

24-7194

ORIGINAL

No. \_\_\_\_\_

IN THE

FILED  
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SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

NEIL AARON CARVER — PETITIONER  
(Your Name)

VS.

STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TEXAS COURT OF CRIMINAL APPEALS IN CASE NO. WR-95,970-01

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

NEIL AARON CARVER

(Your Name)

2661 FM 2054

(Address)

TENNESSEE COLONY, TEXAS 75884

(City, State, Zip Code)

NO PHONE

(Phone Number)

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SUPREME COURT, U.S.

## QUESTION(S) PRESENTED

1. This Honorable Court has declared that Counsel renders ineffective assistance in failing to investigate and present mitigating evidence in a capital punishment case; therefore, is it equally fair to declare the same in a non-capital case when the punishment range is 25-99 to life without the possibility or consideration of parole eligibility? Cf. Wiggins v. Smith, 123 S.Ct. 2527, 2536 (2003); Strickland v. Washington, 466 U.S. 668, 687 (1984).

### Subsidiary Questions:

- i. In a non-capital punishment case, does an accused have a right to present a defense and present evidence before the jury during his punishment hearing?
- ii. In a non-capital punishment case, should an accused have a right to an effective counsel who is willing to present favorable evidence in the face of four witnesses willing to testify on the behalf of the accused?
- iii. In a non-capital punishment case, is it reasonable why counsel would choose not to show the jury any favorable evidence on behalf of the accused in order for the jury to consider when assessing a defendant's punishment?

2. Is Section 21.02(d) of the Texas Penal Code unconstitutional because it is void for vagueness, the statute is too broad concerning specificity; and thus, should Jacobsen and its progeny be overruled?

### Subsidiary Questions:

- i. Does Section 21.02 of the Penal Code authorize or encourage arbitrary and discriminatory enforcement?
- ii. Did Texas Courts' conclusion that Section 21.02(d)'s term "[series] of acts of sexual abuse" constitute the underlying brute facts or means conflict with this Court's reasoning in Richardson v. U.S.?

iii. Should Jacobsen's decision and its prodigy be overruled because 21.02(d)'s words create several elements, namely, the several "violations," in respect to each of which the jury must unanimously and separately agree upon?

iv. What is the level of specificity within the CSA Statute that is required and that must be agreed upon by jurors?

v. How can a defendant defend against a CSA statute when the state is allowed to put any and all evidence they wish to submit to the jury, tell the jury they do not have to be unanimous in their verdict, then hold a conviction based solely on the uncorroborated and unsupported testimony of the victim alone?

3. Should a habeas Petitioner be allowed to first have a meaningful opportunity to be heard before a tribunal; and thus, have a fair and full hearing to develop the habeas record pertaining to the fact-finding process, and the resolution of controverted issue(s) before the Court of Criminal Appeals decides to deny the Petitioner's ineffective assistance of counsel grounds without a written opinion? Cf. Boddie v. Connecticut, 401 U.S. 371, 379 (1971); Keeney v. Tanayo-Reyes, 504 U.S. 1, 10 (1992); Townsend v. Sain, 372 U.S. 293, 312 (1963).

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## RELATED CASES

In re Neil Aaron Carver, No. WR-95, 970-01 (Tex.Crim.App. December 18, 2024)

In re Carver, 2023 Tex.Crim.App. Lexis 340 (Tex.Crim.App. May 17, 2023)

Carver v. State, 2023 Tex.App. Lexis 357 (Tex.App.-Tyler, Jan. 19, 2023)

State v. Neil Aaron Carver, No. 6172 (8th Jud. Dist. Crt. Rains County, May 25, 2022)(jury trial)

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### Question One:

This Honorable Court has declared that Counsel renders ineffective assistance in failing to investigate and present mitigating evidence in a capital punishment case; therefore, is it equally fair to declare the same in a non-capital case when the punishment range is 25-99 to life without the possibility or consideration of parole eligibility? 9

- a. The Constitution of the United States demands for Counsel to act as an assistant, and act as an advocate on Petitioner's behalf. 9
- b. Counsel's performance is deficient when he failed to present a defense and produce evidence before the jury in order to get a more favorable sentence than a life sentence without the possibility of parole. 10
- c. Petitioner's punishment hearing has been prejudiced by counsel's deficient performance. 14

### Question Two:

Is Section 21.02(d) of the Texas Penal Code unconstitutional because it is void for vagueness, the statute is too broad concerning specificity; and thus, should Jacobsen and its progeny be overruled? 17

### Question Three:

Should a habeas Petitioner be allowed to first have a meaningful opportunity to be heard before a tribunal; and thus, have a fair and full hearing to develop the habeas record pertaining to the fact-finding process, and the resolution of controverted issue(s) before the Court of

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

reported at N/A; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the 12th District Court of Appeals court appears at Appendix D to the petition and is

reported at N/A; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. 24 A 810.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was Dec. 18, 2024. A copy of that decision appears at Appendix B.

A timely petition for rehearing was thereafter denied on the following date: Feb. 18, 2025, and a copy of the order denying rehearing appears at Appendix A.

An extension of time to file the petition for a writ of certiorari was granted to and including May 17, 2025 (date) on Feb. 21, 2025 (date) in Application No. 24 A 810.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

All constitutional and statutory provisions appear in citation form below, but appears verbatim in Appendix K:

1. United States Constitution:
  - a. Article I, Section 9, Clause 2
  - b. Amendment V
  - c. Amendment VI
  - d. Amendment XIV, Section 1
2. 18 United States Code, Section 924(c)(3)(B)
3. Federal Rule of Evidence 404
4. Texas Code of Criminal Procedure:
  - a. Article 11.04
  - b. Article 11.07, Section 3(a)-(d)
  - c. Article 37.07, Section 3(a)
  - d. Article 38.07
  - e. Article 38.37
5. Texas Rule of Appellate Procedure 73
6. California Penal Code, Section 288.5(a)-(b)
7. Texas Penal Code:
  - a. Section 21.02(b)-(d)
  - b. Section 22.021(a)(1)(B), (2)(B)

## STATEMENT OF THE CASE

This is a collateral-appeal from a denial out of the Court of Criminal Appeals, and originating from a felony conviction out of the 8th District Court of Rains County, Texas. The Petitioner was indicted for the offense of continuous sexual abuse of a young child, in cause No. 6172 on June 29, 2021. See CR, 6; Tex. Pen. Code § 21.02. This offense's punishment range carries 25-99 to life without the possibility or consideration of parole eligibility. See Tex. Pen. Code § 21.02; Tex. Gov't Code § 508.145(a)(2). The parties selected a jury on May 23, 2022, and the jury returned a guilty verdict the following day. RR3, 1; RR4, 54. That same day, the jury sentenced Petitioner to life in prison. See Appendix J.

On direct appeal, the Petitioner argued two grounds for relief. See Appendix D. First, the evidence presented at trial does not establish the allegations in the indictment, and thus is legally insufficient to support the conviction. Id. And Second, Petitioner contended that the trial court erred by refusing to allow him to represent himself at trial. Id. Opining Chief Justice James T. Worhen affirmed the trial court's judgment on January 19, 2023. Id. The Petitioner then filed his Petition for Discretionary Review (PDR) challenging the lower court's opinion on both issues, and the Court of Criminal Appeals refused his PDR on May 17, 2023. In re Carver, 2023 Tex.Crim.App. Lexis 340 (Tex.Crim.App. May 17, 2023).

