18-8733

No. _____ ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

RUSSELL MCELVAIN — PETITIONER
(Your Name)

vs.

LORIE DAVIS, dir. TDCJ — 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

Russell McElvain #1709041
(Your Name)

1697 Fm 980
(Address)

Huntsville, TX 77343
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Can a state enact a statute that combines the use of older, established statutes as the ways and means to commit the new statutes crime, thereby eliminating all of the elements required to prove the crime committed by the original older established statute?

2. Is a police interrogation using a promise of "no more trouble and no more charges, if the defendant tells the detective the location of evidence" and using questionable coersive measures to get a confession, a violation of the defendant's Fifth Amendment right against self-incrimination?

3. Does a court, by giving a victim's sworn testimony at trial the same credence as an outcry witness' testimony, who offers a different story, violate the right to a fair trial?

4. Petitioner received ineffective assistance of counsel for multiple reasons (see A-E) any of which violated his Sixth Amendment right to counsel and his Fifth Amendment Due Process right.

5. Child pornography or artistic photography? Is today's lewd tomorrow's commonly accepted practices? Is the female breast really a sex organ or did God's design plan it to be a means of feeding an infant? Are sexually related laws sexually discriminatory?

LIST OF PARTIES

[X] 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 CONTENTS

INDEX TO APPENDICES

INDEX TO APPENDIX — Also included in the appendix document

TABLE OF AUTHORITIES

CASES — PAGE

CONSTITUTIONAL PROVISIONS

TEXAS PENAL CODES

OTHER AUTHORITIES

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

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

The opinion of the United States court of appeals appears at Appendix 35a 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 1a 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

[ ] 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

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

The date on which the United States Court of Appeals decided my case was 12/10/18.

[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: _____, 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 _____. A copy of that decision appears at Appendix _____.

[ ] 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

US CONSTITUTION AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

US CONSTITUTION AMENDMENT 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; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

US CONSTITUTION AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for defence.

US CONSTITUTION AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of 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.

28 U.S.C. §§ 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) 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 unless it appears that --

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from the reliance upon the requirements unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) 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 proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by 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 convincing evidence.

(2) If the applicant has failed to develop 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 have been discovered previously through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f.) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g.) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h.) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated

by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

October 19, 2009, Kaitleigh (Kaity) McElvain, age 14, one of the adopted daughters of Russell McElvain made a claim to a school clerk by giving her a note on a notebook with these simple words, "my dad sexually molest [sic] me" written in it. RR5 at 33; Trial Ex. 26. The school resource officer initiated a police response, RR5 at 42, which led to Kaity being interviewed by Lindsey Dula of the Alliance For Children, RR5 at 64-66. There, Kaity made more allegations against her father, Id.

Ms. Dula would later testify in McElvain's trial about what Kaity had told her including oral sex, Id. She would also testify of Kaity telling her about McElvain taking nude photos of her, RR5 at 90-91. This testimony included an alleged ten year history of abuse starting at age 4, RR 5 at 64-65. Based on this discussion between Kaity and Ms. Dula being on 10/19/09, a ten year history starts the abuse on or about 10/19/99. Penal Code 21.02, with which McElvain is charged was enacted on 9/1/07.

Based on Ms. Dula's interview, Detective Jose Trevino, of the Haltom City Police Department obtained a search warrant for the McElvain home. Trial Exs. 41, 41A, 41B. The warrant was issued and the police were searching the home by 5:00 PM until 7:30 PM or 8:00 PM that night, RR 5 at 113, 115. The search of the residence led to the discovery of a variety of computer media, cameras, child pornography and a pink vibrator, Trial Ex. 41B. No pictures or video of Kaity, the victim, were located. RR6 at 26. An arrest warrant for McElvain was obtained and he was in custody being interviewed from around 8:30 PM until 10:00 PM that night, RR 5 at 122, 126.

At the age of 55 years old, this was his first arrest in his otherwise law abiding lifetime. He had raised 2 biological sons and had adopted 4 more children. He had a good career in telecommunications, 30 years with Verizon and it's predecessor companies. He was a man who loved his family lifestyle. Everything about the arrest procedure, the handcuffs, backseat of a patrol car, interrogation and all that followed were new to him.

As part of the interview, Detective Trevino promised McElvain that he

wouldn't get into any more trouble or get any more charges if he would tell him (the detective) where he could find the photos and video he took of Kaity, because his charges already were aggravated sexual assault and possession of child pornography, RR4 at 238, 257. This promise, however, would prove to be a lie.

The next morning Detective Trevino interviewed McElvain again, and based on the promise of no more trouble, or new charges, McElvain gave Trevino the location of the well hidden photos. They were in the location they had searched the day before. Trial Ex. 41B, RR5 at 112, Trial Ex. 41B, RR 5 at 130. Armed with these specifics Trevino sought another search warrant looking for the same items at the same location, RR5 at 131, Trial Ex. 42, because the Haltom City Police had been unable to find them without McElvain's direction, RR4 at 228, Trial Exs. 41, 41A, 42, 42A, RR 5 at 112. The photos of Kaity and one video tape was now located, - the "smoking gun", RR 4 at 249, Trial Ex. 42B.

On 1/19/2011, a full 15 months after the promise of no new charges, McElvain's charges were increased to Continuous Sexual Abuse of a Child, under Texas Penal Code s/s 21.02, to wit Sexual Performance of a Child, the instant case, CR at 2, Adm. R., Clerk's R.2, ECF No. 12-1.

Trial was held in the Criminal District Court Two of Tarrant County, Texas on April 6-7, 2011, cause # 1227000D. McElvain was convicted and given the maximum sentence of 99 years after a mere 28 minutes of jury deliberations, CR at 116, 123.

