No. 21-7646
CAPITAL CASE

IN THE
Supreme Court of the United States

JASON DELACERDA,
Petitioner
v.
STATE OF TEXAS,
Respondent

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Texas Court of Criminal Appeals decide an important federal question in a manner conflicting with relevant decisions of this Court or opinions from the federal courts of appeals or another state court of last resort when it found the evidence sufficient to support Delacerda's conviction?

2. Did the Texas Court of Criminal Appeals decide an important federal question in a manner conflicting with relevant decisions of this Court and contrary to federal constitutional law when it upheld the introduction of expert opinion evidence on state-law procedural harmless-error grounds, without reaching the federal question?

3. Did the Texas Court of Criminal Appeals decide an important federal question in a manner conflicting with relevant decisions of this Court and contrary to federal constitutional law when it denied Delacerda's ineffective assistance of counsel claim based upon counsel's decision to forego objection to expert opinion testimony?

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BRIEF IN OPPOSITION

In December 2010, Amanda Guidry became involved in a relationship with Delacerda, eventually moving in with him and bringing her daughter with her. During the three months, they lived with Delacerda, the child declined from a normal, healthy four-year-old to the undernourished, poorly cared for child, covered head to foot in extensive injuries that were both fresh and healing, who lay on an emergency room bed unresponsive, cyanotic, and cold to the touch on the night of August 17, 2011. Given the state of her injuries and general condition, medical professionals concluded the child was the victim of an obscene level of physical abuse during the months leading up to her death with the cause of her death being non-accidental injury with blunt force trauma to the head.

During the punishment phase of trial, Delacerda's oldest son testified that he also lived with Delacerda, Guidry, and Guidry's daughter (B.L.), before B.L.'s death. During that time, Delacerda frequently and repeatedly abused B.L., often so violently that she would be knocked unconscious and begin convulsing. Initially, B.L. would cry.

Eventually, she lost the will to protest the protracted abuse and "would just take it."[1]

Expert testimony was also offered during the punishment phase of trial, with the State's forensic psychiatrist opining that, if found guilty of capital murder, Delacerda would be a moderate to high risk of future dangerousness. Delacerda countered with his own expert, who opined that in a prison setting Delacerda's risk for future violence would be low.

In October 2018, a Hardin County jury convicted Delacerda of capital murder and, via the special issues, sentenced him to death.

Delacerda's first question presented in the instant petition for certiorari review of the state court's affirmation of his conviction and sentence essentially argues that the Texas Court of Criminal Appeals ("TCCA") misapplied this Court's precedent in deciding his sufficiency of the evidence claim. Delacerda is incorrect. The TCCA utilized the standard for reviewing the sufficiency of the evidence announced by this Court in *Jackson v. Virginia*[2] and conducted an exhaustive analysis of the evidence supporting Delacerda's conviction. The TCCA's holding is

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1 39 R.R. 104-05.

2 443 U.S. 307 (1979).

consistent with this Court's precedent and does not conflict with any opinions from the federal courts of appeals or another state court of last resort. Delacerda's true disagreement is with the TCCA's conclusion, not the standard of review utilized or its application. This is not a proper basis for granting certiorari review.

Delacerda contends in his second question presented that the state court below erred by admitting the testimony of the State's forensic psychiatrist because she questioned him without adequate warnings, in violation of his Fifth Amendment right against self-incrimination and relevant decisions of this Court, and in his third question presented that he did not receive effective assistance from his trial attorney who did not object to the admission of this testimony on these grounds. The TCCA properly decided this admissibility-of-evidence claim against Delacerda based solely on state-law grounds. The TCCA did not reach Delacerda's alleged constitutional issues nor did they decide an important federal question in a way that conflicts with this Court's precedent or any opinions from the federal courts of appeals or another state court of last resort. Thus, with regard to Delacerda's second question presented, this Court does not have jurisdiction to grant review.

In his third and final question presented, Delacerda again essentially argues that the TCCA misapplied this Court's precedent. When considering Delacerda's ineffective assistance of counsel claim, the TCCA conducted an exhaustive analysis of the record and relevant law. The TCCA's holding is consistent with constitutional principles, this Court's precedent, and does not conflict with any opinions from the federal courts of appeals or another state court of last resort. As in his first question presented, Delacerda's true disagreement is with the TCCA's conclusion, not the standard of review utilized or its application. This is not a proper basis for granting certiorari review.

Moreover, the record does not support Delacerda's claim that he was questioned in violation of the Fifth Amendment rights or that he received ineffective assistance of counsel. Accordingly, this Court should deny certiorari review.

STATEMENT OF THE CASE

I. Procedural History

A Hardin County jury convicted Jason Delacerda of capital murder for the 2011 killing of B.L., a four-year-old child. *See* TEX. PENAL CODE ANN. § 19.03(a)(8) (West Supp. 2020). In accordance with the jury's

answers to the special issues, the trial court sentenced Delacerda to death on February 27, 2018. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(g) (West Supp. 2020).

On direct appeal, Delacerda raised thirty-four points of error. Having found all Delacerda's claims to be without merit, the TCCA affirmed the judgment and sentence of the state trial court on June 30, 2021. *Delacerda v. State*, No. AP-77,078, 2021 WL 2674501 (Tex. Crim. App. June 30, 2021) (not designated for publication). Delacerda filed a motion or rehearing on July 30, 2021, which the TCCA denied on January 12, 2022. Delacerda then filed this petition for a writ of certiorari.

II. Facts of the Crime

In its opinion on direct appeal, the TCCA recounted the facts of the capital murder as follows:

> In late 2010, B.L. lived with her grandmother, Wanda Bailey; her aunt, Samantha Bailey; and other family members. Wanda and Samantha took care of B.L. and had been involved in B.L.'s care since her birth. B.L. was a normal, healthy child who never had any serious injuries or illnesses. B.L.'s mother, Amanda Guidry,[3] lived in the Bailey home "off and on." Guidry began dating [Delacerda] around December 2010. Shortly thereafter, Guidry moved in with [Delacerda]. Around May 2011, Guidry took B.L. to live with her and [Delacerda] in his trailer.