On June 11, 2024, the Petitioner filed his first state habeas application challenging his conviction and sentencing. Appendix E, pg. 4; Code of Crim. Proc. art. 11.07. Among other grounds, the Petitioner raised the relevant two issues from his habeas application as explained:

First, the Petitioner argues, in violation of Strickland and Cronic, Counsel is ineffective for his failure to present any evidence or defend the Peti-

tioner at punishment phase of trial. Counsel failed to place any evidence before the jury, and obtain a favorable sentence for the Petitioner. The punishment stage started at 1:36pm. RR4, 55. Counsel never made an opening statement. Id. Counsel did not cross-examine the State's witness. RR4, 7. Nor did Counsel object to the prosecutor's improper line of questioning concerning "what punishment to assess." RR4, 57. To explain, Mr. Vititow (the Prosecutor) questioned Mr. Camp and said: "So what do you think should happen to the defendant? (Mr. Camp responded): I'm pushing for the full." RR4, 57. Further, Counsel did not present any reputation, opinion, or character witness(es) to "seek for mercy." Id.

Christa Carver, Tony Vigil, Deavah L. Campbell-Vigil, and Benji L. Brandow were available at punishment to testify as a reputation, opinion and character witness to "seek for mercy." See Appendices F-I. Each would have testified, for example, that Petitioner is a loving father and person. Petitioner has always dedicated himself to putting others first. That Petitioner would help a bystander stranded on the street, and to show that the community still loves, cares and accepts the Petitioner. Thus, the Petitioner has a steady job and can continue to provide for his family and friends in need. Id.

In ringing terms, the punishment process lost its character as a confrontation between adversaries because Counsel did virtually nothing at punishment. RR4, 55-58. Finally, the closing argument by counsel was only 13 lines long and Counsel only made a conclusory statement or request for mercy to sentence Petitioner to 25 years in prison. RR4, 62-63. Counsel provided no reason or evidence or any redeeming measure(s) why the jury should show mercy to Petitioner. RR4, 55-63. Nothing other than "he has never been in trouble before," without admitting any evidence to support it. RR4, 62-63.

As for prejudice, the entire punishment phase before the jury was 1 hour and

7 minutes long. RR4, 55-72. The prosecution took 99.9% of the record providing arguments and evidence for a stiff verdict. Id. Counsel did nothing to seek for a sentence more favorable to the Petitioner. Id. Truly, during voir dire, Counsel did not even question whether anyone could consider the full range of punishment. RR3, 61-117. The only mention of punishment range was briefly and vaguely by the prosecution when they asked "whether anyone had a problem with the punishment." RR3, 112. Prejudice is further supported when counsel abandoned his own trial strategy and follow through with placing Christa Carver on the stand during guilt/innocence. Accordingly, Counsel completely shut down and stopped acting as an attorney when the Petitioner felt that Counsel was not defending him, and pointed this out to the court when Petitioner untimely requested to represent himself for the rest of the trial proceeding(s). RR3, 288; RR4, 4-5, 10-13.

Furthermore, this fact even shocked the trial court when counsel made a false statement to call Christa Carver before Petitioner brought this issue up to the court; and thereafter, Counsel never did place Christa Carver to the stand because Counsel got upset with Petitioner for Petitioner feeling like Counsel was not defending him. Id.

Within the second issue, Petitioner argued that Section 21.02(d) of the Texas Penal Code is unconstitutional because it is void for vagueness, the statute is too broad concerning specificity and thus, Jacobsen and its progeny should be overturned. There are two states in the United States that have a continuous sexual abuse (CSA) statute—California and Texas. Cal. Pen. Code § 288.5(a)-(b); Tex. Pen. Code § 21.02. This Honorable Supreme Court has not yet provided clear guidance for how specificity should be addressed; nor, has the Court of Criminal Appeals directly spoken on the Constitutionality of the continuous sexual abuse statute. Nevertheless, this Supreme Court has made it

clear that a jury must unanimously agree to every act committed in order to secure a fair verdict.

While 21.02 is clear as to punish a person for continuous sexual abuse committed against a child under 14 years of age, and over a period of 30 days or more. The CSA statute is not clear what the legislature meant when it states: "two acts of abuse." The statute defines a single "act of sexual abuse" as enumerated in several different violations of the Texas Penal Code. See Tex. Pen. Code § 21.02(c). Under the Code construction, a reasonable person believes that the prosecution must prove the lesser enumerated offense first in order to prove that at least two or more offenses were violated. Therefore, Section 21.02(c) should be interpreted to mean a single act of sexual abuse, for example, aggravated sexual assault carries five different sets of elements that are separate and distinct elements the jury must unanimously agree upon.

On June 17, 2024, the Clerk of the 8th Judicial District Court of Rains County, filed Petitioner's habeas corpus application challenging his conviction and sentence. See Appendix E, pg. 4. On June 26, 2024, Christina Carver filed her affidavit in support of Petitioner's habeas application. Appendix F. On June 27, 2024, Benji L. Brandow filed his affidavit in support of Petitioner's habeas application. Appendix G. On July 01, 2024, Deavah Campbell-Vigil filed her affidavit in support of Petitioner's habeas Application. Appendix I. On July 1, 2024, Tony Vigil filed his affidavit in support of Petitioner's habeas application. Appendix H. On July 08, 2024, the Petitioner filed his memorandum of law in support of his habeas application. Appendix E, pg. 5.

On August 26, 2024, the Court of Criminal Appeals received Petitioner's habeas application. There is no record proof on any docket showing that the 8th Judicial District Court of Rains County forwarded any of the affidavits or the memorandum in support. The district court only sent the application because

the state did not file a response or answer, nor did the trial court made any factual findings, nor did the trial court make a recommendation during the entire proceeding. Therefore, it is reasonable to conclude that the Court of Criminal Appeals never seen any of the documents in the district clerk's possession. Accordingly, the Court of Criminal Appeals made a decision on December 18, 2024, based on partial information within the clerk's possession. There is still controverted issues that should have been addressed by the court. See

Appendix B.

Finally, the Court of Criminal Appeals denied the Petitioner's habeas application on the above grounds without a written order, without a hearing, and without a full habeas record at hand. Id. On January 10, 2025, the Petitioner sought for the Court of Criminal Appeals to reconsider their denial based on their own motion. The Petitioner asserted that he has alleged specific facts that entitles him to habeas relief because he proved, by the preponderance of the evidence, that Counsel rendered ineffective assistance during Petitioner's punishment stage of trial.

Truly, Counsel was never given an opportunity to explain his reasoning why he did not place four character witnesses on the stand during his punishment stage. The trial court never attempted to decide whether there are "controverted, previously unresolved facts material to the legality of the Petitioner's confinement," in the face of four different affidavits provided by each individual on their own. Taken together, the Petitioner argues that the Court of Criminal Appeals' decision was premature because the court never saw the full habeas record that the trial court had in its possession.

On February 18, 2025, the Court of Criminal Appeals denied, without written order, the Petitioner's suggestion for reconsideration. Appendix A. Further, this writ is due on May 17, 2025 after Justice Alito granted more time.

