

NO. 21-269

Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY CARTER,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

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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QUESTION PRESENTED

In 2015, the Texas Legislature made seeping revisions to how "controlled substances" are defined in the drug possession statutes. Before the revisions, the statute implicated in this case—Section 481.1031 of the Texas Health & Safety Code, which defines a Penalty Group 2-A substance—was a list of prohibited substances. The problem, however, was that chemists would slightly alter one of the listed substances, making it technically no longer the prohibited substance but nevertheless a dangerous one. With the legislature only meeting every two years, Texas law was simply not able to keep up with clandestine chemists. The 2015 revisions were the legislature's response. They did away with the list of drugs, choosing instead to list several chemicals and detailing which molecular structures of the various listed chemicals (as they relate to one another) are prohibited. Consequently, Section 481.1031, is now, by necessary design, extremely complicated. In a published opinion, the court below inferred a substance met the molecular structural requirements of Section 481.1031 even though (by the court's admission), there was no direct evidence of that molecular structure in the record.

This case, therefore, presents the following question:

In a sufficiency analysis under *Jackson v. Virginia*, 443 U.S. 307 (1979), may a reviewing court uphold a conviction where the offense is defined by technical elements beyond the understanding of an ordinary factfinder if no evidence on the elements was presented at trial?

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a discretionary review proceeding in which Petitioner, Anthony Carter, was the Appellant-Petitioner before the Court of Criminal Appeals of Texas. Mr. Carter is a prisoner who was convicted of possession of a controlled substance with the intent to deliver in the 137th Judicial District Court of Lubbock County, Texas, and he is in the custody of the State of Texas. The State of Texas was the Appellee before the Court of Criminal Appeals of Texas.

Mr. Carter asks that the Court issue a Writ of Certiorari to the Court of Criminal Appeals of Texas.

RULE 29.6 STATEMENT

Anthony Carter, Petitioner, is not a corporate entity.

TABLE OF CONTENTS

	Page
Question Presented.....	i
Parties to the Proceedings Below.....	ii
Rule 29.6 Statement.....	ii
Table of Authorities.....	iv
Petition for a Writ of Certiorari.....	1
Opinions and Orders Below.....	1
Jurisdiction.....	1
Statement of the Case.....	2
Reasons for Granting the Petition.....	3
Argument.....	4
Conclusion and Prayer for Relief.....	11
Appendix A	
Court of Criminal Appeals of Texas' Opinion	
Appendix B	
Seventh Court of Appeals' Memorandum Opinion	
Appendix C	
Judgment of Conviction by Jury	

TABLE OF AUTHORITIES

CASES	Page
<i>Carter v. State</i> , 575 S.W.3d 892 (Tex. App.-Amarillo 2019).....	1,3,8
<i>Carter v. State</i> , ___ S.W.3d ___ (Tex. Crim. App. 2021).....	1,3
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979).....	3,8,9
<i>Ross v. State</i> , 275 S.W.3d 512 (Tex. Crim. App. 2009).....	8,9
<i>Laster v. State</i> , 543 S.W.3d 227 (Tex. Crim. App. 2018).....	8,9
CONSTITUTION	
U.S. CONST. amend. V.....	2
U.S. CONST. amend. XIV.....	2
STATUTES	
28 U.S.C. § 1254(1).....	2
TEX. HEALTH & SAFETY CODE § 481.1031(b)(5).....	2,5

PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Carter 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 March 31, 2021, the Court of Criminal Appeals of Texas issued an opinion affirming the Court of Appeals' memorandum opinion. The March 31, 2021, opinion is published at *Carter v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2021), and attached as Appendix A.

On May 14, 2019, the Court of Appeals for the Seventh Supreme Judicial District of Texas issued a memorandum opinion affirming Mr. Carter's conviction and sentence. The May 14, 2019, memorandum opinion is published at *Carter v. State*, 575 S.W.3d 892 (Tex. App.-Amarillo 2019), and attached as Appendix B.

