

NO. **20-6268**

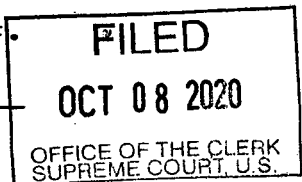
IN THE
SUPREME COURT OF THE UNITED STATES

BRYAN KEITH ROBERTS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

ORIGINAL



*On Petition for a Writ of Certiorari
To the Court of Criminal Appeals of Texas*

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the presence of a large number of uniformed, undercover, and armed spectators identifiable as law enforcement on the final day of the guilt-innocence phase of a criminal trial inherently prejudicial?

2. Can a defendant be found guilty of continuous sexual abuse when the time period of alleged abuse contained within the indictment and application paragraph of the jury charge begins five months before the effective date of the continuous statute?

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which Petitioner, Bryan Keith Roberts, was the Applicant before the Court of Criminal Appeals of Texas. Mr. Roberts is a prisoner who was convicted of continuous sexual abuse in the 188th Judicial District Court of Gregg County, Texas, and is in the custody of the State of Texas. The State of Texas was the Respondent before the Court of Criminal Appeals of Texas.

RULE 29.6 STATEMENT

Bryan Keith Roberts, Petitioner, is not a corporate entity.

RELATED PROCEEDINGS IN STATE COURTS

Roberts was convicted and sentenced in the 188th Judicial District Court of Gregg County, Texas, cause number 45,160-A, styled *The State of Texas v. Bryan Keith Roberts*, on the 24th day of January, 2016.

Roberts' conviction and sentence was affirmed by the Court of Appeals for the Sixth Supreme Judicial District of Texas, cause number 06-16-00026-CR, styled *Bryan Keith Roberts v. The State of Texas*, on the 21st day of December, 2016.

Roberts' petition for discretionary review of the court of appeals' memorandum opinion was refused by the Court of Criminal Appeals of Texas, cause number PD-0062-17, styled *Bryan Keith Roberts v. The State of Texas*, on the 22nd day of March, 2017.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bryan Keith Roberts respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas.

OPINIONS AND ORDERS BELOW

On July 29, 2020, the Court of Criminal Appeals of Texas issued a judgment denying Mr. Roberts' application for a writ of habeas corpus without written order. The July 29, 2020, denial is unpublished and attached as Appendix A.

JURISDICTION

The Court of Criminal Appeals of Texas had original jurisdiction over Mr. Roberts' application for a writ of habeas corpus under Article 11.07 of the Texas Code of Criminal Procedure. The judgment of the Court of Criminal Appeals of Texas was entered on July 29, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS & STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides that "No person shall...be deprived of life, liberty, or property, without due process of law..." U.S. CONST. amend. V.

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..." U.S. CONST. amend. VI.

The Fourteenth Amendment to the United States Constitution provides that "No state shall make or enforce any law which shall

...deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

Texas Penal Code § 21.02, Continuous Sexual Abuse of Young Child. TEX. PEN. CODE § 21.02.

STATEMENT OF THE CASE

Mr. Roberts was indicted on October 29, 2015, for the offense of Continuous Sexual Abuse of Young Child in violation of Texas Penal Code § 21.02. The indictment alleged that Roberts "did then and there during a period that was 30 or more days in duration, to-wit: from on or about the 1st day of April, 2009 through the 1st day of June, 2009, when the defendant was 17 years of age or older, commit two or more acts of sexual abuse against a child younger than 14 years of age..."

On January 19, 2016, the State's attorney *pro tem* filed a Motion to Amend Indictment. The requested amendment expanded the time period to "the 1st day of April, 2007 through on or about the 9th day of June, 2012," and added two additional alleged acts of sexual abuse. That same day, the trial court granted the State's motion as requested. The amended indictment expanded the time period of alleged abuse to five months preceding Texas Penal Code § 21.02's effective date. TEX. PEN. CODE § 21.02; Acts 2007, 80th Leg., ch. 593 § 1.17, eff. Sept. 1, 2007. This new provision applied only to conduct occurring on or after the effective date.

