NO. 20-973

IN THE
Supreme Court of the United States

RICKY HAYWOOD-WATSON,
Petitioner,
v.

THE STATE OF TEXAS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

RICKY HAYWOOD-WATSON
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QUESTION PRESENTED

In Section 21.02(d) of the Texas Penal Code, it states that a jury does not need to unanimously agree on which two or more acts of sexual abuse were committed in the continuous series. The two or more acts used to form the basis of the series are free-standing criminal violations, under Texas law, that independently require jury unanimity.

This case presents the following question: **In light of *Ramos v. Louisiana*, does Section 21.02(d) of the Texas Penal Code violate the constitutional guarantee of jury unanimity by not requiring a jury to unanimously agree on the two or more "acts" that constitute the series?**

PARTIES TO THE PROCEEDING

The petitioner is Ricky Haywood-Watson, the defendant and appellant in the courts below. The respondent is the State of Texas, the plaintiff and appellee in the courts below.

- *The State of Texas v. Ricky Haywood-Watson*, No. 1494189, 339th District Court of Harris County, Texas. Judgment entered June 25, 2018.
- *Ricky Haywood-Watson v. The State of Texas*, No. 14-18-00547-CR, Texas Fourteenth Court of Appeals. Judgment entered February 11, 2020. Judgment denying rehearing entered March 17, 2020.
- *Ricky Haywood-Watson v. The State of Texas*, No. PD-0370-20, Texas Court of Criminal Appeals. Judgment refusing petition for discretionary review entered June 17, 2020. Judgment granting motion for leave to file amended petition for discretionary review granted July 14, 2020. Judgment denying motion for rehearing entered August 19, 2020.

RULE 29.6 STATEMENT

Ricky Haywood-Watson, Petitioner, is not a corporate entity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ricky Haywood-Watson respectfully petitions this Court for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The judgment of the Texas Fourteenth Court of Appeals is an unpublished opinion reported at *Ricky Haywood-Watson v. The State of Texas*, 14-18-00547-CR, Tex. R. App. P. 47.2(b) (TX. 14th COA, 02/11/20), attached as Appendix "A". The Texas Fourteenth Court of Appeals' judgment denying the motion for rehearing is attached as Appendix "B", (TX. 14th COA, 03/17/20). The Texas Court of Criminal Appeals' judgment refusing the petition for discretionary review in *Ricky Haywood-Watson v. The State of Texas*, PD-0370-20 (TX. CCA 06/17/20) is attached as Appendix "C". The Texas Court of Criminal Appeals' judgment granting the motion for leave to file amended motion for rehearing is attached as Appendix "F", (TX. CCA 07/14/20). The Texas Court of Criminal Appeals' judgment denying the amended motion for rehearing is attached as Appendix "G", (TX. CCA 08/19/20).

JURISDICTIONAL STATEMENT

On August 19, 2020 the Texas Court of Criminal Appeals denied the amended motion for rehearing. See Appendix "G". On March 20, 2020, this Court extended the time for filing all certiorari petitions due on or after March 19, 2020 to

150 days from the date of, as relevant here, the order denying the amended motion for rehearing. This petition is filed within 150 days of August 19, 2020. This Court's jurisdiction is pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "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, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction therefore, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

Section 21.02(b)(1) of the Texas Penal Code states: "A person commits an offense if during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims." Tex. Pen. Code § 21.02(b)(1).

Section 21.02(d) of the Texas Penal Code states:

> 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 more days in duration, committed two or more acts of sexual abuse.

Tex. Pen. Code § 21.02(d).

STATEMENT OF THE CASE

The petitioner, Ricky Haywood-Watson, was charged with continuous sexual abuse of young child or children. He pled "not guilty" and elected to be tried by a twelve-member jury. On June 18, 2018 Mr. Haywood-Watson went on trial. After deliberating, the jury found Mr. Haywood-Watson guilty in accordance with the statute and jury charge presented. Under Section 21.02(d) of the Texas Penal Code the jury is not required to unanimously agree on the two or more "acts" used to determine guilt. Mr. Haywood-Watson was sentenced to 65 years in prison without the possibility of parole, a life sentence given his age.