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[3] Guidry is Wanda's daughter and Samantha's sister.

After Guidry took B.L., Wanda and Samantha "stopped getting to see [her]" and they became concerned. In June 2011, Samantha visited her brother who lived across the street from [Delacerda]. Samantha knocked on the doors and windows of [Delacerda]'s trailer, but no one answered. Guidry eventually allowed Samantha inside [Delacerda]'s home.

When Samantha entered the poorly lit trailer, she saw B.L. lying "on the recliner with a bag of ice on her head." Samantha saw that B.L.'s "head was really swollen and black and purple and her eyes were like little slits." B.L. had also suffered a broken leg. Samantha held B.L. with the bag of ice on her head for twenty to thirty minutes. B.L. would not stop crying. [Delacerda] told B.L., "[I]f you don't stop whining, don't think you can't be punished because your aunt is here." Guidry assured Samantha that B.L. was "okay." Guidry said that B.L. had "slipped" on the cast of her broken leg and that "that's why her head was swollen."

A week or two later, Samantha returned to check on B.L. This time Samantha brought her father, her boyfriend, and Wanda. When they knocked on the door, Guidry and [Delacerda] "took awhile to answer." When they entered the trailer, they found B.L. wrapped in covers in a back bedroom. Her head was the only visible part of her and "[i]t was still really swollen and black and purple looking." Wanda and Samantha visited B.L. once more before her death. On this final visit, B.L. seemed to be doing a "little better." She was "excited and talking about going to school."

On August 17, 2011, the Hardin County Sheriff's Office received a 9-1-1 call from a female caller at [Delacerda]'s residence. At the beginning of the recording, a male voice exclaimed something unintelligible followed by, "God damn it!" The caller sounded anxious and was sobbing. She said her four-year-old daughter was not breathing. The male voice in the background said, "She had a broke leg and a head injury

at one time. She's been getting better. She's had like a seizure or something – she's not breathing."

At 10:27 p.m. on August 17, paramedic Cassandra Walters was dispatched to [Delacerda]'s trailer in response to the 9-1-1 call. Guidry flagged her down. As Walters entered the trailer, she saw a small girl wearing only underwear lying on a floor wet with water and ice cubes. Walters said it looked "[l]ike someone had spilled a drink." [Delacerda] was performing cardio-pulmonary resuscitation (CPR) on B.L. as the dispatcher instructed him over the phone. B.L. was not breathing and had no pulse. Walters observed that the child had suffered multiple burns and bruising to her legs and face.[4] She was cold and pale and her lips were blue ("cyanotic"). Walters administered medications to try to start B.L.'s heart and attempted to revive her using a defibrillator, without success. Other paramedics arrived, and they transported B.L. to the hospital.

Dr. Charles Owen treated B.L. in the emergency room at the hospital that night. B.L. was "clothed only in filthy underwear." Owen said that "the general state of her body indicated multiple quite substantial injuries and trauma and wounds that were clearly sustained over a long period of time." He spent about twenty minutes trying to get B.L.'s heart beating, but she had "no meaningful neurologic function." B.L. was, "for all intents and purposes, dead when she came in and remained so."

In treating B.L., Owen observed numerous injuries to the child's body, including:

- Bruising, contusions, and injuries to her head "reflective of blunt force trauma";

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[4] According to B.L.'s medical records, her cast had been removed on July 25, 2011.

- A wound above her left cheek that appeared to be a burn or caused by some type of "gouging or cutting";

- A wound over her left breast that appeared to be a healing cigarette burn which, Owen noted, was "a classic type of injury to a child";

- Another healing cigarette burn and multiple puncture wounds on her hand;

- "[I]njuries to the bottom of the feet, a pattern that ... indicated that she had been walking on or scarred by bottle caps of some sort -- some rounded, pointed object";

- "[L]arge areas of what appeared to be healing burns on the top of one foot and ... one of her thighs";

- "[M]ultiple rib fractures in various stages of healing";[5]

- "[A] spiral fracture of the tibia[,]" which Owen described as "indicat[ing] high risk for non[-]accidental injury"; and

- "[S]unken eyes, dark discoloration around the eyes, just indicative of ... issues of nutrition and hygiene and general care."

The prosecutor asked Owen whether, "[c]onsidering all of these injuries that we have gone over so far, would you state that these are accidental injuries, or would you state it's intentional?" Owen responded:

> Given the full context of all the information I had available to me, including her examination and

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5 A radiological report in evidence documents rib fractures in twelve locations.

> subsequent discussions with the adults responsible for her care, it's unequivocal that this child was seriously abused over a long period of time; and these injuries are reflective of that abuse.

Owen – an emergency room physician who had treated close to 150,000 patients in his thirty-eight year career – said the abuse B.L. suffered was "[h]ead and shoulders above anything else I have ever seen in my entire career." He said she was "subjected to a long repeated and obscene level of physical abuse. It was outside of my experience. It remains outside of my experience."

Dr. Tommy J. Brown later performed B.L.'s autopsy. He noted that B.L. was four years old and weighed only thirty-two pounds. She had suffered hemorrhaging "at the back part of the head, the occipital-parietal area, the left temporal area, [and] the left frontal area." Her head injuries involved "a large amount of granulation tissue," which Brown described as "healing tissue from older injuries or within the last 24 hours to four or five days." B.L.'s forehead had six puncture wounds, one of which pierced her skull and entered her brain cavity. She had hemorrhages beneath both eyes and one on her cheek. Brown also documented a large bruise to B.L.'s rib cage, multiple older rib fractures, a recent rib fracture, a large ulceration on her right thigh, cigarette burns, and a large burn on the top of her right foot. He said that the bruise on B.L.'s chest could not have been caused by CPR-related chest compressions. The bottoms of her feet contained circular injuries about one inch in diameter. Brown noted an injury on the back of B.L.'s left shoulder which looked like someone had sucked on B.L.'s skin "like a hickey." In addition, Brown documented contusions on B.L.'s lips, missing skin on her nose, and other injuries to her face. Like Owen, Brown noted B.L.'s spiral leg fracture, which is usually "caused by twisting of the foot or the leg."