An appeal followed (#8-11-00170-CR) and the judgment affirmed on July 10, 2013. A PDR was filed 10/4/13, refused 11/27/13, followed by a State petition for writ of habeas corpus under Texas Code of Criminal Procedure 11.07 on 2/17/15, denied 8/27/15, followed by a Federal petition for writ of habeas corpus under 28 U.S.C. s/s 2254 on 4/4/16, denied 12/21/17, followed by a motion to appeal 1/8/18, denied, and a motion for Certificate of Appealability (COA) 4/5/18, denied.

REASONS FOR GRANTING THE PETITION

1. Texas Penal Code s/s 21.02 Continuous Sexual Assault of Young Child or Children is Unconstitutional because it is comprised of other older, established statutes as the ways and means to commit the new crime thereby eliminating all of the elements required to prove the crime committed by the original older, established statute.

The Petitioner has carried the question of the constitutionality of Texas Penal Code s/s 21.02 Continuous Sexual Abuse of Young Child or Children through all courts from trial to the present. (Trial - Motion to quash indictment, CR at 94, 95. Appeal Ground 4. PDR Ground 4. Federal habeas corpus Ground 3.

The following will provide just cause for the need for a resolution from the United States Supreme Court to correct this gross miscarriage of justice and denial of the due process guarantee of the Fourteenth Amendment.

Texas Penal Code s/s 21.02 (c) notes "For the purpose of this section, 'act of sexual abuse' means any act that is a violation of one or more of the following penal laws:

(1.) Aggravated Kidnapping under Section 20.04 (a)(4), if the actor committed the offense with the intent to violate or abuse the victim sexually;

(2.) Indecency with a child under Section 21.11 (a)(1), if the actor committed the offense in a manner other than by touching, including touching through clothing, the breast of a child;

(3.) Sexual Assault under Section 22.011;

(4.) Aggravated Sexual Assault under Section 22.021;

(5.) Burglary under Section 30.02, if the offense is punishable under subsection (d.) of that section and the actor committed the offense with the intent to commit an offense listed in Subdivisions (1)-(4); and

(6) Sexual Performance by a Child under Section 43.25.

(7.) Trafficking and (8.) Compelling Prostitution were added effective Sept. 1, 2011 and are therefore inapplicable to petitioner's case.

(d.) If a jury is the trier of fact, members of the jury are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. The jury must agree unanimously that the defendant, during a period that is 30 or days in duration, committed two or more acts of sexual abuse.

It is a well established fact that each of these statutes embedded within this statute require a unanimous jury verdict on each specific detail of the assault (i.e. what was touched, penetrated, etc., by what, when, to who, and how) when tried separately. The Texas Constitution guarantees due course of law and provides that a defendant charged with a felony must be convicted by a unanimous jury, Hendrix v. State, 150 S.W. 3d 839, 849; Tex. Const. Art. I, s/s 19 Art. V, s/s 13; Tex. Code Crim. Proc. Ann. art 36.29; See Kitchens, 823 S.W. 2d at 258 n. 2; Midence, 108 S.W. 3d at 565; Hanson v. State, 55 S.W. 3d 681, 693 (Tex. App.- Austin 2001). The Texas Penal Code requires that "no person may be convicted unless each element of the offense" is proved beyond a reasonable doubt; Tex. Pen. Code. Ann. s/s 201 (Vernon 2003).

The elements required for a unanimous verdict for each of these penal codes within s/s 21.02 (if charged separately) all vanish under penal code 21.02. These statutes become the manner and means to commit the crime under s/s 21.02 and the elements within each no longer must be agreed upon by a unanimous verdict.

The State Courts agree "the Legislature, consistent with due process guarantee, may define a criminal offense in a way that permits jurors to convict while disagreeing about the manner and means of commission of that offense provided the alternate manners and means of commission are basically equivalent morally and conceptually," Casey v. State, 349 S.W. 3d 825, 829 (Tex. App. - El Paso 2011) quoting White v. State, 208 S.W. 3d 467, 469 (Tex. Crim. App 2006), Jefferson, 189 S.W. 3d at 313-14. By making these 8 statutes the manner and means, each element within no longer need unanimity.

"In section 21.02, the alternate manner and means of commission of the offense, i.e., the alternate acts of sexual abuse listed in section 21.02 (d), all involve actual or intended sexual abuse of a child, all are felonies, all are morally equivalent and all are conceptually similar." Casey v. State, 349 S.W. 3d 825, 829 (Tex. App.-El Paso 2011); Jacobsen v. State, 325 S.W. 3d 733, 739 (Tex. App.- Austin 2010, no pet)

Morally equivalent and conceptually similar? Penal Code s/s 43.25 (in s/s 21.02 (c)(6) (the instant case) requires no contact at all with the victim,

basically taking a couple of pictures, yet Penal Code §§ 22.021 (in §§ 21.02(c)(4)) could be penetration of the mouth, the anus, and the vagina of the child by the perpetrator's fingers, mouth, and penis. Morally equivalent and conceptually similar?

The Penal Codes are spread throughout 3 different "Titles" in the Texas Penal Codes established by the Legislature, yet the State says they're similar in nature.

Title 5. Offenses against the person.
- 20.04 Aggravated Kidnapping
- 21.11 Indecency With A Child
- 22.011 Sexual Assault
- 22.021 Aggravated Sexual Assault

Title 7. Offenses against property
- 30.02 Burglary

Title 9. Offenses against public order and decency
- 43.25 Sexual Performance by a Child

Section 6.03 of the Texas Penal Code delineates three "conduct elements" which may be involved in an offense: (1) The nature of the conduct. (2) The result of the conduct. (3) The circumstances surrounding the conduct. "The culpable mental state must apply to the surrounding circumstances, i.e. 'with intent to arouse or gratify sexual desire'." Washington v. State, 930 S.W.2d 695 (Tex. App. - El Paso 1996); Tex. Penal Code Ann. §§ 6.03 (Vernon 1994); Cook v. State, 884 S.W.2d 485, 487 (Tex. Crim. App. 1994), McQueen v. State 781 S.W.2d 600, 603 (Tex. Crim. App. 1989)

The offenses within penal code 21.02 vary as to the conduct elements and culpable mental state:
- 21.11 Indecency with a child has no mention of "intentionally or knowingly".
- 22.011 Sexual Assault and 22.021 Aggravated Sexual Assault has no use of "intent to arouse or gratify the sexual desire."
- 30.20 Burglary has no mention of "Knowingly".
- 43.25 Sexual Performance by a Child makes no mention of "intentionally or knowingly" and no mention of "intent to arouse or gratify the sexual desire."