Mr. Haywood-Watson appealed his case to the Texas Fourteenth Court of Appeals, followed by the Texas Court of Criminal Appeals. His appeal initially presented a different question than the question presented here since non-unanimous jury verdicts were permissible in state criminal trials at the time of his trial. The Texas Fourteenth Court of Appeals and the Texas Court of Criminal Appeals denied the previous argument without explanation. While Mr. Haywood-Watson's case was still on direct appeal this Court issued the *Ramos v. Louisiana* opinion recognizing that the term "trial by an impartial jury" requires jury unanimity and applies to federal as well as state criminal trials.

Mr. Haywood-Watson acknowledges that Texas case law dictates constitutional challenges must be preserved for appeal by initial challenge at trial. *Karanev v. State,* 281 S.W. 3d 428 (Tex. Crim. App. 2009) and *Flores v. State,* 245 S.W. 3d 432 (Tex. Crim. App. 2008). However, Mr. Haywood-Watson argues that the constitutional ruling, conferring newly guaranteed rights, underlying the current challenge occurred during direct appeal, thus preserving his right to challenge. *Griffith v. Kentucky,* 479 U.S. 314 (1987). Jurisprudence dictates that this issue be addressed by appellate courts, even when the issue is raised for the first time on direct appeal. When a statue giving rise to prosecution is unconstitutional it is void from its inception, is no law, grants power to no one, and justifies no act performed under it. Denying constitutional challenges on direct appeal in light of newly guaranteed rights risks allowing criminal convictions based upon unconstitutional statutes.

Therefore, after this Court's *Ramos v. Louisiana* ruling, Mr. Haywood-Watson immediately submitted his Motion for Leave to File Amended Motion for Rehearing and Amended Motion for Rehearing to the Texas Court of Criminal Appeals. App. "D" and "E." Mr. Haywood-Watson argued that in light of *Ramos,* Section 21.02(d) of the Texas Penal Code violates his federal constitutional rights by not requiring the jury to unanimously agree on the two or more "acts" used to determine guilt. Upon receipt the Texas Court of Criminal Appeals granted the Motion for Leave to File Amended Motion for Rehearing and filed the Amended

Motion for Rehearing. App. "F" and "E". The Texas Court of Criminal Appeals considered the merits of Mr. Haywood-Watson's Amended Motion for Rehearing and issued a denial without reasons. App "G". By denying Mr. Haywood-Watson's Amended Motion for Rehearing the Texas Court of Criminal Appeals affirmed Texas Intermediate Court rulings and decided an important question of federal law that has not been directly addressed by this Court. The question presented in this case is significant, recurs frequently, applies nationally and is perfectly preserved on this record.

The State's case against Mr. Haywood-Watson was crafted amidst a bitter divorce between him and his wife, now Ms. Shaw, resulting from his extramarital affairs with adult women. According to testimony presented at trial, Mr. Haywood-Watson allegedly sexually abused all four of his children, two boys and two girls ages two years to eight years old, to varying degrees. This abuse allegedly occurred over the course of two years while Mr. Haywood-Watson was working upwards of one hundred hours per week as a surgical resident and having multiple affairs with adult women. Ms. Shaw's behavior was dubious from the outset. In January 2015, Ms. Shaw filed a no contest divorce petition allowing for visitation while only citing that Mr. Haywood-Watson's demanding work schedule should limit his visitation. In August 2015, Ms. Shaw electronically submitted accusations of sexual abuse of their four children to Child Protective Services reporting the outcry was one year earlier, in July 2014. Ms. Shaw's online report was made ten days before civil

proceedings were to begin and on the day she received a report, from a private investigator she hired, detailing Mr. Haywood-Watson's involvement with multiple adult women. In her initial police interview the officer noted Ms. Shaw's focus on Mr. Haywood-Watson's extramarital affairs rather than the alleged abuse. Mr. Haywood-Watson had no interaction with his children for three years prior to trial.

