NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JASON DELACERDA,

PETITIONER

VS.

THE STATE OF TEXAS,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

[CAPITAL CASE]

I. QUESTION PRESENTED NO. ONE - Did the appellate court err in failing to find that the evidence was insufficient to support the conviction and death sentence?

II. QUESTION PRESENTED NO. TWO - Did the appellate court err in upholding the introduction of opinions of a psychiatrist regarding future dangerousness based on her interviews with petitioner in an absence of evidence that petitioner received adequate warnings?

III. QUESTION PRESENTED NO. THREE - Was petitioner denied the effective assistance of counsel for the failure of trial counsel to object to the opinions of a psychiatrist regarding future dangerousness based on her interviews with petitioner in an absence of evidence that petitioner received required warnings?

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VS.

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PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner, Jason Delacerda, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Court of Criminal Appeals affirming the rulings of the trial court and his sentence of death.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals for the State of Texas is unpublished and appears at citation *Delacerda v. State*, No. AP-77,078, 2021 Tex. Crim. App. Unpub. LEXIS 348 (Crim. App. June 30, 2021). A copy of the opinion

and the order denying petitioner's timely motion for rehearing are attached as hereto as Appendix A.

JURISDICTION

The Texas Court of Criminal Appeals opinion in this matter was filed on June 30, 2021. Petitioner filed a timely motion for rehearing and that motion was denied on January 12, 2022. Appendix A. This Court's jurisdiction is invoked under Title 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution and other constitutional provisions as well as other applicable provisions are set out in the applicable authorities hereinbelow.

STATEMENT OF THE CASE

This petition relates to a conviction of capital murder with a sentence of death. Petitioner was indicted by a Hardin County, Texas, grand jury which alleged that he caused the death of one B.L.[1], a child younger than six years of age, in Hardin County, Texas. CR.I-2. Petitioner was found guilty by the jury and the jury answered special issues adversely to him, resulting in a sentence of death. Petitioner pursued

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[1]Petitioner refers to the child by initials only, although she is named in the indictment. See Tex. R. App. P. Rule 9; Tex. Code Crim. Proc. Art. 57.02; Tex. Fam. Code § 109.002.

a timely direct appeal to the Texas Court of Criminal Appeals, as mandated by Texas statute. The Texas Court of Criminal Appeals affirmed the conviction and sentence in an unpublished opinion. Appendix A.

The evidence of the State included testimony that the subject child was subjected to physical abuse spanning a period of time and that she ultimately died from blunt force trauma. RR.XXXV-53 - 93. Present at the scene when EMS personnel arrived were the mother of the child and petitioner, who was performing CPR on the child. RR.XXXV-102-108. Witnesses described a history of abuse of the child. RR.XXXVI-51-100. Following the arguments of counsel and deliberations of the jury, the jury found petitioner guilty of the offense of capital murder as alleged in the indictment. RR.XXXVIII-61. There was no eyewitness to the offense who testified.

During the punishment phase of the trial, the State called a forensic psychiatrist, who testified that she conducted a risk assessment for future danger involving petitioner. RR.XXXIX-22. Before the jury, she testified that she interviewed petitioner prior to the time of trial, conducted an evaluation, and reviewed the records. RR.XXXIX-23. She testified that she formulated her opinion as to the risk assessment for future danger based upon her interviews, petitioner's background history, and any kind of medical records, ultimately determining that his

risk assessment was moderate to high. RR.XXXIX-24. The record reflects that counsel for petitioner had agreed to her interviewing petitioner years before the trial. RR.VI-8-11. The record also reflects that trial counsel for petitioner did not object to her opinions at trial on the basis that the interviews and subsequent evidence gathered from the interviews were obtained in violation of the U.S. Constitution and authorities prohibiting such conduct by the State. RR.XXXIX-6, 19, 53-63. Following the conviction and sentence of death, automatic appeal was perfected, and counsel herein was appointed to represent petitioner for purposes of direct appeal before the Texas Court of Criminal Appeals. The Texas Court of Criminal Appeals affirmed the conviction and death sentence.

