

Jose Antonio Cortez,
Petitioner,

v.

The State of Texas,
RESPONDENT.

BEFORE THE

UNITED STATES SUPREME COURT

PETITIONER'S PETITION FOR REHEARING

May It Please The Court:

COMES NOW, Jose Antonio Cortez, hereinafter referred to as the Petitioner in the above-entitled and numbered styled case, and in propria persona, pursuant to Rule 44(2) of the Supreme Court Rules, files and tenders this, his Petition for Rehearing of the Order entered on June 23, 2025, denying the Petitioner's Petition for Writ of Certiorari to the Texas Court of Criminal Appeals in Case No. #WR-87,766-06, Styled: Ex Parte Jose Antonio Cortez, and for cause will advance the following, to-wit:

I. PROVISIONAL STATEMENT.

Petitioner states that the Grounds set forth herein are limited to intervening circumstances of a substantial or controlling effect.

Petitioner states that the Grounds presented are non-frivolous and arguable claims that have basis in law and facts to support a rehearing of the Court's order denying certiorari in this case.

Further, the decisional law of this Court clearly indicates that there is a reasonable likelihood of the Court's reversing

its previous decision denying a writ of certiorari in this case if the Court chooses to follow the law.

Also, Petitioner's petition for rehearing provides an efficient mechanism by which the Court can correct an otherwise erroneous decision and/or determination of the case, which enables the Court to reconsider the validity of the decision and/or determination and to vacate or alter as fit and valid under the law and facts of the case, and to correct manifest errors of law or facts, or to prevent a manifest of injustice.

II. GROUNDS AND ARGUMENT.

Petitioner states that the Court has failed to consider controlling decisions of this Court or factual matters put before it, which had they been considered, might reasonably have led to a different result. There has been so much confusing generated by the judiciary in its judicial reasoning and authority to accommodate the government rather than promote the fair administration of justice.

GROUND No. 1:

Whether or not the Court sees it that way, Petitioner states that there is an intervening circumstance of a substantial or controlling effect, although this terminology has not been specifically defined by this Court, that the application of decisional law from this Court that favors the Petitioner in his quest for relief under *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) that requires the State of Texas to give retroactive effect to the new substantial rule of law handed down by this

Court in its decision delivered in *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020) requiring an unanimous jury verdict as part of a criminal defendant's right to trial by jury under the 6TH Amendment to the United States Constitution, that was not recognized as a constitutional protected right for a State criminal defendant until this Court's decision in *Ramos*.

Petitioner was not allowed to raise this issue before a federal court as a constitutional claim in a federal habeas proceeding because the claim of being deprived of a unanimous jury verdict was not a recognized constitutional right subject to federal habeas relief until after the *Ramos* decision.

Under the *Ramos* decision, the failure to provide a criminal defendant with a Jury Charge that provides for a unanimous jury verdict would clearly be a finding, ~~upon the denial of~~ such a claim by a State court, that the State court determination resulted in a decision that involved an unreasonable application or is contrary to clearly established federal as determined by this Court in *Ramos*.

Petitioner understands that if the Constitution establishes a rule and requires that the rule have retroactive application, then a State court's refusal to give the rule retroactive effect is reviewable by this Court because the States may not disregard a controlling constitutional command in their own courts.

In *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), this Court recognized that the Constitution requires State collateral review court's to give retroactive effect to new substantive

rules.

In view of the Louisiana's collateral review procedures, this Court held that such review procedures are open to claims that a decision of this Court has rendered a constitutional violation.

In Ramos, this Court held that the 6TH Amendment right to a jury trial, as incorporated against the States by way of the 14TH Amendment, requires a unanimous verdict to convict a defendant of a serious offense. However, this Court did not define what a serious offense was. At the time of the adoption of the 6TH Amendment, the right to trial by jury included a right to a unanimous verdict, and it was not the court's role to reassess whether the right to a unanimous jury was important enough to retain. However, in Edwards v. Vannoy, 141 S.Ct. 1547 (2021), this Court held and made explicitly clear that the Ramos rule does not apply retroactively on "federal collateral review," and the States, if they chose to retroactively apply the jury-unanimity rule as a matter of State law in State post-conviction proceedings. The only choice remaining for the States is whether and how to apply the new rule of criminal procedure to cases on State collateral review.