## REASONS FOR GRANTING THE PETITION

### I. INTRODUCTION:

Being in violation of Strickland and Cronic, the Petitioner argues that the state courts have allowed counsel to render ineffective assistance in a situation where Counsel failed to present any evidence or defend the Petitioner at his punishment stage to get a favorable sentence on Petitioner's behalf. Therefore, Petitioner presents this question for this Honorable Court to take up in determining whether to grant certiorari as follows:

### II. QUESTION #1:

This Honorable Court has declared that Counsel renders ineffective assistance in failing to investigate and present mitigating evidence in a capital punishment case; therefore, is it equally fair to declare the same in a non-capital case when the punishment range is 25-99 to life without the possibility or consideration of parole eligibility?

After a review of this argument, certiorari should be granted to determine that counsel can render ineffective assistance in failing to essentially present a defense and produce evidence before the jury in order to obtain a more favorable sentence in a non-capital case, as this Honorable Court previously has determined and declared in capital punishment cases. Sup. Crt. Rule 10.

Thus, the Equal Protection of the laws of the 14th Amendment should be upheld within this presented-type of situation(s). U.S. Const. Amend. XIV.

#### a. The Constitution of the United States demands for Counsel to act as an assistant, and act as an advocate on Petitioner's behalf.

This Court in Cronic has explained that "an accused's has a right to counsel is the right to the effective assistance of counsel." U.S. v. Cronic, 466 U.S. 648, 654 (1984)(citation omitted). The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of Counsel to the accused, but "assistance," which is to be "for his defense." Id.

Thus, "the core purpose of the counsel guarantee was to assure 'assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." Id. (citation omitted). If no actual assistance for the accused's defence is provided, then the constitutional guarantee has been violated. Id. In McMann This Court indicated that the accused is entitled to a reasonably competent attorney, whose advice is within the range of competence demanded of attorneys in criminal cases. Id., 466 U.S. at 655 (citing McMann v. Richardson, 397 U.S. 759, 770-71 (1970)). In Cuyler v. Sullivan, 466 U.S. 335 (1980), "we held that the constitution guarantees an accused 'adequate legal assistance.'" Id. And in Engle v. Isaac, 456 U.S. 107 (1980), the Court referred to the criminal defendant's constitutional guarantee of "a fair trial and a competent attorney." Id., 466 U.S. at 655.

Truly, to prevail on this ground, the Petitioner must meet Strickland v. Washington's two-part test. Id., 466 U.S. at 687. Petitioner must show that his Counsel's performance was deficient and prejudicial to his defense. Id.

b. Counsel's performance is deficient when he failed to present a defense and produce evidence before the jury in order to get a more favorable sentence than a life sentence without the possibility of parole.

Counsel's performance fell below an objective standard of reasonableness when he failed to do anything to try and get a favorable sentence for the Petitioner. The punishment stage started at 1:36pm. RR4, 55. Counsel never made an opening statement. Id. Counsel did not cross-examine the state's witness. RR4, 57. Cf, Davis v. Alaska, 415 U.S. 308, 318 (1974)(because the Petitioner had been "denied the right of effective cross-examination" which is a "constitutional error of the first magnitude[.]").

Nor did Counsel object to the prosecution's improper line of questioning

concerning "what punishment to assess." RR4, 57. To explain, Mr. Vititow (the prosecutor) questioned Mr. Camp and said: "so what do you think should happen to the defendant? Mr. Camp responded: "I'm pushing for the full." RR4, 57. Accordingly, case law suggests that a non-victim witness should not be asked for his recommendation of a particular punishment to a trier of fact. See Sattiewhite v. State, 786 S.W.2d 271, 290 (Tex.Crim.App. 1989)(In considering expert testimony regarding appeal from punishment, the Court of Criminal Appeals stated that "[t]he argument that a witness may recommend a particular punishment to the trier of fact has been soundly rejected."). The reasoning why it has been soundly rejected is that the testimony in question of punishment would have little value, because the witness is in no better position to form an opinion than the jury itself. Gross v. State, 730 S.W.2d 104, 105-106 (Tex. App.--Texarkana, 1987, no pet.).

Truly, [Subsidiary Question #i] in a non-capital punishment case, does an accused have a right to present a defense and present evidence before the jury during his punishment hearing? The Answer is clear. The Petitioner has a Sixth Amendment right to present evidence regarding the Petitioner's good reputation and character at his punishment hearing. Cf. Code.Crim.Proc.art. 37.07 §3(a); Fed.Rule of Evid. 404. This Court declared in Strickland that "a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to [effective] counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to Counsel's skill and knowledge is necessary to accord [Petitioners] the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland v. Washington, 466 U.S. 668, 685 (1984)(quoting Adams v. U.S. ex rel. McCann, 317 U.S. 269, 275-76 (1942)).

Accordingly, Petitioner's constitutional guarantee has been violated because the punishment phase's "process los[t] its character as a confrontation between adversaries. See U.S. v. Cronic, 466 U.S. at 656-57. In other words, Counsel's performance is deficient because he did not present any reputation, opinion, or character witness to "seek for mercy" before the jury. RR4, 57-58. Further, [Subsidiary Question ii] In a non-capital punishment case, should an accused have a right to an effective counsel who is willing to present favorable evidence in the face of four witnesses willing to testify on the behalf of the accused? Certiorari should be granted because the Sixth Amendment must require Counsel to present favorable evidence in the face of four witnesses willing to testify on the behalf of the accused during Petitioner's punishment phase. See Sup. Crt. Rule 10.

In the instant case, Christa Carver, Tony Vigil, and Deavah L. Campbell-Vigil and Benji L. Brandow were available at punishment to testify as a reputation, opinion and character witness to "seek for mercy." Each would have testified, for example, that Petitioner is a loving father and person. Petitioner has always dedicated himself to putting others first. That Petitioner would help a bystander stranded on the street, and to show that the community still loves, cares and accepts the Petitioner. The Petitioner has a steady job and can continue to provide for his family and friends in need. See Appendices F-I. Truly, witnesses with personal knowledge of the Petitioner are frequently called to testify about their good opinion of Petitioner's character. See 3 Tex.Crim.Prac.Guide §74.03[1][a][para. 4](2024). Thus, this Honorable Court should conclude that there is no strategic reason why counsel placed no evidence in before the jury at punishment. Cf. RR4, 55-58; U.S. v. Cronic, 466 U.S. at 654 ("If no actual assistance for the accused's defense is provided, than the constitutional guarantee has been violated.").

Finally, the closing argument by Counsel was only 13 lines long and counsel only made a conclusory statement or request for mercy to sentence Petitioner to 25 years in prison. RR4, 62-63. Counsel provided no reason or evidence or any redeeming measure why the jury should show mercy to Petitioner. Nothing other than he has never been in trouble before, and without admitting any evidence to support it. RR4, 62-63. The jury cannot take Counsel's conclusory statement as evidence. RR4, 62-63; Donnelly v. Dechristoforo, 416 U.S. 637, 641 (1974)(Normally, the trial court instructs jury that "closing arguments are not evidence for your consideration.").

Taken together, in a similiar situation as Petitioner's, the Court of Criminal Appeals granted a new punishment because "trial counsel's deficient performance in failing to present any punishment-phase case on Medina's behalf deprived him of his right to a fair trial." See Ex Parte Medina, 540 S.W.3d 593, 594 (Tex.Crim.App. 2017). The Medina Case is not alone in their standing to grantia new punishment hearing. This Honorable Court has made it clear that Counsel must do something during the penalty phase in order to seek a punishment less severe than what the prosecution seeks.