Mr. Haywood-Watson's trial lasted six days. Ms. Shaw testified in addition to all four children testifying as witness and victim. The prosecution presented allegations of numerous combinations of victims and criminal violations within Section 21.02(c) of the Texas Penal Code with no physical or forensic evidence, though the indictment at trial was based upon one victim. Mr. Haywood-Watson maintains his innocence and denies any abuse occurred at his hands, in his presence, or with his knowledge.

SUMMARY OF THE ARGUMENT

The bedrock principles of our legal system originate from the maxims of proof beyond a reasonable doubt and the right to trial by an impartial jury, which are inexorably linked. This Court continues to secure these tenets in cases both past and present. However, continuous series statues that incorporate multiple free-standing criminal violations as a single violation without requiring jury unanimity in regard to the multiple free-standing criminal violations undermines the aforementioned bedrock principles that uphold our system of law. The Sixth and

Fourteenth Amendment requires juries to unanimously agree upon the free-standing criminal violations that constitute the basis of a series because: a) this Court, in *Schad v. Arizona*, *Richardson v. United States* and *Apprendi v. New Jersey*, provides the framework adjudicating the true elements and jury agreement necessary in continuous series statutes; b) this Court, in *Ramos v. Louisiana*, has made clear that the constitutional guarantee of jury unanimity in federal criminal trials extends to state criminal trials.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari to Consider Whether Section 21.02(d) of the Texas Penal Code Violates This Courts Precedent Regarding Jury Unanimity.

Texas is one of many states where legislatures have enacted what are commonly referred to as "continuous course of conduct" or "continuous series" statues. These statues combine a series of acts or free-standing criminal violations to create a new criminal violation. Continuous series statutes vary in their breadth and specificity calling into question the constitutionality of not requiring jury unanimity within these statutes. The Texas Legislature provides eight distinct free-standing criminal violations in Section 21.02(c) of the Texas Penal Code that serve as the "acts"

qualifying for prosecution.[1] Section 21.02(d) does not require juries to unanimously agree on the two or more "acts" necessary to constitute the continuous series. These "acts" within the statute are each codified as free-standing criminal violations that require jury unanimity in the Texas Penal Code. The constitutionality of states allowing jury disagreement concerning incorporated free-standing criminal violations used to constitute a series in continuous series statutes has never been directly addressed by this Court.

Texas Intermediate Courts have erroneously construed the opinions rendered in *Schad v. Arizona* and *Richardson v. United States* to uphold the constitutionality of not requiring juries to unanimously agree on the two or more free-standing criminal violations necessary to constitute a continuous series. In addition, Texas Courts point to *Apodaca v. Oregon* to further support not requiring jury unanimity in state criminal trials. This Court has provided guidance as to what limits the Constitution places on defining true elements verses mere means in *Schad v. Arizona* and *Apprendi v. New Jersey*. This Court also addressed the requirement of jury unanimity regarding the violations constituting a series in *Richardson v. United States*.

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[1] Aggravated kidnapping (Tex. Pen. Code § 20.04(a)(4)); indecency with a child (Tex. Pen. Code § 21.11(a)(1)); sexual assault (Tex. Pen. Code § 22.011); aggravated sexual assault (Tex. Pen. Code § 22.021); burglary (Tex. Pen. Code § 30.02(1)-(4)); sexual performance by a child (Tex. Pen. Code § 43.25); trafficking of persons (Tex. Pen. Code § 20A.02(a)(7) or (8)); and compelling prostitution Tex. Pen. Code § 43.05(a)(2). (See App. H)

First, the majority in *Richardson* agrees with the five-person plurality in *Schad* recognizing that "the Constitution itself limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition." *Richardson v. United States*, 526 U.S. 813 (1999) at 820 (citing *Schad* at 632-633). *Schad* sets the limit of true elements that must be unanimously agreed upon as "indicative of a distinct crime" (*Alternative Elements* at 187). *Apprendi* rejects the notion that legislatures can redefine free-standing criminal violations as non-elements by moving their placement within the criminal code. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) at 29-30. The majority in *Apprendi* rejected the State's contention that it did not create a "separate offense calling for a separate penalty" (*Id.* at 495) instead agreeing with the New Jersey Supreme Court "that merely because the state legislature placed its hate crime sentence 'enhancer' within the sentencing provision of the criminal code does not mean that the finding...is not an essential element of the offense." *Ibid.* *Richardson* guides the level of jury specificity necessary by ruling "the statute requires unanimity in respect to each individual 'violation'." *Richardson* at 824. The majority in *Richardson* found no historical support that free-standing criminal violations be treated as means rather than independent elements and concluded that "unanimity in respect to each individual violation is necessary." *Id.* at 816.

