

No. 24-7074

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

MIGUEL ANGEL ORTIZ,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent,

RECEIVED

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SUPREME COURT, U.S.

On Petition for a Writ of Certiorari to the
Thirteenth Court of Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

Miguel Angel Ortiz
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Beeville, TX 78102

I. Question Presented

Whether the language in a reoccurring jury instruction, upon which there is a split of authority, violates due process by failing to give effect to the requirement that the State must prove every element of the offense charged. *Sandstrom v. Montana*, 442 U.S. 510, 520-521, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979); U.S. Const. Amend. XIV; United States Supreme Court Rule 10(c).

LIST OF PARTIES

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

RELATED CASES

None.

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

Petition for Writ of Certiorari

Petitioner Miguel Angel Ortiz, an inmate currently incarcerated at the McConnell Unit in Beeville, Texas respectfully prays that writ of certiorari issue to review the judgment of the Thirteenth Court of Appeals of Texas.

OPINIONS BELOW

The unpublished opinion of the highest state court to review the merits appears at Appendix A to this petition and is reported at *Ortiz v. State*, No. 13-23-00082-CR, 2024 Tex. App. LEXIS 3216 (Tex. App.—Corpus Christi May 9, 2024, pet. ref'd)

JURISDICTION

The date on which the highest state court decided my case was on May 9, 2024. A copy of that decision appears at Appendix A.

A timely petition for discretionary review was thereafter denied by the Texas Court of Criminal Appeals on August 21, 2024, and a copy of the order refusing the petition for discretionary review appears at Appendix B.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), having timely filed/mailed this petition within 90 days of a petition for discretionary review refusal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

United States Constitution, Amendment XIV.

Texas Penal Code Sec. 21.02. Continuous Sexual Abuse.

(a) In this section:

- (1) "Child" has the meaning assigned by Section 22.011(c).
- (2) "Disabled individual" has the meaning assigned by Section 22.021(b).

(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) a child younger than 14 years of age, regardless of whether the actor knows the age of the victim at the time of the offense; or
 - (B) a disabled individual.

(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 Subdivisions (1)-(4);
- (6) sexual performance by a child under Section 43.25;
- (7) trafficking of persons under Section 20A.02(a)(3), (4), (7), or (8); and
- (8) compelling prostitution under Section 43.05.

(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 of the 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) With respect to a prosecution under this section involving only one or more victims described by Subsection (b)(2)(A), 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 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. Penal Code § 21.02

STATEMENT OF THE CASE

The Thirteenth Court of Appeals of Texas addressed and denied Ortiz' direct appeal regarding language in a jury charge that failed to give effect to an element of a charged offense resulting in a violation of Due Process. *Ortiz v. State*, No. 13-18-00614-CR, 2023 Tex. App. LEXIS 6647 (Tex. App.—Corpus Christi Aug. 28, 2023, *pet. ref'd*); U.S. Const. Amend. XIV (Appendix A, 1-6)

This Court has held that in a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement. *See Sandstrom v. Montana*, 442 U.S. 510, 520-521, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979); U.S. Const. Amend. XIV.

Nonetheless, not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is "whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process."¹ *Estelle v. McGuire*, 502 U.S. 62, 72, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991) (*quoting Cupp v. Naughten*, 414 U.S. 141, 147, 38 L. Ed. 2d 368, 94 S. Ct. 396 (1973)).

The present question is whether the language in a reoccurring jury instruction, upon which there is a split of authority, violates due process by failing to give effect

¹ No such analysis was conducted in the present case.

to the requirement that the State must prove every element of the offense charged.

In short, to obtain a conviction for continuous sexual abuse of a child, as Ortiz was charged, the State must show, in relevant part, that the defendant committed at least two acts of sexual abuse against a child younger than 14 years of age during a period of at least 30 days' duration. *Ramos v. State*, 636 S.W.3d 646, 651 (Tex.Crim.App. 2021) (citing Tex. Penal Code Ann. § 21.02(b)).

