older, other than the defendant, to whom the child or person with a disability made a statement about the offense or extraneous crime, wrong, or act.

(b) A statement that meets the requirements of Subsection (a) is not inadmissible because of the hearsay rule if :

(1) on or before the 14th day before the date the proceeding begins, the party intending to offer the statement:

- (A) notifies the adverse party of its intention to do so;
- (B) provides the adverse party with the name of the witness through whom

ARTICLE 38.072 cont.

it intends to offer t~~he~~ statement; and

(C) provides the adverse party with a written summary of t~~he~~ statement;

(2) t~~he~~ trial court finds, in a hearing conducted outside t~~he~~ presence of t~~he~~ jury, that t~~he~~ statement is reliable based on the time, content, and circumstances of the statement; and

(3) the child or person with a disability testifies or is available to testify at the proceeding in court or in any other manner provided by law.

APPENDIX C
ARTICLE 38.37
TEXAS CODE OF CRIMINAL PROCEDURE

Sec. 2 (a) Subsection (b) applies only to the trial of a defendant for:

(1) an offense under any of the following provisions of the Penal Code:

- (A) Section 20A.02, if punishable as a felony of the first degree under Section 20A.02(b)(1) (Sex Trafficking of a Child);
- (B) Section 21.02 (Continuous Sexual Abuse of Young Child or Children);
- (C) Section 21.11 (Indecency With a Child);
- (D) Section 22.011(a)(2) (Sexual Assault of a Child);
- (E) Sections 22.021(a)(1)(B) and (2) (Aggravated Sexual Assault of a Child);
- (F) Section 33.021 (Online Solicitation of a Minor);
- (G) Section 43.25 (Sexual Performance by a Child); or
- (H) Section 43.26 (Possession or Promotion of Child Pornography), Penal Code, or

(2) an attempt or conspiracy to commit an offense described by Subdivision (1).

(b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence, and subject to Section 2-a, evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2) may be admitted in the trial of an alleged offense described by Subsection (a)(1) or (2) 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.

Sec. 2-a. Before evidence described by Section 2 may be introduced, the trial judge must:

(1) determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt; and

(2) conduct a hearing out of the presence of the jury for that purpose.

Sec. 3. The state shall give the defendant notice of the state's intent to introduce in the case in chief evidence described by Section 1 or 2 not later than the 30th day before the date of the defendant's trial.

Sec. 4 This article does not limit the admissibility of evidence of extraneous crimes, wrongs, or acts under any other applicable law.

APPENDIX C
TRE 404
TEXAS RULES OF EVIDENCE

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for an Accused.

(A) In a criminal case, a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecution may offer evidence to rebut it.

(B) In a civil case...

(3) Exceptions for a Victim.

(A)...(B)...(C)...

(4) Exceptions for a Witness...

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in Criminal Case.

This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On timely request by a defendant in a criminal case, the prosecutor must provide reasonable notice before trial that the prosecution intends to introduce such evidence--other than that arising in the same transaction--in its case-in-chief.

APPENDIX D

APPENDIX A



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

DENNIS LEVECE MAYES, Appellant

No. 05-16-00490-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court

No. 4, Dallas County, Texas

Trial Court Cause No. F-1253766-K.

Opinion delivered by Justice Lang, Justices
Myers and Stoddart participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 23rd day of May, 2017.

APPENDIX B