Second, in *Ramos v. Louisiana* this Court rejects permitting juries to convict while not being unanimous, where unanimity is required in state criminal trials. Permitting juries to disagree about free-standing criminal violations is a grant of power to the State that has no history or tradition and risks serious unfairness to citizens. This Court recognizes that "an interpretation of 'violations' as means are not sufficiently powerful to overcome the considerations...of language, tradition, and potential unfairness." *Richardson* at 820.

Over the two decades in which these continuous series statues have emerged, constitutional interpretation regarding the incorporation of the Bill of Rights to the States and the original understanding of the guarantees contained within the Sixth Amendment has coalesced into the majority opinion of *Ramos v. Louisiana.* The Constitution clearly expresses jury unanimity are a foundational right extended to federal as well as state criminal trials.

A. History Unequivocally States Unanimity is an Indispensable Precept of Trial by Jury.

The laws of our country can be found rooted in principles as far back as the English Magna Carta. "[I]t was this extraordinary document [the Magna Carta]—agreed to by the King of England in 1215—that first spelled out the rights and liberties of man. The ideals of the Magna Carta inspired America's forefathers to define and protect many of the rights expressed in our founding documents, which we continue to cherish today." Barack Obama, 04/30/15, Proclamation of Law Day.

Concepts such as proof beyond a reasonable doubt, a jury comprising of twelve men, and the requirement of those twelve men to unanimously agree arose long ago, becoming an inherent feature of our common-law jury. At the founding of our country this guarantee of a right to jury trial and requirement of jury unanimity was written into the Constitution. This Court has long espoused the common understanding of these inalienable rights: "The requirement of a unanimous jury verdict in criminal cases and proof beyond a reasonable doubt are so embedded in our constitutional law and touch so directly on all citizens and are such barricades of liberty..." (*Johnson v. Louisiana*, 406 U.S. 356 (1972) at 393) and "In an unbroken line of cases reaching back to the late 1800s, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of federal jury trial." *Id.* at 369.

Sir William Blackstone expounded that the mere existence of a jury alone does not provide a barrier between "the liberties of the people and prerogative of the crown," but in addition "that the truth of every accusation...should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors." William Blackstone, *Commentaries on the Laws of England* (1769) at 343. In acknowledgment of the enduring link between jury unanimity and proof beyond a reasonable doubt this Court, *In re Winship*, 397 U.S. 358 (1970), made sure to express each components necessity in a criminal trial. To meet "the proof beyond a reasonable doubt standard...the jury must first find that the government has met

its burden of proof beyond a reasonable doubt as to each fact necessary to constitute the offense charged (the elements of the offense)." *Alternative Elements* at 199. The Alaska Supreme Court, inspired by *United States v. Gipson*, pronounced "[i]f the jury is not required to agree on what criminal conduct a defendant has committed, then there can be no guarantee that the jury has agreed that the defendant committed a crime beyond a reasonable doubt." *Khan v. State*, 278 P.3d 893 (2012) at 899. Furthermore, "The unanimity rule thus requires jurors to be in substantial agreement as to just what the defendant did...Requiring the vote of twelve jurors...does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required." *United States v. Gipson* 553 F.2d 452 (1977) at 458.

Continuous series statutes straddle these constitutional maxims enshrined in our Sixth and Fourteenth Amendments, while Texas' continuous sexual abuse statue egregiously traverses them. The historical record, and more importantly the Constitution, does not support a law such as this to continue to stand as currently written. Statues written and enacted that dispense with commonly held standards of unanimity lower the State's burden while eroding the citizens Constitutional guarantees. Justice Joseph Story poignantly said, "A trial by jury is generally understood to mean...a trial by twelve men...who must unanimously concur in the guilt of the accused...Any law, therefore, dispensing with any of these requisites,

may be declared unconstitutional." Joseph Story, *Commentaries on the Constitution of the United States*, 559 n.2 (1891).