Under Texas post-conviction proceedings, Article 11.07 et seq. of the Texas Code of Criminal Procedure provides the avenue for review claims upon which this Court has declared to be a constitutional right, and a violation of that right if not carried through by the States. However, the State of Texas

has fail to provide Petitioner relief upon his claim that he was deprived of his constitutional rights to a unanimous jury verdict. The picture is clear, and presents a non-frivolous claim, as the claim has an arguble basis in law and fact, and clearly demonstrates that the Petitioner is entitled to relief.

Following Texas decisional law, in Vick v. State, 991 S.W.2d 830 (Tex.Cr.App. 1999), the Texas Court of Criminal Appeals (TCCA) held that the Aggravated Sexual Assault Statute, Section 22.021 of the Texas Penal Code is a conduct-oriented statute because it uses the conjunctive "or" to distinguish and separate different conduct, and the various sections of the statute specifically define sexual conduct in ways that usually require different and distinct acts to commit. These consideration led the TCCA to conclude that the Texas legislature intended that each separately described conduct constitute a separate statutory offense.

Generally, instructing the jury on alternative theories of committing the same offense does not violate the unanimity requirement. However, charging on alternative theories, however, differs from charging on separate offenses involving separate incidents. The later runs afoul of the unanimity requirement. *Hendrix v. State*, 150 S.W.3d 839 (Tex.App. 14th Dist. 2004, pet. ref'd.).

In *Hendrix* the Jury Charge disjunctively submitted two (2) distince means of penetraion, and the court held that *Hendrix* was entitled to a unanimous jury verdict and that the trial

erred in submitting the Jury Charge in the disjunctive, because the erroneous Jury Charge made it possible for the jury to return less than an unanimous guilty verdict, and the error was harmless.

The Petitioner is in the same position and circumstances as enumerated in Henderix, that the Court has apparently overlooked.

Petitioner was charged by way of an Indictment with the offense of Aggravated Sexual Assault in Count I; by causing the penetration of the female sexual organ with his male sexual organ; and by causing the penetration of the Anus with his male sexual organ.

The jury was instructed that they could find the Petitioner guilty of Aggravated Sexual Assault if they found beyond a reasonable doubt, that he cause the penetration of the female sexual organ with his male sexual organ "or" caused the penetration of the anus with his male sexual organ. The jury charge allowed the submission of two (2) distinct offenses in the disjunctive.

Here, six (6) members of the jury could have voted to find Petitioner guilty of aggravated sexual assault by causing the penetration of the female sexual organ with his male sexual organ, and six (6) members of the jury could have voted to find Petitioner guilty of aggravated sexual assault by causing the penetration of the anus with his male sexual organ. The jury was never instructed that they had to be unanimous on each one of the offense submitted.

Under the record, Petitioner was deprived of his constitutional

to a unanimous jury verdict

Neither this Court or the State can muster any authority that demonstrates that Petitioner was not deprived of his right to a unanimous jury verdict. Rather, than demonstrate such, the Court rather dispense with the matter by denying certiorari.

By virtue thereof, rehearing should be granted to prevent a fundamental miscarriage of justice.

GROUND No. 2:

Petitioner states that there are intervening circumstances of a substantial or controlling effect that justifies the application of the established Double Jeopardy Doctrine where its interest in protection has to yield where the interests of justice would make it unfair and a travesty to forego its application.

The protection afforded by the Double Jeopardy Clause has a legal and controlling effect that should not simply be casted away upon judiciary review absent a thorough review of the claim.

Nonetheless, where the Double Jeopardy Clause is applicable, its sweep is absolute. There are no "equities" to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination. *Burks v. U.S.*, 98 S.Ct. 2141 (1978).