Brown concluded that B.L.'s cause of death was "a non-accidental injury with blunt force trauma to the head." When asked how he determined that the fatal injury was non-accidental, Brown responded, "All the signs I [saw] leading up to the cause of death [were] like the baby had been tortured or abused for a long period of time."

Captain Gary Spears and Sergeant Mark Minton of the Hardin County Sheriff's Office were dispatched to the hospital in the early morning hours of August 18, 2011. They examined B.L.'s body and noted her numerous injuries. They then interviewed [Delacerda] and Guidry separately.[6] Spears used a pocket audio recorder to record [Delacerda]'s interview.[7] [Delacerda] said that B.L. "had a trembling incident about a month and a half to two months ago." He explained that, at that time, they were outside on the trampoline, and B.L. "was acting bad -- as usual like she does" and "she ended up bouncing off the trampoline and landing on the ground. Broke her leg. Hit her head."

[Delacerda] said they took B.L. to the hospital and the doctor told them that they "could expect swelling" and that there was "probably a slight concussion." [Delacerda] said that he and Guidry "kept ice on it -- kept icing it down." He said that they watched B.L. "[p]retty much at all times." B.L.'s head "got better" but "probably about a week and a half, two weeks ago," her head "swole right back up." [Delacerda] said they mentioned the swelling to the doctor when they took B.L. to get her cast removed, and the doctor told them that the swelling was normal. They continued to apply ice to B.L.'s head and bathe her in cold water, although they switched to warm baths when she started "acting funny."

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6 Guidry did not testify at trial, and her recorded statements were not admitted into evidence.

7 Th[e] [TCCA] received [Petitioner]'s recorded statements in audio and/or audiovisual format only.

[Delacerda] said that, at around 5:30 p.m. on August 17, he and Guidry were giving B.L. a warm bath when she started "acting funny again":

> [B.L.] was like, "no, no, no, no, no" ... "Mm, mm, mm, mm." So we thought she was messing with us.... Sometimes she'd be stubborn like that.... She started leaning back and like trying to put her head in the water.... So I told her to stop.... [Guidry] grabbed her and got her out of the bathtub.... After it was all over with, she was acting fine. We had asked her, "was that all just to get out of the damn bathtub?" And she was like, "yes." ... So we looked at each other and we were like, "Damn."

[Delacerda] told the officers that B.L. seemed fine from about 8:00 p.m. until around 10:00 p.m. when Guidry left for work, although she was "still kind of sluggish." Shortly after Guidry left, "all of the sudden [B.L.] balled her fists up" and started "to come up in the air with them." He said B.L. was making sounds again like, "nah, nah, nah, nah, nah." He called Guidry and told her, "She is doing it again. I don't know what the fuck is going on. Get here now." He said he did not call 9-1-1 before Guidry got home because B.L. was still breathing and making sounds. He said that when Guidry got home, he picked up B.L., who was "still slightly breathing" and said, "We gotta go." But Guidry told him to call 9-1-1, and he complied.

The officers asked [Delacerda] about B.L.'s other injuries:

> [Officer]: ... [N]ow I'm gonna be blunt with you, alright? This child has got bruises from head to toe. She's got marks from head to toe, okay?
>
> [Delacerda]: The ones on her ass, I can say where they came from.

[Officer]: Where did they come from?

[Delacerda]: Those came from me and [Guidry] -- about four days ago, five days ago, something like that -- paddling her. She woke up in the morning. She had been bad that morning. [Guidry] paddled her first.

[Officer]: What did you paddle her with?

[Delacerda]: A paddle. Just, just a regular wood paddle.

[Officer]: How thick of a wood paddle?

[Delacerda]: Uh, probably about a half an inch. I made it in wood shop when I was young.

The officers asked [Delacerda] how B.L. received the burns on her leg. He replied that he accidentally spilled coffee on B.L. when she "staggered and hit" his recliner. The officers asked [Delacerda] what caused the bruise in the middle of B.L.'s head. He replied, "That's from her head being swole like an egg, and also me and [Guidry] were trying to release the fluid out of it and we had popped it a couple of times -- a little pus[.]" When asked how B.L.'s ribs were broken, [Delacerda] said, "I have no idea. We thought they were broken when we first went in with the broken leg. And we told him that her side was hurting.... He asked her how does it feel and she said, '[I]t's okay.' "

When asked why they did not take B.L. to the hospital for her injuries after the broken leg, [Delacerda] said that they talked about it but that Guidry "was afraid they would take her daughter for the spanking on the butt." The officers asked, "And all that time you [had] lived with the mother and the daughter?" [Delacerda] answered, "Yes, Sir." When asked who

"normally disciplined [B.L.]," [Delacerda] answered, "We both did."

At the end of the hospital interview, [Delacerda] signed a written consent form allowing the officers to search his residence. They also obtained a search warrant. When searching [Delacerda]'s trailer, investigators found cigarettes, a paddle, a push pin, bottle caps, and a battery powered device for shocking a person.

Minton began to gather timecards and similar documentation to determine Guidry's working hours during the period preceding B.L.'s death. The records showed that she worked full-time overnight shifts from around 10:00 p.m. until around 6:00 a.m. on the nights of August 13-16, 2011. On August 17, 2011, Guidry reported for work at 9:53 p.m. and clocked out at 10:16 p.m. (approximately eleven minutes before Walters was dispatched).

Later, [Delacerda] voluntarily came to the police station to make another statement. Minton and Spears conducted a videotaped interview. They began by reading [Delacerda] the *Miranda* warnings.[8] [Delacerda] indicated that he understood the warnings. In this interview, [Delacerda] repeated many of the statements he made in the hospital interview. However, he added some new information:

- When B.L.'s head began swelling and "getting tight," [Delacerda] and Guidry wrapped a "tourniquet" around her head. They joked about how B.L. looked in the tourniquet and took a photo of it. When she complained that the tourniquet hurt, they removed it.