At Roberts' jury trial, the application paragraph of the Jury Instructions on Verdict for guilt-innocence quoted the time period reflected in the amended indictment as an element of the offense. The jury ultimately found Roberts guilty as charged.

The alleged victim in this case was the son of an investigator employed by the county in which Roberts was tried and convicted. Said investigator testified during the trial while wearing his Class A uniform, although investigators were encouraged to wear suits.

Seven law enforcement officers testified during Roberts' trial. The Rule was invoked at the beginning of trial and witnesses were excluded from the courtroom during the trial. The guilt-innocence phase of the trial was six days in duration. On the final day of the guilt-innocence phase, there was a large presence of uniformed, undercover, and armed spectators identifiable as law enforcement. Roberts' trial attorney commented twice on the record concerning the police officers presence. The officer turnout was significantly higher on the final day of the guilt-innocence phase. The State admitted to 10-15 uniformed officers and avoided putting a number on the other identifiable law enforcement. Several defense witnesses swore under oath that the total number of identifiable law enforcement was 60 or more. The large presence of these officers were only present for the jury charge, closing arguments, jury deliberation, and guilty verdict. The majority of the law enforcement spectators did not return after the verdict and lunch recess.

REASONS FOR GRANTING THE PETITION

The Court of Criminal Appeals of Texas has decided an important question of federal law that has not been, but should be settled by this Court, and has decided an important federal question in a way that conflicts with relevant decisions of this Court. The

questions presented are important, recur frequently, and are perfectly presented on this record. This Court should grant certiorari to stop Texas's curtailment of defendants' United States Constitutional rights.

I. This Court Should Grant Certiorari to Determine Whether the Presence of a Large Number of Uniformed, Undercover, and Armed Spectators Identifiable as Law Enforcement on the Final Day of the Guilt-Innocence Phase of a Criminal Trial is Inherently Prejudicial.

The presence of a large number of uniformed, undercover, and armed spectators identifiable as law enforcement on the final day of the guilt-innocence phase of a trial is inherently prejudicial, resulting in a lack of due process. This violated Roberts' right to a fair and impartial trial, and to due process of law, as guaranteed by Amendments V, VI, and XIV to the United States Constitution. *See Holbrook v. Flynn*, 475 U.S. 560 (1986).

Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. *Id.* at 567 (*citing Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)). To guarantee a defendant's due process rights under ordinary circumstances, our legal system has instead placed primary reliance on the adversary system and the presumption of innocence. *Id.* When defense counsel vigorously represents his client's interests and the trial judge assiduously works to impress jurors with the need to presume the defendant's innocence, we have trusted that a fair

result can be obtained. *Id.* at 567-68.

To determine inherent prejudice, we look to whether "an unacceptable risk is present of impermissible factors coming into play." *Id.* at 570 (*citing Estelle v. Williams*, 425 U.S. 501, 505 1976)).

Roberts asserts that his Sixth Amendment right to a fair trial was denied by the presence of the large number of officers in the courtroom on the last day of the guilt-innocence phase of the trial. The presence of the officers prejudiced Roberts' opportunity to receive a fair trial. The appearance of the considerable number of the City of White Oak police officers and Gregg County Sheriff's deputies in various modes of official attire presented an unacceptable risk of impermissible factors coming into play.

Roberts contends that his case is very similar to that of *Shootes v. State*, 20 So.3d 434 (Fla Dist. Ct. App. 2009), with the exception that Roberts' circumstances are more aggravating.