Petitioner brings this timely petition complaining of the opinion of the Texas Court of Criminal Appeals affirming the conviction and death sentence.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the reasons that the Texas Court of Criminal Appeals has rendered and opinion concerning an important issue that has not been, but should be, settled by this Court, and additionally has, in effect, rendered a decision that conflicts with applicable decisions of this Court. Petitioner sets out the following issues that were raised in the Texas Court of Criminal Appeals on direct appeal that merit review by this Court:

> **I. QUESTION PRESENTED NO. ONE** - Did the appellate court err in failing to find that the evidence was insufficient to support the conviction and death sentence?

Petitioner raised the issue of the insufficiency of the evidence based upon the failure to establish that petitioner was the person who intentionally caused the death of the child. Over petitioner's objection, the trial court authorized the jury to convict petitioner if he was simply a party to the offense. Based upon the jury's verdict, there was no way to determine whether the jury found that petitioner or his wife personally caused the death. Following the analysis of the Texas Court of Criminal Appeals in the opinion upholding the sufficiency of the evidence that petitioner

caused the death, petitioner expounded on the fallacy of the opinion in a detailed motion for rehearing. The fact that the State could not prove that petitioner himself intentionally caused the death was demonstrated by the State's argument to the jury:

> "[The District Attorney]: All these injuries make and show a clear picture. This was abuse. And this was abuse leading up to the death of B.L.
>
> "Do we have pictures of Jason Delacerda doing this to her? No. Do we have an eyewitness there twelve to twenty-four hours when the final deadly blow took place? No. But B.L. is telling you who is doing this to her. She is doing it by the injuries that she carried to her death."

Taking advantage of the party charge the trial court submitted to the jury, the prosecutor repeatedly asserted that "they" committed the offense, as in his argument to the jury at RR.XXXVIII-27:

> "[The District Attorney]: We have circumstantial evidence about this. *They* kept her hidden from her family from the people that loved her. *They* refused to get medical treatment for things that any of us would go and take a child to get treated for. *They* had knowledge of those injuries. "*Jason and Amanda* are the only ones there twelve to twenty-four hours during that period of which the death blow was made." (Emphasis

added.)

Such evidence is insufficient to support this conviction and death sentence. Death may not be imposed for unintentional homicides. *Kennedy v. Louisiana,* 554 U.S. 407, 128 S. Ct. 2641(2008). Texas long recognized this principle. When this Supreme Court upheld the Texas capital sentencing scheme in *Jurek v. Texas*, 428 U.S. 262 (1976), this Court acknowledged that the Texas scheme then permitted the imposition of death as a penalty for capital murder if the murder was committed deliberately with the expectation that death would occur. The 1991 "Penry Amendments" to the Texas statute[2] eliminated the former first special issue and its requirement that the murder be committed deliberately. As a result, the present Texas scheme unlawfully permits a conviction for capital murder for some murders that are not committed intentionally or deliberately but only knowingly. This is one of those cases and the Court of Criminal Appeals failed to adequately address the issue, despite petitioner's complaints regarding the insufficiency of the evidence.

Under *Ramos v. Louisiana*, 140 S. Ct. 1390 590 U.S. 1390 (2020), decided April 20, 2020. neither petitioner's capital murder conviction or death sentence can stand. Both jury verdicts suffer from the improper use of the word "or" connecting

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[2] Effective September 1, 1991, the Texas Legislature deleted the "deliberateness" special issue from Article 37.071 and added the "anti-parties" special issue.

intentionality with lesser forms of culpable mental state. This word use in the jury instructions renders the verdicts impermissibly ambiguous where great clarity is required. The controlling authority of the United States Supreme Court was established after the briefing in this case. *Ramos* will not permit a non-unanimous jury verdict to support severe criminal punishment. On this record, petitioner urges that the verdicts that put him on death row were probably not unanimous with respect to intentionality or party liability. A review of the possible juror votes reveals the frailty of the ambiguous verdicts returned in this case. We know that all twelve jurors joined in the same verdicts. We do not know why. With life itself in the balance, the Eighth Amendment requirement of heightened reliability mandates that we must know why. Some jurors likely joined the verdicts because they believed he acted knowingly and that was enough to support a death verdict as a party or a principal. It might well be that some of the jurors who joined in the conviction and death sentence believed petitioner was not a party and did not actually intend to cause the death of the child. Without violating their oaths or the instructions the judge gave them, such jurors could still vote for guilt of capital murder and death because they thought petitioner acted knowingly as a principal. Some of the jurors may well have believed that petitioner acted knowingly but not intentionally. Similarly, some of the jurors probably believed that the child's mother did not intend her child's death, only

