IN THE SUPREME COURT OF TEXAS

NO. 13-0006

ZAHER EL-ALI, PETITIONER,

v.

THE STATE OF TEXAS, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

JUSTICE BOYD, joined by JUSTICE GUZMAN, concurring in the denial of the petition for review.

The opinion dissenting to the Court's denial of this petition for review is both eloquent and persuasive. I agree that the State of Texas should not "ensnare guiltless citizens and seize their homes and other property." But courts resolve cases, not just issues, and this case presents a particularly poor opportunity to resolve the issues that disturb the dissent.

To prevail in this case, petitioner Zahir El-Ali bears a difficult legal burden. The Texas civil forfeiture statute allows the State to seize and take private property if the State proves that the property was used, or was intended to be used, in or to facilitate the commission of certain crimes, or that the property constitutes the proceeds from the commission of certain crimes. TEX. CODE CRIM. PROC. art. 59.01(2), 59.02(a). Ali argues that this statute is unconstitutional because it does not also require the State to prove the property owner knew or should have known of the illegal conduct. This Court has already rejected that exact argument. *See State v. Richards*, 301 S.W.2d

597, 603 (Tex. 1957) (holding that the forfeiture statute is not unconstitutional "as applied to the property rights of an innocent owner who entrusts his vehicle to another"). And many other courts, including the United States Supreme Court, have rejected it as well. *See, e.g.*, *Bennis v. Michigan,* 516 U.S. 442, 446 (1996) (reaffirming the "long and unbroken line of cases [that] holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use").[1]

Certainly, we could decide to overrule *Richards* and reject the reasoning of the "long and unbroken line of cases" that the United States Supreme Court has reaffirmed. But Ali does not ask us to do that. Instead, he notes that the Texas statute now provides an "innocent owner defense," which enables the property's owner to avoid forfeiture by proving that the owner "did not know or should not reasonably have known" that the property was being used illegally. TEX. CODE CRIM. PROC. art. 59.02(c). Having decided to protect the rights of innocent owners, Ali asserts, the State may not constitutionally require him to prove his own innocence; instead, the State must prove that he is not innocent. The State, of course, contends that this just gets us back to the argument we

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[1] As the dissent notes, Ali bases his challenge on the Texas Constitution's due course of law provision rather than the U.S. Constitution's due process clause. But Ali does not identify any difference between the two that is material to the issue in this case, and under such circumstances "we treat them as the same." *In re E.R.*, 385 S.W.3d 552, 566 n.25 (Tex. 2013) (citing *Nat'l Collegiate Athletic Ass'n v. Yeo*, 171 S.W.3d 863, 867–68 (Tex. 2005)). In fact, instead of distinguishing the federal clause, Ali's briefs address a national problem and cite federal as well as Texas decisions. His opening brief does not mention *Bennis*, but instead quotes from Justice Thomas's dissent in *United States v. James Daniel Good Real Prop*erty: "Given that current practice under [the federal forfeiture statute] appears to be far removed from the legal fiction upon which the civil forfeiture doctrine is based, it may be necessary—in an appropriate case—to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture." 510 U.S. 43, 82 (1993) (Thomas, J., dissenting). I do not disagree with most of the concerns that Justice Thomas and this Court's dissenting opinion raise, I simply conclude that this is not "an appropriate case" in which to address them.

rejected in *Richards*: if the owner's innocence is irrelevant to the statute's constitutionality, then the burden of proving the owner's innocence is likewise irrelevant.

Even if Ali's reliance on the enactment of the article 59.02(c) defense is sufficient to distinguish *Richards*, it creates significant procedural and jurisdictional issues. Although Ali's brief assures us that he is "wholly innocent of any wrongdoing," he refused in the trial court to offer any evidence, even a simple affidavit, to support that claim. More importantly, he amended his pleadings to specifically abandon any reliance on the article 59.02(c) defense. Yet in this appeal, he challenges the constitutionality of article 59.02(c), the very statute on which he has refused to rely. The State contends that, by abandoning any reliance on article 59.02(c), Ali has mooted, and now lacks standing to assert, any challenge to that article's constitutionality.

Although the dissent urges us to apply "21st-century scrutiny" in light of the current "prevalence, procedures, and profitability" of 21st-century forfeiture practices, I'm confident that the dissent is not suggesting that the words of the Constitution mean something different from what they meant in 1957. So we are left in this case with either overruling *Richards* or distinguishing it based on a statutory provision upon which the petitioner intentionally does not rely. Although I share the Court's desire that the State not become like old Mother England, I'm not convinced that, in this case, we should consider either option.

Finally, by calling for "21st-century scrutiny" and "modern study," the dissenting opinion could be read to suggest that the Court has not studied and scrutinized these issues when deciding, today, whether to grant this petition for review. I write in response to the dissent mainly to confirm that we certainly have.

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Jeffrey S. Boyd
Justice

OPINION DELIVERED: March 28, 2014