To satisfy the thirty day requirement element, the proof must establish "there [were] at least 28 days between the day of the first act of sexual abuse and the day of the last act of sexual abuse." *Smith v. State*, 340 S.W.3d 41, 51 (Tex. App.—Houston [1st Dist.] 2011, no pet.)

Here, the jury was charged as follows:

Now if you find from the evidence beyond a reasonable doubt that the Defendant, Miguel Angel Ortiz[,] did then and there, in Hidalgo County, Texas, *during a period that was 30 or more days in duration, to-wit: from on or about the 1st day of January, 2012, to on or about the 30th day of September, 2016*, when the defendant was 17 years of age or older, *committed two or more acts of sexual abuse* against VERONICA, a pseudonym, a child younger than 14 years of age, namely aggravated sexual assault of a child and indecency with a child, then you will find the Defendant guilty of the offense of Continuous Sexual Abuse of a Child as charged in this indictment. (Emphasis Added)

Ortiz v. State, No. 13-23-00082-CR, 2024 Tex. App. LEXIS 3216, at *4 (Tex. App.—Corpus Christi May 9, 2024, pet. ref'd)(Appendix A, 2-3)

The italicized portion is central to the issue presented especially when

combined with "on or about" language regarding the date of offense.

The phrase, "*during a period that was 30 or more days in duration, to-wit: from on or about the 1st day of January, 2012, to on, or about the 30th day of September, 2016*", eliminated the penal code element that at least 28 days passed between the day of the first act of sexual abuse and the day of the last act of sexual abuse. See Tex. Penal Code § 21.02(b); See *Smith v. State*, 340 S.W.3d 41, 51 (Tex. App.—Houston [1st Dist.] 2011, *no pet*) (interpreting this language to mean "there is at least 28 days between the day of the first act of sexual abuse and the day of the last act of sexual abuse."

For example, in *Smith v. State*, the First Court of Appeals determined that a charge was erroneous when it stated that the jury could convict the appellant if it determined that, "on or about the 1st day of December, 2007, through the 1st day of September, 2008, which said time period being a period that was 30 days or more in duration, in Brazoria County, Texas, the defendant, Jesse James Smith, committed two or more acts of sexual abuse." *Id.* at 50.

The First Court explained

The precise phrasing in the application paragraph *does not specifically require* a finding that the last act of sexual abuse occurred on at least the 29th day after the day of the first act. Rather, it allows a finding of guilt if two or more acts of sexual abuse occurred "on or about the 1st day of December, 2007, through the 1st day of September, 2008, which said time period being a period that was 30 days or more in duration." *This instruction lacks clarity*² in that, read

²Herein it is argued that such an instruction does not lack clarity. It eliminated an element of the offense.

literally, it allowed the jury to find appellant guilty so long as two or more acts of sexual abuse occurred between December 2007 and September 2008 regardless of whether the acts occurred at least 30 days apart. Thus, *for example*, if the jury had found beyond a reasonable doubt that during the first week in August 2008, appellant committed two acts of sexual abuse against the complainant, the application paragraph read literally would have allowed the jury to convict even though the acts would not have occurred at least 30 days apart. The application paragraph of the charge is erroneous because it does not specifically require that the jury determine that two or more acts of sexual abuse occurred during a period at least 30 days in duration—i.e., that there is at least 28 days between the day of the first act of sexual abuse and the day of the last act of sexual abuse.

Id. at 50-51.

Similarly, the Fourteenth Court of Appeals in *Pelcastre v. State* ultimately found the following jury charge to be in error:

Now, if you find from the evidence beyond a reasonable doubt that in Harris County, Texas, *the defendant, Esteban Pelcastre, theretofore on or about the 12th day of December, 2017 through on or about the 16th day of March, 2018, did then and there unlawfully, during a period of time of thirty or more days in duration, commit at least two acts of sexual abuse against a child younger than fourteen years of age including an act constituting the offense of aggravated sexual assault of a child, committed against [complainant] on or about December 12, 2017, and an act constituting the offense of aggravated sexual assault of a child, committed against [complainant] on or about March 16, 2018, and the defendant was at least seventeen years of age at the time of the commission of each of those acts, then you will find the defendant guilty of continuous sexual abuse of a child, as charged in the indictment.*