B. *Schad v. Arizona*, *Richardson v. United States* and *Apprendi v. New Jersey* Provide the Framework for Determining True Elements and Jury Agreement Necessary in Continuous Series Statues.

The Texas Court of Criminal Appeals has not issued an opinion on constitutional challenges to Section 21.02 of the Texas Penal Code since its inception fourteen years ago, notwithstanding numerous petitions seeking review.[2] The question of the constitutionality of continuous sexual abuse statutes recurs frequently and has resulted in several opinions by Texas Appellate Courts as well as opinions from challenges in other states with similar statutes.[3] Texas courts

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[2] ***State v. Espinoza***, No. 05-09-01260-CR (Tex. App. Jun. 30, 2010), PDR refused 09/10/20; ***Render v. State***, 316 S.W.3d 846 (2010), PDR refused 10/13/10; ***Reckart v. State***, 323 S.W.3d 588 (2010), PDR refused 02/09/11; ***Henshaw v. State***, No. 05-10-00104-CR (Tex. App. Apr. 18, 2011), PDR refused 09/14/11; ***Martin v. State***, 335 S.W.3d 867 (Tex. App. Mar. 16, 2011), PDR refused 10/05/11; ***Ramirez v. State***, No. 05-10-00139-CR (Tex. App. Apr. 26, 2011), PDR refused 10/19/11; ***Lewis v. State***, No. 02-10-00004-CR (Tex. App. Jul. 14, 2011), PDR refused 11/16/11; ***Casey v. State***, 349 S.W.3d 825 (Tex. App. Aug. 31, 2011), PDR refused 01/25/12; ***Hernandez v. State***, No. 05-10-00493-CR (Tex. App. Oct. 27, 2011), PDR refused 01/25/12; ***Bays v. State***, No. 06-10-00114-CR (Tex. App. Dec. 7, 2011), PDR refused 03/28/12; ***Henry v. State***, No. PD-0097-13, PDR refused 03/27/13; ***Kennedy v. State***, No. 07-11-00042-CR, PDR refused 04/17/13; ***Smith v. State***, No. 05-16-01318-CR, PDR refused 11/07/18. ***Haywood-Watson v. State***, No. 14-18-00547-CR, PDR denied August 19, 2020.

[3]***Reckart v. State***, No. 13- 09-00179-CR, 2010 Tex. App. LEXIS 7002, at *30-34 (Tex. App. Corpus Christi Aug. 26, 2010, pet. filed.); ***Render v. State***, No. 05-09-00528-CR, 2010 Tex. App. LEXIS 5820, at *18-27 (Tex. App.–Dallas July 23, 2010, pet. ref'd); ***State v. Espinoza***, No. 05-09-01260-CR, 2010 Tex. App. LEXIS 4952, at *14 (Tex. App.–Dallas June 30, 2010, pet. ref'd) (mem. op., not

have reasoned that the legislature has the power to define a free-standing criminal violation as manner and means in a continuous series, consequently a jury need not be unanimous regarding manner and means. Therefore, no constitutional violation occurs if a free-standing criminal violation is merely manner and means. This reasoning is circular and lacks scrutiny of the constitutional issues that arise with blind adherence to the intent of the legislature. The Texas Court of Criminal Appeals' implicit agreement with the Intermediate Courts along with those Courts' faulty exegeses of *Schad* and *Richardson* has allowed Section 21.02 of the Texas Penal Code to stand despite being unconstitutional. Texas Intermediate Courts argue that Section 21.02 of the Texas Penal Code is constitutional because: 1. Legislative intent; 2. The "acts" constituting the series are manner and means; 3. Texas' continuous sexual abuse statute is narrower than the federal continuous criminal enterprise statue; and 4. The Sixth Amendment guarantee of jury unanimity has not been extended to state criminal trials.

