

No. **21-7537**

Supreme Court, U.S.  
FILED

JAN 19 2022

OFFICE OF THE CLERK

\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

LEONARDO GUTIERREZ — PETITIONER  
(Your Name)

vs.

STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Leonardo Gutierrez #2282972

(Your Name)

Robertson Unit, 12071 F.M. 3522

(Address)

Abilene, Texas 79601

(City, State, Zip Code)

N/A

(Phone Number)

**ORIGINAL**

## QUESTION(S) PRESENTED

### ISSUE ONE:

Whether, in light of Ramos v. Louisiana, Texas Penal Code §21.02 is unconstitutional on its face?

### ISSUE TWO:

Whether a trial court has jurisdiction to render a Penal Code unconstitutional on its face; and thus a Defendant should not be required to raise a frivolous objection in order to preserve a facial constitutional challenge on direct appeal?

### ISSUE THREE:

Whether the trial court is required to conduct a hearing out of the presence of the jury to determine the admissibility of extraneous offense evidence, or is a brief statement on the record regarding the anticipated testimony sufficient?

## 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

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## TABLE OF AUTHORITIES CITED

### CASES

### PAGE NUMBER

Jacobsen v. State, 352 S.W.3d 733 (Tex. App. - Austin 2010)  
Ramos v. Louisiana, 140 S.Ct. 1390 (April 2020)  
Richardson v. U.S., 119 S.Ct. 1707 (1999)

### STATUTES AND RULES

Texas Penal Code §21.02  
Texas Code Criminal Procedure, art. 31.04  
art. 38.22 §6  
art. 38.37 §2(a)  
art. 38.37 §2(b)

### OTHER

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☐ is unpublished.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.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A 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 Texas Court of Appeals court appears at Appendix B to the petition and is

- ☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ 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 27<sup>th</sup> Oct 2021.  
A copy of that decision appears at Appendix A.

☐ 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**

U.S. CONST. amend, VI

U.S. CONST. amend. XIV

Texas Penal Code §21.02

Texas Code Criminal Procedures §38.37



## **STATEMENT OF THE CASE**

The State of Texas charged Petitioner by indictment with Continuous Sexual Abuse of a Child. Petitioner pled not guilty, and the case was presented to a jury.

The jury returned a guilty verdict, and assessed sentence at 33 years confinement without the possibility of parole.

Petitioner filed a written notice of appeal on the same day, however the Court of Appeals affirmed his conviction on July 13, 2021.

Petitioner did not file a motion for rehearing. He instead filed a Petition For Discretionary Review to the Texas Court of Criminal Appeals presenting the questions before this Court. Petitioner's PDR was refused on October 27, 2021.

Petitioner now seek Certiorari from this Honorable Court.

## REASONS FOR GRANTING THE PETITION

### ISSUE ONE:

Whether, in light of Ramos v. Louisiana, Texas Penal Code §21.02 is unconstitutional on its face?

The Texas Court of Criminal Appeals has decided a legal question of constitutional magnitude that conflicts with this Court's recent holding in Ramos v. Louisiana, 140 S.Ct. 1390 (April 2020) that an unanimous verdict is required to convict in state court.

Petitioner urges that the holding in Ramos warrants this Court to address the constitutionality of Texas Penal Code §21.02 [Continuous Sexual Abuse].

Petitioner contends that by failing to require jury unanimity as to the specific acts of sexual abuse committed by the accused, Section 21.02, on its face, violates the right to an unanimous jury verdict guaranteed by the United States Constitution, and now this Courts holding in Ramos.

For the same reason, Petitioner urges that Section 21.02 requires a burden of proof which is less than beyond a reasonable doubt and denies Due Process of Law on itsr face.

Texas Penal Code §21.02(c) defines the offense of Continuous Sexual Abuse inbterms of multiple violations of other penal codes. See, Jacobsen v. State, 325 S.W.3d 733 (Tex. App. - Austin 2010). Specifically it defines an 'act of sexual abuse' as "anytact that is a violation of one or more of the following penal laws" - 20.04(a)(4); 21.11(a)(1); 22.011; 22.021; 30.02; or 43.25.

