

No. 25-1195

IN THE
Supreme Court of the United States

JOHN DAVID TRICE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS ELEVENTH COURT OF APPEALS**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The State reads *Ramos* myopically. In its view, *Ramos* has no effect on state trials beyond requiring that all jurors vote “guilty” to establish a criminal conviction. *See* (Resp. Br. at 10-11.) Because Texas already requires unanimous verdicts (at least in a superficial sense), the State claims Petitioner was fully afforded his federal constitutional right to “jury unanimity of the variety described in [Ramos].” (Resp. Br. at 10). The State’s reading of *Ramos* narrows a defendant’s Sixth Amendment right to jury unanimity to a “watered down” version of the right. *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010).

The State’s argument fails to recognize that an incorporated right is incorporated *in its totality*. *Ramos* did not incorporate a “variety” of the federal jury unanimity right. (Resp. Br. at 10.) For rights incorporated against the states, “there is no daylight between the federal and state conduct it prohibits or requires.” *Timbs v. Louisiana*, 586 U.S. 146, 151 (2018). This principle was not only reaffirmed in *Ramos*; it provided the very basis for overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972). *See Ramos v. Louisiana*, 590 U.S. 83, 93 (2020) (“[t]his Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government”).

Apodaca had held that jury unanimity was not incorporated to the states in a “badly fractured set of opinions.” *See Ramos*, 590 U.S. at 93 (discussing *Apodaca*). The decision had rested on Justice Powell’s concurring

opinion, where he held that a “single right can mean two different things depending on whether it is being invoked against the federal or state government.” *Id.* (discussing Powell concurrence).¹ The Court rejected this paradigm and concluded that “the Sixth Amendment’s unanimity requirement applies to state and federal criminal trials equally.” *Id.* at 94-95.

Ramos gives rise to questions as to the “content” of the federal jury unanimity right. *Ramos*, 590 U.S. at 93. Whatever its scope may be, “it applies to states and federal criminal trials equally.” *Id.* at 94-95. The State asserts only the Due Process Clause can save Petitioner from the particular non-unanimity issue arising in this case. (Resp. Br. at 11.) In the State’s view, Sixth Amendment jury unanimity affords no protection beyond requiring that everyone vote guilty; the juror unanimity right only requires that all jurors agree, but sets no limits on what they must agree about. (Resp. Br. at 10-11.) This view runs headlong into *Richardson*, which is a pre-incorporation jury unanimity case and not a due process case. *See Richardson v. United States*, 526 U.S. 813 (1999).

It is true, as the State contends, that the *Richardson* majority cited the *Schad* plurality opinion and Justice Scalia’s concurrence when discussing “Constitution[al] . . . limits” on non-unanimity. *Richardson*, 526 U.S. at 820 (citing *Schad v. Arizona*, 501 U.S. 624, 632-633 (1991) (plurality op.); 501 U.S. at 651 (Scalia, J., concurring)); (Resp. Br. at 12.) But from this citation the State leaps to

1. The concurrence came from a companion case to *Apodaca*, *Johnson v. Louisiana*, 406 U.S. 356, 366-380 (1972) (Powell, J., concurring).

the conclusion that Petitioner’s complaint “could only be of the variety described in *Schad* . . . under the Due Process Clause.” (Resp. Br. at 11.) The State’s due-process-only leap cannot be reconciled with *Richardson*. *Richardson* was driven by federal jury unanimity concerns and not the due process clause.

The *Richardson* majority opinion discusses limitations imposed by “the Constitution” but never specifies that the Due Process Clause provides the source for Constitutional limitation. *See Richardson*, 526 U.S. at 820-821. In fact, the majority does not mention the Due Process Clause at all. *See Richardson*, 526 U.S. at 815-824. By contrast, the Court explicitly discusses jury unanimity at multiple junctures in the opinion.

At the outset, the Court made a point to emphasize that its ruling applied to a “*federal* criminal case.” *Richardson*, 526 at 815 (emphasis added). When identifying the governing legal principles, the Court observed that “a jury in a federal criminal case cannot convict unless it unanimously finds the Government has proved each element.” *Richardson*, 526 U.S. at 817 (citing *inter alia Johnson v. Louisiana*, 406 U.S. 356, 369-371 (1972) (Powell, J. concurring); and *Andres v. United States*, 333 U.S. 740, 748 (1948)).

