Docket No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SANDY PEREZ HERNANDEZ,
PETITIONER,

-V-

THE STATE OF TEXAS,
RESPONDENT.

On petition for writ of certiorari from the
Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Fifth Amendment's double jeopardy clause bar conviction for intentional injury to a child following acquittal for capital murder, but conviction for manslaughter under Texas law?

2. Is trial counsel ineffective for failing to request jury instructions furthering the defensive theory of the case, when counsel didn't realize such instructions were even available, and did the Texas Courts err in analyzing Petitioner's claim?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner:	Sandy Perez Hernandez
Petitioner's Counsel:	Mike DeGeurin Foreman, DeGeurin & DeGeurin 300 Main Street, Suite 300 Houston, Texas 77002
The State of Texas:	Michael Morris Assistant District Attorney Hidalgo County District Attorney's Office 100 E. Cano Street Edinburg, Texas 78539
Trial Court:	Honorable Roberto "Bobby" Flores 139th District Court, Hidalgo County, Texas 100 N. Closner Edinburg, Texas 78539

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

LIST OF PROCEEDINGS

Trial on the Merits: 139th District Court; Cause No. CR-0064-15-C; *State of Texas v. Sandy Perez Hernandez*; Judgment of Conviction entered

Appellate Court: 13th Court of Appeals; No. 13-16-00696-CR; Sandy Perez Hernandez v. The State of Texas; Judgment affirming conviction entered May 16, 2019.

Petition for Discretionary Review: Texas Court of Criminal Appeals; PD-1285-19; Sandy Perez Hernandez v. The State of Texas; Judgment refusing Hernandez's Petition for Discretionary Review entered April 29, 2020.

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CITATIONS OF OPINIONS AND ORDERS ENTERED BELOW

Petitioner was charged by indictment with the offense of capital murder and the offense of intentional injury to a child. Following a jury trial, Petitioner was acquitted of capital murder, but found guilty of the lesser included offense of manslaughter. Petitioner was also found guilty of intentional injury to a child. Copies of the judgments of conviction are attached as Appendix E.

Petitioner appealed her conviction to the 13th Court of Appeals of Texas, presenting a number of federal and state claims. The 13th Court of Appeals denied Petitioner's request for relief in an unpublished Memorandum Opinion issued on May 16, 2019, and cited as *Perez Hernandez v. State*, 13-16-00696-CR, 2019 WL 2127895 (Tex. App.—Corpus Christi May 16, 2019, pet. ref'd). A copy of that Memorandum Opinion is attached as Appendix A.

Petitioner filed a motion for rehearing with the 13th Court of Appeals, which was denied on October 23, 2019. No citation is available, but a copy of the letter denying the motion for rehearing is attached as Appendix B.

Petitioner filed a motion for *en banc* reconsideration with the 13th Court of Appeals, which was denied on November 20, 2019. No citation is available, but a copy of the letter denying the motion for *en banc* reconsideration is attached as Appendix C.

Petitioner filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals, which was refused on April 29, 2020. No citation is available, but a copy of the letter refusing the Petition is attached as Appendix D.

STATEMENT OF JURISDICTION

The Texas Court of Criminal Appeals denied Petitioner's Petition for Discretionary Review on April 29, 2020. *See* Appendix D. This Court's March 19, 2020 Order extended the deadline for this Petition to 150 days from the date of the order denying discretionary review – until September 26, 2020. Because September 26, 2020 falls on a Saturday, the deadline extends to Monday, September 28, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Texas Penal Code 1.07(a) (Definitions) provides in pertinent part:

> "(1) "Act" means a bodily movement, whether voluntary or involuntary, and includes speech."

Texas Penal Code § 2.03 (Defense) provides in pertinent part:

> "(d) If the issue of the existence of a defense is submitted to the jury, the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted."

Texas Penal Code § 6.01 (Requirement of Voluntary Act or Omission) provides in pertinent part:

> "(a) A person commits an offense only if he voluntarily engages in the conduct, including an act, an omission, or possession."