- Around the time the doctors removed B.L.'s cast, B.L.'s "leg just shrunk." [Delacerda] and Guidry joked

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8 *See Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

about the shrunken leg, saying that it looked like B.L. was doing a dance when she walked.

- When [Delacerda]'s coffee burned B.L.'s leg, she "jumped off the sofa screaming." The spilled coffee did not burn [Delacerda].

- When B.L.'s head swelled up "like a balloon," [Delacerda] observed indentations, soft spots, and "lumps" on her head. Also, B.L. was having seizures.

- Regarding discipline, [Delacerda] said, "Normally, I would use my hand. I would slap [B.L.] on her leg. I would slap her on her hand."

- [Delacerda] said that he also disciplined B.L. by making her "stand in the corner" and that she "would stand there forever."

- When [Delacerda] decided that standing in the corner was not "working," he and Guidry removed "a bottle cap off a water bottle" and put the "bottle cap on the ground." They forced B.L. to "stand on the bottle cap." He explained, "[T]hat would start hurting her like about five or ten minutes afterwards. And we would tell her, 'Do you want to stop? Do you want to get off? Yes? Well, then stop being bad.' "

- The day [Delacerda] and Guidry paddled B.L., they struck her "about six times." That night, [Delacerda] saw that her buttocks had "swelled up like a blister."

- [Delacerda] conceded that the paddling was intentional and "it was wrong."

- When B.L.'s head swelled, they "popped" it with a "thumbtack" cleaned with alcohol – not a "needle," as [Delacerda] had previously stated.

- When asked about the cigarette burn on B.L.'s chest, [Delacerda] said he did not know what happened but speculated that "one of us dropped a damn cherry on her."

- When asked how B.L. could have suffered twelve broken ribs that were in different stages of healing, [Delacerda] said that sometimes they would pick up B.L. and "she would pop." He said he had suspected that she had a broken rib.

- [Delacerda] said he had noticed that B.L.'s stomach was swollen and distended, and her hair was falling out, as was Guidry's hair. He said he had joked about this, saying, "Y'all are shedding." He disagreed with the doctor's statement that B.L. was "very malnourished."

- [Delacerda] agreed with each of the following statements: "The butt, you did"; "The bottoms of the feet, you did"; and "The pin holes in the forehead, you did."

- [Delacerda] conceded that, despite B.L.'s severe head swelling, suspected broken rib, burns, and other injuries, they did not take her to the hospital except to treat her broken leg. He emphasized Guidry's fear that Child Protective Services (CPS) would take B.L. away from her.

At the end of the interview, the officers arrested [Delacerda].

Subsequently, Sergeants Jerry Roberts and Billy Malone, also from the Sheriff's Office, conducted a third interview. They read the *Miranda* warnings to the handcuffed [Delacerda]. Roberts had attended the autopsy and spoken

with [Delacerda]'s sons, J.G.D. and D.D.[9] He told [Delacerda] that J.G.D. and D.D. had independently stated that [Delacerda] would force B.L. to stand on bottle caps and would burn her with cigarettes if she stepped off the bottle caps. [Delacerda] responded, "Bullshit." But he eventually conceded, "Having [B.L.] stand on bottle caps was my idea after she stood there for a long time in the corner and it wasn't working." He also admitted, "We fucked up with her ass."

Forensic scientist, Angelina Temple, analyzed DNA derived from B.L.'s fingernail scrapings. She testified that the DNA profiles from both of B.L.'s hands indicated a mixture of two individuals (B.L. was an assumed contributor). Temple said B.L.'s mother, Guidry, and [Delacerda]'s sons were "excluded as contributors to the profile[s]" obtained from both hands. For the profile from B.L.'s left-hand scrapings, Temple found that it was "140 million times more likely that the DNA came from [B.L.] and [[Delacerda]] than ... from [B.L.] and an unrelated, unknown individual." She concluded, "Based on the likelihood ratio results, [[Delacerda]] cannot be excluded as a possible contributor to the profile."[10]

Defense counsel called no witnesses and offered no testimony. The jury charge authorized the jury to convict [Delacerda] as a principal or a party to the offense.[11] The jury

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9 The record reflects that J.G.D. was eighteen years old at the time of the trial and twelve at the time of the offense. D.D. was sixteen at the time of the trial and ten at the time of the offense.

10 Temple said it was "inconclusive" whether [Petitioner] could be a contributor to the DNA profile obtained from B.L.'s right-hand scrapings.

11 The jury charge provided:

"PARTY TO AN OFFENSE" - A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or both. Each party to an offense may be charged with the commission of the offense. All traditional distinctions between accomplices and principals are abolished by this section, and each party to an offense

found [Delacerda] guilty of the capital murder of a child under six as alleged in the indictment.[12]

The TCCA summarized the punishment phase evidence as follows:

> At the punishment phase of trial, the State's board-certified forensic psychiatrist, Lisa Douget, M.D.,12[13] testified that she interviewed [Delacerda] in early 2013. She also considered [Delacerda]'s background, history, and medical records in assessing his risk for future dangerousness. She found his risk level for future violent behavior to be "moderate" without the capital murder conviction. However, because the jury found [Delacerda] guilty of capital murder, Douget adjusted her assessment of [Delacerda]'s risk for future violence to "moderate to high." Douget conceded that she did not review [Delacerda]'s jail records from the last six-and-a-half years,[14] and that she had not interviewed [Delacerda] in the last five years.

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may be charged and convicted without alleging that he acted as a principal or accomplice.

"CRIMINAL RESPONSIBILITY FOR CONDUCT OF ANOTHER" - A person is criminally responsible for an offense committed by the conduct of another if: acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids or attempts to aid the other person to commit the offense; or, having a legal duty to prevent commission of the offense and acting with intent to promote or assist in its commission, he fails to make a reasonable effort to prevent commission of the offense.