1. Legislative Authority has Constitutional Limits

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designated for publication); ***Jacobsen v. State***, No. 03-09- 00479-CR, 2010 Tex. App. LEXIS 4394, at *14 (Tex. App.–Austin June 8, 2010, no pet.) (mem. op., not designated for publication); ***Coker v. State***, No. 12-09-00331-CR (Tex. App. Dec. 8, 2010). ***People v. Cissna***, 182 Cal. App. 4th 1105, 106 Cal. Rptr. 3d 54, 68-70 (Cal. Ct. App. 2010); ***State v. Sleeper***, 150 N.H. 725, 846 A.2d 545, 550-51 (N.H. 2004); ***State v. Johnson***, 2001 WI 52, 243 Wis. 2d 365, 627 N.W.2d 455, 460-64 (Wis. 2001); but see ***State v. Rabago***, 81 P.3d 1151, 1169 (Haw. 2003) (holding similar statute to be unconstitutional).

The Texas Constitution provides the legislature with "considerable discretion in defining crimes and the manner in which those crimes can be committed" (*Landrain v. State*, 268 S.W.3d 532 (Tex. Crim. App. 2008) at 535-36) and this Court "generally give[s] great deference to the States in defining the elements of crimes." *Schad* at 652. This legislative authority does, however, have limits under the Texas Constitution (art. 1, §19) and the U.S. Constitution (Amendments VI and XIV).

When analyzing whether or not a statute comports with the constitutional requirement of jury unanimity, legislative intent in statutory construction weighs heavily. The legislative intent of Section 21.02 of the Texas Penal Code is clear. "Under the plain language of Section 21.02, it is the commission of two or more acts of sexual abuse over a specified period of time...that is the *actus reus* element of the offense as to which the jurors must be unanimous in order to convict." *Jacobsen v. State*, 325 S.W.3d 733 (2010) at 5. This was in response to Judge Cochran's suggestion in her concurring opinion in *Dixon v. State* that the Texas Legislature consider enacting "a new penal statute that focuses upon a continuing course of conduct crime..." (*Dixon v. State* 201 S.W.3d 731 (2006) at 737), yet "assist[s] in preserving our bedrock criminal procedure principles of double jeopardy, jury unanimity, due-process notice, grand-jury indictments, and election law." *Ibid.* While petitioner acknowledges the difficulty in prosecuting child sexual abuse cases, the legislature's attempt to create a statute meeting Judge Cochran's prerequisites, and more importantly constitutional requirements, falls short. The

legislature created a statute that is too broad and amounts to a work around of specificity requirements. The Texas Legislature is well within its authority to create a continuing series using free-standing criminal violations as the acts that form the basis of the series. The legislature violates the Constitution and exceeds its authority by redefining historically long accepted criminal violations as mere manner and means or non-elements in order to dispense with the unanimity requirement inherent to each criminal violation. The Texas Twelfth Court of Appeals was correct that "the constitutional question about this part of the statute [Section 21.02(c)]...is whether it is permissible for the legislature to treat the specific acts of sexual abuse as manner and means of committing a series of sexual abuses." *Coker v. State*, No. 12-09-00331-CR (Tex. App. Dec. 8, 2010) at 8. The Texas Legislature has already defined the acts in Section 21.02(c) of the Texas Penal Code as free-standing criminal violations that remain unchanged to this day. "To allow the State to avoid the consequences of its legislative choices through judicial interpretation would permit the State to escape federal constitutional scrutiny..." *Schad* at 658.

2. In *Apprendi v. New Jersey* This Court Rejected the Concept That Changing Placement of a Criminal Violation Defines Its Character.

