

**IN THE**  
**Supreme Court of the United States**

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NEIL AARON CARVER,  
*Petitioner,*  
v.

STATE OF TEXAS,  
*Respondent.*

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

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**RESPONDENT'S BRIEF IN OPPOSITION**

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## QUESTIONS PRESENTED

Respondent (the “State”) objects to Carver’s Questions Presented and suggests the following instead:

- 1) Should the Court grant certiorari to review the Texas Court of Criminal Appeal’s (CCA) denial of a garden variety ineffective assistance of counsel at sentencing claim which is ripe for federal habeas review?
- 2) Should the Court grant certiorari to review whether the Texas legislature’s decision to characterize the ongoing sexual abuse of a child as a single, continuous-course-of-conduct offense, as to which the jury was not required to agree unanimously regarding the specific and discreet acts of sexual abuse committed, violates the Due Process Clause?
- 3) Should the Court grant certiorari to review the CCA’s procedures for state postconviction writ proceedings?

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## INTRODUCTION

Carver was convicted of continuous sexual abuse of a young child in Rains County, Texas and given a life sentence. In the instant petition for certiorari review of the CCA's denial of state habeas relief, Carver argues three claims: 1) trial counsel was ineffective for failing to make a case for mitigation during the punishment phase of trial; 2) Texas Penal Code § 21.02, Continuous Sexual Abuse of a Young Child, is unconstitutional because it allows a non-unanimous verdict; and 3) the CCA's state habeas proceedings violated his right to "have a meaningful opportunity to be heard before a tribunal" because a hearing was not held.

However, all of Carver's claims fail to raise either a compelling invocation of this Court's jurisdiction under 28 U.S.C. § 1257(a), or a motivating assertion under Supreme Court Rule 10. First, Carver fails to establish that defense counsel's representation fell below the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). Next, Texas's continuous sexual abuse of a young child criminal statute is fully consistent with the Court's precedent. Finally, Carver's complaints regarding Texas's state habeas procedures fail to present a constitutional violation.

Moreover, Carver's claims are now ripe for him to raise in a federal habeas petition.<sup>1</sup> Therefore, the Court should deny certiorari review.

## **OPINION BELOW**

The CCA's order denying Carver's application for state writ of habeas corpus is not reported. *See Ex parte Carver*, No. 95,970-01 (Tex. Crim. App. 2024); Resp't App'x. 1a.

## **JURISDICTION**

The Court has jurisdiction under 28 U.S.C. § 1257(a) to review the CCA's denial of Carver's state habeas corpus application.

## **CONSTITUTIONAL PROVISIONS INVOLVED**

The Questions Presented involve application of the Sixth Amendment right to counsel and the Due Process Clause in Section I of the Fourteenth Amendment.

## **STATEMENT OF THE CASE**

### **I. State Habeas Proceedings**

Carver was convicted of continuous sexual abuse of a young child for abuse of his daughter, S.C., and given a life sentence on May 24, 2022. *See* Resp't App'x. 1b–2b. Carver appealed to the Twelfth Court of Appeals, which

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<sup>1</sup> The Director believes, however, that Carver's federal petition would be barred by AEDPA's statute of limitations. 28 U.S.C. § 2244(d). A federal district court would be best situated to determine if Carver meets any exception to the statute of limitations. *See Duncan v. Walker*, 533 U.S. 167, 179 (2001) (§ 2244's limitations period was designed to ensure finality to state convictions).

affirmed his conviction. *Carver v. State*, No. 12-22-00164-CR, 2023 WL 327815 (Tex. App. Jan. 19, 2023). The CCA refused Carver's petition for discretionary review on May 17, 2023.

On June 11, 2024, Carver filed a state habeas application pursuant to Tex. Code Crim. Proc. art. 11.07, challenging his conviction and life sentence. The application was forwarded to the CCA without findings or conclusions or a response from the Rains County District Attorney. The CCA denied Carver's application "without written order." Carver now seeks a writ of certiorari.