The presence of courtroom observers wearing uniforms, insignia, buttons, or other indicia of support for the accused, the prosecution, or the victim of the crime does not automatically constitute denial of the accused's right to a fair trial. *Holbrook v. Flynn*, 475 U.S. 560 (1986) (four uniformed officers seated immediately behind defendants not prejudicial); *Carey v. Musladin*, 549 U.S. 70 (2006) (fair trial not denied by wearing buttons with photo of victim by some members of victim's family). However, there are situations where the atmosphere in the courtroom might infringe on the defendant's right to a fair trial. When this issue is raised, a case-by-case approach is required to allow courts

to consider the "totality of the circumstances." *Sheppard v. Maxwell*, 384 U.S. 333, 352 (1966); *Holbrook v. Flynn*, 475 U.S. at 569.

The number of spectators identifiable as law enforcement personnel was substantial in this case and distinguishes this case from those cases involving the appearance of a relatively few officers in the gallery. *Compare Holbrook v. Flynn*, 475 U.S. 560 (1986) (supplemental security of four officers in trial of six defendants not inherently prejudicial); *Davis v. State*, 223 S.W.3d 466 (Tex.App.-Amarillo 2006) (no inherent prejudice when up to eight uniformed officers sat in gallery over course of trial, vastly outnumbered by civilian spectators, no indication that officers "gravitated towards" jury or that prosecution "had a role in the presence of the officers during trial").

The alleged victim's father, Roy Nixon, had worked for the City of Gladewater Police Department with the White Oak police chief and was an investigator for Gregg County Sheriff's Department at the time of trial. (RR5:27-28; RR9:13). Investigator Nixon testified in Roberts' trial as an outcry witness. (RR5:27; RR9:72-115). He testified in his Class A uniform. (RR9:99). He testified that he was "required" to wear his uniform during court. (RR9:99).

Investigator Nixon's co-worker, Detective David Craig Harrington, testified at Roberts' trial also. (RR11:41-106). Harrington was not wearing his Class A uniform and testified that it was not policy to wear the uniform, that investigators are encouraged to wear suits. (RR11:94).

After Detective Harrington's testimony, Investigator Nixon returned to the stand where he then admitted that the sheriff's

uniform and suit is optional, either or. (RR11:124). He chose to wear his Class A uniform for the entire trial, even on days he did not testify.

The special prosecutor for Roberts' trial, attorney *pro tem* Richard A. Hurlburt was a former Gregg County Deputy, which he was sure to inform the jury of. (RR10:224).

The guilt-innocence phase of Roberts' trial was six days in duration. (RR9; RR10; RR11; RR12; RR13; RR14). On the fifth day, the trial court recessed before the lunch break. (RR13:152). The trial court's reasoning for ending the day early was for a charge conference. (RR13:152). The jury charge conference, including a ten minute recess, lasted less than 30 minutes. The remainder of the guilt-innocence phase could have been completed on that day. (Pet. State Hab. Exhs: J, K, L, M).

On the final day of the guilt-innocence phase, the prosecution side of the gallery contained a large number of identifiable law enforcement officers from the City of White Oak and Gregg County. (RR14:40, 65, 80; RR16:17; Pet. State Hab. Exhs: J, K, L, M). The State admitted in Roberts' habeas proceeding that there were 10-15 uniformed officers, they made up about one-half of the spectators, and some sat on the front row. Several defense spectators stated under oath that there were 60 or more identifiable law enforcement officers, they made up 75%-80% of the trial spectators, and that the officers sat together and closest to the jury. (Pet. State Hab. Exhs: J, K, L, M).

Roberts was found guilty at 12:20 p.m. (CR1:111-112). Many of the officers did not return after the lunch recess or for any

other part of the punishment phase. (Pet. State Hab. Exhs: J, K, L, M).

In hindsight, it is obvious that the only reason for the early recess on the fifth day of the guilt-innocence phase was to accommodate the large officers' presence for the guilt-innocence jury charge, closing arguments, deliberations, and guilty verdict. The excessive number of officers were not there as added security or to give testimony. The prosecution clearly had a role in the presence of the officers. The officers presence was designed to show official interest and to communicate a message to the jury. The jury could not help but receive the message that the officers wanted a conviction.