Texas Penal Code § 12.31 (Capital Felony Punishment) provides in pertinent part:

> "(a) An individual adjudged guilty of a capital felony in a case in which the state seeks the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for life without parole or by death. An individual adjudged guilty of a capital felony in which the State does not seek the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for:
>
> (1) life, if the individual committed the offense when younger than 18 years of age . . . ."

Texas Penal Code § 12.32 (First Degree Felony Punishment) provides in pertinent part:

> "(a) An individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 5 years . . . ."

Texas Penal Code § 12.33 (Second Degree Felony Punishment) provides in pertinent part:

> "(a) An individual adjudged guilty of a felony of the second degree shall be punished by imprisonment in the Texas Department of Criminal Justice for any term of not more than 20 years or less than 2 years . . . ."

Texas Penal Code § 19.02 (Murder) provides in pertinent part:

> "(b) A person commits an offense if he:
>
> (1) intentionally or knowingly causes the death of an individual.
>
> . . .

(c) Except as provided by Subsection (d), an offense under this section is a felony of the first degree."

Texas Penal Code § 19.03 (Capital Murder) provides in pertinent part:

"(a) a person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and:

(8) the person murders an individual under 10 years of age.

. . .

(b) An offense under this section is a capital felony."

Texas Penal Code § 19.04 (Manslaughter) provides in pertinent part:

"(a) A person commits an offense if he recklessly causes the death of an individual.

(b) An offense under this section is a felony of the second degree."

Texas Penal Code § 22.04 (Injury to a Child) provides in pertinent part:

"(a) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child . . .:

(1) serious bodily injury;

. . .

(e) An offense under Subsection (a)(1) . . . is a felony of the first degree when the conduct is committed intentionally or knowingly. When the conduct is engaged in recklessly, the offense is a felony of the second degree.

. . .

(h) A person who is subject to prosecution under both this section and another section of this code may be prosecuted under either or both sections . . . ."

STATEMENT OF THE CASE

Petitioner was charged, by indictment, with capital murder (Count One) and intentional injury to a child (Count Two) following the death of her newborn child, Baby Hernandez. T.C.R. at 28-29. Petitioner entered a not guilty plea to both counts and the case proceeded to trial.

At the time of Baby Hernandez's birth, Petitioner – and her family and boyfriend – had not known she was pregnant. Appendix A at 3, 8. Though Petitioner had a positive pregnancy test in February 2014, Petitioner and her mother believed she had a miscarriage in late February or early March 2014. *Id.* at 8. Testimony of Petitioner's family indicated that she had not gained any weight, never appeared to be pregnant, and had taken vacations where she had worn two-piece bathing suits. *Id.* at 8-9. Petitioner also described continuing to have her menstrual cycle. *Id.* at 4, 8.

Throughout the middle of the night on October 17, 2014, Petitioner had been having stomach pain and diarrhea, had gone to the bathroom several times, and was in and out of sleep. *Id.* at 2. Petitioner thought she was having another bowel movement, but instead delivered Baby Hernandez. *Id.* Petitioner described that after delivering the child, she sought to cut the umbilical cord outside to avoid making a mess, and to alert her parents to get help by setting off the car alarms. *Id.* at 2. Petitioner described that she slipped and fell with the baby both inside and outside the home. *Id.* at 3. After cutting the umbilical cord, Petitioner felt the placenta come out and began losing blood. *Id.* at 2. Petitioner wrapped Baby

Hernandez in a towel, placed him down in the yard, and dizzily made her way into the home, where she collapsed crying for help. *Id.* at 2-3. Petitioner's parents heard her cries and found her in the dining room with a lot of blood around her crying "my baby, my baby." *Id.* at 2-3. Petitioner's mother described Petitioner as getting hysterical and then going limp. *Id.* at 3.

Petitioner's father called 911 and after paramedics arrived, they followed the trail of blood outside and found Baby Hernandez in the yard. *Id.* at 3. Paramedics rushed Baby Hernandez to the hospital, where he died at 8:00 p.m. that same day. *Id.* at 6.