## **II. Facts of the Crime**

The Twelfth District Court of Appeals of Texas summarized the evidence presented at trial as follows:

Jessica Cassett, an investigator with the Texas Department of Family and Protective Services (the Department), testified that she performed an investigation into [Carver's] home after [Carver's] daughter, S.C., was in an automobile accident with her mother, C.C., who was accused of neglectful supervision by driving while intoxicated. Cassett explained that S.C.'s mother was subsequently incarcerated, and S.C. was sent out of town to stay with [Carver's] sister while [Carver] was working in another state. Cassett learned that C.C. was previously charged with driving while intoxicated and suffered from a drinking problem, and she conducted a forensic interview with S.C. According to Cassett, during the interview, S.C. made an outcry of sexual abuse. Cassett testified that [Carver] was "[r]eluctant for the child to have a forensic interview without him present."

Courtney Ma, a forensic interviewer with The Bridge Children's Advocacy Center, testified that it is common for children not to disclose as much to her as they might disclose to their counselors later on, since children often only make partial disclosures when

beginning to speak about their experiences. Ma explained that during her interview with S.C., S.C. was consistent, used age-appropriate language, provided sensory details, and corrected Ma if Ma said something wrong. According to Ma, there was an incident when S.C. saw [Carver's] "bad spot" and called it a "little peach worm." Ma testified that S.C. told her that when [Carver] would grab her hand, she would "take her hand away and tuck it in the couch because she would know what he was going to be doing[.]" Additionally, Ma explained that S.C. "described that [Carver] would always wake her up at night, and she would wake up to him grabbing her wrist, and he would be guiding it over to touch his bad spot[.]" and S.C. stated that this occurred "a lot of times." Ma testified that S.C. described these incidents as occurring both in Emory, Texas and out of town. According to Ma, S.C. described "cannonballs" as her diving her hand off the table, and [Carver] taking her hand and moving it up and down. Furthermore, Ma testified that S.C. described putting toys in front of her door to create an obstacle course.

Licensed professional counselor Sylvia Hill testified that she counseled S.C. Hill testified that when she began counseling S.C., she "was told that [S.C.] had been molested by her father." According to Hill, S.C. was fourteen years of age or younger when she was in counseling. S.C. made statements to Hill about being abused, and Hill stated that S.C. "was very reluctant to talk about it[ ]" and "expressed extreme concern that it be understood that when it all started she was too little to know better." Hill testified that S.C. appeared to be embarrassed and ashamed. When asked whether S.C. described penetration by [Carver], Hill testified that S.C. told her that [Carver] "put his fingers and hands into me." Hill explained that S.C. also described an incident when [Carver] "put his fingers into her" while she was mowing the lawn with him during the summer. According to Hill, S.C. locked her bedroom door and put her toys on her bedroom floor to serve as an obstacle course. Hill further testified that S.C. described an incident when she was bitten by a dog and received stitches around Thanksgiving, and [Carver] asked if he could kiss her where her stitches were and "again used his fingers to penetrate her[.]" and Hill inferred that S.C. was referring to her anus. Hill testified that S.C. told her these incidents occurred in Emory.

S.C., who was eleven years old at trial, testified via closed circuit television. S.C. testified that when she was bitten by a dog around Thanksgiving, she received stitches on her leg, arm, and buttocks. According to S.C., [Carver] asked if she wanted him to kiss her stitches, and he “pulled [her] butt cheeks apart[ ]” and “kissed up [her] butt.” S.C. explained that [Carver] then “started using his fingers” on her “bad spot.” S.C. testified that she locked her bedroom door until [Carver] made her stop doing so, and she “put up an obstacle course” in her bedroom to block [Carver]. S.C. explained that she believed [Carver] made her stop locking her door so he could “do the thing.” S.C. testified that the dog bite incident occurred in Emory. S.C. also testified that when she was riding the lawn mower with [Carver] in Emory during the summer, [Carver] slipped his hand underneath her panties and touched her “butt.” In addition, S.C. testified that on one occasion, she tried to stop [Carver] from “doing the thingy” by tucking her hands into the couch. S.C. explained that she would use her hand to “jump off [Carver’s] bad spot[,]” which she called “doing cannonballs,” and [Carver] grabbed her hand and tried to make her touch “his bad spot[,]” or “private,” which she described as “a giant peach worm.” S.C. testified that the cannonball incident did not occur in Emory. According to S.C., [Carver] put his hand under her Pull-Up when they lived in Emory.