The Texas judiciary follows this Court's infamous "Blockburger Test." *Blockburger v. U.S.*, 52 S.Ct. 180 (1932). See., *Aekins v. State*, 447 S.w.3d 270 (Tex.Cr.App. 2014), the TCCA reaffirmed its decision in *Paterson v. State*, 152 S.W.3d 88 (Tex.Cr.App. 2004),

known as the "Incident to and Subsumed By" Doctrine, and reiterated that it was well grounded in the Fifth Amendment guarantee against Double Jeopardy, "that no person shall be subject for the same offense to be twice put in jeopardy of life or limb."

The Aekins court settled the fact that penetration without contact is next to impossible, and penetration without contact is impossible. A single act of penile penetration almost always consists of exposing the penis en route to contacting the vagina (or anus or mouth) with the penis, en route to penetration of the same with the penis. That one continuing act is the result of a single impulse. One cannot be committed without necessarily committing the other.

In the instant case, Petitioner was charged with the alleged offense of Aggravated Sexual Assault by (1) causing the penetration of the female sexual organ with his male sexual organ, and (2) causing the penetration of the anus with his male sexual organ. In a separate Count, Petitioner was charged with the alleged offense of Indecency with A Child By Contact, specifically by causing his male sexual organ to contact the female sexual organ. The offense was alleged to have occurred on a single date and was the result of a single impulse. Petitioner received a twenty (20) year sentence on the Indecency with A Child By Contact offense, and a forty-five (45) year sentence on the Aggravated Sexual Assault.

The Indecency offense was clearly subsumed by the Aggravated Sexual Assault Offense, thus, the conviction and punishment

imposed and assessed for the Indecency offense was jeopardy barred.

Therefore, Petitioner's constitutional rights to be free from jeopardy was clearly violated. There is nothing that this Court or the State can dispute about this matter, thus, this Court should reverse it's previous decision denying a certiorari in this case.

GROUND No. 3:

Petitioner states that the application of the Due Process Clause of the 14TH Amendment to the United States Constitution mandates in favor of the Petitioner that this Court take under consideration whether he can be unlawfully confined and illegally-restrained of his liberty by the State of Texas upon an instruction to the jury, that described an impossible act, that could not have been proven because the "act" was impossible to have been committed.

Petitioner cannot find any authority from this Court that specifically addresses this matter, nor is there any State authority that addresses this matter.

In the instant case, the jury was instructed that they could find the Petitioner guilty of aggravated sexual assault, if they found beyond a reasonable doubt, that the Petitioner caused the penetration of the female sexual organ by placing his male sexual organ in the anus of the alleged victim..

Clearly this is an impossible act, an act that could not have simply been committed and for which no reasonable jury

could have voted to convict the Petitioner had they properly followed the instruction given... Therefore, this Court should take this matter up and decide whether or not the Petitioner's conviction is valid under the Due Process Clause of the 14TH Amendment to the United States Constitution in the promotion of the fair administration of justice, and to prevent a fundamental miscarriage of justice.

III. PRAYER:

WHEREFORE, PREMISES CONSIDERED, and in the interest of justice, Movant respectfully moves and prays, that for the reasons set forth above and as demonstrated, it clearly indicates that this Court should grant a rehearing in this case, and grant certiorari in this case.

Accordingly Written. @

for H. Carter
/s/ Jose Antonio Cortez
11637 Kilkirk Lane
Dallas, Texas. 75228

Ph.: (210) 365-0185

Petitioner, In propria persona.

CERTIFICATION OF PARTY

I, Jose Antonio Cortez, do hereby certify that the foregoing Instrument and/or Pleading is restricted to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented in the petition, and is presented in good faith and not for delay.

/s/ 

Jose Antonio Cortez.

PROOF OF SERVICE

I, Jose Antonio Cortez, do swear or declare that on this date, July 07, 2025, as required by Supreme Court Rule 29, I have served the enclosed Petition for Rehearing on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by deliver to a third-party commercial carrier for delivery within 3 calendar days.

The names and address of those served are as follows:

Joe D. Gonzales
Criminal District Attorney
Bexar County
101 W. Nueva
San Antonio, Texas. 78205

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 07th day of July, 2025.

/s/ 
Jose Antonio Cortez.