At trial, it was undisputed that Baby Hernandez's death occurred as a result of blunt force head trauma, which included skull fractures. *Id.* at 6-7. However, the central issue in the case is whether the sustained injuries occurred as a result of voluntary and intentional conduct on the part of Petitioner, or whether the injuries occurred due to accidental falls, or in combination with falls and the delivery of Baby Hernandez in Petitioner's home, where she lived with her parents and siblings.

The trial State's expert, Dr. Norma Farley, testified that the injuries she observed could not have occurred as a result of a difficult childbirth or fall. *Id.* at 6-7. By contrast, the Defense expert, Dr. Carlos Mattioli, testified that even a short fall could have caused the fatal injuries sustained by Petitioner, and he concluded that the cause of the blunt force trauma was an accidental fall. *Id.* at 7.

Following the presentation of evidence, the trial court submitted its charge to the jury on both counts, and included instructions related to lesser-included offenses. *See* Appendix F. The charge to the jury included instructions on capital murder and the lesser-included offenses of manslaughter and criminally negligent homicide. *Id.* The charge also included instructions on injury to a child committed intentionally/knowingly and the lesser-included offenses of injury to a child committed recklessly or with criminal negligence. *Id.*

Trial counsel did not request that the jury be instructed with regard to "voluntary conduct," and the trial court did not include any such instruction in its charge to the jury. *See* Appendix F. In trial counsel's affidavit, and again in testimony during the Motion for New Trial Hearing, trial counsel stated that though he wanted to present the defense of "accident" to the jury, his research indicated that this was not a defense and that there was no jury instruction available on this ground. *See generally* Appendices G, H, I, J. Trial counsel stated that he learned of the concept of "involuntary act" during a meeting with Petitioner's appellate counsel and quickly realized his defense would have benefitted from having this instruction in the jury charge. *See* Appendix G at 2. Trial counsel recognized his error in failing to object to the jury charge which did not contain the jury instruction on "voluntary act," acknowledged he had no strategy in failing to request it, and acknowledges the failure was because he was unaware of the defense. *See* Appendix G at 2-7.

Ultimately, with respect to Count One, the jury found Petitioner not guilty of the capital murder charge, which required proof of intentional conduct with respect to the death of Baby Hernandez, a child under 10 years of age. *See* TEX. PEN. CODE § 19.03(a)(8); *see also* Appendix E. The juror instead found Petitioner guilty of the lesser included offense of manslaughter, which required proof of reckless conduct. *See* TEX. PEN. CODE § 19.04; *see also* Appendix E. Petitioner's sentence was 20 years on the manslaughter conviction. *See* Appendix E.

With respect to Count Two, and despite having found Petitioner not guilty of intentional conduct in Count One, the jury found Petitioner guilty of intentional injury to a child. *Id.* Petitioner's sentence was 32 years on the intentional injury to a child conviction. *Id.*

The acquittal for capital murder and the subsequent conviction for intentional injury to a child make the basis of Petitioner's federal double jeopardy claim, which was first raised before the trial court in Petitioner's filed Motion for New Trial. *See* Supplemental Exhibit Volume 001 - Motion for New Trial Exhibits at 10, 22-23; see also Appendix A at 10-13. That claim was litigated again before the Texas 13th Court of Appeals, and subsequently presented in Petitioner's filed Petition for Discretionary Review before the Texas Court of Criminal Appeals. The 13th Court of Appeals Memorandum opinion denied Petitioner's double jeopardy claim finding that, under a *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932) analysis, each of the convictions for manslaughter and intentional injury to a child required proof of an additional element that the other did not. *See* Appendix A at 10-13. The

Court also found that the Texas legislature intended multiple punishments for the same offense, citing TEX. PEN. CODE § 22.04(h) – which states that "[a] person who is subject to prosecution pursuant to [section 22.04] and another section of this code may be prosecuted under either or both sections." TEX. PEN. CODE § 22.04(h); see Appendix A at 12-13. The Texas Court of Criminal Appeals refused Petitioner's Petition for Discretionary Review, which included this presented claim. *See* Appendix D.

