

No. \_\_\_\_\_

**18-7967**

IN THE  
SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
JAMES DALTON SMITH

(Your Name)

PETITIONER

vs.

\_\_\_\_\_  
THE STATE OF TEXAS

— RESPONDENT(S)

ORIGINAL

ON PETITION FOR A WRIT OF CERTIORARI TO

\_\_\_\_\_  
TEXAS COURT OF CRIMINAL APPEALS

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

FILED  
JAN 24 2019  
OFFICE OF THE CLERK  
SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI

\_\_\_\_\_  
James Dalton Smith #2097680

(Your Name)

\_\_\_\_\_  
Robertson Unit, 12071 F.M. 3522

(Address)

\_\_\_\_\_  
Abilene, Texas 79601

(City, State, Zip Code)

\_\_\_\_\_  
n/a

(Phone Number)

## QUESTION(S) PRESENTED

1. Whether a criminal defendant may raise for the first time on direct appeal the constitutionality of the statute creating and defining the crime for which the defendant has been convicted - To wit, a facial challenge to a penal statute?
2. Whether the Texas 'Continuous Sexual Abuse of a child', Texas Penal Code § 21.02, is Unconstitutional?

## 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:

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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- is unpublished.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- is unpublished.

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- is unpublished.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   Fifth Court of Appeals of Texas   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- is unpublished.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 Nov 7th, 2018.  
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

### TEXAS PENAL CODE § 21.02 - CONTINUOUS SEXUAL ABUSE OF A CHILD:

- (a) In this section, "child" has the meaning assigned by Section 22.011(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 14 years of age.
- (c) For purposes of this section, "act of sexual abuse" means any act that is a violation of one or more of the following penal laws:
  - (1) aggravated 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 by 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 Subdivision (1)-(4);
  - (6) sexual performance by a child under Section 43.25;
  - (7) trafficking of persons 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 (c):



- (1) is charged in the alternative;
  - (2) occurred outside the period in which the offense alleged 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 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 more than one victim; or
    - (B) the youngest victim of the offense, if the offense is alleged to have been committed against more than one 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 this section or an act of sexual abuse as described 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 of not more than 99 years or less than 25 years.

**TEX. CODE CRIM. PROC., ART. 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.

**TEX. CONST. 1, §19:**

No citizen of this State shall be deprived of life, liberty, property, privilege or immunity, or in any manner disfranchised, except by the due course of law of the land.

**TEX. CONST. V, §13:**

Grand and petit juries in the District Courts shall be composed of twelve persons.

**U.S. CONST. AMEND VI:**

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, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

**U.S. CONST. AMEND XIV:**

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

A jury found Petitioner Smith guilty of Continuous Sexual Abuse pursuant to Texas Penal Code § 21.02, and two counts of indecency by sexual contact. At punishment the jury sentenced Petitioner to thirty years for the Continuous Sexual Abuse and four years on both indecency counts, with all sentences to run concurrently.

Petitioner's counsel did not object at trial to the constitutionality of Texas Penal Code § 21.02. On direct appeal Petitioner argued, among other things, that the Continuous Sexual Abuse statute is unconstitutional on its face. The Texas Court of Appeals held that Petitioner's failure to object in the trial court waived any appellate claim regarding the statute's constitutionality. The Court of Appeals overruled the claims and denied relief in an unpublished opinion issued on July 16th, 2018.

Petitioner filed a Petition For Discretionary Review to the Texas Court of Criminal Appeals on August 28th, 2018. Petitioner raised the question as to whether a facial challenge to a penal code must be objected to at trial and whether it can be raised for the first time on direct appeal. Petitioner also made a direct facial challenge to the constitutionality of Texas Penal Code § 21.02.

On November 7th, 2018, the Texas Court of Criminal Appeals refused his Petition For Discretionary Review.

Petitioner now files this Petition For Writ of Certiorari.

## REASONS FOR GRANTING THE PETITION

1. Whether a criminal defendant may raise for the first time on direct appeal the constitutionality of the statute creating and defining the crime for which the defendant has been convicted - To wit, a facial challenge to a penal statute?

Texas has decided an important question of federal law that has not been, but should be, settled by this Honorable Court [SUPREME COURT RULE 10(c)].

This question is of great national importance because it concerns a defendant's ability to raise a facial challenge to the constitutionality of a state penal code.