Yet, the Courts of the State of Texas still deem the penal codes within the definition of 21.02 are morally equivalent, conceptually similar and similar in nature. Casey v. State, 349 S.W.3d 825, 829 (Tex. App. El Paso 2011); Jacobsen v. State, 325 S.W.3d 733, 739 (Tex. App. - Austin, no pet.)

The words of Honorable Judge, Lee Ann Dauphinot, in the Court of Appeals, Second District, Fort Worth, August 25, 2016 explain the confusion surrounding Penal Code 21.02 better than anyone:

"I write separately because the continuous sexual abuse of a child statute that is the basis of Appellant's conviction is a troubling statute. The commission of two or more acts of sexual abuse over a specified time period - that is 'the pattern of behavior or the series of acts' - is the element as to which the jurors must be unanimous in order to convict. I am a person of normal intellect, despite any suspicions to the contrary, and I do not understand either the scope or the limitations of the statute. Does the indictment merely establish the specified period of time within which the jury members, and consequently we, search for proof of the statutorily included offending acts? Or do the offending acts have to be included in the indictment to count as evidence that supports the verdict? Because the law permits a general verdict, how can we know the members of the jury relied only on those acts alleged in the indictment? Or, perhaps, they are not required to. Maybe they can consider any and all qualifying acts proved to their satisfaction in court, regardless of the allegations in the indictment. If the State alleges ten qualifying acts in the indictment for continuous sexual abuse, does that mean that the State can prosecute separately acts not specifically enumerated that a defendant also allegedly committed during the time period established by the indictment? Can the State establish a time period in the indictment but then indict separately for acts a defendant allegedly committed but not within the temporal catchment of that indictment? What about the 'on or about' language that extends the prosecution's time scope to any qualifying offense committed within the limitations period but before indictment on the section 21.02(b) offense? Of course, there is no traditional limitations period. If the qualifying offenses are not offenses and not elements of the offense, but merely manners and means that do not require unanimity, then do they have to be pled at all? Why not just plead that during the thirty-day period, the defendant sexually assaulted one or more children younger than fourteen years of age on two or more occassions? The children's names appear to be surplusage if we rely on case law, as we are required to do.

In summary, I do not understand the statute, it's extent, or it's limitations. I do not understand what the prosecution is required to prove. I do not understand how much specificity a defendant is entitled to." Garcia v. State, 2016 Tex.App. LEXIS 9376, Court of Appeals, 2nd Dist. Fort Worth.

See also "The Constitutional Quicksand of Jessica's Law in Texas", March 5, 2011 by the John T. Floyd Law firm. Appendix 37a.

"To establish a due process violation, appellant must show that the challenged statute or rule violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions' and which define the community's sense of fair play and decency. The key is whether the challenged statute impermissibly lowers the State's burden of proof." Distefano v. State, 2016 Tex.App. LX 1289, Court of Appeals of Texas, 14th Dist., Houston; Belcher v. State, Tex.App. 12th Dist. Tyler, 2015.

This Honorable Court must recognize the unconstitutionality of Texas Penal Code s/s 21.02 to right a significant wrong in the Texas courts and restore the due process guarantee of the Fourteenth Amendment to the U.S Constitution to petitioner McElvain and others who will benefit.

2. The petitioner was subjected to highly questionable coersive measures and a promise of no more trouble and no more charges if he confessed as to where the detective could find crucial evidence, violating his Fifth Amendment right against self-incrimination.

Detective Trevino promised the petitioner he "would not get into any more Trouble" or "get any more charges" if he confessed where the evidence could be found, RR 4 at 257. At this point, the charges against him were "possession of child porn" and "aggravated sexual assault," carrying a lesser punishment range than he now has, including parole eligibility.

Det. Trevino said to "tell us where the pictures are for Kaity, so no one will find them someday, embarrass her, and ruin her life in the future," RR4 at 243. Det. Miller asked the petitioner "if he thought someone deserves a second chance" (10/20/09 investigative narrative by Det. Trevino). Det. Miller is noted in the trial record as saying, "it's understandable [what you did], I know shes a cute girl," RR5 at 127. State's Ex. 23. (See also Appendix 42a and 58a)

In addition, under questioning by the prosecutor about McElvain's interrogation, Det. Trevino expressed concern.

Q. And one of the strategies or things that you see on States Exhibit No 23 (the recording of the interrogation) is Detective Miller saying some things to the defendant that seem a bit odd; is that right?

A. Yes.

Q. Like what kind of things?

A. Well - he's asking him [McElvain] questions based off a school that he went to that's called the Reid Interview Technique.

Q. Does Det. Miller say some things during the interview -- talking about, you know, it's understandable, I know she's a cute girl?

A. Yes.

Q. Is that --to a lay person, that sounds kind-of strange. Would you agree?

A. Yes, it does.

RR5 at 127

"The method of behavior analysis taught by the police training firm Reid and Associates has been found empirically to lower judgment accuracy leading researchers to conclude that the Reid Technique may not be effective and

indeed may be counter productive." (False Confessions: Causes, Consequences, and Implications, Journal of the Academy of Psychiatry and the Law, Richard A. Leo, September 2009). Appendix 57a.