In Lance v. Sellers, Justice Sotomayor, reasoned that counsel renders ineffective assistance by allowing the jury to hear no evidence whatsoever to counter balance the state's case for the death penalty. Id., 586 U.S. 1097 (2019)(Justice Sotomayor's dissent). Akin to failing to place favorable character witnesses before the jury at punishment, in Wiggins v. Smith, this Court rendered counsel ineffective for failing to investigate out the defendant's prior childhood's severe privation and abuse in the first six years of his life. No competent attorney would not have introduced this evidence to the jury and there is a reasonable probability that the jury would have a different sentence. Id., 539 U.S. 510 (2003).

Additionally, in Rompilla v. Beard, this Court reasoned that an intentional undiscovered mitigating evidence that will influence the jury's appraisal of punishment renders counsel ineffective during the penalty phase. Id., 545 U.S. 374 (2005). Further, in Andres v. Texas, this Court rendered counsel deficient when counsel performed almost no mitigation investigation and what little counsel did present backfired by bolstering the state's aggravation case. Id., 590 U.S. 806 (2020).

Accordingly, all of these decisions by this court have been ruled in a capital death penalty stage of each trial. Therefore, if this Honorable Court rendered counsel ineffective in these situations, is it equally fair to rule counsel ineffective for failing to place any witness(es) to advance a lesser sentence, in the face of four witnesses willing to testify on Petitioner's behalf, in a non death penalty case where the range of punishment is 25-99 to life without the possibility of parole eligibility? This Court should grant certiorari because it is equally fair to render counsel ineffective during his punishment phase of trial. Sup. Crt. Rule 10.

In considering whether to grant certiorari this Court should be reminded of Justice Brennan's sentiment when he observed that "a sentencing judge's [or jury's] failure to consider relevant aspects of a defendant's character and background creates such an unacceptable risk that the death penalty [or life sentence without possibility of parole] has unconstitutionally imposed that, even in cases where the matter was not raised below, the 'interests of justice' may impose on reviewing courts 'a duty to remand [the] case for resentencing.'" See Jacobs v. Wainwright, 469 U.S. 1062, 1065 (1984)(quoting Strickland, 466 U.S. at 705)(dissenting opinion by Marshall, with whom Justice Brennan joined).

- c. Petitioner's punishment hearing has been prejudiced by counsel's deficient performance.

[Subsidiary Question iii] In a non-capital punishment case, is it reasonable why counsel would choose not to show the jury any favorable evidence on behalf of the accused in order for the jury to consider when assessing a defendant's punishment? This Court should grant certiorari because the answer is clear: it is not reasonable why counsel would choose not to show the jury any favorable evidence on behalf of the accused. See Sup. Crt. Rule 10.

As for prejudice, had counsel at least presented some evidence to the jury on the Petitioner's behalf, there is a reasonable probability that the outcome would have been different. Strickland, 466 U.S. at 687 (Petitioner must show counsel's "deficient performance prejudiced [his] defense."); U.S. v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004) ("The reasonable-probability standard is not the same as, and should not be confused with, a requirement that the defendant prove by a preponderance of the evidence that but for error things would have been different.").

The entire punishment before the jury was 1 hour and 07 minutes long. RR4, 55-72. The prosecution took 99.9% of the record providing evidence and arguments for a stiff verdict. RR4, 55-72. Counsel placed no evidence for the jury to consider or seek for assentence more favorable than the maximum sentence. See Andrus v. Texas, 142 S.ct. 1866, 1875 (2022) ("The likelihood of a different result need only be established as to one juror, not a unanimous jury."); Turner v. U.S., 582 U.S. 313, 331 (2017) (A reasonable probability of any different outcome, including a deadlocked jury or lesser sentence, is sufficient.); Cabberiza v. Moore, 217 F.3d 1329, 1334 (11th Cir. 2000); Cravens v. State, 50 S.W.3d 290, 298 (Mo. App. 2001).

Prejudice is compounded when counsel failed to question the panelist pertaining to punishment and its range. RR3, 116-117; RR4, 64-65. Axiomly, at the time of trial the Petitioner was 51 years old; therefore, anything over 40

years without parole eligibility means death in prison. The proceeding is rendered unreliable because, had counsel questioned the panelist concerning the punishment range, the jury would not have sentenced Petitioner to a life sentence without the possibility of parole. Id.; See also, Dennis v. U.S., 339 U.S. 162, 171-72 (1950) ("Part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors"); Goodspeed v. State, 120 S.W.3d 408, 411 (Tex.App.--Texarkana, 2003) (Counsel found ineffective in his/her failure to ask venire any voir dire questions.).

Prejudice is further supported when counsel abandoned his own trial strategy and follow through with placing Christa Carver on the stand through guilt/innocence phase of trial. Accordingly, counsel completely shut down and stopped acting as an attorney when the Petitioner felt that counsel was not defending him, and pointed this out to the court when Petitioner untimely requested to represent himself for the rest of the trial proceeding(s). RR3, 288; RR4, 4-5, 10-13; McCoy v. Louisiana, 504 U.S. 414, 422 (2018) (citing Gonzalez v. U.S., 553 U.S. 242, 248 (2008)). Further, this fact even shocked the trial court when counsel made a false statement to call Christa Carver before Petitioner brought this complaint up to the court; and thereafter, counsel never did place Christa Carver to the stand because counsel got upset with Petitioner for Petitioner feeling like counsel was not defending Petitioner.

Id.

Stuart Sacks', an attorney and adjunct professor of law, words also reveals how counsel prejudiced the Petitioner's defense at sentencing as declared: "Perhaps one of the most critical tasks facing defense counsel is preparation for sentencing. It is at this stage of the proceeding where counsel must diligently explore every possible way to minimize his client's exposure to imprisonment." See 6 Crim. Def. Tech. §122.01[1]. Finally, Counsel's lack of action

during Petitioner's punishment can be viewed as a complete denial of his Sixth Amendment right to counsel which makes the punishment process itself presumptively unreliable. See U.S. v. Cronic, 466 U.S. at 651 ("[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.").

Taken together, this Honorable Court should grant certiorari and order briefs on the merits because, had counsel acted on the Petitioner's behalf during his punishment phase, there is a reasonable probability that the jury would not have sentenced Petitioner to "life" without parole eligibility or consideration. See Sup. Crt. Rule 10; RR4, 65; Strickland, 466 U.S. at 687, 692; Ex Parte Medina, 540 S.W.3d at 594. Therefore, a reversal is required because this particular punishment proceeding undermines confidence that the proceeding is rendered reliable. Id.

### III. QUESTION #2:

Is Section 21.02(d) of the Texas Penal Code unconstitutional because it is void for vagueness, the statute is too broad concerning specificity; and thus, should Jacobsen and its progeny be overruled?

Certiorari should be granted because the answer to this two-pronged question is yes, this statute is unconstitutional and Jacobsen and its progeny should be overruled as explained below. See Sup. Crt. Rule 10. There are two states in the United States that have a continuous sexual abuse (CSA) statute—California and Texas. Cal. Penal Code § 288.5(a) - (b); Tex. Penal Code § 21.02. The Petitioner brings this Honorable Court's attention to a Texas Law Review that addresses these CSA statutes and argues that Texas' CSA statute is too broad. See 91 Tex. L. Rev. 1203, 1207, 1226 (April 2013). Thus, the United States Supreme Court has not provided clear guidance for how specificity should

be addressed. Truly, there appears to be significant differences of opinions among the Justices when it comes to these sorts of questions that Petitioner brings to this Court's attention. 91 Tex. L. Rev. at 1212.