Petitioner first raised her federal ineffective assistance of trial counsel claim on account of trial counsel's failure to request a voluntary conduct jury instruction in her Motion for New Trial before the trial court. *See* Supplemental Exhibit Volume 001 – Motion for New Trial Exhibits at 2, 6-14. This claim was similarly litigated again before the Texas 13th Court of Appeals, and subsequently presented in Petitioner's filed Petition for Discretionary Review before the Texas Court of Criminal Appeals. The 13th Court of Appeals Memorandum Opinion denied this ineffective assistance of counsel claim finding that counsel's alleged failures regarding the jury instructions and definitions did not fall below reasonable professional assistance and that because there was substantial evidence to support Petitioner's conviction, she could not show prejudice. *See* Appendix A at 41-43. The Texas Court of Criminal Appeals refused Petitioner's Petition for Discretionary Review, which included this presented claim. *See* Appendix D.

These identical claims are presented herein.

ARGUMENT: REASONS FOR GRANTING RELIEF

1. **Does the Fifth Amendment's double jeopardy clause bar conviction for intentional injury to a child following acquittal for capital murder, but conviction for manslaughter under Texas law?**

Petitioner's conviction for intentional injury to a child following her acquittal for capital murder and conviction for manslaughter violated the double jeopardy provision of the Fifth Amendment to the U.S. Constitution. Petitioner's convictions serve to give her multiple punishments for the same conduct, and serve to punish conduct for which she was specifically acquitted.

The Fifth Amendment to the U.S. Constitution provides in pertinent part that "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V; U.S. CONST. amend. XIV.

The Double Jeopardy clause embodies three general protections: 1) it protects against a second prosecution for the same offense after acquittal; 2) it protects against a second prosecution for the same offense after conviction; and 3) it protects against multiple punishments for the same offense. *Illinois v. Vitale*, 447 U.S. 410, 415 (1980); *Brown v. Ohio*, 432 U.S. 161 (1977); *North Carolina v. Pearce*, 395 U.S. 711 (1969). The first and third protections are violated by Petitioner's conviction for intentional injury to a child following Petitioner's acquittal for capital murder.

In conjunction with these principles, the Double Jeopardy Clause has been interpreted as forbidding a subsequent trial following acquittal where the subsequent trial requires that the prosecution prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial. *See Ashe v. Swenson*,

397 U.S. 436 (1970); *Currier v. Virginia*, 138 S.Ct. 2144, 2150 (1970); *Yeager v. U.S.* 557 U.S. 110, 119-120 (2009). In such a situation, the second trial "is not precluded simply because it is unlikely – or even very likely – that the original jury acquitted without finding the fact in question." *Currier*, 138 S.Ct. at 2150; *Yeager v. U.S.*, 557 U.S. at 133-34. Rather, the Court must be able to say that "it would have been irrational for the jury" in the first trial to acquit without finding in the defendant's favor on a fact essential to a conviction in the second. *Currier*, 138 S.Ct. at 2150; *Yeager*, 557 U.S. at 127, 129.

In the instant case, Petitioner was initially charged in separate counts with the offenses of capital murder and intentional injury to a child. The jury was charged with respect to capital murder and the lesser included offenses of manslaughter and criminally negligent homicide. *See* Appendix F. The capital murder charge required proof of both a child victim and proof of an intentional or knowing *mens rea* with respect to Baby Hernandez's death. *See* TEX. PEN. CODE § 19.03. By contrast, manslaughter and criminally negligent homicide both required proof of a lesser *mens rea* and did not require proof of a child victim. *See* TEX. PEN. CODE 19.04. Manslaughter, the offense for which Petitioner was convicted, required proof that Petitioner acted "recklessly."

By finding Petitioner guilty of manslaughter, the jury necessarily acquitted her of the greater offenses of capital murder. *See generally Currier*, 138 S.Ct. at 2150 (2018) (recognizing that historically, courts have treated greater and lesser-included offenses as the same offense for double jeopardy purposes, so a conviction

on one normally precludes a later trial on the other); *Brown v. Ohio*, 432 U.S. 161, 168-69 (1977); *Blueford v. Arkansas*, 566 U.S. 599, 614 (2012) (" . . . acquittal is . . . implied by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge.") In acquitting Petitioner of the capital murder charge, but finding her guilty of manslaughter, the jury necessarily resolved the question of intent – finding that she did not act intentionally or knowingly, but recklessly.