Wicklader-Zulawski & Assoc, Inc., a highly influential consulting group that has worked with a majority of the nations police departments has stated that it would no longer train detectives in the Reid Technique, causing shockwaves throughout the law enforcement community. (Wicklander-Zulawski Discontinues Reid Method Instruction After More Than 30 Years, March 6, 2017) Appendix 39a.

"At some point, the technique itself has to take responsibility", said Professor Saul Kassin of the John Jay College of Criminal Justice, who is an expert on police interviews." What Wicklander-Zulawski has realized is that once you start down the road of using trickery and deception, the misuses are inherent in that, there are no clear lines of, 'This is a good amount of trickery, and this isn't. Appendix 51a

To say McElvain Knowingly and intelligently waived his Miranda rights is questionable as well. See RR 4 at 241 where he asks the detectives "is this where I need an attorney?" showing is naivety, thinking the authorities would help him. Compare to appendix 59a.

The Supreme Court has explained that an individual is coerced to give a confession by both "mental as well as physical" means. Garrity v. State of New Jersey, 385 U.S. 493, 496, 87 S.Ct. 616 (1967).

"A defendant in a criminal case is deprived due process of law if his conviction is founded in whole or in part upon an involuntary confession, without regard to the truth or falsity of the confession, and even if there is ample evidence from the confession to support the conviction." Jackson v. Denno, 378 U.S. 368, 376, 84 S.Ct. 1774 (1964).

"In Bram v. U.S., 168 U.S. 532, 542-43, 18 S.Ct. 183, 187, 42 L.Ed 568 (1897), the Supreme Court stated that the test for determining the voluntariness of a confession is whether the confession was extracted by or obtained by any direct or implied promises, however slight. See also Hutto v. Ross, 429 U.S. 28, 31, 97 S.Ct. 202, 203 50 L.Ed 2d (1976). If Streetmans statements had been excluded, there exists a reasonable probability that the outcome of his trial would have been different. See Smith v. Wainwright, 777 F.2d 609 (11th Cir. 1985) (extreme prejudice occurred where inadmissible confessions provided

the primary evidence offered)" Streetman v. Lynaugh, 812 F.2d 950, 1987 U.S. App. LEXIS 3179, U.S. Court of Appeals for the 5th Circuit.

"A confession is coerced if the defendant's will was overborne by the circumstances surrounding the confession." Dickerson v. U.S., 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed 2d (2000); Schneckloth v. Bustamonte, 412 U.S. 218, 225-26, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

"In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort." Haynes v. Washington, 373 U.S. 503, 513, 83 S.Ct. 1336, 10 L.Ed 2d 513 (1963) (quoting Wilson v. U.S., 162 U.S. 613, 623, 16 S.Ct. 895, 40 L.Ed 1090 (1896)).

"A statement is "involuntary for the purposes of federal due process, only if there was official, coersive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by it's maker." Alvarado v. State, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995).

"Independent factual review is required any time confession is involved in securing conviction which is challenged by habeas corpus petition; State court conclusions do not limit that review." Pemberton v. Collins, 911 F.2d 1218 (5th Cir)

"Confession involuntary because implied promise to defendant that prison sentence would be 50 years lighter if he confessed." U.S. v. Lopez, 437 F.3d 1059, 1064-65 (10th Cir 2006).

"The existence of the bargain may have well entered into the respondents decision to give a statement." Bram v. U.S. 168 U.S. 532, 542-43, 18 S.Ct. 183 (1897), Brady v. U.S. 742, 9749-50, 90 S.Ct. 1463 (1970).

"Over the years, a sense of 'fairplay and decency' has led courts to exclude not only the coerced confession but the real evidence discovered by virtue of the coerced confession." Lam v. Kelchner, 304 F.3d 256 (3rd Cir. 2002). See e.g., People v. Ditson, 57 Cal. 2d 415, 20 Cal. Rptr. 165, 369 P.2d 714 (1962).

"A search cannot be justified by what it uncovers", Brown v. State, 481 S.W.3d 106, 112, (Tex. Crim. App. 1972), Whiteley v. Warden, Wyoming Penetentiary, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed 2d 306 (1971), Sibron v. N.Y., 392 U.S. 40, 88 S.Ct. 1889 (1967).

McElvain's entire interrogation, and the fruits from it, were a profound miscarriage of justice violating the petitioner's most basic Fifth Amendment right against self-incrimination. Without this illegal interrogation and the fruits there of, the petitioner may be a free man today. This was the proverbial "smoking gun". Without it, the results of this trial would have been different.

3. The petitioner's right to a fair trial was violated when the outcry witness testimony varied from the witness's personal testimony. The victim's testimony should carry more weight that an outcry witness.

In ground 4 of the petitioner's habeas corpus, he notes how the outcry witness perjured herself by fabricated testimony which was proven to be incorrect by the victim.

Lindsay Dula spoke of the petitioner forcing the victim to perform oral sex on him, giving full details of what the victim allegedly told her, RR 5 at 65-66, 72-73. When the victim, Kaitleigh, was asked by the prosecution "Did he [defendant] ever have you put your mouth on his private area?" Her reply, "No Ma'am". RR 5 at 91. Therefore, the first question becomes who to believe. Per Black's Law Dictionary, 8th Ed., a Victim is "a person harmed by a crime, tort, or other wrong." A Witness is "one who sees, knows, or vouches for something." Common sense should prevail and say the victim knows more about what occurred to herself than the outcry witness.