that she acted knowingly or with some lower culpable mental state and had no extreme culpable intent to transfer to petitioner. Some of the jurors may well have believed that petitioner did not personally harbor the desire or objective to cause the child's death, only that he assisted his wife without him having the specific intent to kill, and that he acted with reckless indifference and anticipated that a life would be ended. After years of legal process in this case, we still cannot rule out the substantial likelihood that petitioner was not unanimously found guilty as a principal or that he was vicariously responsible for the death of the child. Petitioner asserts that after the opinion in *Ramos v. Louisiana*, *supra*, based on Sixth and Fourteenth Amendment principles, a serious criminal case cannot rest on a single verdict that may not be unanimous for death and may not be a true capital murder conviction, one that rests on the requisite intentionality.[3] Petitioner asserts the *Ramos* federal constitutional principles as well as Texas law here, as the basis warranting review by this Court. A review of the trial process that produced this unlawful and unconstitutional result is necessary. The court's jury charge at both phases of the trial failed to distinctly set forth the constitutional "fair trial" law applicable to the case. See the application paragraph of the guilt-innocence charge at CR.I-823 and the so-called anti-parties

[3] Petitioner acknowledges that Texas criminal law has long required a unanimous verdict, but the state's administration and application of that rule is a state law issue, cognizable in the federal courts only if the federal constitution is offended.

special issue in the punishment charge at CR.I-834. The jurors were not given an opportunity anywhere in all the instructions and verdict forms to state in an unambiguous way whether they believed petitioner acted intentionally rather than knowingly.[4] The difference is life or death. An ambiguous jury finding on the culpable mental state is not enough to support a death sentence. That is part of the arbitrariness petitioner asserted in the trial court, citing *Furman v. Georgia,* 408 U.S. 238 (1972), and progeny. At the guilt phase charge conference, petitioner objected and secured an adverse ruling on the submission of an intentional murder and the parties charge on the grounds that the record evidence would not support these elements.[5] As discussed above, in *Kennedy v. Louisiana*, *supra*, this Court, citing *Enmund v. Florida*, 458 U.S. 782 (1982) makes it crystal clear that only intentional homicides can be punished by death. Accordingly, petitioner may not be lawfully convicted of capital murder upon proof that went no farther than to establish that he "knowingly" caused the child's death. Without clear instruction and the provision of appropriately tailored verdict forms to clarify which mental state was found by the jury – including a demonstration that that verdict was unanimous – there would be no way for a reviewing court to determine whether the jury found that the State had met

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[4] Petitioner complained of the death penalty process as applied to him when he moved for a mistrial and secured an adverse ruling near the end of the guilt-innocence phase. RR.XXXVIII-11-12.

[5] See RR.XXXVIII-7-14.

its burden of proof of establishing beyond reasonable doubt that the killing and petitioner's participation in it, if he did, had been intentional rather than knowing. Such proof was required to demonstrate the "extreme culpability" necessary for eligibility for the death penalty, and the available proof fails because of the insufficiency of the evidence of intentionality as set out in petitioner's Issue No. One before the Court of Criminal Appeals. The appellate court rejected the merits of this and all of petitioner's points raised in his opening brief, warranting review by this Court. The death penalty is constitutional only when imposed for the most serious offenses committed by offenders demonstrating "extreme culpability." *Kennedy*, *id.* Comparison of the statutory definitions of "intentional" and "knowing" show a substantial difference between the terms. See TEX. PEN. CODE § 6.03. In this case, there is no satisfactory record evidence that the child's mother or any other person formed the actual intent to kill the child, rather than to discipline her. In the case at bar, there is no satisfactory evidence that petitioner caused the death of the child or that clearly supported a finding that petitioner subjectively appreciated that his acts were likely to result in the taking of the innocent life of the child, much less that he had the conscious desire or objective to kill the child. Furthermore, this Court has recognized that capital punishment deters crime "only when murder is the result of premeditation and deliberation." *Atkins,* 536 U.S. at 319. The evidence in this record

is clear that, if petitioner did cause the death, it was only an act of indifference to the possible result of his actions, and not one of actual intent to kill. Based on the inadequate analysis of this issue by the Court of Criminal Appeals, petitioner briefed the issue more extensively on motion for rehearing, which the appellate court summarily denied. The federal due process unanimity issue should be considered by this Court in light of the recent opinion in *Ramos v. Louisiana*, *supra*, unavailable at the time of original briefing herein.