The State argues that "Section 21.02 of the Texas Penal Code is a statue that creates a single element of a 'series' of sexual abuse. It does not make each

'violation' a separate element of the offense that needs to be agreed upon unanimously..." *Render v. State*, No. 05-09-00528-CR (2010). Here, the State crosses a constitutional boundary by asserting that each free-standing criminal violation is not a separate element to be agreed upon unanimously. This Court carefully states "[d]ecisions about what facts are necessary to constitute a crime and therefore must be proved individually, and what facts are mere means represent value choices more appropriately made in the first instance by a legislature than by a court." *Schad* at 638. The State agrees that "we must look both to history and wide practice as guides to fundamental values." *Jacobsen v. State*, 325 S.W.3d 733 (2010) at 737 (citing *Schad* at 637). Using history, wide practice, and the assumption of legislative competence it must be concluded that when the violations of sexual abuse were initially created as free-standing criminal violations the Texas Legislature, as well as virtually all other state legislatures, made the fundamental value choice that these criminal violations were *actus reus* elements in and of themselves rather than the manner and means by which an offense is committed. The Texas Legislature initially reasoned that the violations incorporated into Section 21.02(c) of the Texas Penal Code to form the basis of the series have "material difference[s] requiring separate theories of crime to be treated as separate offenses subject to separate jury findings" (*Schad* at 633) thus the violations "are *ipso facto* independent elements defining independent crimes under state law, and therefore subject to the axiomatic principle that the prosecution must prove

independently every element of the crime." *Id.* at 636 (citing *In re Winship*, 397 U.S. 358 (1970) and *Sandstrom v. Montana*, 442 I.S. 510 (1979)) Furthermore, "the Court also has made clear that having set forth elements of a crime, a State is not free to remove the burden of proving one of those elements from the prosecution." *Id.* at 657. To warrant less than jury unanimity with respect to each violation forming the basis of the series lowers the long-held burden of proof required of the State, while increasing the citizens exposure to deprivation of life and liberty; concepts antithetical to the protection of citizens guaranteed in the Constitution. This Courts' critique of the federal continuous criminal enterprise statutory construction holds in this case, "...unanimity...required only as to the existence of the 'continuing series' and not as to the individual violations, would have come close to and test[ed] constitutional limits," *Richardson* at 820. Furthermore, Section 21.02(d)'s failure to require jury unanimity regarding the individual violations that constitute the continuing series does go beyond constitutional limits to the extent of being unconstitutional.

The State also argues that the "acts" are not to be considered free-standing criminal violations because "Section 21.02 does not criminalize the underlying acts, but rather, incorporates the other statutes merely to define the acts that make up the continuous course...," which redefines them as the manner and means of committing a newly created offense. *Henry v. State*, No. 08-11-0221-CR (Tex. App. Jan. 16, 2013) at 6. This Court roundly rejected "the possibility that a State could

circumvent the protections of *Winship* merely by 'redefin[ing] the elements that constitute different crimes...'" (*Apprendi* at 485), adding "constitutional limits exist to the States authority to define away facts necessary to constitute a criminal offense." *Id.* at 486 (citing *In re Winship* at 85-88).

In *Schad* this Court suggested both history and current practice of other states can give a "sense of appropriate specificity." *Schad* at 637. In the present context, thirty to forty years of Texas law demonstrates that the acts used in Section 21.02(c) of the Texas Penal Code to form the basis of a continuing series are free-standing violations of criminal law requiring jury unanimity, rather than mere manner and means of committing a single offense. Moreover, all fifty states have laws making the acts listed in Section 21.02(c) free-standing violations of their criminal laws. This Court strongly points out "[i]ndeed, the fact that New Jersey, along with numerous other States, has also made precisely the same conduct the subject of an independent substantive offense makes clear that the mere presence of this 'enhancement' in a sentencing statute does not define its character." *Apprendi* at 496. Following this Court's logic in *Apprendi*, the mere presence of the acts in a series does not define their character. Simply because the legislature chooses to redefine the acts as manner and means does not *a priori* mean the acts are not essential elements. Justice Thomas, in his concurring opinion, succinctly states that "if a fact is by law the basis for imposing or increasing punishment—for establishing or increasing the prosecutions entitlement—it is an element." *Id.* at

521. Viewed from this perspective it is evident why the specific acts used to form the basis of the series in Section 21.02(c) of the Texas Penal Code are individual elements requiring jury consensus, rather than mere means or brute facts.

3. The Breadth of Texas' Continuous Sexual Abuse Statute is Why It is Analogous to the Federal Continuous Criminal Enterprise Statute.