It is well established fact that Court's believe a young girl victim's testimony 100% when that testimony is against the defendant. "Testimony of victim, standing alone, even when victim is a child is sufficient to support conviction for sexual assault." Ruiz v. State, 891 S.W. 2d 302 (App. 4 Dist. 1994); Gonzales v. State, 647 S.W. 2d 369 (Tex. App. - Corpus Christi 1983); Martinez v. State, 662 S.W. 2d 393 (Tex. App. Corpus Christi 1983; Hellums v. State, 831 S.W. 2d 545 (Tex. App. - Austin 1992); Villalon v. State, 791 S.W. 2d 130 (Tex. Crim. App. 1990). "The testimony of a child victim alone is sufficient to support convictions for sexual assault of a child and indecency with a child." Perez v. State, 113 S.W. 3d 819 (App. 3 Dist 2003); Tear v. State 74 S.W. 3d 559, 560 (Tex. App. - Dallas 2002). "Testimony of a child victim was sufficient to establish vaginal and anal penetration by a dogs penis to support defendant's conviction for sexual assault of a child." Karnes v. State, 873 S.W. 2d 92 (App. 5 Dist. 1994).

The question now turns to, did the outcry witness meet the standard for perjury or impeachment of her testimony? "Counsel impeaches a witness when he provides evidence that the witness is unworthy of belief or credit." Cochran v. State, 874 S.W. 2d 769 (Tex. App. - Houston [1st Dist.] 1994), Ransom v. State, 789 SW2d 572, 587 (Tex. Crim. App. 1989).

The State's response to this ground in part is (A) "there was no proof Dula committed perjury." In RR5 at 62, the prosecutor is questioning Ms Dula.

Q. So you interviewed her [Kaity] beginning at approximately 2:45 on that Monday, October 19th. How long did that interview last?
A. About an hour and 14 minutes.
Q. And was this interview taped?
A. Yes Ma'am.
Q. What is the purpose of videotaping an interview?
A. If there is ever a question regarding what Kinds of things that Im asking children or what information the child is reporting, it's all documented.

I have no access to that tape, but it clearly could be used to find proof or no proof of perjured testimony. (B.) "inconsistent testimony goes to the credibility of the States witness and does not establish the use of perjured testimony. This falls back to the question of who is more credible, the outcry witness or the victim herself. The State notes both as "witness". (C.) "Perjury is not established by mere contradictory testimony from witnesses, inconsistencies with a witness's testimony" Koch v. Puckett, 907 F.2d 524, 531 (5th Cir. 1990). In this case they cited, the victim was murdered, therefore unable to testify. When you have a live victim who says "No Ma'am", this did not occur, the cited case is not applicable.

Elimination of the outcry testimony of Lindsay Dula could have easily resulted in a totally different outcome of the trial because she stated it in such detail that it was convincing, yet based on the victim herself denying it, it should be perceived the outcry witness was unworthy of belief or credit.

4. Petitioner received ineffective assistance of counsel for multiple reasons (see A-E) any of which violated his Sixth Amendment right to counsel and his Fifth Amendment due process right.

As the Fifth Circuit Court of Appeals has written, "Sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard." Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979).

(A.) The key piece of evidence used in this trial was 146 photos of Kaitleigh McElvain taken over a period of time from December 2004 (before the enactment of Penal Code 21.02) through September 2009 (statute was enacted September 1, 2007), so covering approximately 3 years before this statute existed and 2 years after.

In the "investigative followup" documented 10/21/2009 15:25 by Detective Jose Trevino, he lists the photos of the victim, 18 undated and the others being from December 2004 - September 2009. (See Appendix 64a)

In the State's Notice of Extraneous Offenses, Intention to Introduce Evidence of other Crimes, Wrongs, CR 80-83, item 10 refers to "145 images of child pornography reflecting the sexual performance of defendant's daughter and further notes images depict sexual performances from the time the defendant's daughter was 9 years of age up to the time she was 13 and that the sexual performances depict lewd exhibition of the female genitals and deviate sexual intercourse."

The victim's birthdate is 10/14/95 so she turned 9 on 10/14/04, 10 on 10/14/05, 11 on 10/14/06, 12 on 10/14/07 (just over a month after the enactment of penal code 21.02.), so based on the photos covering her from age 9-13, the ones applicable under code 21.02 should only be the 12 year old and 13 year old ones.

"Deviate sexual intercourse" is an impossibility when Kaity is alone in the photos and there was no penetration of any kind by any thing. Prosecution questioning Detective Trevino. "Q. And each and every one of these 146 photographs depict Kaity McElvain, is that true?" A. "Yes they do." I believe the victim was eight years old until she was 13 or 14." Q. "Can you tell the court what is contained on the Hi-8 tape?" A. "There are several clips of the victim Kaitleigh performing several different kinds of sexual acts on herself." RR 4 at 253-254. Q. "Is there anybody else in these pictures besides Kaity?" A. "No" RR 5 at 145.

All 146 photos are evidence as exhibit 27B. There was no separation as to which ones the jury could use for conviction (post 9/1/07) and which they could not (pre 9/1/07). Defense attorney failed to inform the jury how they were to use the extraneous evidence at the time it was admitted. RR5 at 139-40. "A defendant is entitled to an instruction limiting the jury's use of extraneous offense not only on the jury charge but also at the time the evidence is admitted, if such an instruction is timely requested by the accused." Rankin v. State, 974 S.W.2d 707, 713 (Tex. Crim. App. 1996); Pederson v. State, 237 S.W. 3d 882, 887 (Tex. App.- Texarkana 2007).

Similarly, there was a video tape that covered October 7, 2005 through May 11, 2009 with no separation. In RR6 at 48-49, the forensic analyst, Mark Porter, is being questioned and he says "the earliest date on the tape was 10/7/05, second 2/9/06, third 3/9/06, fourth 4/12/07, fifth 4/17/07, sixth 9/9/07, seventh 5/11/09." (5 tape segments were before the enactment of Penal Code 21.02; 2 after.)

The jury was told "you cannot consider evidence of any acts... that occurred prior to September 1, 2007", but were not told how to know what photos and portion of the tape was prior to that date.

During jury deliberations they asked for Exhibit 27B which were all of the photos. CR 108, RR5 @ 138-145. Clearly they used all of them to reach their decision because there was never any separation of the pre 9/1/07 photos. "If you throw a skunk into the jury box, you cannot instruct the jury not to smell it."