The citations are telling. *Andres* focuses on the unanimity rights afforded by the Sixth (and Seventh) Amendments and not the Due Process Clause. *See Andres*, 333 U.S. at 748 (“[u]nanimity in jury verdicts is required where the Sixth and Seventh Amendments apply.”). And the citation to the ill-fated *Powell* concurrence is even more illuminating. Justice Powell made explicit within

the cited portion of the opinion that “I do not think that all the elements of jury trial within the Sixth Amendment are necessarily incorporated into the Due Process Clause of the Fourteenth Amendment.” *Johnson*, 356 U.S. at 369 (Powell, J., concurring). The citation to Powell’s concurrence demonstrates that the federal nature of the case was important to the decision in light of a defendant’s Sixth Amendment unanimity right.

But the Court went further and explicitly relied on jury unanimity in its reasoning. *See Richardson*, 526 U.S. at 821. Applying the doctrine of constitutional avoidance, the Court concluded the jury must unanimously agree on the predicate violations to establish a conviction under the federal continuing criminal enterprise statute. *Id.* at 820-824. The government pointed to continuing sexual abuse statutes similar to the one at issue in this case. *Id.* at 821; *see also Richardson*, 526 U.S. at 832 (Kennedy, J., dissenting, joined by O’Connor & Ginsburg, JJ., dissenting) (“[s]tate course-of-conduct crimes provide an analog to the federal CCE statute”). In distinguishing the federal statute, the majority reasoned that the statutes (or cases interpreting such statutes) “are not federal but state *where this Court has not held that the Constitution imposes a jury unanimity requirement.*” *Richardson*, 526 U.S. at 821. (emphasis added). The State ignores this language. (Resp. Br. at 15-16.) If the jury unanimity right does no independent work from the Due Process Clause, as the State contends, this sentence would be superfluous.

The State places undue emphasis on the *Schad* plurality opinion. *Schad* was a pre-incorporation case. The defendant had asked the Court to find jury unanimity was incorporated in state capital cases only. *Schad v. Arizona*,

501 U.S. at 624, 631 (1999) (plurality op.). The Court refused to carve an exception to *Apodaca* and analyzed Schad’s jury-unanimity claim under the Due Process Clause. *Id.* at 631. It is from this plurality opinion that the State gets the language that the issue in this case “is not one of jury unanimity.” *Id.* at 631; (Resp. Br. at 11.) But the State ignores the fact that Justice Scalia never found that Schad’s claim could only be raised under due process and not under the jury unanimity clause. *Schad*, 501 U.S. at 648-652 (Scalia, J., concurring). This makes tremendous sense. Because the jury unanimity right had not been incorporated, it was not on the menu of options for relief. And incorporation could have been denied for reasons separate than those offered by the plurality.

The language the State cites from Justice Scalia’s concurring opinion in *Schad* does not support its position. (Resp. Br. at 12.) The continuous-sexual-abuse statute does *not* present a situation where Justice Scalia found non-unanimity acceptable: when a “*single crime* can be committed in various ways.” *Schad*, 501 U.S. at 649 (Scalia, J., concurring) (emphasis added). For example, in *Schad* the Arizona murder statute proscribed multiple ways that the “single crime” of murder can be committed: by robbery, or with premeditation. Because defining a crime in this fashion “was the norm when this country was founded,” Justice Scalia concluded that the Constitution did not require a jury to agree on how the “single crime” of murder was committed. *Id.* at 649-651 (Scalia, J., concurring).²

2. The State also cites *Mathis* proposition that the Court had “reaffirmed *Schad*’s continued viability.” (Resp. Br. at 17) (citing *Mathis v. United States*, 579 U.S. 500, 506 (2016)). But *Mathis* also presents a scenario of a “single crime.” The jury did not have to agree on the particular structure burgled to establish a conviction

But the continuous statute does not capture multiple methods of committing a “single” crime. It proscribes the commission of multiple crimes, and the jury need not even agree on which crimes those are. *See* Texas Penal Code § 21.02. This is the very structure which the *Richardson* majority (including Justice Scalia) found Constitutionally suspect. *See Richardson*, 526 U.S. at 815. The continuous-sexual-abuse statute “imposes punishment on a defendant for underlying crimes without any factfinder having found that the defendant committed those crimes.” *Id.* at 822.