654 S.W.3d 579, 586 (Tex. App.—Houston [14th Dist.] 2022, no pet. h.)

While going over the same principle noted in the *Smith* case, the *Pelcastre* court noted how “the error in *Smith* was more egregious than in the case before them. In *Smith*, the language at issue “which said time period being a period that was 30 days or more in

duration" clearly *modified* the period of time in the indictment. *Pelcastre v. State*, 654 S.W.3d 579, 587 (Tex. App.—Houston [14th Dist.] 2022, pet. ref'd) (Emphasis added)

The jury charge in the present case was erroneous because it eliminated an element of the offense. It instructed the jury to convict Ortiz on a finding that two or more acts of sexual abuse occurred at any time over a period that was more than 30 days in duration, regardless of whether the acts themselves were separated by the time period required by the statute/basically, a non-offense. TRAP 21.3 (h), U.S. Const. Amends. V, VI, XIV, Art. 1 Sec. 10 Tex. Const.

In fact, one court of appeals, in going through the above noted analysis has found the "to wit" language, as used here, to be in error in an unpublished opinion.

In *Lewis v. State*, the application paragraph in the jury instructions provided:

Now bearing in mind the foregoing instructions, if you believe from the evidence beyond a reasonable doubt, that defendant, Quartshezz Lewis, did then and there, *during a period that was 30 or more days in duration, to-wit: May 15, 2013[,] and continuing until on or about September 30, 2014*, in Bowie County, Texas, committed two or more acts of sexual abuse against [A.B.] (a pseudonym), a child younger than 14 years, namely, Aggravated Sexual Assault of a Child, the defendant did then and there intentionally or knowingly cause the penetration of the sexual organ of [A.B.] (a pseudonym), a child who was then and there younger than 14 years of age, by the defendant's finger; Indecency with a Child by Sexual Contact, with intent to arouse or gratify the sexual desire of the defendant, engage in sexual contact with [A.B.] (a pseudonym), by touching the genitals of [A.B.] (a pseudonym), a child who was then and there younger than 17 years of age, then you will find the Defendant guilty of the offense of Continuous Sexual Abuse of a Child as charged in the indictment.

Lewis v. State, No. 06-21-00021-CR, 2022 Tex. App. LEXIS 1536, at *13-15 (Tex. App.—Texarkana Mar. 4, 2022, pet. ref'd), (unpublished) cert. denied, 143 S. Ct. 740 (2023)

Turning to the current opinion, the opinion notes:

Last term, in *Chavez v. State*, No. 13-22-00551-CR, 2023 Tex. App. LEXIS 6533, 2023 WL 5486232, at *2-4 (Tex.App.—Corpus Christi—Edinburg Aug. 24, 2023, *no pet.*) (mem. op., not designated for publication), we considered the same challenges to a virtually identical jury charge and found no error. This term, in *Perez v. State*, No. 13-22-00292-CR, --- S.W.3d ----, 2024 Tex. App. LEXIS 1284, 2024 WL 715326, at *5-7 (Tex. App.—Corpus Christi—Edinburg Feb. 22, 2024, *no pet.*), we were again confronted with a virtually identical jury charge and found no error. *But see id.* at *9-11 (Contreras, C.J., concurring) (*finding* error because the statutory language "does not sufficiently inform the jury of the requirement" "that there must be 'at least 28 days' between the days of the first and last acts of abuse," but ultimately concluding the error was harmless); *Turner*, 573 S.W.3d at 462-63 (finding a charge that tracked the statute to be erroneous because "the express language used does not make it clear that the first and last acts must occur thirty or more days apart"). We are bound by the principle of horizontal *stare decisis* to once again conclude that the statutory language in this jury charge was sufficient to inform the jury about the contours of the duration element. *See Mitschke v. Borromeo*, 645 S.W.3d 251, 257 (Tex. 2022) ("If one appellate panel decides a case, and another panel of the same court differently resolves a materially indistinguishable question in contravention of a holding in the prior decision, the second panel has violated the foundational rule of *stare decisis*.").