"We cannot tell how jurors have used admitted evidence, thus the possibility exists that, unless we instruct the jury on evidence concurrently with it's admittance, jurors may, unbeknownst to us, use that evidence improperly by forming an indelible perception of the defendant that will work unfairly to his inevitable detriment." Rankin v. State, 974 S.W. 2d 707, 712 (Tex. Crim. App. 1996); Pederson v. State, 237 S.W. 3d 882, 889-90 (Tex. App.- Texarkana 2007). "We must therefore conclude the trial court's error injured Pederson's substantial rights. The Texas Rules of Appellate Procedure mandate that we reverse the trial courts judgment of conviction and remand this case for a new trial." cf Roberts v. State, 29 S.W. 3d 596, 601-02 (Tex. App.- Houston [1st Dist.] 2000 pet. ref'd. (Extraneous offense had 'substantial and injurious influence on jury verdict) Pederson at 890.

Had jurists of reason had less evidence they could use, that met the timeline of the penal code, at a minimum they could have chosen a less than the maximum sentence, and questioned beyond a shadow of a doubt his guilt of this continuous crime thinking he's guilty of a lesser one, but were not given that option.

(B.) The defense did not put a lesser charge into the jury instructions, nor on the verdict form. The prosecution had said there would be the option. RR4 at 47-48, 68-70. CR 105-116. In the paragraph above, the petitioner notes how jurists could have reasonably agreed to a lesser charge of Sexual Performance by a Child, but not given that option, they favored the continuous charge. "If the prosecution has not established beyond a reasonable doubt every element of the offense charged, and no lesser instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of "some offense", the jury is likely to resolve it's doubts in favor of conviction." Keeble, 412 U.S. at 212-13, 93 S.Ct. 1993. "Keeble illustrates what possibly happened in this case. Because of this possibility, we find that the district court's refusal to instruct the jury on the lesser included offense... is an intrinsically harmful constitutional error that warrants a new trial." U.S. v. Monger, 185 F.3d 574, 578 (6th Cir. 1999).

The lack of a lesser charge in the petitioners case warrants a new trial.

(C.) Counsel did not hire a private investigator to do any investigative work on the case, to track down any of the 30+ foster children who'd come through the petitioner's home, to interview CPS case workers who were familiar with the petitioner. The investigator could have found witnesses who could shed a more positive light on the petitioner. He/she could have investigated the recordings of the outcry witness Lindsey Dula to learn what the victim did say about the oral sex issue that raised the perjury concern, or check the recordings from when the victim spoke to authorities when she was removed from her biological parents to try to separate which "father"

Kaity was referring to in each instance.

The petitioner had explained to his attorney his past interest in nude photography books, specifically "Radiant Identities" by Jock Sturgis, "Immediate Family" by Sally Mann, and "Age of Innocence" by David Hamilton, which are photo books of nude children, legal and protected by the First Amendment. (Appendix 65a) His attorneys refused to even consider using anything related to this as a defense, even though in the petitioner's mind, the photos he took of Kaity were based on these books. A private investigator could have been as successful as the one in Royce v. State who investigated and was able to acquit Royce of the charges related to those books. "In the hotel room, Snyder [chief of police Robert Snyder] found the book "Immediate Family." Several photos therein were the subject matter of Count I of the indictment. He also discovered the book "Radiant Identities", several pages of photographs of which were the subject matter of Count II." Ella Watson testified for the defense giving her book store and publishing company experience. Watson related that the "Book People" store where she worked carried both of the books found in appellant's room." Royce v. State, 7 SW3d 225, 231 (Tex. App.-Austin 1999). "[Leonard] Snyder, a private investigator, testified that he had been employed by the defense to go to book stores to view different books. Snyder testified that the books were found at several book stores in Austin and at the public library." Royce at 238. The jury acquitted appellant on counts I and II. Royce at 230.

"A substantial body of the Fifth Circuit case law insists,' that effective counsel conduct a reasonable amount of pretrial investigation'." Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1980). "Counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Bell v. Watkins, 692 F.2d 999, 1099 (5th Cir. 1982); Rummell v. Estella, 590 F.2d 103, 104 (5th Cir. 1979). This duty is reflected in the American Bar Associations Standards for Criminal Justice, 4-4.11 (2d ed 1980) (The Defense Function) Nealy v. Cabana, 764 F.2d 1173, 1177-78 (1985).

"Investigation consisting solely of reviewing prosecutor's file' fell short of what a reasonable competent attorney would have done." Thomas v. Lockhart, 738 F.2d 304, 308 (8th Cir. 1984), U.S. v. Gray, 878 F.2d 702, 711 (3rd Cir 1989)

"Strickland requires counsel to 'make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffective case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances." 466 U.S. at 687. Colton v. Cockrell, 343 F.3d 746, 752 (5th Cir 2003) (quoting Smith v. Cockrell, 311 F.3d 661, 668 (5th Cir. 2002). Of course in the sentencing context, the movant must demonstrate that the alleged failure to investigate created a reasonable probability that his sentence would have been less harsh." See Glover v. U.S., 531 U.S. 198, 200, 121 S.Ct. 696, 148 L.Ed 2d 604 (2001) (holding 'that if an increased prison term did flow from an error [of counsel] the petitioner has established a Strickland prejudice.) U.S. v. Potts, 566 F. Supp. 2d 525, 536-37, 2008 U.S. Dist. LEXIS 106557, U.S. Dist. Court for the Northern Dist. of Texas.

Petitioner's attorneys were prejudiced against the petitioner from the start as is evident from their affidavits in response to his state habeas corpus. John W. Stickels, 4/8/15"... video and photographic evidence documenting Mr. McElvain's sexual abuse." (these were Kaity alone, abuse is questionable.) Kimberly Campbell, pg 4," McElvain himself confessed to sexually abusing the complainant over a number of years and memorializing that abuse in pictures and video. V RR 128." (abuse is questionable, McElvain never confessed to that but did confess to taking photos and video of Kaity alone as artistic photography and an unusual growth chart. Attorney's refused to defend..