[Subsidiary Question i]: Does Section 21.02 of the Penal Code authorize or encourage arbitrary and discriminatory enforcement?

The answer is yes it does. Texas Penal Code § 21.02(d) reads as follows:

"If a jury is the trier of fact, members of the jury are not required to agree unanimously on which [two] specific acts of sexual abuse were committed by the defendant or the exact date[s] when these acts were committed. The jury must agree unanimously that the defendant, during a period that is thirty or more days in duration, committed two or more acts of sexual abuse."

It is very clear this Supreme Court in Ramos v. Louisiana, declares that a jury must unanimously agree to every act committed in order to secure a fair verdict at hand. Id., 140 S.Ct. 1390 (2020). Within Texas' Law Review, the author, as does Petitioner, argues "that legislatures in certain states have gone too far in adopting CSA statutes. These statutes attempt to solve very real problems in our criminal justice system, but the end result is an approach that is much too broad and far reaching." 91 Tex. L. Rev. at 1226.

Even California's CSA statute is limited compared to Texas, and the punishment is no where near as severe. 91 Tex. L. Rev. at 1212. For example, California has a "shared residency or routine access" requirement, a same victim requirement, and the acts of abuse must happen at least three times or more over a period of time that is three months or longer. Id. Therefore, it is obvious Texas' CSA statute authorizes and encourages arbitrary and discriminatory enforcement of convict. Kolender v. Lawson, 461 U.S. 352, 357 (1983).

Further, to often in cases of sexual nature, such as this case, juries are far more likely to convict based on emotion than the actual evidence at trial.

This statute provides a "blank check" to the jury to decide the Petitioner's guilt by any means they choose and not necessarily by the acts charged in the indictment. For example, and based on the facts of this case, the State failed to produce any evidence that Petitioner penetrated the sexual organ of S.C., and failed to present evidence that he caused her to contact his sexual organ with intent to arouse or gratify anyone's sexual desire. The only evidence related to indecency was S.C. touching Petitioner's sexual organ "only once" and not in Rains County, Texas. Cf. CR, 6-7; RR3, 203-215. Further, all other testimony was an attempted offense and is not multiple completed crimes, as the Prosecution told the jury they were. Cf. RR3, 203-204; RR4, 39-49.

Accordingly, the statute arbitrarily allows the jury to convict based on a non-unanimous decision. Harm is such when the jury could have split their decision to convict based on a crime not alleged in the indictment, with a crime outside its jurisdiction, and with the many attempted offenses described by S.C. Finally, to put the context of this argument in simple english, the Petitioner's constitutional right to be tried in a fair proceeding, and on an equal playing field, has been violated due to the state statute being unconstitutionally vague and ambiguous that would allow a jury to base there decision on a unanimous decision. See Kolender, 461 U.S. at 357.

[Subsidiary Question iii]: Should Jacobsen's decision and its prodigy be overruled because 21.02(d)'s words create several elements, namely, the several "violations," in respect to each of which the jury must unanimously and separately agree upon?

Yes. This CSA statute should be limited. Under Section 21.02(c) defines a single act of sexual abuse to mean "any act that is a violation of one or more of the eight enumerated offenses." Tex. Pen. Code § 21.02(c). Section 924(c)(3) (B) of Title 18 to the United States Code has a significant similiarity as

stated: "for purposes of this subsection, the term 'crime of violence' means an offense that is a felony and ... that by its nature, involved a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B).

A reasonable person will look at the term "acts of sexual abuse" to be defined with the same specificity necessary as the penal code defines the offenses as enumerated in the statute. For instance, a reasonable person would believe that the prosecution would first have to prove that there is a violation of an aggravated sexual assault, in order to show the "series of sexual abuses" terminology. Within this case, S.C. described one incident outside Rains County's jurisdiction, many attempted offenses, and one offense not alleged in the indictment. RR3, 191-230. How can a jury rely on facts that cannot be applied in order to convict the Petitioner? The Petitioner is not alone in the view that Texas' CSA statute should be limited some, and the Jacobsen's case and its prodigy should be overruled; therefore, this Court should grant certiorari. See Sup. Crt. Rule 10.

According to this Honorable Court in Kolender, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Kolender v. Lawson, 461 U.S. at 357. Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, this Court recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." Id., 461 U.S. at 357-58. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen,

prosecutions, and juries to pursue their personal predilections." Id. This standard has two components to this rule: such notice must be clear to the offender and sufficiently clear to law enforcement officials so as to avoid arbitrary and discriminatory enforcement. Butler v. O'Brien, 663 F.3d 514, 518 (1st Cir. 2011)(citing Kolender, 461 U.S. at 357-58). Therefore, in 2000 this Honorable Court held that a "statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." See Hill v. Colorado, 120 S.Ct. 2480, 2498 (2020)(citing Chircage v. Morales, 527 U.S. 41, 56-57 (1999)).

Jacobsen and its progeny should be overruled because a reasonable jurist would disagree, and this Honorable Court should grant certiorari to determine the same. Sup. Crt. Rule 10. In U.S. v. Davis, This Court rule Section 924(c)-(3)(B) unconstitutional in a similar statutory language. Id., 139 S.Ct. 2319 (2019). This Court held 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague since even if it was possible to read the statute to impose additional punishment, it was impossible to say that Congress intended that result or that the law gave defendants fair warning that the mandatory penalties of § 924(c) would apply to their conduct. Id.

While it is true that 21.02 is clear as to punish a person for continuous sexual abuse committed against a child under 14 years of age, and over a period of 30 days or more. The CSA statute is not clear what the legislature meant when it stated [two acts of sexual abuse]. See Tex. Penal Code § 21.02. The statute defines a single "act of sexual abuse" as enumerated in several different violations of the penal code. Tex. Pen. Code § 21.02(c).

As mentioned above, a reasonable person would believe that the prosecution

must prove the lesser enumerated offense first in order to prove that at least two or more offenses were violated. Specifically, the focus of this trial was whether Petitioner penetrated S.C.'s sexual organ, and caused indecency by contact. CR, 6. Truly, it is not clear as what constitutes two or more "acts of sexual abuse." Because the Court of Criminal Appeals has not directly spoken on the constitutionality of the continuous sexual abuse statute, this Court should consider overruling Jacobsen and its prodigy at bar. Cf. Holton v. State, 487 S.W.3d 600, 607-608 (Tex.App.--El Paso, 2015, no pet.); 91 Tex. L. Rev. 1203, 1216 (April 2013) ("The statute has yet to come before the Court of Criminal Appeals, but lower courts have ruled on its constitutionality.").

The Petitioner asserts that it is time for this Honorable Court to grant certiorari and order briefs on the merits in order to make a ruling concerning Jacobsen and its prodigy and it should be overruled. Sup. Crt. Rule 10. Arguably, the lower court in El Paso considered this issue and constituted the Legislature's intent to define the two or more acts of sexual abuse. The lower courts determined the legislature's intent as "the commission of two or more acts of sexual abuse over specified time period—that is, the pattern of behavior or the series of acts." Holton, 487 S.W.3d at 606-607. The lower courts collectively held that the "series" itself is the key 'element' of the offense upon which jury unanimity is required[.]" Id. Therefore, this is reasonably interpreted as a "series of violations" that constitute the continuous sexual abuse of young children.