Therefore, §21.02(c) essentially defines what constitutes the actus reus for Continuous Sexual Abuse of a Child. Petitioner asserts that because §21.02 defines the offense in terms of multiple violations of other penal codes, the elements of those violated penal laws inherently become elements to establish a series of "acts of sexual abuse".

However, under §21.02(d) "the jury are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant".

Petitioner asserts that in light of Ramos this renders §21.02 unconstitutional on its face because it essentially relieves the State of proving a reasonable doubt the actus reus element of the acts of sexual abuse listed in §21.02(c) and the jury need not agree unanimously as to the acts committed by a Defendant.

Texas courts have previously held in the past that the multiple violations of other penal codes listed in §21.02(c) are merely the "manner or means" of the offense and not the necessary elements to be proven or agreed upon unanimously.

However, when interpreting statutes, courts look first to the language. Richardson v. U.S., 119 S.Ct. 1707 (1999). Petitioner Gutierrez avers that the plain language of the statute itself does not support the "manner or means" conclusion. In both §21.02(g)(2)&(3) the Texas Legislature included the phrase "the commission of any of the acts of sexual abuse alleged as an element of the offense".

This clearly demonstrates that the legislature intended the acts of sexual abuse to be the "elements of the offense" - not merely the manner or means.

For these reasons, Petitioner urges this Court to address whether Texas Penal Code §21.02 is constitutional in light of this Court's recent holding in Ramos.

#### ISSUE TWO

Whether a trial court has jurisdiction to render a Penal Code unconstitutional on its face; and this a Defendant should not be required to raise a frivolous objection in order to preserve a facial constitutional challenge on direct appeal?

The Texas Courts held that Petitioner could not raise a facial challenge to the constitutionality of Texas Penal Code §21.02 because he did not object in the trial court in order to preserve the issue on direct appeal.

Petitioner asserts that if the trial court can not render a statute unconstitutional on its face, he should not be required to raise a frivolous objection to preserve a facial constitutional challenge on direct appeal.

### ISSUE THREE:

Whether the trial court is required to conduct a hearing out of the presence of the jury to determine the admissibility of extraneous offense evidence, or is a brief statement on the record regarding the anticipated testimony sufficient?

This issue raises a question about what constitutes a sufficient hearing pursuant to Tex. Code Crim. Proc., art. 38.37 §2(b) to determine the sufficiency of evidence that the defendant has committed a separate offense beyond a reasonable doubt, and thus is admissible at trial as an extraneous offense.

Article 38.37 permits the admission of "evidence that the defendant has committed a separate offense... for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant"

Before such evidence may be introduced, the trial court must:

- 1) determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt; and,
- 2) conduct a hearing out of the presence of the jury for that purpose.

In the case at hand, the trial court held a very brief 'hearing' on the extraneous offense evidence, however the hearing simply consisted of the State's proffer of the anticipated evidence - nothing more.

The Texas courts held that a brief statement on the record regarding the anticipated testimony was sufficient to inform the trial court of the nature of the evidence the witness would present.

Petitioner avers that the trial court failed to comply with the procedural requirement of article 38.37 §2(a) and thus not only abused its discretion in admitting ~~sitting~~ the extraneous evidence but also violated the Due Process Clause of the 14th Amendment.

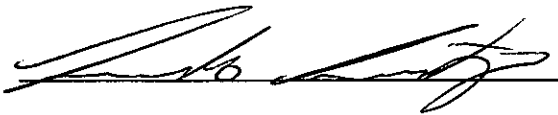
Petitioner asserts that if only a brief proffer of anticipated testimony is necessary, then such would render the hearing requirement superficial and meaningless. In every trial where a defendant stands accused of a sex offense, the State's proffered testimony of an alleged extraneous offense victim will ALWAYS be held to be admissible since, in Texas, a victim's testimony alone is sufficient to establish the offense beyond a reasonable doubt.

Petitioner urges that like articles 38.22 §6 and 31.04 there must be a more evaluative inquiry to adequately draw the judicial conclusion about the legal sufficiency of extraneous evidence. Without such an inquiry, the hearing requirement of 38.37 becomes a meaningless rubber-stamp procedure that can not effectively determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "L. B. Smith", written over a horizontal line.

Date: 18th January 2022