The State continues to belabor the non-precedential *Schad* plurality opinion in its analysis, focusing on legislative intent and so-called moral equivalence. (Resp. Br. at 18-21.) But *Richardson* supplies the relevant standard here. The labeling-elements-as-means workaround violates the right to jury unanimity when the resulting definition “risks serious unfairness” and “lacks support in history or tradition.” *Richardson*, 526 U.S. at 820 (internal citation omitted).

The State concedes no common law tradition supports this statute. (Resp. Br. at 21.) *See Richardson*, 526 U.S. at 821 (finding no history or tradition exists for “treating individual criminal ‘violations’ as simply a means towards the commission of a greater crime.”). Further *Richardson* shows that the structure of Section 21.02 is unfair given its

for burglary in Iowa. *See Mathis*, 579 U.S. at 507. Regardless, this case is inapposite. The Court was not called upon to decide whether the statute satisfied jury unanimity or even due process. Instead, the Court analyzed how the modified categorical approach could be used to classify this offense under the Armed Career Criminal Act. *See Mathis*, 579 U.S. at 509-520. This has nothing to do with the question presented in this case.

structural similarity to the government’s proposed reading of the continuing criminal enterprise statute. As presently constituted, Section 21.02(d) punishes a defendant for 25-99 years or Life if a jury finds he committed multiple “underlying crimes without any factfinder having found the defendant committed those crimes.” *Richardson*, 526 U.S. at 822; Texas Penal Code § 21.02(h).

In essence, the State argues that the Legislature has authority to pass any continuing offense crime so long as the “cumulative” or ongoing nature of the crime was the harm targeted. (Resp. Br. at 19 (“[b]ecause the constituent incidents occurring over a substantial time frame generally resulted in *cumulative* injury; and hence the continuous pattern constituted an analytically distinct crime”). By making the statute a series, the State would always have a statutory workaround to proving any particular criminal violation.

Imagine a habitual burglary statute. Under the State’s logic, the Legislature could create a statute where a jury was authorized to convict a defendant if it found he committed two or more burglaries over a specified time period, even if it disagreed as to which burglaries took place. The indictment may charge ten burglaries committed on a ten different occasions. Under the dictates of this hypothetical statute, the jury need not agree on any particular burglary, so long as all agreed more generally that he committed two of them. The State believes a statute of this kind satisfies unanimity. Surely this type of law would be at odds with our understanding of what a jury must be unanimous about in an American criminal trial. *See Richardson*, 526 U.S. at 820 (citing *Schad*, 501 U.S. at 651 (Scalia, J., concurring) (“[w]e would not permit, for

example, an indictment charging that defendant assaulted either X on Tuesday or Y on Wednesday . . . ”).

But this is not just a Kafkaesque hypothetical. The continuous-sexual-abuse statute at issue in this case already codifies a form of this burglary statute. Section 21.02 includes a class of burglaries within the definition of sexual abuse. Texas Penal Code 21.02(c)(5) (including burglary with intent to commit specified child sex crimes within the definition of acts of sexual abuse under continuous-sexual-abuse statute). Thus, under the *existing* statute at issue in this case, a defendant may be charged with having committed ten different burglaries and a jury need not agree that he committed any of them. So long as the jury agrees more generally that the defendant committed two burglaries over a period exceeding 30 days, he may be sent to prison for the remainder of his life. Texas Penal Code § 21.02(h) (continuous sexual abuse punishable by 25-99 years, or life); Texas Gov’t Code § 508.145(a)(2) (defendant not eligible for parole if sentenced under § 21.02).

This cannot be allowable under the Constitution. Intervention of the Court is necessary to ensure that criminal defendants are afforded the right to jury unanimity under the Sixth and Fourteenth Amendments. Petitioner respectfully requests that the Court grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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