The conspicuous crowd of officers present, in close proximity to the jury, created an unacceptable risk that the jury's determination of the credibility of witnesses and findings of fact would be tainted by impermissible factors not introduced as evidence or subject to cross-examination. The totality of the circumstances in the courtroom on the final day of the guilt-innocence phase influenced the jury's decision and thus constituted inherent prejudice to Roberts' right to a fair trial, resulting in fundamental error. Roberts was not only denied a fair trial, he was denied due process of law.

As a result, Mr. Roberts respectfully suggests that some guidance from the Supreme Court of the United States is warranted.

II. This Court Should Grant Certiorari to Determine Whether a Defendant can be Found Guilty of Continuous Sexual Abuse When the Time Period of Alleged Abuse Contained Within the Indictment and Application Paragraph of the Jury Charge Begins Five Months Before the Effective Date of the Continuous Statute.

Roberts is not guilty of continuous sexual abuse based on the retroactive application of the continuous statute. This violates Roberts' right to due process of law, as guaranteed by Amendments V and XIV to the United States Constitution.

Roberts asserts that he is actually innocent, not guilty, of the offense of Continuous Sexual Abuse of a Child, Texas Penal Code § 21.02, for which he was convicted.

"Actual Innocence" originally meant that the accused person did not, in fact, commit the charged offense. *See e.g. Sawyer v. Whitley*, 505 U.S. 333, 336 (1992); quoted in *Dretke v. Haley*, 541 U.S. 386, 393 (2004); *Murray v. Carrier*, 477 U.S. 478 (1986) (actually innocent of the substantive offense). That meaning began to change when the United States Supreme Court expanded the term from "not guilty of" the charged offense to also mean "ineligible for the punishment assessed." *See e.g. Dretke v. Haley*, 541 U.S. at 393-94 ("allegations of actual innocence, whether of the sentence or of the crime charged").

In the case at bar, Roberts was indicted for the offense of Continuous Sexual Abuse of a Child. (CR1:7). The indictment alleged that Roberts "did then and there during a period that was 30 or more days in duration, to-wit: from on or about the 1st day of April, 2009 through the 1st day of June, 2009, when the defendant was 17 years of age or older, commit two or more acts of sexual abuse against a child younger than 14 years of age..." (CR1:7).

The State's attorney *pro tem* filed a pretrial Motion to Amend Indictment. (CR1:45-46). The requested amendment expanded the time period of alleged abuse to "the 1st day of April, 2007 through on or about the 9th day of June, 2012," and added two additional alleged acts of sexual abuse. (CR1:45-46). The trial court granted the motion as requested. (RR5:26).

The bill enacting Section 21.02 of the Texas Penal Code provided this new provision applied to conduct occurring on or after September 1, 2007. *See* TEX. PEN. CODE § 21.02; Acts 2007, 80th Leg., Ch. 593, § 1.17, eff. Sept. 1, 2007; *Render v. State*, 316 S.W.3d 846 n. 2 (Tex.Crim.App. 2010).

The alleged victim, T.N. was born on July 10, 1998. (RR5:34; RR10:67); At the time of T.N.'s testimony at trial, which was February 17, 2016, he was 17 years of age and a senior in high school. (RR10:137). T.N. moved to 308 Cates and went to White Oak schools beginning in 3rd grade. (RR10:70-71, 138, 167).

Rachel Nixon Dolle, T.N.'s mother, testified that she was certain that T.N.'s first school year in White Oak school district was 3rd grade. (RR10:71).

Based on T.N.'s testimony at trial, that he was then 17 years of age and a senior in high school, Roberts presents as proof of the retroactive application of the continuous statute the following timeline:

<u>T.N.'s Age</u>	<u>Grade</u>	<u>Years</u>
17	12	2015-2016
16	11	2014-2015
15	10	2013-2014
14	9	2012-2013
13	8	2011-2012
12	7	2010-2011

11	6	2009-2010
10	5	2008-2009
9	4	2007-2008
8	3	2006-2007

The evidence adduced at trial clearly reflects that T.N. and his family moved to 308 Cates in November, 2006.