On November 17, 2017, the 137th Judicial District Court of Lubbock County, Texas, issued a Judgment of Conviction by Jury where Mr. Carter was convicted of possession of a controlled substance, Penalty Group 2/2A, with intent to deliver over 400 grams, and sentenced to 90 years' imprisonment. The November 17, 2017, judgment is unpublished and attached as Appendix C.

JURISDICTION

The Court of Criminal Appeals of Texas had jurisdiction over the petition for discretionary review under Rule 66 of the Texas Rules of Appellate Procedure. The judgment of the Court of Criminal Appeals of Texas was entered on March 31, 2021. This Court

has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS 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 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.

Section 481.1031(b)(5) of the Texas Health and Safety Code states in relevant part:

(b) Penalty Group 2-A consists of any material, compound, mixture, or preparation that contains any quantity of a natural or synthetic chemical substance...listed by name in this subsection or contained within one of the structural classes defined in this subsection:

...
(5) any compound containing a core component substituted at the 1-position to any extent, and substituted at the 3-position with a link component attached to a group A component, whether or not the core component or Group A component are further substituted to any extent, including:
Naphthoylindane;
Naphthoylindazole (THJ-018);
Naphthylmethylinene (JHW-171);
Naphthoylindole (JWH-018);
Quinolinoyl pyrazole carboxylate (Quinolinyl fluorepentyl fluorephenyl pyrazole carboxylate);
Naphthoyl pyrazolopyridine; and
Naphthoylpyrrole (JWH-030).

TEX. HEALTH & SAFETY CODE § 481.1031(b)(5).

STATEMENT OF THE CASE

A jury convicted Mr. Carter of possession of a controlled substance weighing 400 grams or more in Penalty Group 2-A. (9RR-65). Later that day, the jury sentenced Mr. Carter to 90 years' incarceration and a \$100,000 fine. (CR44; 9RR156-57).

On direct appeal, following supplemental briefing ordered by the court and oral arguments, the Seventh Court of Appeals affirmed Mr. Carter's conviction. *Carter v. State*, 575 S.W.3d 892 (Tex. App.-Amarillo 2019, pet. granted). Mr. Carter did not file a motion for rehearing.

On petition for discretionary review, the Court of Criminal Appeals affirmed the court of appeals ruling. *Carter v. State*, S.W.3d (Tex. Crim. App. 2019). Mr. Carter did not file a motion for rehearing.

REASONS FOR GRANTING THE PETITION

In overruling the sufficiency claim raised by Mr. Carter, the Court of Criminal Appeals of Texas has decided important federal questions in a way that conflicts with relevant decisions of this Court and has decided an important question of federal law, that has not, but should be, settled by this Court.

The question presented is important, recurs frequently, and is perfectly presented on this record. This Court should grant certiorari to stop Texas' expansion of the assumptions permitted by *Jackson v. Virginia* into the realm of the highly technical area of molecular chemistry.

Background

Petitioner, Anthony Carter, was a successful Lubbock businessman. He ran his business—a smoke shop—entirely in the public eye. (4RR79; 5RR86, 131). He did everything a normal business owner would do: He reported income, paid taxes, stocked inventory, kept track of sales, had posted store hours, and deposited money into his bank account. (5RR99; 6RR48-49, 169).

Mr. Carter was not, however, a chemist. When local law enforcement told him some of his products may contain banned substances, Mr. Carter found a DEA-certified lab, sent his products to that lab, and paid the lab to test those products. He paid for new rounds of testing around every six months and did so for years. Each time, the lab issued written reports certifying there was nothing illegal in any of Mr. Carter's products. (State's Exhs. 70C, 70D, 70E, 123; Defense Exh. 5).

But the State averred, the lab got it wrong: There was one illegal substance—fluoro-ADB—in Mr. Carter's product. (7RR19). Police seized Mr. Carter's inventory and charged him with possession with intent to deliver more than 400 grams of a Penalty Group 2-A controlled substance. A jury found Mr. Carter guilty. The jury further sentenced him to 90 years' incarceration and a \$100,000 fine. The conviction was affirmed on direct appeal. The decision of the Seventh Court of Appeals was affirmed on petition for discretionary review by the Court of Criminal Appeals of Texas.