The State contends that the continuous sexual abuse statute is different from the federal continuous criminal enterprise statute "by being narrower in scope." *Jacobsen* at 8. Section 21.02(c) of the Texas Penal Code does contain less than the ninety violations that can be found associated with the federal continuous criminal enterprise statute, however, that by no means qualifies the Texas statute as narrow. In fact, Texas has the broadest continuous sexual abuse statute of any state, allowing for combinations of different victims with different violations without requiring unanimity on what specific violation occurred with any specific victim. Brian Bah, *Jury Unanimity and the Problem with Specificity*. Justice Scalia expressed "[w]e would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday, despite the moral equivalence of those two acts." *Schad* at 651. In Section 21.02 of the Texas Penal Code convictions of the nature Justice Scalia described are permitted and occur. Additionally, the breadth of Section 21.02(b)(1) and (d) of the Texas Penal Code compounds Justice Scalia's example by allowing a general guilty verdict. In a case

where four children testify the statute allows, for example, either violation 1 with X on Tuesday or violation 2 with Y on Wednesday or violation 3 with A on Monday or violation 4 with B on Friday. This would not pass constitutional muster as an indictment, much less grounds for a conviction.

The State concedes "the 'acts of sexual abuse'...are found in only six penal statutes, although these statues sometimes define more than one offense," *Jacobsen* at 8, which fundamentally increases the need for juror concurrence rather than diminishes the need for concurrence as the State would suggest. Including penal statutes that sometimes define more than one offense in a continuous series statute exponentially complicates the charge of a jury to be triers of fact; not requiring jurors to agree unanimously upon each penal code that constitutes the series directly violates the constitutional duty of a jury in our legal system. The breadth of Section 21.02 of the Texas Penal Code unacceptably increases the possibility for juror confusion or different jurors concluding a defendant committed different criminal violations by permitting jurors to avoid discussion of factual details of the violations. Without requiring jury unanimity on the two or more acts that constitute the series "jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say of bad reputation, that where there is smoke there must be fire." *Richardson* at 819.

4. Sixth Amendment Guarantee of Jury Unanimity Has Been Extended to State Criminal Trials Via *Ramos v. Louisiana*.

In this Court's landmark decision, *Ramos v. Louisiana,* the Sixth Amendment guarantee of a jury unanimity in criminal trials enshrined on the federal level was extended to the states. Section 21.02(d) of the Texas Penal Code violates a defendant's constitutional right to a unanimous jury by allowing jury disagreement concerning essential elements which can result in patchwork jury verdicts that determine guilt. Patchwork verdicts regarding commonly held essential elements were not the intention of the framer's as they secured the right to trial by an impartial jury. If the jury cannot unanimously agree as to the two or more acts that constitute the series, such difficulty tends to cast doubt on the defendant's guilt or culpability within the statute. The defendant may be guilty of some enumerated violation, but if the jury cannot unanimously agree then the defendant may not be guilty of the continuous statute and should not be convicted.

Texas Penal Code 21.02 also has the material effect of increasing the maximum penalty for the free-standing criminal violations used to form the basis of the series. "The continuous sexual abuse statute brings together several different offenses and permits a higher penalty when the state can show that the defendant committed the acts over a period of time longer than thirty days." *Coker* at 4-5. This Court made clear that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact...that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi* at 476 (citing

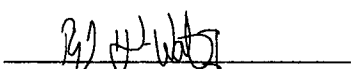
Jones v. United States, 526 U.S. 227 (1999) at 243, n.6.). Since this Court looks so carefully at the degree to which a jury authorizes punishment, it logically follows similar care is given about the extent to which a jury finds guilt. This condition alone requires jurors to unanimously agree as to which two or more acts in the series were committed by a defendant. For a unanimity guarantee to possess true effectiveness the legislatures almost complete authority to define the degree of unanimity required must have limits, lest it become a shell of a requirement. The fear in allowing Section 21.02 of the Texas Penal Code to stand echoes that of the framer's fear "that the jury right could be lost not only by gross denial, but by erosion." *Id.* at 483.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: January 11, 2021

Respectfully submitted,



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