Even assuming the truth of the premise that petitioner was responsible for physical acts that ultimately led to the child's death, absent a demonstration that he possessed an actual intent to cause the death and therefore possessed the "extreme culpability" making him deserving of execution, his sentence was unconstitutionally imposed under *Kennedy*, *supra*, and *Roper,* 543 U.S. at 568. Retribution by exacting the death penalty against an individual who has not evinced "extreme culpability" reflects a constitutionally disproportionate response to his crime. *Id.* Despite these concerns of evolving standards of decency, and the penological justifications given for the death penalty, the provision of Texas law at issue here fails to separate the "worst of the worst" within the universe of those who commit a murder plus a statutory aggravating factor. The evidence herein also fails in that regard as failing to establish sufficiently that petitioner deserved the death penalty under the facts.

That failure exists because the statutory regime does not ensure that only those who actually possess the highest degree of culpability are sentenced to death. The unreliability this creates violates the constitutional requirement that the death penalty not be "administered in an arbitrary and unpredictable fashion." *California v. Brown*, 479 U.S. 538, 541 (1987) (citing *Gregg*, 428 U.S. 153; *Furman v. Georgia*, 408 U.S. 238 (1972); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion) (requiring a State to give narrow and precise definition to factors that warrant imposition of death). Here, the jury could rationally have concluded, on rather thin evidence, that petitioner knew that his conduct was reasonably certain to cause the child's death, but also that he lacked the conscious objective or desire to cause the death of the child. There was no satisfactory proof to suggest he actually caused or desired to cause the child's death. Yet he was sentenced to death. This case must be distinguished from those like *Medina v. State,* 7 S.W.3d 633 (Tex. Crim. App. 1999) where the capital defendant complained about intentionality only regarding his conviction, but not, as here, a death sentence. Death is different. All the elements leading to the imposition of death must be submitted to the jury and found beyond a reasonable doubt under the principles that underlay the opinion in *Hurst v. Florida*, 136 S. Ct. 616, 577 U.S. 92 (2016). In this case, the jury never did find the intentionality required by *Kennedy* and *Enmund, supra*. No evidence suggested

preplanning the actual death of the child. Petitioner made no threat of killing or threatening to kill her. There was no evidence of forethought to cause death. The insufficient evidence simply failed to meet the constitutional muster required to support the conviction or death sentence. For this reason, this Court should grant the writ as requested.

II. QUESTION PRESENTED NO. TWO - Did the appellate court err in upholding the introduction of opinions of a psychiatrist regarding future dangerousness based on her interviews with petitioner in an absence of evidence that petitioner received adequate warnings?

III. QUESTION PRESENTED NO. THREE - Was petitioner denied the effective assistance of counsel for the failure of trial counsel to object to the opinions of a psychiatrist regarding future dangerousness based on her interviews with petitioner in an absence of evidence that petitioner received required warnings?

The above issues are discussed together in that they relate to the same factual basis. Petitioner contends that the State's psychiatrist failed to warn him prior to multiple interviews with him. Petitioner's trial counsel failed to object to the introduction of her harmful opinion regarding future dangerousness based on her interviews of petitioner. The death sentence cannot be upheld in the absence of evidence that the interviews were conducted only after petitioner was adequately warned, and trial counsel was ineffective for allowing the introduction of that

evidence. In the Court of Criminal Appeals, petitioner raised the issue of the introduction of the harmful opinions of a State's psychiatrist regarding future dangerous based on unwarned interviews with petitioner. Petitioner additionally raised the issue of the ineffectiveness of counsel for failing to object to the inadmissible opinions because of the failure of the expert to warn petitioner prior to the interviews. The Texas Court of Criminal Appeals failed to correctly analyze the issues, thus warranting review.

Based upon the State's motion requesting a psychiatric examination of petitioner by a State's psychiatrist, the trial court entered its written order granting the State's request, without objection by petitioner. CR.II-504. Apparently unbeknownst to defense counsel, the State had absolutely no right to examine petitioner for the issues of future dangerousness. In summary, the State had a right to advance notice if the defense had an expert that examined petitioner and intended upon relating to the jury an opinion regarding future dangerousness. Then, and only then, would the State have the right for its own expert to examine petitioner, and would then only have access to that information when and if petitioner actually put on expert testimony on future dangerousness. During the punishment phase of the trial, the expert was allowed to render her opinion that petitioner was a moderate to high risk for future dangerousness based upon her interviews with petitioner. RR.XXXIX-24.