Ortiz v. State, No. 13-23-00082-CR, 2024 Tex. App. LEXIS 3216, at *7 (Tex. App.—Corpus Christi May 9, 2024, *pet. ref'd*)(Appendix A, 4)

The current opinion plainly notes there is a split in panels in the Thirteenth Court of Appeals on a materially indistinguishable question. But, not only is there a split in the Thirteenth Court of Appeals, there is a split in the circuits on this same issue, as noted in the cited case of *Turner v. State*. 573 S.W.3d 455, 462-63 (finding

a charge that tracked the statute to be erroneous because "the express language used does not make it clear that the first and last acts must occur thirty or more days apart").

The language at issue presents extraordinary circumstances not only due to the array of authority noted but, as noted within the current panel opinion, the continual reoccurrence of this issue. A jury instruction directing conviction for a non-offense.

The current panel opinion further notes that:

Here, as in *Perez* and *Chavez*, the jury charge faithfully tracked the statutory duration language, and thus, the trial court satisfied its obligation to instruct the jury on the law applicable to the case. *See* Tex. Code Crim. Proc. Ann. art. 36.14; *Perez*, 2024 Tex. App. LEXIS 1284, 2024 WL 715326, at *7; *Chavez*, 2023 Tex. App. LEXIS 6533, 2023 WL 5486232, at *3; *Lewis v. State*, No. 14-21-00691-CR, --- S.W.3d ---, 2023 Tex. App. LEXIS 5668, 2023 WL 4873306, at *7 (Tex. App.—Houston [14th Dist.] Aug. 1, 2023, pet. ref'd) (finding no error where the jury charge tracked the statutory duration language). And as we said in *Perez* and *Chavez*, the addition of the "to-wit" language in this charge did not nullify the duration element; rather, "the timeframe provided in the application paragraph merely 'explained to the jury, in concrete terms, how to apply the law to the facts of the case.'" *Perez*, 2024 Tex. App. LEXIS 1284, 2024 WL 715326, at *6 (cleaned up) (quoting *Yzaguirre*, 394 S.W.3d at 530); *Chavez*, 2023 Tex. App. LEXIS 6533, 2023 WL 5486232, at *3 (same). Ortiz's first issue is overruled.

Ortiz v. State, No. 13-23-00082-CR, 2024 Tex. App. LEXIS 3216, at *7 (Tex. App.—Corpus Christi May 9, 2024, pet. ref'd)(Appendix A, 4)

The application paragraph in the present case does not track the language of the

penal statute. The penal code statute reads, in relevant part, "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". Tex. Penal Code § 21.02

Again, the application paragraph in the present case, in relevant part, instructed the jury to find Ortiz guilty if, "during a period that was 30 or more days in duration, *to-wit: from on or about the 1st day of January, 2012, to on or about the 30th day of September, 2016*", . . . committed two or more acts of sexual abuse . . .". (Emphasis added) (CR-337)

The penal code does not contain any qualifying calendar dates. The italicized portion is inserted into the penal code language. On this issue the current panel opinion notes: And as we said in *Perez* and *Chavez*, the addition of the "to-wit" language in this charge did not nullify the duration element; rather, "the timeframe provided in the application paragraph merely 'explained to the jury, in concrete terms, how to apply the law to the facts of the case."

That the "*to-wit*" language in this charge did not nullify the duration element; rather, "the timeframe provided in the application paragraph merely 'explained to the jury, in concrete terms, how to apply the law to the facts of the case" is not tantamount to tracking the language of the penal code. That appears to be a different legal standard of review. However, even if the jury charge had tracked the language

of the statute, courts have, as noted, found that the statutory language insufficient.