Despite this acquittal, however, the jury also convicted Petitioner of intentionally or knowingly causing injury to a child. This second verdict cannot stand in light of the capital murder acquittal and manslaughter conviction.

In dispatching with Petitioner's double jeopardy claim, the 13th Court of Appeals applied this Court's *Blockburger* test in comparing the elements of manslaughter and injury to a child. *See* Appendix A at 10-13. *Blockburger* and its progeny recognize:

> "the applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."
>
> *Vitale*, 447 U.S. 410, 416 (1980); *Brown*, 432 U.S. 161 at 166.

The 13th Court of Appeals concluded that because the Texas injury to a child statute requires that the injured person be a child and does not require that the child die, it was different under *Blockburger* from manslaughter, which did not require a child victim, but required death. The Court also recognized that the *mens*

rea for each offense was different – manslaughter requiring recklessness; injury to a child requiring intentional or knowing conduct (as in the manner Petitioner was charged).

This application of *Blockburger* however, failed to consider that Appellant was acquitted of the offense of capital murder – which required proof of both a child victim and proof of an intentional or knowing *mens rea*. It is Petitioner's acquittal under the capital murder charge that constitutes the "same offense" under both the first and third general protections of the Fifth Amendment's double jeopardy clause, not merely just her manslaughter conviction.

The intentional injury to a child conviction also required that the prosecution prevail on an issue that the jury necessarily resolved in Petitioner's favor with respect to the capital murder acquittal – that Petitioner acted intentionally or knowingly.

Petitioner requests that this Court grant this Petition for a Writ of Certiorari on this presented issue, find that the Texas Courts erred in their analysis of this presented Fifth Amendment claim, and find that Petitioner has established that her conviction for intentional injury to a child cannot stand on double jeopardy grounds following her capital murder acquittal and manslaughter conviction.

2. **Is trial counsel ineffective for failing to request jury instructions furthering the defensive theory of the case, when counsel didn't realize such instructions were even available, and did the Texas Courts err in analyzing Petitioner's claim?**

Petitioner was deprived of her Sixth Amendment right to the effective assistance of counsel (applicable to the States through the Fourteenth Amendment's due process clause) when trial counsel failed to object to the jury instructions (for both counts of the indictment), which did not contain an instruction on "voluntary conduct," and by failing to request such a defensive instruction. And the Texas courts erred in its analysis of Petitioner's claim – erroneously applying this Court's enumerated *Strickland v. Washington* standard.

The Sixth Amendment to the U.S. Constitution, made applicable to Texas through the Fourteenth Amendment, provides that: "In all criminal prosecutions, the accused shall enjoy . . . the assistance of counsel for his defense." U.S. CONST. amend. VI; U.S. CONST. amend. XIV. This Sixth Amendment provision provides more than just the presence of counsel alongside the accused; but rather, provides for the right to the effective assistance of counsel – envisioning counsel playing a role that is critical to the ability of the adversarial system to produce just results. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

To prevail on a claim of ineffective assistance of counsel requiring reversal of a conviction, an applicant must establish by a preponderance of evidence that: 1) trial counsel's performance was deficient; and 2) that this deficient performance deprived applicant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Ex parte Chandler*, 182 S.W.3d 350, 353 (Tex.Crim.App. 2005).

Under the first prong of *Strickland*, the applicant must show that trial counsel's performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 698. The applicant must show by a preponderance of evidence that trial counsel's actions did not meet the objective norms for professional conduct. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex.Crim.App. 2002).

Under the second prong of *Strickland*, the applicant must show that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Restated, this requires establishing that there is a reasonable probability that but for the trial counsel's deficient performance, the outcome of the case would have been different. *Mitchell*, 68 S.W.3d at 642. A reasonable probability is that which is sufficient to undermine confidence in the outcome. *Id.*

In evaluating an ineffective assistance of counsel claim, the reviewing court must consider the totality of the evidence before the judge or jury. *Id.*

Both prongs of the *Strickland* test are met.