Based upon the counsel's error, the State was allowed to present expert evidence that petitioner posed a future danger, warranting the death penalty. The conduct of defense counsel in allowing such interviews, and then failing to object to the introduction of harmful evidence gained from those interviews to support a death sentence constituted ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted for Texas constitutional claims in *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). Clearly counsel's representation fell below an objective standard of reasonableness and the deficient performance prejudiced the defense. Petitioner had an absolute right not to be interviewed by the State psychiatrist. *Estelle v. Smith*, 451 U.S. 454, 462-63, 101 S. Ct. 1866, 1872-73 (1981). The conduct of trial counsel made petitioner into that "deluded instrument of his own execution" referred to in *Estelle supra*, when trial counsel aided the State in obtaining this constitutionally protected information. The State's privilege to interview the petitioner only vests when a defendant initiates psychiatric examination and raises evidence concerning mental health examinations on the future dangerousness, on behalf of the accused, as discussed in *Soria v. State*, 933 S.W.2d 46, 57-59 (Tex.Crim.App. 1996). The constitutional limitations on the privileges to interview an accused for future dangerousness in a capital murder case was set out definitively in *LaGrone v. State,*

942, S.W.2d 602 (Tex.Crim.App. 1997). The Texas Court of Criminal Appeals discussed the "legal fiction" created by the procedure authorized to allow, and both prohibit, the State's examination and use of information from that examination in a capital murder case. The Court of Criminal Appeals failed to properly analyze the issue under *Lagrone, supra* and other authorities of this Court.

The ineffectiveness of defense counsel was then exacerbated when trial counsel failed to object to the introduction of the harmful future dangerousness testimony during the punishment phase. No objections were made on the basis of the requirements of *Miranda*, 384 U.S. 436, 86 S. Ct. 1602 (1966) and its progeny. No objection was made on the basis of the inadmissibility of the testimony based upon *Estelle v. Smith*, 451 U.S. 454, 462-63, 101 S. Ct. 1866 (1981). There was nothing in the record to indicate that petitioner had received any of the required warnings at the time he made the statements to the State's expert, and therefore, the interviews and information gained from petitioner which were made the base of her opinions were all obtained in violation of his constitutional and statutory rights. Had counsel objected to the subject of her testimony concerning information she had gained from petitioner, the trial court must have excluded her testimony under the cited authorities. By failing to object on that basis, trial counsel allowed the significantly and substantially damaging opinions concerning future dangerousness, and

underlying hearsay "facts." This information that was gained in violation of petitioner's constitutional rights compelled the jury to sentence petitioner to death, based upon trial counsel's failure to object to the testimony of the State's expert psychiatrist.

The evidence was simply inadmissible for all purposes, obtained in violation of petitioner's constitutional rights to remain silent. *Estelle v. Smith, supra.* Trial defense counsel's performance in failing to object to the inadmissible testimony of the State's psychiatrist unquestionably affected the outcome of the case and caused the jury to sentence petitioner to death. For these reasons, petitioner urges that this Court grant the writ as requested.

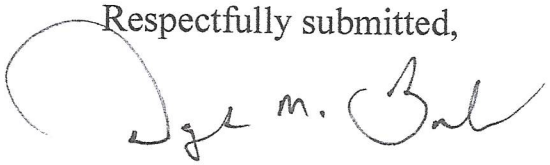
CONCLUSION

The decision of the Texas Court of Criminal Appeals conflicts with significant decisions of this Court, the applicable facts, and the U.S. Constitution. The Texas Court of Criminal Appeals should have reversed the judgment of the District Court and ordered a new trial. Additionally, the Texas Court of Criminal Appeals should have found the evidence insufficient to support a sentence of death. This United States Supreme Court should grant certiorari to determine these issues and to resolve the conflict between the opinions of the Texas Court of Criminal Appeals and this Court in the various cases relating to the issues.

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Texas Court of Criminal Appeals in this case.

DATED: April 12, 2022.

Respectfully submitted,



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