Furthermore, the "concrete terms" referenced in "the timeframe" provided in the application paragraph seem to refer to "on or about" dates that are as fluid as *any day* within the statute of limitations and before the presentment of the indictment and as the jury was repeatedly so instructed.

Finally, "*To-Wit*", by definition, is "used to make clearer or more particular something that you have already said." Cambridge Dictionary (<https://dictionary.cambridge.org/dictionary/english/to-wit>).

The language in the present case both (A) took an element of the offense/the 30 day requirement and (B) "structured" it into a literally read, non-offense. This is error.

The language is analogous to the language in *Smith v. State*, where the First Court of Appeals determined that the jury charge was erroneous when it stated that the jury could convict the appellant if it determined that, "on or about the 1st day of December, 2007, through the 1st day of September, 2008, which said time period being a period that was 30 days or more in duration, in Brazoria County, Texas, the defendant, Jesse James Smith, committed two or more acts of sexual abuse." See *Smith v. State*, 340 S.W.3d 41, 50 (Tex. App.—Houston [1st Dist.] 2011, *no pet*)

However, even if left alone, the noted penal code language itself, is open to

interpretation as noted in the cited case of *Turner v. State*. Hence, the pattern jury charge the trial court did not use. The Texas Pattern Jury Charge for this offense includes the following clarifying language: "With regard to element 2, you must all agree that at least thirty days passed between the first and last acts of sexual abuse committed by the defendant." Comm. on Pattern Jury Charges—Criminal, State Bar of Tex., Texas Criminal Pattern Jury Charges: Crimes Against Persons & Property CPJC 84.2, 99 (2020).

The current jury charge/application paragraph does the opposite. It instructed the jury to convict Ortiz by finding that he committed two or more acts of sexual abuse, even if the acts occurred less than thirty days apart and even if they occurred in a single day.

REASONS FOR GRANTING THE PETITION

The Texas Court of Criminal Appeals has refused to resolve the present conflicts of authority. This leaves some citizens with full review of the present issue with some form of harm review while others do not get past the finding of any error.

This is a relatively new statute that constructs a pattern of offenses into one element of an offense. Usually, a jury would have to unanimously find beyond a reasonable doubt each discrete offense. This tension has led to much litigation in

which lower courts have found no violation of the unanimity requirement as follows:

Penal code section 21.02 provides that for the offense of continuous sexual assault of a young child, a jury is "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." Tex. Penal Code Ann. § 21.02(d). The commission of two or more acts of sexual abuse over a specified time period—that is, the pattern of behavior or the series of acts—is the element as to which the jurors must be unanimous in order to convict. *McMillian v. State*, 388 S.W.3d 866, 872 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Thus, section 21.02(d) does not allow jurors to convict on the basis of different elements, and this court and our sister courts have held that the statute does not violate the state constitutional right to jury unanimity. *See id.* (citing *Casey v. State*, 349 S.W.3d 825, 829 (Tex. App.—El Paso 2011, pet. refd); *Jacobsen v. State*, 325 S.W.3d 733, 737 (Tex. App.—Austin 2010, no pet.) . . . (*string cite omitted*))

Pollock v. State, 405 S.W.3d 396, 405 (Tex. App.—Fort Worth 2013, no pet.)³

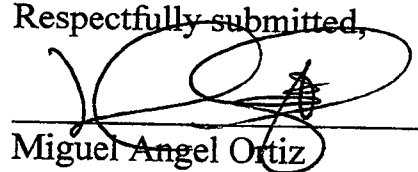
Thus, there is a strong constitutional importance in having this newly constructed element properly deliberated upon by juries. Applying *Sandstrom v. Montana* here will ensure due process by giving effect to the requirement that the State must prove every element of the offense charged. *Sandstrom v. Montana*, 442 U.S. 510, 520-521, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979); U.S. Const. Amend. XIV; United States Supreme Court Rule 10(c).

³It appears that the Texas Court of Criminal Appeals has also refused to state whether this statute violates the unanimity requirement.

X. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Miguel Angel Ortiz

Date: 11-18-24