The instant Petition for a Writ of Certiorari follows.

ARGUMENT

A COURT OF APPEALS ERRS IN AFFIRMING A CONVICTION FOR AN OFFENSE BASED ON TECHNICAL ELEMENTS NOT PROVEN BY THE EVIDENCE AND OUTSIDE THE SCOPE OF KNOWLEDGE OF AN ORDINARY FACTFINDER.

I. THE ELEMENTS OF SECTION 481.1031(b)(5) OF THE TEXAS PENAL CODE.

A. The Complex Language of Section 481.1031(b)(5).

Mr. Carter was found guilty of possessing a significant amount of synthetic marijuana. The synthetic marijuana in the

instant case is outlawed as a Penalty Group 2-A substance in Section 481.1031(b)(5) of the Texas Health and Safety Code:

(b) Penalty Group 2-A consists of any material, compound, mixture, or preparation that contains any quantity of a natural or synthetic chemical substance...listed by name in this subsection or contained within one of the structural classes defined in this subsection:

(5) any compound containing a core component substituted at the 1-position to any extent, and substituted at the 3-position with a link component attached to a group A component, whether or not the core component or Group A component are further substituted to any extent, including:

Naphthoylindane;

Naphthoylindazole (THJ-018);

Naphthyl methyl indene (JWH-171);

Naphthoylindole (JWH-018);

Quinolinoyl pyrazole carboxylate (Quinolinyl fluoropentyl fluorophenyl prazole carboxylate);

Naphthoyl pyrazolopyridine; and

Naphthoylpyrrole (JWH-030).

TEX. HEALTH & SAFETY CODE § 481.1031(b)(5).

B. Not Even the Legislators Who Drafted and Passed Section 481.1031(b)(5) Understand What it Prohibits—Only a Chemist can Understand the Substance of the Statute.

Most people reading the language of Section 481.1031 quoted above will quickly pass over the words as their eyes glaze over. The law was not always so complicated. Before 2015, the statute simply listed out prohibited substances. Act of May 22, 2015, 84th Leg., R.S., ch. 65, S.B. 173 (amended 2015) (current version at TEX. HEALTH & SAFETY CODE § 481.1031(b)(5)).

The problem, however, was that clandestine chemists would tweak the molecular structure of a listed substance. The changed structure resulted in a new substance, which was not on the list of prohibited substances but was still just as dangerous. The legislature would meet and revise the penalty group list. But

with the legislature only meeting every two years, the chemists were always able to stay one step ahead of the law. Debate on Tex. S.B. 173 Before the Senate Crim. Justice Comm., 84th R.S. at 1:32:20 (Mar 10, 2015) (recording available from online Tex. Senate Archives).

By 2015, the legislature was tired of playing games. It amended the statute to where clandestine chemists could no longer evade the law simply by moving a molecule here or there. *Id.* But those necessary amendments were beyond the skill of any non-chemist. Even the legislators who passed the bill did not know what the statute's language meant. They just knew, from working with the Senate's resource chemist, that this was the language they needed to pass for the safety of Texans. *Id.* at 51:56-52:20 (recording the author of the bill saying "[r]eally, to me, it's the chemist who we relied on on these bills more than even the lawyers because that was what--the code we've been trying to crack.").

II. THE EVIDENCE DID NOT DIRECTLY ADDRESS EACH ELEMENT OF SECTION 481.1031(b)(5)—A FAILING NO ONE DISPUTES.

An ordinary person can safely say that a substance is illegal if it:

- 1) contains a core component
- 2) that is substituted at the 1-position
- 3) to any extent
- and
- 4) substituted at the 3-position
- 5) with a link component
- 6) which is attached
- 7) to a group A component

TEX. HEALTH & SAFETY CODE § 481.1031(b)(5). Whatever those words mean, those are the elements of a substance prohibited under Section 481.1031(b)(5).

