

21-5299 ORIGINAL
No. _____

FILED
JUL 22 2021

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN JOHNSON, JR. — PETITIONER
(Your Name)

vs.

THE STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE TEXAS COURT OF CRIMINAL APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

John Johnson, Jr.
(Your Name)

Robertson Unit #2272908

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(Address)

Abilene, Texas 79601

(City, State, Zip Code)

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QUESTION(S) PRESENTED

Does Texas Penal Code §21.02 discriminate who is and who is not protected under the Equal Protection Clause under the Fourteenth Amendment by allowing factfinders to not unanimously decide on all elements to commit an offense under the said statute but must agree on all elements to convict another of any other offense in Texas?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- John Johnson, Jr. v. State of Texas, No. 11-19-00218-CR, Eleventh District Court of Appeals for Texas, Judgment entered February 11th, 2021
- John Johnson, Jr. v. State of Texas, No. PD-0164-21, Texas Court of Criminal Appeals, Judgment entered May 19th, 2021.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

[x] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the Eleventh District Appellate court appears at Appendix A to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[x] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was May 19th, 2021. A copy of that decision appears at Appendix C.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE III

Article III, Section 2 of the U.S. Constitution: "of the trial of Crimes, except in Cases of Impeachment, shall be by Jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as Congress may by Law have directed.

Amendment VI of the U.S. Constitution: "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..."

Amendment XIV, Section 1 of the U.S. Constitution: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any State deprive a 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.

Texas Code of Criminal Procedure, article 36.29(a) - "Not less than twelve jurors can render and return a verdict in a felony case. It must be concurred in by each juror and signed by the foreman. Except as provided in Subsection (b), however, after the trial of any felony case begins and a juror dies or, as determined by the judge, becomes disabled from sitting at any time before the charge of the court is read to the jury, the remainder of the jury shall have the power to render the verdict; but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it."

Texas Penal Code §21.02, Continuous Sexual Abuse of Young Child or Children-

- (a) In this section, "child" has the meaning assigned by Section 22.01(c).
- (b) A person commits an offense if:
 - (1) 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; and
 - (2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 17 years of age.
- (c) For purposes of this section, "acts of sexual abuse" means any act that is a violation of one or more of the following penal laws:
 - (1) aggravating kidnapping under Section 20.04(a)(4), if the actor committed the offense with the intent to violate or abuse the victim sexually;
 - (2) indecency with a child under Section 21.11(a)(1), if the actor committed the offense in a manner other than touching, including touching through clothing, the breast of a child;
 - (3) sexual assault under Section 22.011;
 - (4) aggravated sexual assault under Section 22.021;
 - (5) burglary under Section 30.02, if the offense is punishable under Subsection (d) of that section and the actor committed the offense with the intent to commit an offense listed in Subsections (1)-(4);
 - (6) sexual performance by a child under Section 43.25;
 - (7) trafficking of person under Section 20A.02(a)(7) or (8); and
 - (8) compelling prostitution under Section 43.05(a)(2).
- (d) If a jury is the trier of fact, members of the jury are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact

date when those acts were committed. The jury must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse.

(e) A defendant may not be convicted in the same criminal action of an offense listed under Subsection (c) the victim of which is the same victim as a victim of the offense alleged under Subsection (b) unless the offense listed in Subsection (e):

- (1) is charged in the alternative;
- (2) occurred outside the period in which the offense under Subsection (b) was committed; or
- (3) is considered by the trier of fact to be a lesser included offense alleged under Subsection (b).

(f) A defendant may not be charged with more than one count under Subsection (b) if all of the specific acts of sexual abuse that are alleged to have been committed against a single victim.

(g) It is an affirmative defense to prosecution under this section that the actor:

- (1) was not more than five years older than:
 - (A) the victim of the offense, if the offense is alleged to have been committed against only one victim; or
 - (B) the youngest victim of the offense, if the offense is alleged to have been committed against the victim;
- (2) did not use duress, force, or a threat against a victim at the time of the commission of any of the acts of sexual abuse alleged as an element of the offense; and
- (3) at the time of the commission of any of the acts of sexual abuse alleged as an element of the offense:
 - (A) was not required under Chapter 62, Code of Criminal Procedure, to register for life as a sex offender, or
 - (B) was not a person who under Chapter 62 had a reportable conviction or adjudication for an offense under

for an offense under this section or an act of sexual abuse as directed by Subsection (c).

(h) An offense under this Section is a felony of the first degree, punishable by imprisonment in the Texas Department of Criminal Justice for life, or for any term not more than 99 years or less than 25 years.

STATEMENT OF THE CASE

On August 9th, 2018, Petitioner John Johnson, Jr. was indicted by the Taylor County Grand Jury in cause number 21,463-B (C.R. at 5-6). Count 1 of the indictment alleged that engaged in continuous sexual assault of two children under the age of 14 (M.J and I.J.), and alleging that this conduct occurred during a period that was thirty or more days in duration from on or about September 1st, 2007 through on or about April 1st, 2018 (C.R. pg.5).

Count 2 of the indictment alleged that in November of 2015, Petitioner engaged in sexual intercourse with his [adult] step-daughter, M.J. (C.R. at 6). Both counts also alleged prior felony convictions of the Petitioner. (C.R. pgs.5-6)

On June 17th, 2019, Petitioner pleaded guilty to count 2 of the indictment (R.R. Vol.2 pg.5). On that same day, Petitioner was tried before a jury for Count 1 of the indictment in the 104th District Court of Taylor County, T.x. (R.R.Vol.2Pg.10). The jury convicted the petitioner of continuous sexual assault of a child under 14 years of age. (C.R. pg.28). On June 19th, 2019, the trial court assessed punishment on both at 35 years confinement in the Texas Department of Criminal Justice- Institutional Division, (C.R.pgs.39,48),(R.R.Vol.5pg.5).