12 The current version of Texas Penal Code § 19.03(a)(8) makes it a capital felony to murder "an individual under 10 years of age," but at the time of the instant offense, the statute applied to "an individual under six years of age." *See* Act of June 17, 2005, 79th Leg., ch. 428, 2005 Tex. Gen. Laws 428 (amended 2011) (current version at TEX. PENAL CODE § 19.03(a)(8)).

13 The record contains varying spellings and first names for this witness. [The TCCA used] the witness's own spelling of her name for the court reporter.

14 The record indicates that [Delacerda] was jailed from the time of his arrest in August 2011 until his trial in February 2018.

Douget's risk assessment report (State's Exhibit 74A) indicated that [Delacerda] received inpatient hospitalization at Fannin Pavilion in 1994 (at age seventeen) and 1996 (at age eighteen). He was diagnosed with "Bipolar affective disorder, mixed type, Attention deficit hyperactive disorder, Cannabis Dependence, Chronic," and "Anti-social personality disorder." The 1996 hospitalization records indicated that [Delacerda]:

- Had threatened to kill his parents and engaged "in physical fights with them";
- Had "stole[n] his parents' property and sold it to support his drug habit";
- Was "manipulative, demanding, non-compliant, uncooperative, and abrupt with the staff and some of the other patients"; and
- "[W]as judged not dangerous to himself or others."

The report noted that [Delacerda] had received treatment in jail while awaiting trial and had "demonstrated an improved mental state, which should remain manageable with continued medication compliance."

Amanda Henderson testified that, in 2001, she saw [Delacerda] and her neighbor yelling at each other. At one point, [Delacerda] drove away, and then turned around and drove back towards the neighbor at a "high rate of speed." Henderson said that, if her neighbor had not moved, [Delacerda] "probably would have run over him." [Delacerda]'s ex-girlfriend, Jeri Shelburne, was riding in [Delacerda]'s Bronco at the time. Jeri testified that [Delacerda] tried to "[r]un over a guy" due to a "drug deal gone bad." He "did a big U-turn in the trailer park[,]" and drove at high speed toward the man. He "hit a culvert and flipped the Bronco," which "busted all the windows" and trapped Jeri

inside the vehicle. The man [Delacerda] had tried to run over helped her escape from the Bronco.

Jeri's husband, Joys Shelburne, testified about a separate assault. Joys pulled into a parking lot with his newborn daughter riding in a car seat next to him. [Delacerda] approached the car and punched Joys through his open car window.

The State offered documentation of [Delacerda]'s criminal history, which included misdemeanor marijuana possession, Class B misdemeanor theft, criminal trespass, and theft by check. The State offered no evidence of prior convictions for felonies or crimes of violence.

[Delacerda]'s son, J.G.D., testified that he and his brother D.D. periodically stayed with [Delacerda], Guidry, and B.L. During these visits, J.G.D. witnessed [Delacerda] abuse B.L. "[a]ll the time." J.G.D. said [Delacerda] would punch B.L. with his fists "in her head and just everywhere; in her stomach, in her chest." B.L.'s head and "whole face" would "swell up" with bruises and black eyes. And [Delacerda] "poked [B.L.'s] head with thumbtacks to try to drain the fluid from it being swollen." Sometimes, when [Delacerda] punched B.L., "[s]he would be knocked out, and she would start shaking." He said that [Delacerda] also choked B.L. "[w]ith his hands around her neck" until she lost consciousness.

J.G.D. further testified that [Delacerda] would make B.L. "stand on the bottle caps for -- all night long, and he would make her sit in bathtubs full of ice for hours." When B.L. tried to step off of the bottle caps, [Delacerda] "would act like he was going to burn her" with a cigarette. While forcing B.L. to stand on the bottle caps, [Delacerda] would also "poke her fingertips and toes with thumbtacks."

J.G.D. said [Delacerda] would put B.L.'s panties in her mouth and make her lick the panties. Once, when J.G.D. and

D.D. were riding in the car with [Delacerda], [Delacerda] "reached back and twisted [B.L.'s] foot like -- looked like almost all the way around." J.G.D. said [Delacerda] routinely kicked B.L. with his feet or his boots. [Delacerda] also spanked B.L. with a wooden paddle "[a]s hard as he could," leaving her buttocks bruised and bleeding. The prosecutor asked, "How would [Delacerda] act while these things were going on? Did he say anything, did he -- I mean, what was his demeanor?" J.G.D. answered, "He just acted like it was normal to do that to a four-year-old."

J.G.D. testified that he witnessed this sort of abuse every time he and D.D. went to [Delacerda]'s house. At first, B.L. would cry, but eventually she "got used to it" and "[s]topped crying." None of the abuse occurred when Guidry was present, though J.G.D. told her about it. J.G.D. said [Delacerda] told B.L. that "she better not tell her mom or he would do something worse."

The defense's final witness was Dr. Edward Gripon, a psychiatrist. Gripon opined that there is no test that can reliably assess future dangerousness, and "past behavior" is "the best indicator of future behavior, particularly if there is a history of escalating past behavior." Gripon reviewed [Delacerda]'s jail records, recorded interviews, jail calls, and visits. He focused on how [Delacerda] has "functioned and how will he function in an incarcerated setting, because that's the only option left." Gripon stated that [Delacerda]'s jail records were "pretty benign" and demonstrated that [Delacerda] "has been able to conduct himself [in] a reasonable manner ... without any repeated acts of violence." Gripon concluded, "It appears as though in a prison setting ... his risk for future violence is low."

On cross-examination, Gripon agreed that [Delacerda] had a "temper" and his jail calls with his mother included "a lot of hollering and screaming." [Delacerda]'s jailers had to "intervene and tell him to cool off." Gripon agreed that

> [Delacerda] had a list of grievances against his parents, and he blamed his parents for "this situation even now."