A. The Evidence Presented at Trial.

Mr. Carter was found guilty of possessing a substance called fluoro-ADB. At trial, the State's expert testified about fluoro-ADB and the three components of Section 481.1031(b)(5). He talked about the core component, the link component, and the group A component he found in the fluoro-ADB. (7RR19). He testified fluoro-ADB's core component is indazole; its group A component is methoxy dimethyl oxobutane; and its link component is carboxamide. (7RR19). He reasoned as long as one of each of the components is present, the drug is illegal. (7RR19). ("[B]ased off of those three combinations, that's why it is able to be controlled under the structural class with how the law is currently written.").

B. The Evidence Not Presented at Trial.

The State's expert never talked about the position of each component relative to one another. He said fluoro-ADB's core component is indazole, but he never said whether the indazole had any substitutions at the 1-position. He said fluoro-ADB's link component is carboxamide, but he never said whether the carboxamide is "substituted at the 3-position" to the indazole (the core component). He said fluoro-ADB's group A component was methoxy dimethyl oxobutane, but he again failed to discuss whether that group A component was attached to the link component.

No one disputes these failings. At the court below, both sides were asked to find the testimony discussing how the components related to each other. Both sides reached the same answer: there is no such testimony. *See* State's Supplemental Brief, pg. 7 (Feb. 19, 2019). In its opinion, the court below acknowledged,

The prosecutor asked the forensic chemist, "So if we put all of those together...We see the portions of fluoro-ADB that are relevant to this, is that correct?" The chemist answered, "Correct...[B]ased off of those three structural class with how the law is currently written." Sadly, the chemist was not asked to clarify the latter statement. This is of important because § 481.1031(b)(5) speaks in terms of certain chemicals having a specific placement within the molecular structure of an illegal compound.

Carter, No. 07-18-00043-CR, pg. 6.

No one really understands what the words of Section 481.1031 (b)(5) mean, but everyone agrees that the elements of the provision require both the presence of certain chemicals and that those chemicals are structured in a certain way relative to one another. And everyone agrees that the latter set of elements was never directly established by the evidence.

III. THE COURT BELOW, ACTING WITHOUT PRECEDENCE, EXPANDED THE ASSUMPTIONS PERMITTED BY *JACKSON V. VIRGINIA* INTO THE REALM OF A HIGHLY TECHNICAL AREAS OF EVIDENCE (MOLECULAR CHEMISTRY) OUTSIDE THE UNDERSTANDING OF AN ORDINARY JUROR.

A. The *Jackson v. Virginia* Jurisprudence does not Permit a Reviewing Court to Impart Specialized, Technical Knowledge on Ordinary Factfinders.

At its heart, this case involves a sufficiency-of-the-evidence issue. What makes this kind of case unique is that the revised statutory language establishing the elements of drug possession offenses is now highly technical.

When reviewing a legal sufficiency challenge, we view all of the evidence in the light most favorable to the verdict to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Ross v. State, 543 S.W.3d 227, 234 (Tex. Crim. App. 2018) (quoting *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 316 (1979))).

Most cases will pass this sufficiency review even if there is no direct evidence as to every element. Jurors are ordinary people capable of drawing reasonable inferences. So, for example, if the evidence establishes defendant shot the victim in the torso and the charge is murder, then a rational factfinder could infer that the defendant murdered the victim even without direct evidence connecting every dot. If the evidence establishes defendant broke into a car, and a phone that was on the front seat of the car before the break-in was not there after the break-in, then a rational factfinder could conclude that defendant stole the phone. That deduction is reasonable and well-within an ordinary person's experiences and common sense. In most criminal cases, a rational juror can connect the dots, and the court of appeals should assume that is what the jury did in reaching their verdict.

But what about cases where the offense is outside the scope of an ordinary person's intelligence, experience, and understanding? The "rational trier of fact" envisioned in the *Jackson* jurisprudence has no specialized training. See *Jackson*, 443 U.S. at 316; *Ross*, 543 S.W.3d at 234; *Laster*, 275 S.W.3d at 517. Therefore, a court of appeals errs in imparting onto the factfinder a specialized understanding of the evidence necessary to support the verdict.

