

FEB 22 2021

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NO. 21-5192

IN THE
SUPREME COURT OF THE UNITED STATES

GILBERTO ANTONIO GUILLEN-HERNANDEZ,
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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ORIGINAL

QUESTION PRESENTED

This Court recently recognized that the term "trial by an impartial jury," contained within the Sixth Amendment of the United States Constitution, requires jury unanimity. The Court further recognized that said requirement applies to state and federal criminal trials equally.

Petitioner was convicted of continuous sexual abuse by a jury that was not required to agree unanimously on which two or more specific acts of sexual abuse were committed by Petitioner or the exact date when those acts were committed. To date, the Court of Criminal Appeals of Texas has not written on the constitutionality of the statute that authorizes the jury to convict a defendant without unanimity.

This Court has not directly spoken on the constitutionality of continuous sexual abuse statutes that do not require a jury to unanimously agree on the particular acts of wrongdoing committed by a defendant.

This case, therefore, presents the following question:

Does the constitutional requirement of jury unanimity, contained within the Sixth Amendment of the United States Constitution, require a jury to be unanimous as to the specific acts of sexual abuse in order to convict a defendant of continuous sexual abuse?

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a Petition for Discretionary Review proceeding in which Petitioner, Gilberto Antonio Guillen-Hernandez, was the Appellant before the Court of Criminal Appeals of Texas. Mr. Guillen-Hernandez is a prisoner who was convicted of the offense of Continuous Sexual Abuse of a Child in the 458th Judicial District Court of Fort Bend County, Texas. The State of Texas was the Appellee before the Court of Criminal Appeals of Texas.

Mr. Guillen-Hernandez asks that the Court issue a Writ of Certiorari to the Court of Criminal Appeals of Texas.

RULE 29.6 STATEMENT

Gilberto Antonio Guillen-Hernandez, Petitioner, is not a corporate entity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gilberto Antonio Guillen-Hernandez respectfully petitions the Court for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas.

OPINIONS AND ORDERS BELOW

On November 25, 2020, the Court of Criminal Appeals of Texas issued a judgment refusing Mr. Guillen-Hernandez's Petition for Discretionary Review. The November 25, 2020, refusal is unpublished and attached hereto as Appendix A.

JURISDICTION

The Court of Criminal Appeals of Texas had jurisdiction over the Petition for Discretionary Review under Rule 68 of the Texas Rules of Appellate Procedure. The judgment of the Court of Criminal Appeals of Texas was entered on November 25, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Texas Penal Code § 21.02(d) provides that "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 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 of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by

law."

The Fourteenth Amendment to the United States Constitution provides that "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."

STATEMENT OF THE CASE

Petitioner was convicted of continuous sexual abuse by a jury that was authorized by state law to return a verdict of guilty without being unanimous on the *actus reus* element of the offense. It was alleged that Petitioner committed two or more acts of sexual abuse during a period that was 30 or more days in duration. Each alleged act of sexual abuse is a violation of the Texas Penal Code that when tried alone require jury unanimity. Under Texas' continuous sexual abuse statute, a jury is authorized to dispense with unanimity concerning the two or more acts of sexual abuse.

When this Court recently decided in *Ramos v. Louisiana*, 590 U.S. ___, 2020 WL 1906545 (April 20, 2020), that the term "trial by an impartial jury" within the Sixth Amendment requires jury unanimity, Petitioner's case was pending on direct appeal and not yet final.

Petitioner submitted the present issue to the Court of Criminal Appeals of Texas in his Appellant's Petition for Discretionary Review. The court considered the merits of Petitioner's petition and ultimately decided to refuse the petition.

REASONS FOR GRANTING THE PETITION

By denying Petitioner's Petition for Discretionary Review, the Court of Criminal Appeals of Texas has decided an important question of federal law that has not been, but should be, settled by the Court. The question is important, recurs frequently, and is perfectly presented on this record. The Court should grant certiorari to stop Texas' and other states' curtailment of defendants' constitutional right to a unanimous verdict.

I. The Question Presented is Important and Recurs Frequently.

The importance of this issue—whether the requirement of jury unanimity applies to the *actus reus* element for an offense of continuous sexual abuse—is self-evident. *See Ramos v. Louisiana*, 590 U.S. ___, 2020 WL 1906545 (April 20, 2020).

The Court touched on the issue of jury unanimity in continuous sexual abuse cases in *Richardson v. United States*, 526 U.S. 813, 816 (1999). In considering the jury unanimity requirements of a different state statute, the Court, by analogy, discussed the jury unanimity issues that have arisen in the context of continuous sexual abuse statutes adopted by various state legislatures. The Court noted that continuous sexual abuse statutes typically allow "jury disagreement about a 'specific' underlying criminal 'incident' insisting only upon proof of a 'continuous course of conduct' in violation of the law." 526 U.S. at 821. The Court observed that in doing so, the States were likely responding to the special difficulties inherent in proving the individual criminal acts in such cases, and that the special subject matter of such cases indicates that they represent an exception to the

general rule requiring a jury to unanimously agree on the particular acts of wrongdoing committed by a defendant. *Id.* at 821-23. In light of *Ramos v. Louisiana*, the Court's direct attention to the issue is now warranted.

Following a plea of not guilty, Gilberto Antonio Guillen-Hernandez, Petitioner, was convicted by a jury of one count of continuous sexual abuse of a child. Petitioner was sentenced to life imprisonment without the possibility of early release. By a single issue, Petitioner contends that Texas Penal Code § 21.02(d) violates the newly recognized constitutional requirement of a unanimous jury verdict.

A person commits the offense of Continuous Sexual Abuse of Young Child if during a period of 30 or more days in duration, a person who is age 17 or older commits two or more acts of sexual abuse against one or more victims who are under the age of 14. TEX. PEN. CODE § 21.02(b). Subsection (d) 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. TEX. PEN. CODE § 21.02(d).

There are more than 20 alleged acts of sexual abuse that qualify for prosecution in this case. These acts fall under Section 21.11, Indecency with a Child, Section 22.011, Sexual Assault, and Section 22.021, Aggravated Sexual Assault. TEX. PEN. CODE § 21.02(c). While jury unanimity is not required about the two or more specific acts committed for this particular offense, a lesser included offense conviction for a crime requiring a singular

act can only be had if the jury agrees unanimously to a specific act. *See Soliz v. State*, 353 S.W.3d 850, 854 (Tex.Crim.App. 2011). By charging a defendant with continuous sexual abuse, the prosecution bypasses the Sixth Amendment's requirement of jury unanimity.

In sum, allowing a jury to convict a defendant without being unanimous as to the specific acts of sexual abuse—the *actus reus* element of the offense—in a prosecution for continuous sexual abuse fails to ensure that the constitutional requirement of jury unanimity is fulfilled. Petitioner's conviction by a nonunanimous jury violates his right to a jury trial, as guaranteed by Amendments VI and XIV to the United States Constitution.

As a result, Petitioner respectfully suggests that some guidance from the Court is warranted.

CONCLUSION AND PRAYER FOR RELIEF

Gilberto Antonio Guillen-Hernandez prays that the Court grant this petition for a writ of certiorari to resolve the Question Presented.

Dated: February 12, 2021.

Respectfully submitted,



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