Delacerda, 2021 WL 2674501, at *1-8.

III. State Proceedings Related to Delacerda's Sufficiency of the Evidence Claim

On direct appeal, Delacerda's first point of error challenged the sufficiency of the evidence supporting his conviction for capital murder. *Delacerda*, 2021 WL 2674501, at *8. The TCCA relied upon this Court's well-settled standard for reviewing the sufficiency of the evidence set forth in *Jackson v. Virginia. Id.* The TCCA exhaustively set forth the evidence presented to the jurors from which they could find the elements of the offense of capital murder beyond a reasonable doubt. *Id.* at *9-10.

Applying the *Jackson* standard to the evidence before the jury, the TCCA held: "[v]iewing the evidence in the light most favorable to the verdict, a rational juror could have deduced that [Delacerda] intentionally or knowingly caused four-year-old B.L.'s death." *Id.* at *10. This holding by the TCCA is the basis of Delacerda's first question presented in the instant petition.

Delacerda also asserts the TCCA failed to adequately address his contention that the present Texas capital sentencing scheme is unlawful

in the context of his sufficiency of the evidence claim. Specifically, Delacerda asserts that the Texas capital sentencing scheme permits a conviction by non-unanimous verdict for unintentional murder.

In issues twenty through twenty-seven, Delacerda attacked the constitutionality of Texas's death penalty sentencing scheme in the TCCA on a variety of grounds. *Delacerda*, 2021 WL 2674501, at *20-21. The TCCA addressed each of these claims on the merits and noted it had previously rejected arguments substantially similar to the constitutional challenges presented by Delacerda and found no reason to depart from well-settled precedent. *Id.* at *21.

On May 20, 2020, the TCCA heard Delacerda's case. Despite being decided one month prior to original submission to the TCCA, *Ramos v. Louisiana*[15] was not brought to the attention of the TCCA during argument as a basis for reversal of the trial court's judgment and sentence. *See* Texas Court of Criminal Appeals, AP-77,078 - JASON DELACERDA V. THE STATE OF TEXAS (streamed live on May 20, 2020), https://www.youtube.com/watch?v=P1SYOiKvLaA. Instead, Delacerda waited until filing a motion for rehearing on July 30, 2021, to

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15 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020).

assert that the decision of this Court in *Ramos* required rehearing of the case to address an alleged lack of juror unanimity regarding Delacerda's *mens rea* and the jurors' answers to the sentencing special issues. Thus, no federal question was timely and properly raised such that jurisdiction lies to review the judgment of the TCCA on this ground.

IV. State Proceedings Related to Delacerda's Admissibility of Expert Opinion Evidence and Correlated Ineffective Assistance of Counsel Claim

A. Pretrial Hearings

Prior to trial, the trial court appointed Douget to assess Delacerda's competence pursuant to Texas law and defense counsel expressed no objection to Douget's appointment. (C.R. 486-87; 5 R.R. 4-7). Three weeks later, when the State filed its second motion to allow Douget to examine Delacerda "for all purposes," Delacerda's attorney again expressed no opposition. (C.R. 511-14; 6 R.R. 16). Counsel did suggest, however, that the defense team wanted their expert to review Douget's report before making any decisions about whether a defense expert would testify. (6 R.R. 10-16). Moreover, during the interviews with Douget, Delacerda discussed "the official account" of the offense but "didn't discuss his part in anything." (39 RR 31-32).

B. Trial

Appellant objected to Dr. Douget's testimony only as "irrelevant" and "hearsay." (39 RR 19-20, 59-60, 62-63). Over Delacerda's objection, Dr. Douget testified. Delacerda's trial counsel cross-examined Dr. Douget, effectively calling into question the credibility of her testimony. (39 RR 24-31).

C. Direct Appeal

On direct appeal, Delacerda's arguments included that the trial court erred by allowing Dr. Lisa Douget to testify to her opinion of Delacerda's propensity for future dangerousness because he was not given *Miranda* warnings prior to speaking with her and that his trial counsel provided ineffective assistance by forgoing objection to the testimony of Douget on that ground. *Delacerda*, 2021 WL 2674501, at *25-33.

Comporting with his trial objections, Delacerda's thirtieth and thirty-second points of error alleged that the trial court erred in admitting Douget's testimony regarding Delacerda's propensity for future dangerousness because it was irrelevant and hearsay, not because it was taken in the alleged absence of warnings. *Id.* at *29-33. The TCCA

assumed without deciding that the trial court erred in admitting Douget's testimony. *Id.* at *30, 33.

The TCCA analyzed the trial court's admission of Douget's testimony and found any error to be harmless. *Id.* at *30-33. Specifically, the TCCA held: "any error in admitting Douget's testimony did not have a 'substantial and injurious' effect on the jury's deliberations concerning the future dangerousness special issue." *Id.* at *30; *see also id.* at 33. This holding by the TCCA forms the basis of Delacerda's second question presented in the instant petition.

Delacerda's twenty-ninth point of error alleged that he was denied the effective assistance of counsel when trial counsel failed to object that he was not sufficiently warned concerning his constitutional right to remain silent prior to Douget's interview, as required by *Estelle v. Smith.*[16] *Id.* at *28-29. The TCCA noted that the record in the instant case does not reflect whether Douget gave Delacerda any warnings before interviewing him: "[n]o one asked Douget at trial if she gave [Delacerda] any warnings and her report does not address this subject. Defense counsel agreed to allow Douget to interview [Delacerda] "for all purposes"

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16 451 U.S. 454 (1981).

including future dangerousness. Further, defense counsel have had no opportunity to explain their actions or inactions." *Id.* at *29.

The TCCA analyzed the performance of Delacerda's trial attorneys under this Court's standard set forth in *Strickland v. Washington.*[17] *Id.* at *22-29. After doing so, the TCCA held that on the limited record presented, "we cannot find that counsel's performance fell below an objective standard of reasonableness." *Id.* at 29. The TCCA further held: "even assuming deficient performance, we hold that [Delacerda] has not shown a reasonable probability that the result of his punishment proceeding would have been different but for counsel's failure to object based on Douget's alleged failure to administer *Miranda* warnings." *Id.* These holdings by the TCCA are the basis of Delacerda's third question presented in the instant petition.