B. The Court Below Stretched the *Jackson* Jurisprudence Too Far When it Applied the *Jackson* Presumptions to Jurors Evaluating the Elements of the Highly Technical Drug Possession Statute.

After the 2015 revisions, a rational juror's common sense will be of little help in understanding whether a defendant committed

a drug possession offense. The State cannot say "defendant possessed fluoro-ADB" and expect an ordinary juror to understand what that means. More to the point, a discussion about molecular structure in general does not equip a jury to make any conclusions about the molecular structure of the specific compound in a case. An ordinary factfinder cannot rely on his own common sense to make the leap from the general to the specific in the highly technical area of molecular chemistry.

And yet, as the court of appeals below observes, the only evidence in the case was very general in nature. For example, as relied upon by the court of appeals below, the State's expert said things like:

- * "we are looking at the structural class, now we are actually looking at the structure itself and seeing it falls within a particular combination of groups."
- * the "law classifies three different parts of the molecule"
- * "based off of those three combinations [of indazole, methoxy dimethyl oxobutane, and carboxamide], that's why it is able to be controlled under the structural class and how the law is currently written."
- * "I can at least tell you that [fluoro-ADB is] the indazole ring group"

Seventh Court of Appeals' Opinion, pgs. 7-8. No ordinary juror will hear a statement like "I can at least tell you that [fluoro-ADB is] the indazole ring group" and be able to deduce that that means fluoro-ADB has indazole substituted at either the 1-position or the 3-position with carboxamide which is attached to methoxy dimethyl oxobutane.

And it does not matter how many general statements one piles on. Adding "that's where the fluorine is actually attached to a particular carbon" or "we now classify a synthetic compound by the structure" or "there are a whole bunch of different combina-

tions of structures" or a thousand more general comments *still* not going to get the jury to the conclusion that fluoro-ADB has indazole substituted at either the 1-position or the 3-position with carboxamide which is attached to methoxy dimethyl oxobutane. *See Id.*, pgs. 7-8. Ten thousand spoons do no good for someone who needs a knife. It does not matter how many general comments about chemistry an expert makes when what the jury really needs is specific testimony about molecular structure required by the statute it is applying to a defendant.

Jackson contemplates an ordinary person as a rational trier of fact and imparts upon him the ability to make reasonable deductions from the evidence based on common experience and sense. *Jackson* does not, however, relieve the State of its burden in proving the elements of technical statutes beyond an ordinary person's comprehension.

The Court of Criminal Appeals of Texas admittedly had a problem with this case based on Mr. Carter having had his products tested for illegal substances at a DEA-certified lab and that lab certifying that no illegal substances were present. At a minimum, Mr. Carter did not satisfy the *mens rea* element of the offense. In other words, he never *knowingly* possessed a controlled substance in Penalty Group 2-A. Somehow, without evidence, the court was able to conclude that each of the elements of the offense had been met.

In sum, the court below stretched the *Jackson* jurisprudence too far by applying it to highly technical elements of a statute. It relieved the State of its burden of proof. And there is no

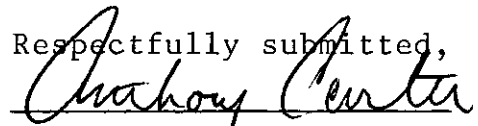
basis in caselaw to support the court's action. No court expects an ordinary juror to comprehend molecular chemistry. But that is the tacit assumption the court below made in affirming the court of appeals decision and Carter's conviction. Neither *Jackson* nor any other case supports extending the sufficiency doctrine so far.

CONCLUSION AND PRAYER FOR RELIEF

Anthony Carter prays that this Court grant this petition for a writ of certiorari to resolve the Question Presented.

Dated: August 9, 2021

Respectfully submitted,



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APPENDIX LIST

Appendix

Court of Criminal Appeals of Texas' Opinion.....	A
Seventh Court of Appeals' Memorandum Opinion.....	B
Judgment of Conviction by Jury.....	C