T.N. had a hard time recalling specifics of the alleged conduct, including an exact year and his age when it first happened. (RR10:178, 190-191). T.N. believed it was in the summer, around the 4th grade. (RR10:143, 179). As shown above, T.N. began the 4th grade in September, 2007. The summer before T.N.'s 4th grade year is clearly before the September 1, 2007, effective date of Texas Penal Code § 21.02.

The record demonstrates that the jury found Roberts guilty of Continuous Sexual Abuse of a Child based on alleged conduct that was engaged in prior to the effective date of the continuous statute. Therefore, the statute was retroactively applied to Roberts.

In further support of his claim, Roberts directs the Court's attention to the Jury Instructions on Verdict for guilt-innocence. (CR1:62-70). In the application paragraph, the jury was instructed that "You must determine whether the state has proved Continuous Sexual Abuse of a Child beyond a reasonable doubt, in Gregg County, Texas, the Defendant: 1. Intentionally or knowingly, 2. During a period that is 30 or more days in duration, to-wit: from on or about April 1, 2007 through June 9, 2012, 3. The Defendant committed two or more acts of sexual abuse against John Doe..." (CR1:67).

In further support of the retroactively applied statute claim, the jury was also instructed, pursuant to Section 21.02(d), "The

jury is 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." (CR1:67). In sum, the jury instructions did not limit the time period the jury was to consider in order to avoid the retroactive application of Section 21.02 to Roberts.

The jury found Roberts guilty of Continuous Sexual Abuse of a Child, as charged in the amended indictment, and assessed punishment at 55 years confinement in the Texas Department of Criminal Justice. (CR1:71, 76). "An inmate...serving a sentence for an offense under Section 21.02, Penal Code...is not eligible for release on parole." TEX. GOV'T CODE § 508.145(a).

The Jury Instructions on Verdict also provided that "If you have a reasonable doubt as [to] the defendant's guilt of Continuous Sexual Abuse of a Child, you will acquit the defendant of that charge and next consider whether he is guilty of Aggravated Sexual Assault of a Child." (CR1:68).

"An offense under this section [22.021, Penal Code (Aggravated Sexual Assault)] is a felony of the first degree." TEX. PEN. CODE § 22.021(e). "An individual adjudged guilty of a first degree shall be punished by imprisonment in the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 5 years." TEX. PEN. CODE § 12.32(a). "An inmate described by Subdivision (1) [an inmate serving a sentence for an offense under Section 22.021] is not eligible for release on parole until the inmate's actual calendar time served, without consideration of good conduct time, equals one-half of the sentence

or 30 calendar years, whichever is less..." TEX. GOV'T CODE § 508.145(d)(2)..

Under the offense Roberts was convicted of, the punishment range is "imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years." TEX. PEN. CODE § 21.02(h). As mentioned above, there is no eligibility for early release on parole.

In the case challenged here, it involves—too severe punishment—a felony with a minimum of 25 years confinement and no possibility of parole rather than a felony with a minimum of 5 years confinement with the possibility of parole.

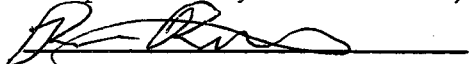
In short, Roberts could not have been found guilty of Continuous Sexual Abuse of a Child because the time period of alleged abuse contained within the amended indictment and the application paragraph of the jury charge began five months before the effective date of the continuous statute. Therefore, Roberts is "guilty only of" the lesser-included offense of Aggravated Sexual Assault and "ineligible for" the sentence assessed.

As a result, Mr. Roberts respectfully requests some guidance from the Supreme Court of the United States.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Bryan Keith Roberts prays that this Court grant a writ of certiorari to resolve the Questions Presented.

Dated: October 5, 2020

Respectfully submitted,

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PETITIONER

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