On July 5th, 2019, Appellants pro se Notice of Appeal was filed with the Trial Court. The Appellant timely drew up 3 grounds for an Appeal:

Issue I - The trial courts jury instructions applied section 21.02(b) with respect to the 30-day "continuous" requirement by permitting the submission of the two separate victim offenses when both alleged victims were not under the age of 14 at the same time.

Issue II - The evidence is insufficient to support a finding that Appellant engaged in sexual intercourse with M.J. when she was under 14 years of age.

Issue III - Appellant trial counsel rendered ineffective assistance he failed to object to the error-

eous jury charge and in failing to challenge section 22.02(b) as unconstitutional vague.

The Petitioner argument for the Third ground on Appeal raised *prima facie* to this unconstitutional concern, in accordance to State precedent, *Robinson v. State*, 16 S.W.2d 809(Tex.Crim.App. 2000).

Some of the concerns and theories set forth in the 1st ground (can a person be tried with such charge when one of the two victims was not even born/alive during the alleged first offense) are tied over to the third ground, the real crux of this petition is the jury instruction, in general, to Texas Penal Code 21.02, ~~where~~ where it is not required for a jury to be unanimous that any alleged offense occurred, only that they be unanimous that any believe occurred are 30 or more days apart.

In the Petitioner's direct appeal, he raised, vaguely, this unconstitutional discretion towards the jury and his trial counsel failed to object to the court for allowing such an abuse of justice to take place. He states in his Appellate brief:

"From the jury charge, it is impossible to determine if the jury convicted Appellant on any combination of findings between the constitutionally impermissible (allegations regarding I.J.) and the legally insufficient. Additionally, the prosecution argued for such a verdict:

You have to be unanimous that two or more things happened and that they happened 30 days apart, but someone can believe, 'I believe all things happened to M.J.', 'I believe all things happened to M.J. and something happened to [I.J.]', 'I think one thing happened to [I.J.] and one thing happened to M.J., but I think they were 30 days apart, ', 'Thats fine, and its continuous.' (R.R.Vol.4pg.121).

Therefore, the verdict in the case at bar being general in nature, and being incapable of determining upon which specific finding the jury convicted the Appellant. The

only proper remedy is that this case be reversed and remanded for "new trial. See *Fraser*, 523 S.W.3d at 336."

The Eleventh District Court of Appeals in Eastland, Texas on February 4th, 2021 affirmed the Petitioner's direct appeal on the basis that, though the trial court could not show the Petitioner did have sexual intercourse with M.J. prior to her turning 14, which was in the charge to the jury, the Petitioner did not challenge the other two accusations against M.J.; however, those two charges were about specific acts done unto M.J. while she was under the age of 17 not 14 years as is required under the continuous statute.

Also, the Texas Court of Appeals ruled that the Penal Code 21.02 is not unconstitutional and affirmed his conviction.

The Petitioner filed for a Petition for Discretionary Review and raised several concerns for consideration to review his appeal:

Ground One - Is it not unconstitutional to convict someone when the language in the charging instrument alleges offenses that cannot reasonably be used to convict that person of a specific crime, namely Penal Code 21.02(b)?

Ground Two - In belief that ground one is unconstitutional, then was the Petitioner's trial counsel ineffective for not objecting to the jury instruction pertaining to the vagueness of penal code 21,02(b) as it was applied to this case?

The Petitioner did raise the issue where the State of Texas decision to allow this unconstitutional practice of convicting people of continuous sexual abuse under Texas Penal Code §21.02 and it sets an unreasonable precedent that sanctions the convictions of such an offense and will impact the jurisprudence of the State and defendants as a class, and also how the State does not require that the jury have to unanimously decide on any alleged incident of sexual abuse, only that any two, or more, alleged

incidents happened 30 days or more in durations. (PDR, pg.3)

The Petition was refused on May 19th, 2021. No rehearing was filed. The Petitioner took his cause to the highest Stae Court and was denied relisf. The Petitioner now takes his complaint to this Court.

REASONS FOR GRANTING THE PETITION

The Petitioner believes the State of Texas is sanctioning, within its jurisdiction, an unconstitutional statute, which discriminates against those charged with Texas Penal Code §21.02 whereas all the other statutes of the Texas Penal Code do require complete unanimity. The Petitioner is addressing this issue because it is unconstitutional as it violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the trial by impartial jury clause of the Sixth Amendment. The Petitioner is asking this Court to decide as to whether or not this malpractice is unconstitutional.

The State Appellate Courts have recognized federal statutes and U.S. Supreme Court precedents addressing such issues as presented herein; however, Texas legislature and district courts believe they are within compliance with federal standards, that they are fair and impartial. Yet, Texas Penal Code §21.02 is anything but impartial and fair to those who are charged with such an offense. And more and more Texans are being convicted with this offense day by day.

How can Texas legislators be permitted to uphold such a statute where a jury is not required to be unanimous in determining any specific offense to have occurred (but must with any other statute) just that whichever each juror believes to have happened to have occurred 30 or more days apart?

Texas laws do state that all jurors are to be unanimous, as laid out in Texas Code of Criminal Procedure 36.29(a), as well as Texas Penal Code §2.01:

"All persons are presumed innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt...."

There are also precedents set forth in Texas upholding such standard, such as Johnson v. State, 673 S.W.2d 190 (Tex.Crim.App. 1984), as well as federal precedents, like Ramos v. Louisiana, 140 S.Ct. 1390 (2020). and Richardson v. U.S., 119 S.Ct. 1707 (1999).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jahr Jahn, Jr.
Date: 22nd of July, 2021