Trial counsel's defensive theory of Petitioner's case (on both the capital murder and intentional injury to a child counts of the indictment) was that Baby Hernandez's fatal injuries were sustained during falls, or in combination with falls and the child's delivery in the bathroom of Petitioner's home. By contrast, the State's theory (which it was obligated to prove under both counts) was that the injuries to Baby Hernandez were caused as a result of voluntary conduct done with requisite intent. This was the absolute central issue in the case, and both sides

presented expert testimony supporting their respective positions during the guilt/innocence phase of trial.

Missing from the Court's charge to the jury, however, was an instruction regarding the issue of "voluntary conduct." *See* Appendix F – Charge to the Jury. Such a defensive instruction is derived from Texas Penal Code § 6.01, which states that "a person commits an offense only if he voluntarily engages in the conduct, including an act." TEX. PEN. CODE § 6.01(a). The trial court did not unilaterally include the instruction in its charge to the jury, and Petitioner's trial counsel did not request such an instruction. *See* Appendix F. The failure to request this instruction constituted deficient performance. Had the trial court included such a charge, it would have been required to instruct the jury that a reasonable doubt on the issue would require that Petitioner be acquitted. TEX. PEN. CODE § 2.03(d).

Texas law is well established that counsel's failure to request a jury instruction can render his assistance ineffective if, under the particular facts of the case, the trial judge would have erred in refusing the instruction had counsel requested it. *Vasquez v. State*, 830 S.W.2d 948, 949 (Tex.Crim.App. 1992) (finding ineffective assistance of counsel for trial counsel's failure to request jury instruction on necessity defense raised by the evidence); *Waddell v. State*, 918 S.W.2d 91, 93 (Tex.App—Austin 1996, no pet.) (finding ineffective assistance of counsel for trial counsel's failure to seek lesser-include offense jury instruction supported by the presented evidence); *Green v. State*, 899 S.W.2d 245, 249 (Tex.App—San Antonio

1995, no pet.) (holding trial counsel ineffective for failing to request mistake of fact jury instruction supported by the evidence).

The Texas Court of Criminal Appeals has stated:

> "We readily recognize that if evidence admitted before the jury at a trial raises a defensive issue, the defendant is entitled to have the requested instruction concerning this defense submitted to the jury in the court's charge."

Willis v. State, 790 S.W.2d 307, 315 (Tex.Crim.App. 1990).

A defendant is entitled to an instruction on a defensive issue if it is raised by the evidence, whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense. *Hayes v. State*, 728 S.W.2d 804, 807 (Tex.Crim.App. 1987).

In light of the defensive evidence presented at trial – that Baby Hernandez's injuries were sustained during accidental falls, the trial court would have been required to give the "voluntary act" instruction with the corresponding burden of proof and the definition of the term "act." TEX. PEN. CODE § 1.07(a)(1); 2.03(d); 6.01(a).

Texas cases have affirmed this point. In *Crouch v. State*, an injury to a child case where the defendant claimed that she "fell or slipped" causing the child's injuries, the Tyler Court of Appeals reversed on account of the trial court's failure to provide a voluntary conduct jury instruction. *Crouch v. State*, 702 S.W.2d 660, 665 (Tex.App.—Tyler 1985, no pet.) (supplemental op. on reh'g). And a similar result was reached in *Sparks v. State*, where the Dallas Court of Appeals reversed the trial court on account of the failure to submit voluntariness to the jury, which was

raised by the defendant's testimony that he accidentally injured the child when he tripped, fell, and struck the child with his elbow. *Sparks v. State*, 68 S.W.3d 6, 12-14 (Tex.App.—Dallas 2001, pet. ref'd) (abrogated in part on other grounds by *Guzman v. State*, 85 S.W.3d 242 (Tex.Crim.App. 2002). These cases establish that a trial court would err in refusing to include these instructions, had trial counsel appropriately requested them.