[Subsidiary Question ii]: Did Texas Courts' conclusion that Section 21.02 (d)'s term "[series] of acts of sexual abuse" constitute the underlying brute facts or means conflict with this Court's reasoning in Richardson v. U.S.?

When considering this question in light of Richardson, this Court should determine that the lower state courts have misapplied the holding in Richardson.

Section 21.02(d) of the Penal code reads in relevant part: "[The jury is] not required to agree unanimously on which specific acts of sexual abuse, [but the] jury must agree unanimously that [defendant] committed two or more acts of sexual abuse." Again, in the lower courts view, the statute criminalizes the series of acts, that is, two or more brute facts to support the series of violations. Holton, 487 S.W.3d at 606-607; & Jacobsen, 325 S.W.3d at 737. Nevertheless, in the Supreme Court's view as determined in Richardson, the two or more acts or aggravated sexual assault is the "series of violations" that make up two or more specific elements the jury must agree upon, then the jury can use the brute facts to support the two or more specific elements beyond a reasonable doubt. Cf. Richardson, 119 S.Ct. at 1713 ("[we] concluded that statute makes each 'violation' a separate element, and the statute requires jury unanimity in respect to each individual violation.").

The Petitioner further argues and reasons that the legislature intended the "series of sexual abuse" to constitute two or more separate elements as determined in Richardson, and applied under the doctrine of in pari materia that is a recognizable principle of statutory interpretation in Texas. State v. Allen, 346 S.W.3d 713, 715 (Tex.App.--Austin, 2011). "In pari materia is a canon of construction that statutes that are in pari materia may be resolved by looking at another statute on the same subject." See Black's Law Dictionary, pg. 944 (11th ed. 2019); see also, Allen, 346 S.W.3d at 715 (the doctrine of in pari materia is employed to implement the "full legislative intent, by giving effect to all law and provisions bearing on the same subject.")(citations omitted).

For instance, in order for Section 21.02(d) to be in harmony with other statutory authority, the Texas legislature did not intend for the "series of sexual abuse" to constitute two or more brute facts, but "two or more separate elements" that make up the series of sexual abuse. Cf. Richardson, 119 S.Ct. at

1713; Cueva II. v. State, 339 S.W.3d 839, 848-49 (Tex.Crim.App. 2011). The Court of Criminal Appeals has determined that "jury unanimity require[s] that the jury agree upon a single and discrete incident that would constitute commission of the offense alleged." Stahler v. State, 218 S.W.3d 706, 717 (Tex.Crim.App. 2007). The Court of Criminal Appeals declares that a unanimous verdict is more than a mere agreement on a violation of a statute, it ensures that the jury agrees on the factual elements underlying an offense. See Cueva II, 339 S.W.3d at 839 (citing Francis v. State, 36 S.W.3d 121, 125 (Tex.Crim.App. 2000)).

The Court of Criminal Appeals determined exactly what a jury must be unanimous about by examining the legislative intent of the applicable statute. Id., 339 S.W.3d at 849. For example, one statute out of many involved is section 22.021 of the Penal code which provides that a defendant commits an offense if he intentionally or knowingly:

- (i) Causes the penetration of the anus or sexual organ of a child by any means;
- (ii) Causes the penetration of the mouth of a child by the sexual organ of the actor;
- (iii) Causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;
- (iv) Causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or,
- (v) Causes the mouth of a child to contact the anus or sexual organ of another person, including the actor; and the victim is younger than fourteen years of age. Id. (citing Tex. Penal Code § 22.021(a)(1)(B), (2)(B)).

Certiorari should be granted because the Texas Court of Criminal Appeals has ruled that Section 22.021 is a conduct-oriented offense in which the legis-

lature criminalized each specific acts of conduct of several different types. Id. (citing Viul. v. State, 991 S.W.3d 830, 832 (Tex.Crim.App. 1999)). In other words, each of the above separately-described acts (or violations) constitutes a separate statutory offense. Id. This means that under Section 21.02(c) a single act of aggravated sexual assault carries five different sets of elements that are separate and distinct elements the jury must unanimously agree upon.

Richardson, 119 S.Ct. 1707. Therefore,

[Subsidiary Question iv]: What is the level of specificity within the CSA Statute that is required and that must be agree upon by jurors?

Certiorari should be granted in order for this Honorable Court to hold that this CSA statute should be reconstructed and narrowed down some. See Sup. Crt. Rule 10; 91 Tex. L. Rev. at 1226. For example, a more narrow CSA statute as Petitioner argues for, an allegation that a defendant caused a child's sexual organ to contact his mouth is a separate and distinct offense from an allegation that the defendant penetrates the child's sexual organ with his sexual organ. Likewise, touching a child's breast and touching a child's genitals are separate offenses. Id. In ringing terms, Texas laws require that a jury reach a unanimous verdict about the specific crime that the defendant committed. This means that the jury must "agree upon a single and discrete incident that would constitute the commission of the offense alleged." Cosio v. State, 353 S.W.3d 766, 771 (Tex.Crim.App. 2011).

Taken together, the legislation intended for "two or more acts of sexual abuse" to be applied as separate and discrete elements to constitute the series of violations. See Richardson, 119 S.Ct. at 1713. This Court should grant relief and narrow down this CSA statute. Thus, as it stands right now, the lower courts are misconstruing, not only federal law as determined by the Supreme Court, but also the legislature's intent, assuming the legislature wanted all the laws to

be in harmony with each other that it criminalizes. Furthermore, Petitioner argues that Section 21.02 encourages arbitrary and discriminatory law enforcement that violates Kolender's void for vagueness standard.

In other words, Section 21.02(c) must not encourage arbitrary and discriminatory enforcement. However, section 21.02(d) very much does encourage arbitrary and discriminatory enforcement to the point that any person accused of continuous sexual abuse cannot have a fair trial. Under the conformity rule, section 21.02(d) created devastating effects of arbitrariness and discriminatory law enforcement. In Texas, a person being accused of a sexual offense can and will be convicted based solely on the victim's testimony alone. See Gutierrez v. State, 585 S.W.3d 599, 607 (Tex.App.--Houston, 2019, no pet.)(under Code of Criminal Procedure article 38.07, the victim's testimony, standing alone is sufficient to support a conviction for continuous sexual abuse).

This Honorable Court clearly established that "article 38.07 is unquestionably a law that alters the legal rules of evidence, and receives less, or different, testimony than the law requires [in any other type of crime] in order to convict the offender." Carmall v. Texas, 529 U.S. 513, 529 (2000). Further, in a sexual offense, article 38.37, section 2(b) to the Code of Criminal Procedure, allow testimony regarding any extraneous offense, including sexual offenses, to show character conformity—a law that Rule 404 prohibits in every other type of crime." Dominguez v. State, 467 S.W.3d 521, 526 (Tex.App.--San Antonio, pet. ref'd). Before section 21.02(d) was enacted, the Court of Criminal Appeals has long held that "where more than one act of [abuse] is shown, upon motion of the accused, the state should be required to elect as to which act it will rely for a conviction." Bates v. State, 305 S.W.2d 366, 368 (Tex. Crim.App. 1957).