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17 466 U.S. 668 (1984).

REASONS FOR DENYING THE PETITION

Delacerda fails to advance a compelling reason for this Court to review his case, and none exists. *See* SUP. CT. R. 10 (providing that review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons). The record supports the TCCA's conclusion that the evidence is sufficient to support Delacerda's conviction. Delacerda simply disagrees with this finding. While Delacerda highlights some of the evidence that supports his claim of insufficiency, he fails to acknowledge the other evidence to the contrary, to which deference must be shown, that the TCCA found was sufficient to support the jury's verdict of guilt. However, it is well-settled under this Court's precedent as well as under Texas law that the sufficiency of the evidence supporting a conviction is assessed by reviewing all the evidence in the light most favorable to the verdict, and allowing for the jurors' reasonable inferences and resolution of any conflicts in the evidence. Accordingly, Delacerda's claim has no merit, and this Court should deny certiorari review.

As a threshold matter on Delacerda's second question presented, this Court does not have jurisdiction to review the state court's denial of

Delacerda's admissibility of evidence claim because the TCCA's ruling rests on independent and adequate state-law grounds. Delacerda did not argue to the TCCA that the trial court erred by admitting his statements to Douget because they were unwarned, nor did he object in the trial court that he was not given adequate warnings, rather he objected to the admission of this testimony as irrelevant and hearsay under state evidentiary rules. Thus, the TCCA never reached the federal issue Delacerda raises in his petition. Moreover, jurisdiction notwithstanding, Delacerda fails to provide a compelling reason to grant review on this ground. Again, the record supports the TCCA's finding – that any error in admitting Douget's testimony did not have a "substantial and injurious" effect on the jury's punishment deliberations – and Delacerda merely disagrees. As such, Delacerda's claim has no merit and is unworthy of this Court's attention.

Finally, Delacerda fails to provide a compelling reason to grant review on his ineffective assistance of counsel claim. Delacerda's complaint is with the TCCA's application of the *Strickland* standard for reviewing ineffective assistance of counsel claims to the record in this case. Given the limited record in this case, relevant decisions of this

Court support the TCCA's finding that counsel's performance cannot be held to have fallen below an objective standard of reasonableness. However, even assuming Delacerda's trial counsel performed deficiently, the record further supports the finding that Delacerda has not shown a reasonable probability that the result of his punishment proceeding would have been different but for counsel's failure to object based on Douget's alleged failure to administer *Miranda* warnings. Consequently, Delacerda's claim has no merit, and this Court should deny certiorari review.

I. Because the TCCA Applied the Correct Legal Standard in Reviewing the Sufficiency of the Evidence Supporting Delacerda's Conviction, No Compelling Reason Exists for Granting Certiorari Review.

To prevail on a claim that the evidence is legally insufficient to support his conviction, a defendant must demonstrate that, even viewing the evidence in the light most favorable to the verdict, no rational juror could have found beyond a reasonable doubt that he committed the essential elements of the offense with which he is charged. *Jackson*, 443 U.S. at 319. Texas's standard is consistent with this Court's precedent and Delacerda does not contend otherwise. *Godsey v. State*, 719 S.W.2d

578, 582 (Tex. Crim. App. 1986) (citing *Jackson* and setting forth standard for reviewing sufficiency of the evidence to support a conviction); *see also Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) (allowing for jurors' resolution of conflicting testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (providing "circumstantial evidence alone can be sufficient to establish guilt.").

After considering all of the evidence and applying the correct legal standard, the TCCA concluded that: "[v]iewing the evidence in the light most favorable to the verdict, a rational juror could have deduced that [Delacerda] intentionally or knowingly caused four-year-old B.L.'s death." *Delacerda*, 2021 WL 2674501, at *8-10. Delacerda spends the bulk of his petition attacking the particular evidence the TCCA relied on in reaching its conclusion and offering alternative evidence from which the opposite conclusion could be drawn. However, Delacerda's arguments amount to no more than a complaint that he lost in the lower courts; he does not actually identify a flaw in the standard utilized to reject his claim.

In his petition, Delacerda affords no deference to the evidence underpinning the jurors' decision that he intentionally or knowingly caused four-year-old B.L.'s death. He does so notwithstanding substantial record support for this determination. *Delacerda*, 2021 WL 2674501, at *1-6, 9-10. However, a petition for writ certiorari is not the appropriate forum for asserting a claim of erroneous factual findings. *See* SUP. CT. R. 10.

Because the TCCA properly denied Delacerda's claim based on existing law and its opinion does not conflict with any opinions from this Court, a federal court of appeals, or another state's court of law resort, there is no compelling reason to grant certiorari review on this ground.

II. This Court lacks jurisdiction to grant review of Delacerda's admissibility of evidence claim because the TCCA's ruling rests exclusively on state-law grounds.

This Court holds "no supervisory power over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *Smith v. Phillips*, 455 U.S. 209, 221 (1982). As such, this Court has consistently held that it will not address a federal question if the state-court decision rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman*

v. Thompson, 501 U.S. 722, 729 (1991). This rule applies whether the state law ground is substantive or procedural, and its application means this Court lacks jurisdiction to review the federal claim. *Id.*

Delacerda frames the issue presented in question two of his petition as having constitutional dimension. In actuality, this claim implicates nothing more than the TCCA's proper application of Texas law regarding the admissibility of evidence.

Harmless error rules are rules of appellate procedure. Under Texas law, harm from the erroneous admission of evidence at the punishment stage of trial is reviewed to determine "whether that error affected [] substantial rights to a fair sentencing trial." *See* TEX. R. APP. P. 44.2; *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010). To establish harm, a Texas defendant must show on the record that the error in admitting the evidence had a "substantial and injurious" effect on the jury's punishment-phase deliberations. *See Coble*, 330 S.W.3d at 280-87.