As trial counsel's affidavit and testimony during the Motion for New Trial hearing reflect, his failure to request the "voluntary act" jury instruction was not a matter of strategy, but rather, occurred because of his lack of awareness of this defensive issue. Trial counsel had intended to raise "accident" as a defense, but after researching it and determining that "accident" was no defense – stopped his research on the jury charge issue. *See* Appendices G, I.

The voluntary conduct, "act," and burden of proof jury instructions were critical to an analysis of trial counsel's presented accident defense – especially in light of the defensive issue "accident" not having its own specific jury instruction. These jury instructions are the manner in which an "accident" defense is presented in a jury charge.

Trial counsel's performance was deficient for failing to request these interrelated instructions on voluntary conduct. And Petitioner was prejudiced as a result of trial counsel's deficient performance.

The failure to request these instructions deprived Petitioner of the ability to root her defense into the jury charge – taking away from the charge specific

language regarding an element that the State was required to prove, and depriving Petitioner of burden of proof language that if there was reasonable doubt as to her defensive issue, then the jury must acquit. In effect, Petitioner was effectively deprived of her presented defense in the jury charge.

As the proffered testimony of Juror L reflected during the Motion for New Trial Hearing, had that juror been given the proper voluntary conduct jury instruction, her verdict probably would have been different. *See* Appendix I.

Finally, the Texas 13th Court of Appeals erred in analyzing both *Strickland* prongs.

With respect to the deficient performance prong, the 13th Court of Appeals found that Petitioner's trial counsel "could have reasonably believed that accident was an appropriate defense." Appendix A at 43. The Memorandum Opinion fails to connect, however, that the voluntary act jury instruction is mechanism by which "accident" is presented as a defense in the jury instructions. Petitioner agrees that accident was an appropriate defense in the case – however, the defense needed to be properly contained and rooted in the jury charge with the applicable instructions on the defense. It was not.

With respect to the prejudice prong, the 13th Court of Appeals found that there was "substantial evidence to support Petitioner's conviction." However, this is a misapplication of *Strickland*, and one that fails to take into appropriate consideration that the jury reject the State's theory of the evidence and acquitted Petitioner of the capital murder charge – which required proof of knowing and

intentional conduct, and instead found her guilty of manslaughter, which required proof of reckless conduct. The Memorandum Opinion also fails to consider that the verdicts reached could have occurred specifically on account of the jury's failure to be presented with the guidance necessary to make the appropriate jury findings on Petitioner's defensive issues in light of the presented evidence.

Petitioner requests that this Court grant this Petition for a Writ of Certiorari on this presented issue, find that the Texas Courts erred in their analysis of this presented Sixth Amendment claim, find that Petitioner has established that her trial counsel was ineffective for failing to request the voluntary act jury instruction.

CONCLUSION

Petitioner respectfully requests this Court find these issues merit review by this Court' grant the Petition for a Writ of Certiorari; order briefing and argument; and grant Petitioner's claims for relief and to give her any and all relief to which she may be entitled.

Respectfully submitted,

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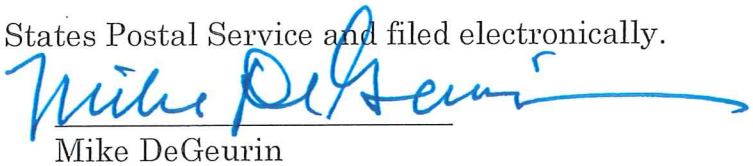
CERTIFICATE OF MAILING

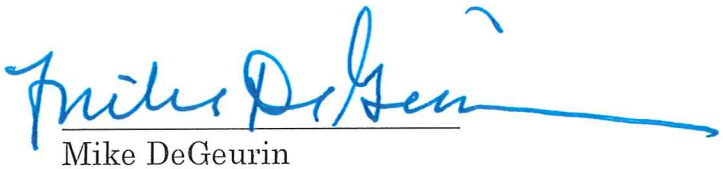
I hereby certify that, on the 28th day of September, 2020, this pleading was served on the Court via the United States Postal Service and filed electronically.



Mike DeGeurin

CERTIFICATE OF COMPLIANCE

I hereby certify that this document is within the page limits prescribed by Rule 33.2(b).



Mike DeGeurin