[Carver’s] sister, D.C., testified that S.C. sometimes stayed at her home. D.C. testified that S.C. denied being touched inappropriately. D.C. explained that she is close to her brother, and she does not believe he is capable of committing the crime. D.C. testified that she sometimes tracked [Carver’s] progress when he was traveling, and he was away on the December 2020 date set forth in the indictment. D.C. testified that her daughter was abused by her former husband, and S.C.’s allegations against [Carver] are worded similarly to those made by D.C.’s daughter.

*Carver*, 2023 WL 327815, at \*1-\*2.

## ARGUMENT

### **I. The Questions Presented Are Premature, Provide No Important or Compelling Reason for Review, and Are More Appropriate for Federal Habeas Review.**

Rule 10 provides that certiorari review is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. *See Sup. Ct. R. 10.* Certiorari review of state habeas decisions is generally inappropriate where a claim is ripe for federal habeas review. Carver advances no special or important reason for the Court to review the denial of a state habeas application before he has even initiated a federal habeas review of his claims. As Justice Stevens once noted:

[T]his Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

*Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J. concurring). Justice Stevens's reasoning applies here. A federal district court is better situated to review Carver's claims. Carver's arguments here belong in a federal habeas corpus petition, which he has not yet filed. Prudence calls for the Court to deny certiorari.

## **II. The CCA’s Decision Rejecting Carver’s Garden Variety *Strickland* Claim Is Fully Consistent with Sixth Amendment Protections.**

In his first claim, Carver argues that he received ineffective assistance of counsel in violation of the Sixth Amendment and the familiar *Strickland* standard. Specifically, he asserts that defense counsel, Theryn Waggener, was ineffective during the sentencing phase of trial because he did not present character witnesses as mitigation evidence to support a plea for leniency from the jury, resulting in a life sentence. *See* Pet. Cert. 9–17. He also complains that Waggener did not give an opening statement or cross-examine the State’s witness. *Id.* During State habeas proceedings, Carver included affidavits from four individuals stating they were in the court room and willing to testify on his behalf as character witnesses. *See* Resp’t App’x. 2a–10a.

Both the State and Defense waived an opening statement during the punishment phase of trial. Resp’t App’x. 1d. The State presented only one witness, Brandon Camp, the victim’s brother and Carver’s stepson. Camp testified briefly about the effect that Carver’s abuse had on S.C. in her daily life. Resp’t App’x. 1d–3d. During closing statements, Waggener requested mercy from the jury and asked for the minimum sentence, noting that Carver had no previous criminal history. Resp’t App’x. 4d–5d. The State asked for the maximum sentence and the jury returned a sentence of life imprisonment. Resp’t App’x. 4d.

## **A. The *Strickland* Standard**

The proper standard for determining whether counsel's performance was constitutionally adequate is that of "reasonably effective assistance." *Strickland*, 466 U.S. at 687; *Hinton v. Alabama*, 571 U.S. 263, 272 (2014). "Under Strickland, a defendant who claims ineffective assistance of counsel must prove (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that any such deficiency was prejudicial to the defense." *Garza v. Idaho*, 586 U.S. 232, 237 (2019) (internal citations removed). Merely alleging that counsel's performance was deficient is not enough; instead, a petitioner must show that counsel's performance fell beyond the bounds of prevailing, objective, professional standards. *Strickland*, 466 U.S. at 688. Furthermore, in determining the merits of an alleged Sixth Amendment violation, courts "must be highly deferential" to counsel's conduct. *Id.* at 689. A reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and every effort must be made to eliminate the "distorting effects of hindsight." *Strickland*, 466 U.S. at 689; *see also Burt v. Titlow*, 571 U.S. 12, 12 (2013).