If this question is left unaddressed, criminal defendants whose attorneys do not preserve such a challenge in the trial court on pain of waiver could run the serious risk of being convicted and deprived of their liberty based upon an unconstitutional statute, with absolutely no meaningful way to challenge the trial courts jurisdiction to convict them under such.

The present case is ripe to address this question: Petitioner Smith was convicted under Texas Penal Code § 21.02 - however, his attorney did not challenge the constitutionality of this statute in the trial court. Instead he raised a facial challenge for the first time on direct appeal. Texas declared that Petitioner's failure to object in the trial court waived any appellate claim regarding the statute's constitutionality.

Petitioner Smith avers that when a statute criminalizing a defendant's conduct is necessary to the jurisdiction of the convicting court, he need not object in the trial court to preserve the facial challenge on appellate review.

Petitioner acknowledges that an "as applied" constitutional challenge must be preserved for appeal by first raising it at trial. The same is true for facial challenges to statutes creating procedural or evidentiary rules.

However, Petitioner argues that a facial challenge to a penal statute is fundamentally different from that of a facial challenge to a procedural statute or evidentiary rule. This is because a penal code affects the jurisdiction of the court, its authority, and its power to render judgment.

Thus jurisprudence dictates that this is an issue that should be addressed by appellate courts, even when such issues are raised for the first time on direct appeal.

If a statute giving rise to a prosecution is unconstitutional, it is void from its inception, is no law, confers no rights, bestows no power on anyone, and justifies no act performed under it. Requiring the defendant to preserve such a challenge in the trial court on pain of waiver could result in criminal convictions based upon an unconstitutional statute.

Therefore, this question is of great national importance and goes to the integrity of the Constitution.

Premises considered, Petitioner respectfully requests that this Honorable Court grant Certiorari and resolve this question.

2. Whether the Texas 'Continuous Sexual Abuse of a child', Texas Penal Code § 21.02, is Unconstitutional?

Texas has decided an important question of federal law that has not been, but should be, settled by this Honorable Court [SUPREME COURT RULE 10(c)].

Despite countless challenges to the constitutionality of Texas Penal Code § 21.02 since its inception in 2007, Texas courts have rejected all arguments that it violates the U.S. Constitution. To settle this matter once and for all, this Court should address the constitutionality of Texas Penal Code § 21.02.

Under the plain language of Texas Penal Code § 21.02, the offense of Continuous Sexual Abuse of a child has five elements:

- 1) a person;
- 2) who is 17 or older;
- 3) commits a series of two or more acts of sexual abuse;
- 4) during a period of 30 or more days; and
- 5) each time the victim is younger than 14.

See, Casey v. State, 349 S.W.3d 825 (Tex. App. - El Paso, 2011)

The Penal Code thus defines the offense of Continuous Sexual Abuse in terms of multiple violations of OTHER PENAL CODES. See, Jacobsen v. State, 325 S.W.3d 733 (Tex. App. - Austin 2010).

§ 21.02(c) specifically defines an 'act of sexual abuse' as "any act 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; 43.25; 20A.02(a)(7) or (8); or 43.05(a)(2).

Therefore, § 21.02(c) essentially defines what constitutes the ACTUS REUS element for Continuous Sexual Abuse.

Because § 21.02(c) defines the offense in terms of multiple violations of other penal laws, 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". This essentially relieves the State of proving beyond a reasonable doubt the Actus Reus element of the acts of sexual abuse listed in § 21.02(c).

Petitioner Smith contends that by failing to require jury unanimity as to the specific acts of abuse committed by the accused, Texas Penal Code § 21.02 on it's face violates the right to an unanimous jury verdict guaranteed by the U.S. and Texas Constitutions, as well as Texas Statute. See, U.S. Const. amends VI, XIV; Tex. Const. art V, § 13; Tex. Crim. Proc. art 36.29(a).

For the same reason, Petitioner urges that Texas Penal Code § 21.02 requires a burden of proof which is less than beyond a reasonable doubt, and denies due process and due course of law on it's face. See, U.S. Const. amend XIV; Tex. Const. art 1, § 19.

Premises considered, petitioner respectfully requests that this Honorable Court grant Certiorari and resolve this question once and for all. Thank you.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

*Jan D. Smit*

Date: 1-1-2019