The purpose of an election was to ensure the evidence was placed in its

proper scope, to provide notice, and to promoting unanimous jury verdicts. See Phillips v. State, 193 S.W.3d 904, 910-11 (Tex.Crim.App. 2006). This election requirement was to minimize the risk that the jury might choose to convict, not because one or more crimes were proved beyond a reasonable doubt, but because all of them together convinced the jury the defendant was guilty. See Fisher v. State, 33 Tex. 792, 794 (1870). The election requirement was to ensure unanimous verdicts; that is, all of the jurors agreeing that one specific incident, which constituted the offense charged in the indictment, occurred. See Francis v. State, 36 S.W.3d 121, 123-25 (Tex.Crim.App. 2000). Section 21.02(d) took away election for it is not required because the state of Texas declares the term "two or more acts of sexual abuse" to mean nothing but brute facts. See Jacobson, 325 S.W.3d at 737.

Unlike the Supreme Court that clearly declares in Kolender, Richardson, & Ramos [v. Louisiana, 140 S.Ct. 1390, 1397 (2020)], Texas courts have put each defendant accused of continuous sexual abuse in a chair to hear any and all evidence or allegations, and place anything before the jury—going unchecked—and, then finally tell the jury that all they have to believe is what they want to believe occurred, and without an agreement as to what actually occurred.

[Subsidiary Question v]: How can a defendant defend against a CSA Statute when the state is allowed to put any and all evidence they wish to submit to the jury, tell the jury they do not have to be unanimous in their verdict, then hold a conviction based solely on the uncorroborated and unsupported testimony of the victim alone?

Taken together, this Court should grant certiorari because a reasonable jurist will debate the lower courts' decision due to this Honorable Court's reasoning, along with a Texas Law Review that this CSA statute is just too broad. Cf. 91 Tex. L. Rev. at 1207, 1226 ("Within the attempt to resolve the

difficulty in prosecuting child molestation cases by enacting CSA statutes is too broad.").

Thus, the lower courts' application of Section 21.02(d) simply permits "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections, that places any accused of continuous sexual abuse in prison without parole just because the prosecution and juries simply want it to occur. See Kolender, 461 U.S. at 357. This Court should not cave into the social revulsion for this type of crime by forever locking up a child molester and turn him into a permanent parasite to die in prison. But, this Court should consider that there is also societal revulsion against taking a man with a previously spotless record who from the evidence appears to be reformable, and turning him into a permanent parasite, languishing in prison with no real hope of ever becoming a useful member of society. In other words, how far is the prosecution allowed to go before Petitioner's fair trial rights are violated?

Simply put, to allow Texas' CSA statute to not be reconstructed and narrowed down some, will result in a standardless sweep that encourages a jury to convict based on what the jury believes and not based on an unanimous agreement based on the evidence adduced at trial. Kolender, 461 U.S. at 357. Therefore, has Texas gone too far? This Honorable Court should grant certiorari because the end result, here, is an approach that is much too broad and far reaching; and the CSA statute should be reconstructed and narrowed down some. See 91 Tex. L. Rev. 1203, 1226 ("arguing that legislatures in certain states have gone too far in adopting CSA statutes."); Sup. Crt. Rule 10.

#### IV. QUESTION #3:

Should a habeas Petitioner be allowed to first have a meaningful opportunity to be heard before a tribunal; and thus, have a fair and full hearing to develop the habeas record pertaining to the fact-finding process, and

the resolution of controverted issue(s) before the Court of Criminal Appeals decides to deny the Petitioner's ineffective assistance of counsel grounds without a written opinion?

This Honorable Court should grant certiorari because the Court of Criminal Appeals has upheld a procedure that conflicts with this Court's view and holdings: "The state postconviction proceedings must provide prisoners with whatever "factfinding procedures" are necessary to afford "a full and fair" hearing on any disputed and controlling factual issue in the case." See Keenney v. Tamayo-Reyes, 504 U.S. 1, 10 (1992); Townsend v. Sain, 372 U.S. 293, 312 (1963).

a. History of the Great Habeas Writ.

On December 21, 2022, the Court of Criminal Appeals explained: "The writ of habeas corpus, which Sir William Blackstone called the most celebrated writ in the English law, and others have named "the great writ of liberty," is ancient." See Ex Parte Dennis, 665 S.W.3d 569, 571 (Tex.Crim.App. 2022)(quoting Ex parte Lawson, 966 S.W.2d 532, 533 (Tex.App.--San Antonio 1996, pet.ref'd)). There are references to its use prior to the signing of Magna Carta, and it was formally adopted in the Habeas Corpus Act of 1679. Id., 665 S.W.3d at 572. The writ was developed to protect against executive detention; its function was to block imprisonment by royal fiat without a judicial hearing. Id. (citing Neil Douglas McFeeley, The Historical Development of Habeas Corpus, 30 Southwestern L.L. 585 (1976)). The writ was not an appeal device after conviction by a "legal," competent tribunal, but rather an extraordinary remedy against executive detention. Id.

Today, the writ is available only for relief from jurisdictional defects and violations of constitutional or fundamental rights. Id. (citing Ex parte McCain, 67 S.W.3d 204, 207 (Tex.Crim.App. 2002)). The Texas Code of Criminal

Procedure sets forth the following definition for the writ of habeas corpus: "The writ of habeas corpus is the remedy to be used when any person is restrained in his liberty. It is an order issued by a court or judge of competent jurisdiction, directed to anyone having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint." Id. (citing Tex.Code.Crim.Proc.art. 11.01).

Because of the unique nature of the remedy, habeas corpus relief is underscored by elements of fairness and equity. Id. (citing Ex parte Drake, 883 S.W.2d 213, 215 (Tex.Crim.App. 1994)). These elements of fairness and equity are protected by the United States Constitution (U.S. Const. art. I, §9, cl. 2), and the Texas Constitution commands that the privilege of the writ of habeas corpus shall never be suspended. Id. (also citing Tex. Const. art. I, § 12). Further, Article 11.04 of the Texas Code of Criminal Procedure instructs that we are to construe every provision relating to the writ of habeas corpus most favorably to give effect to the remedy and protect the rights of the person seeking relief under it. Id. (citing Tex.Crim. Proc. art. 11.04).

On the same day, the Court of Criminal Appeal explained Rule of Appellate Procedure 73 concerning postconviction applications for writs of habeas corpus: "Rule 73 of the Texas Rule of Appellate Procedure provides clear instructions for the filing and consideration of postconviction applications for writs of habeas corpus under Article 11.07 of the Code of Criminal Procedure. See Ex parte Flowers, 665 S.W.3d 575, 577 (Tex.Crim.App. 2022)(citing T.R.A.P. 73.1 & Code.Crim.Proc.art. 11.07).

Rule 73.1 specifies the required form and contents of the application. Id. (citing T.R.A.P. 73.1). In terms of content, the Rule requires the Petitioner to "provide all information required by the form. Id. The form must include all

grounds for relief and set forth in summary fashion the facts supporting each ground. Id. Any ground not raised on the form will not be considered. Id. Legal citations and argument may be made in separate memorandum." Id. (citing T.R.A.P. 73.1(c)). This memorandum "shall" also comply with the rules pertaining to length and format. Id. (citing T.R.A.P. 73.1(d)). Importantly, Rule 73.2 allows this Court to dismiss any application that does not comply with the rules. Id. (citing T.R.A.P. 73.2).