The TCCA followed this longstanding procedure in addressing Delacerda's admissibility of evidence claim regarding Douget's expert testimony on direct appeal. The TCCA found:

- Douget "did not offer strong expert testimony for the State" and, in fact, conceded on cross-examination

that she should have considered Delacerda's jail records, that her risk assessment could be "stale," and that she had never before been qualified to give an opinion about future violence in a capital murder case;

- the defense effectively rebutted Douget's testimony with the testimony of a psychiatrist who had practiced since 1975 and testified in court regarding risk assessments on twenty-five to thirty occasions;

- in over 250 lines of closing argument, the State's attorneys devoted only eight lines to Douget's testimony and defense counsel stressed Douget's concessions and emphasized their expert's contrary testimony in their closing arguments; and

- there was ample evidence that there was a probability Delacerda would commit future acts of violence in the form of the sheer brutality of the instant offense, Delacerda's history of angry outbursts, and Delacerda's oldest son's "troubling testimony."

Id. Finding "ample evidence" apart from Douget's testimony of a probability that Delacerda would commit future acts of violence, that her testimony was not "particularly powerful," "was effectively rebutted" by the defense expert, and "barely mentioned" during the State's closing argument, the TCCA held that any error in admitting Douget's testimony did not have a "substantial and injurious" effect on the jury's

deliberations concerning the future dangerousness special issue. *Delacerda*, 2021 WL 2674501, at *30-33.

Thus, the TCCA's disposition of Delacerda's complaint regarding the admission of Douget's testimony rested on a state-law ground that is adequate to support the judgment. Moreover, there was no federal issue passed upon by the TCCA and therefore no federal question upon which jurisdiction can rest. *Delacerda*, 2021 WL 2674501, at *30-33. Accordingly, this Court should deny Delacerda's petition on this ground.

Moreover, under well-established Texas law as well as this Court's precedent, a trial court's evidentiary decisions are entitled to great deference. *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1992) (op. on reh'g); *see also United States v. Tsarnaev*, 142 S. Ct. 1024, 1040, 212 L. Ed. 2d 140 (2022). Further, the Texas rule for reviewing non-constitutional reversible error for harm mirrors the federal rule of harmless error. *Compare* FED. R. CRIM. P. 52(a), *with* TEX. R. APP. P. 44.2(b).

Based on the foregoing, Delacerda's claim is meritless and therefore unworthy of this Court's attention. The petition for certiorari review should be denied.

III. Because the TCCA Applied the Correct Legal Standard in Reviewing Delacerda's Ineffective Assistance of Counsel Claim, No Compelling Reason Exists for Granting Certiorari Review.

To prevail on a claim that counsel rendered ineffective assistance, this Court has held that a defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment and that counsel's errors deprived the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Id.* Texas courts adhere to this Court's two-pronged test to determine whether counsel's representation was inadequate such that a defendant's Sixth Amendment right to counsel was violated and Delacerda does not claim otherwise. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999).

After considering the record in the instant case, the TCCA noted that it:

> "does not reflect whether Douget gave [Delacerda] any warnings before interviewing him. No one asked Douget at trial if she gave [Delacerda] any warnings and her

> report does not address this subject. Defense counsel agreed to allow Douget to interview [Delacerda] "for all purposes" including future dangerousness."

Delacerda, 2021 WL 2674501, at *29. The TCCA further observed that defense counsel had no opportunity to explain their actions or inactions. *Id.*

On such a limited record, the TCCA declined to find that trial counsel's performance fell below an objective standard of reasonableness. *Id.* This is consistent with this Court's mandate that judicial scrutiny of counsel's performance be highly deferential, with the reviewing court making every effort to "eliminate the distorting effects of hindsight" and "indulg[ing] a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

On direct appeal to the TCCA and now in his petition to this Court, Delacerda bemoans the lack of a record indicating warnings were given. However, to prevail on his claim, it is his burden to provide the TCCA and this Court with a record from which deficient performance can be shown. *See Strickland*, 466 U.S. at 687-88. Moreover, Delacerda affords no deference to counsel's decisions, despite the necessity to indulge a

strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689. Essentially, Delacerda asks this Court to view a single decision of trial counsel regarding the grounds on which to assert an objection in a vacuum and conclude that counsel's decision for forego objecting was erroneous.

The TCCA also addressed the prejudice prong of Delacerda's ineffective assistance of counsel claim, stating: "even assuming deficient performance, we hold that [Delacerda] has not shown a reasonable probability that the result of his punishment proceeding would have been different but for counsel's failure to object based on Douget's alleged failure to administer *Miranda* warnings." *Delacerda*, 2021 WL 2674501, at *29. Support in the record for this holding includes: several concessions made by Douget on cross-examination that were characterized by the TCCA as "detrimental to the State's case;" weighty evidence supporting the jury's punishment verdict; evidence revealing Delacerda's history of angry outbursts, drug abuse, threats, and violence; Delacerda's own expert admitting that Delacerda "had a 'temper'"; and the particularly damaging testimony of Delacerda's oldest son who witnessed firsthand Delacerda's torture of B.L.. *Id.* at *27-28. Additional

evidence of distinct significance to the TCCA was "the heinous nature of the instant offense, the prolonged abuse [Delacerda] inflicted on the child victim, and the minor role Douget's testimony played in the State's punishment case." *Id.* at 29.

The TCCA applied the correct governing precedent to the record in the instant case. Delacerda does not identify a flaw in the standard of review utilized or the reasoning of the TCCA. His complaint is merely that he disagrees with the result. Because the holding of the TCCA does not conflict with relevant decisions of this Court, any opinions from the federal courts of appeals or another state court of last resort, there is no compelling reason to grant certiorari review on this ground.

CONCLUSION

For the foregoing reasons, the State of Texas respectfully requests that Delacerda's petition for writ of certiorari be denied.

Respectfully submitted,

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