(D.) Plea bargain presented to the defendant at Tarrant County jail on 3/31/11 was not presented clearly. Attorney didn't seem to understand the offer which can be seen as she repeated it in hearings as the prosecutor has to correct the petitioner's attorney several times. RR 2 at 4-10. How could she have presented it clearly to the defendant at the jail when she could not in the hearing?

(E.) Two jurors were left on the jury, who should have been stricken. One female who had been sexually abused as a child (Heiser); Another who had a friend who was sexually abused as a child (Weathers). RR 4 at 98-100, 219.

There is reasonable probability that, but for the counsels unprofessional errors, the result of the proceeding would have been different. While any one of the separate problems under this ground constitute a reversal, due to prejudice and a violation of the defendant's right to due process, the cumulative result of all of them warrants a reversal of this conviction.

"Cumulative error is present when the 'cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error.'" Duckett v. Mullin, 306 F.3d 982, 992 (10th Cir. 2002), (quoting U.S. v. Rivera, 900 F.2d 1462, 1469 (10th Cir. 2002)(en bank)).

"A cumulative error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of trial is such that collectively they can no longer be determined to be harmless." Id.

"The cumulative error doctrine recognizes that 'an aggregation of non-reversible errors 'can result in a denial of the constitutional right to a fair trial [Fifth Amendment] which calls for a reversal." U.S. v. Munoz, 150 F.3d 401, 418 (5th Cir 1998).

5. The underlying issue throughout this case is PERCEPTION. Artistic photography or child pornography? Lewd today is normal tomorrow. The female breast is NOT a sex organ. Sexual related laws are discriminatory.

These are questions that have been presented in one form or another throughout the petitioner's trial and post-conviction proceedings, largely through ineffective assistance of counsel; concerns the attorneys did not give merit to want to address despite the defendant's wishes and importance he placed on them. These are all questions that have been around through the ages and no one wants to be bold enough to take a stance against this or that because they know half of society leans one way, the other half leans the other.

The petitioner is presenting these taboo subjects to the United States Supreme Court in order to address these issues and provide explanation and answers to his behaviors to prove to you that, in his mind, his charges should be entirely dismissed.

In legalese this is his showing of cause and the prejudice against him which equates to a total miscarriage of justice and has been a violation of his First, Fifth, Sixth, and Fourteenth Amendment rights.

Virtually everyone, the prosecution and defense, have said the petitioner admits to sexually abusing Kaitleigh, yet he does not recall using those words and has not seen a transcripted text of any of his words saying he sexually abused anyone. He openly admits to taking nude photos and video of his daughter, but in his view these were artistic in nature, <u>not</u> child pornography, and representative of a growth chart.

The petitioner had owned photography books by David Hamilton (Age of Innocence), Jock Sturgis (Radiant Identities), and was aware of Sally Mann's book, "Immediate Family", all depicting nude photos of adolescent and pre-adolescent children. (Appendix 65a)

"The government <u>does not</u> claim that either 'Age of Innocence' or 'Radiant Identities' is obscene. Hamilton's photographs depict pubescent girls, most

of whom either have their breasts exposed or are fully nude. Several aspects of these photographs make them sexually provocative; The majority of the photographs are in soft focus and the girls are often staring into the camera, unsmiling, with a sultry look; Some photographs are of nude or partially nude girls lying on beds; In some of the photographs, the girls are looking at their bodies in mirrors; Some girls are lying or standing with their arms over their heads and backs arched; In some photographs the girls are touching their own breasts or sex organs; and a few of the photographs show two nude or partially nude girls kissing." U.S. v. Various Articles of Merchandise, 230 F.3d 649, 655 (3rd Cir. 2000). Appendix 65a

"Pictures of nude minors showing them walking or standing were not 'child pornography'." Faloona by Fredrickson v. Hustler Magazine, Inc., 799 F2d 1000 (5th Cir. 1985).

In a "Metroactive" interview titled "Naked Truth", 3/19/98, Jock Sturgis is speaking about his child photography books, "I am fascinated by the human body and all it's evolutions. I have this naive and quixotic hope that in seeing the physical progress from the beginning on, and looking at the body in all it's different changes, looking at the fat-bellied babies turning into thinner children, they get straight, they get long, they become sticks, they begin to develop, their hips go, the whole process matures. I have series that are 25 years long. I don't believe I'm guilty of any crimes, but I've always been drawn to and fascinated by physical, sexual and psychological change. That fascination pervades the species from the beginning of time; people just admit to it in varying degrees." Pages 7,8,10 http://www.metroactive.com/papers/metro/03.19.98/cover/sturges 1-9811.html.

The petitioner viewed the photos he took of his daughter in the same manner. They are a lone girl going through various stages of life, developing just the way God planned it, which is in fact a beautiful thing.

Had all this been presented in trial and the aforementioned First Amendment protected books of nude photos of children been shown to the jury,

they would have viewed the petitioner's photos, and the petitioner, from a different perspective. This could have swayed jurors resulting in the acquittal of the petitioner.

"In the hotel room, Snyder [chief of police Robert Snyder] found the book 'Immediate Family'. Several photos therein were the subject matter of Count I of the indictment. He also discovered the book 'Radiant Identities', several pages of photographs of which were the subject matter of Count II. Ella Watson testified for the defense giving her book store and publishing company experience. Watson related that the "Book People" store where she worked carried both of the books found in appellant's room". Royce v. State, 7 S.W.3d 225, 231 (Tex. App - Austin 1999).

"[Leonard] Snyder, a private investigator, testified that he had been employed by the defense to go to book stores, to view different books. Snyder testified that the books were found at several book stores in Austin and the public library." Royce at 238.