Once the trial court issues its findings of fact and conclusions of law, Rule 73.4 affords a Petitioner ten days to file any objections. Id. (Citing Tex.R.App.P. 73.4(b)(2)). The Rule also reflect time limits for resolution of an application, providing that on the 181st day from the date of receipt of the application by the state, the application must be forwarded to this Court unless an extension has been granted. Id. (citing T.R.A.P. 73.4(b)(5)). See also, Tex. R. App. P. 73.5 (providing that "within 180 days from the date of receipt of the application by the state, the convicting court shall resolve any issues that the court has timely designated for resolution"). Article 11.07 itself contains several additional time limits: state has 30 days after receipt of the application to file a response in the trial court, and the trial court then has an additional 20 days to enter any order designating issues. Id. n.4 (citing Tex.Crim.Proc.art. 11.07 §3(b),(c)). If the convicting court determines there are no controverted issues in need of resolution, then the clerk "shall immediately transmit to the Court of Criminal Appeals a copy of the application, any answers filed, and a certificate reciting the date upon which that finding was made. Failure of the court to act within the allowed 20 days shall constitute such a finding." Id n.4 (citing Tex.Crim.Proc. art. 11.07 §3(c)).

At a first glance of these two Texas Criminal Appeals cases, this Honorable Court might think: "Well, this state is following our mandated rulings concern-

ing the Great Writ of Habeas Corpus, as proscribed by the United States Constitution." Nevertheless, the Petitioner argues that when it come to a pro se litigant, the Court of Criminal Appeals has left this rationale and started to apply or allow a procedure that is foreign to the United States Constitution and the Rules of law.

b. The foreign procedure that the Court of Criminal Appeals has allowed to be resurrected must die.

The Petitioner presents the foreign procedure as follows:

(1) Applicant/Petitioner, being pro se, files an application for a writ of habeas corpus.

(2) In most cases, the memorandum in support is filed by the pro se litigant on a later date.

(3) The state prosecution does nothing and remains silent.

(4) The trial court does nothing and remains silent.

(5) In any event, 99% of pro se litigants do not get to present any facts or argument for or against any state answer or recommendation, if there is any filed, in which is very rare.

(6) The clerk of the convicting court then forwards the writ application alone, regardless of anything else the pro se litigant may have filed on his behalf, to the Court of Criminal Appeals. And,

(7) The Court of Criminal Appeals denies the habeas corpus without written order, or a hearing—in essence, it suspends the Petitioner's habeas writ.

The Petitioner argues that he is ultimately denied his constitutional rights to due process because he was denied a meaningful, full and fair hearing in his habeas proceeding pertaining to the development of the factual record proof that entitled Petitioner to habeas relief.

This Court explained that "what the constitution does require is 'an

opportunity ... granted at a meaningful time and in a meaningful manner, for [a] hearing appropriate to the nature of the case[.]' ... In short, 'within the limits of practicability, a state must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause.'" Boddie v. Connecticut, 401 U.S. 371, 379-380 (1971)(quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)); See also, Tenn. v. Lane, 541 U.S. 509, 540 (2004)(Court cites four access-to-the-courts rights that title II purportedly enforce: [...] (2) the right of litigants to have a "meaningful opportunity to be heard" in judicial proceedings).

Further, certiorari should be granted because Justice Alcala in the Court of Criminal Appeals declared: "for poor people, the Texas scheme for addressing claims of ineffective assistance of counsel is broken." See Ex parte Sandoval, 508 S.W.3d 284, 286-87 (Tex.Crim.App. 2016)(Dissenting opinion by J. Alcala). Accordingly, "legal scholars know this, and [this Honorable] Supreme Court has essentially acknowledged this." Id., 508 S.W.3d at 286-87, FN 1.

Therefore, the Petitioner implores this Court to address this problem, and not miss the point of this argument: "The point is that indigent defendants in Texas ordinarily do not have a viable procedural avenue for challenging the ineffectiveness of their trial attorneys. This problem that is unique to the poor in Texas because affluent people, who can afford to hire habeas counsel, have an adequate procedural avenue for challenging the ineffectiveness of trial counsel through post-conviction habeas applications." Id., 508 S.W.3d at 287.

c. The Petitioner's constitutional rights to have a meaningful opportunity to be heard, and to have a full and fair hearing to develop the habeas record pertaining to the fact-finding process have been denied.

On June 17, 2024, the clerk of the 8th Judicial district court of Rains County, filed Petitioner's habeas corpus application challenging his conviction

and sentence. See Appendix E, pg. 4. On June 26, 2024, Christina Carver filed her affidavit in support of Petitioner's habeas application. Appendix F. On June 27, 2024, Benji L. Brandow filed his affidavit in support of Petitioner's habeas application. Appendix G. On July 01, 2024, Deavah Campbell-Vigil filed her affidavit in support of Petitioner's habeas Application. Appendix I. On July 1, 2024, Tony Vigil filed his affidavit in support of Petitioner's habeas application. Appendix H. On July 8, 2024, the Petitioner filed his memorandum of law in support of his habeas application. Appendix E, pg. 5. During this entire proceeding, the state did not file a response or answer, nor did the trial court make any factual findings, nor did the trial court make a recommendation.

According to the history of the great writ of habeas proceedings, normally, in the face of four different affidavits filed with the clerk of the court, the trial court would order counsel to answer why he did not present these witnesses coming forward to testify on Petitioner's behalf during his sentencing phase of trial. A hearing is required when new facts are presented to the trial court for the development of the habeas record. However, Rains County court threatens the integrity of the habeas appellate process because there was no hearing ever held and the witnesses were never heard. See Boddie v. Conn., 401 U.S. 371, 379 (1971).

Truly, on August 26, 2024, the Court of Criminal Appeals received Petitioner's habeas application. There is no record proof on any docket showing that the 8th Judicial District Court of Rains County forwarded any of the affidavits or the memorandum in support. Therefore, it is reasonable to conclude that the Court of Criminal Appeals never seen any of the documents in the District Clerk's possession. Accordingly, the Court of Criminal Appeals made a decision on December 18, 2024, based on partial information within the Clerk's posses-

sion. Appendix B. There is still controverted issues that should have been addressed by the court. Id. Certiorari should be granted because the Court of Criminal Appeals denied the Petitioner's habeas application on the above grounds without a written order, without a hearing, and without a full habeas record at hand. See Appendix B; Sup. Crt. Rule 10. On January 10, 2025, the Petitioner sought for the Court of Criminal Appeals to reconsider there denial based on their own motion.

Briefs on the merits should be granted by this Honorable Court because the Petitioner has alleged facts that entitles him to habeas relief because he proved, by a preponderance of the evidence, that Counsel rendered ineffective assistance during Petitioner's punishment stage of trial. Truly, Counsel was never given an opportunity to explain his reasoning why he did not place four character witnesses on the stand during his punishment phase. The trial court never attempted to decide whether there are "controverted, previously unresolved facts material to the legality of the Petitioner's confinement," in the face of four different affidavits provided by each individual on their own. Taken together, the Petitioner argues that the Court of Criminal Appeals' decision was premature because the Court never saw the full habeas record that the trial court had in its possession; therefore, this Honorable Court is justified in granting certiorari.

#### V. CONCLUSION:

Petitioner prays this Honorable Court will GRANT certiorari and ORDER briefs on the merits.

Respectfully Submitted

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