The jury acquitted appellant on counts I and II. Royce at 230

On page 10 of the Respondent's Answer to his federal habeas corpus, it notes "the writing on the photographs indicated that they had been taken over several years where it's very evidence that she gets older, V RR 146." On the "investigative Followup" documented 10/21/2009 15:25 by Det. Trevino, he notes the dates, and he adds at the bottom "The photos are all of the victim posing nude throughout different ages of her life. (Appendix 64a) Laying aside all preconceived prejudices and moral hinderances, and omiting the word nude, this is nothing more than a growth chart like parents throughout the world keep of their children. The only problem perceived by moral elitists is that this girl is nude and the growth is depicted in a manner some find offensive, yet others find artistic. The petitioner's attorneys refused to accept this, or even attempt to argue it, much less hire a private investigator to go online to locate the Hamilton, Sturgis, Mann

and other books of nude children with First Amendment protection.

"The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by people." Miller, 413 U.S. 15, 34-35, 93 S.Ct. 2607, 37 L.Ed 2d 419 (1973), U.S. v. Various Articles of Merchandise, 230 F.3d 649, 657-58 (3rd Cir 2000). "A sexual deviants quirks could turn a Sears catalog into pornography". U.S v. Amirault, 173 F.3d 28, 29 (1st Cir. 1999), U.S. v. Wiegland, 812 F.2d 1239, 1245 (9th Cir. 1987). "Private fantasies are not within the statute's ambit." Id. (cf. Appendix 76a, 77a)

Reiterating back to the title of this question, "Child pornography or artistic photography?"

The petitioner also made it known to his's attorney's his interest in the nudist culture, and that he had visited nudist facilities in California and Texas. They saw no relevance. Defense attorneys and the prosecution had declared everything to be child pornography with no expert testimony by anyone.

Texas Penal Code sls 43.25, Sexual Performance by a Child, item 6 under Penal Code 21.02 uses the words "sexual conduct means sexual contact, lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola." Lewd is such an overbroad term as it evolves and changes over time. It's a word whose definition/description varies widely between 18 year olds to 88 year olds. A 70 year old coming out of church would have a different perception of lewd than a 16 year old high schooler. Playtex bra commercials in the 1960's could not show a woman wearing only their bra. It was worn on the outside of a sweater to show it. Today's Victoria Secrets commercials/shows would be lewd to that generation. If a man was arrested in 1960 and sentenced to 99 years for possession

of a lewd photo, but today that photo is not considered lewd, will he be released because the word no longer carries the same meaning? (See Appendix 76a). The color photos are from 2016 US Weekly magazines. The definition above defines lewd as "any portion of the female breast below the areola". Thus, every one of these photos are lewd by this law. Compare to the black and white photo on the same sheet from 1933. Because the word lewd is solely an opinion of a given person at a given time it should be eliminated as a factor in these laws. I find TV shows where 2 men are kissing to be lewd. It's all simply an opinion.

On a related constitutional error, is the female breast a sex organ? In penal code 43.25 and 21.02 the female breast is part of "sexual conduct". (The lewd display of the female, underage breast, touching the breast of a child.) In addition, there's no age so a 3-year old's female breast is a sex organ. The 2004 Merriam-Webster Dictionary defines breast as, "1. either of the pair of mammary glands extending from the front of the chest esp. in pubescent and adult human females. 2. the front part of the body between the neck and abdomen" No definition describes the breast as sex organ. If the female breast is a sex organ, then what does Appendix 80a represent? A mother forcing a child's mouth to contact her sex organ? It's called breast feeding, so a child sucking on a mother's breast delineates the breast as non-sexual, but as soon as the baby is full, it magically becomes a sex organ when a male touches it? What if the man touches the breast as the baby is feeding? Clearly these laws need to remove a womans breast as a sex organ. See appendix 81a for other information related to a woman's breast not being a sex organ. Men's and women's breasts can be stimulated by a partner's caress, but the male breast is not declared a sex organ. Male stars can be on TV with shirts off and women get all excited, but the moment a woman tries it, she is censored.

This line from an earlier topic is worthy to note here. " in some photographs the girls are touching their own breasts or sexual organs." U.S. v. Various Articles of Merchandise, 230 F.3d 649, 655 (3rd Cir. 2000). Notice the placement of the word "or", their own breasts or sexual organs.

Our laws are also sexually discriminatory. Let's say for example a homosexual male is attracted to children. He can have all kinds of photos of boys without shirts, his attraction, yet a heterosexual male cannot have photos of girls without shirts. Or, reverse it, a lesbian woman cannot have photos of young girls without shirts, but a heterosexual woman can have photos of young boys without shirts. The problem then goes to transgender. Whose breasts are sex organs in this scenario? If a developed girl in Jr. High decides she's a boy, does that mean her breasts are no longer a sex organ? If a high school boy declares he's a girl, did his breasts suddenly become sex organs?

"The constitution is violated when government, state or federal, invidiously classifies similarly situated people on the basis of the immutable characteristics with which they were born." Michael M. v. Superior Court of Sonoma City, 101 S.Ct. 1200, 1208, 450 U.S. 464, 67 L.Ed. 2d 437 (1981).

One final mental picture I'd like to close with. In an ironic twist of nature, at 65 years old, my "breasts" are larger than Kaity's were in the photos noted herein, but mine are not sex organs, but hers were?

Petitioner, Russell McElvain, has been deprived of basic fundamental rights guaranteed by the First, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and seeks relief in this Court to restore those rights. Based on the arguments and authorities presented herein petitioner was deprived of his right to freedom of speech, self-incrimination, effective assistance of counsel, and due process of law in the district court and appellate court. Petitioner prays this Court will issue a writ of certiorari and reverse the judgment of the Fifth Circuit Court of Appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Russell McElvain

Russell McElvain, petitioner pro se

Date: March 6, 2019