## **B. Carver's Reliance on *Wiggins v. Smith* Is Inapposite.**

The procedural framework of this appeal suggests serious concerns with the justiciability of the first Question Presented. Carver's argument relies on a distinction between non-capital and capital sentencing regimes in relation to

*Strickland*'s measure for ineffective assistance at sentencing. *See* Pet. Cert. 9–17. Specifically, he observes that the Court has recognized Sixth Amendment violations under *Strickland*'s familiar measure when counsel fails to investigate and present mitigating evidence in death penalty cases—and asks the Court to extend the same legal measure to non-capital sentence proceedings where the punishment range is 25 years to life, without the possibility of parole. *Id.*; *see Wiggins v. Smith*, 539 U.S. 510, 521–522 (2003) (Counsel in a death penalty case has an obligation to consider possible penalty-phase defenses).

However, this petition is a poor vehicle to resolve this distinction because the CCA fully applies *Strickland*'s prejudice standard to Texas's non-capital sentencing regime. *E.g. Ex parte Scott*, 541 S.W.3d 104, 115 (Tex. Crim. App. 2017) (holding that proving *Strickland* prejudice at non-capital sentencing requires applicant to show “that a reasonable probability exists that, but for counsel's deficient conduct, the punishment jury would have returned a more favorable verdict (i.e., a lesser punishment). A reasonable probability is one that is sufficient to undermine confidence in the outcome of the proceeding.”) (internal citation omitted).

Furthermore, Carver's assertion that Waggener was *per se* ineffective for failing to present mitigating evidence in the form of character witnesses relies on a misunderstanding of the holding in *Wiggins*. Even in death penalty cases,

ineffective assistance claims are still governed by the *Strickland* standard. *Strickland*, 466 U.S. 668. The Court has clarified that *Wiggins* did not establish “strict rules” for counsel’s conduct “[b]eyond the general requirement of reasonableness.” *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011). In *Wiggins*, the Court found that it was defense counsel’s decision not to expand their investigation which fell short of professional standards. *See Wiggins*, 539 U.S. at 523. In other words, the question presented by *Wiggins* is “whether the investigation supporting counsel’s decision not to introduce mitigating evidence...*was itself reasonable*. *Id.* Carver does not argue that Waggener conducted a deficient investigation and failed to uncover mitigating evidence, but rather that he should have presented the character witnesses that were available. *See Pet. Cert.* 9–17.

Carver’s argument also ignores the significant difference in a capital punishment phase—a unanimous verdict is required to impose the death penalty, so swaying even one juror that the defendant should be sentenced to life imprisonment rather than death is sufficient to change the outcome of the sentencing. *See Andrus v. Texas*, 590 U.S. 806, 822 (2020); *Luna v. Lumpkin*, 832 F. App’x 849, 852 (5th Cir. 2020). The Court in *Strickland*, a capital case, “held that the same standard for evaluating claims of ineffective assistance of counsel” at guilt-innocence applies “to capital sentencing proceedings because [a] capital sentencing proceeding . . . is sufficiently like a trial in its adversarial

format and in the existence of standards for decision, that counsel's role in the proceeding is comparable to counsel's role at trial." *Caspari v. Bohlen*, 510 U.S. 383, 393 (1994) (citing *Strickland*, 466 U.S. at 686–87) (internal citations and quotation marks omitted) (alterations in original).

The Court further acknowledged these differences when it expressly reserved the question of whether the prejudice standard announced in *Strickland* applied to counsel's deficiencies during a non-capital sentencing proceeding. *Strickland*, 466 U.S. at 688 ("We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and *hence may require a different approach to the definition of constitutionally effective assistance.*"') (emphasis added). The Court specifically declined to extend *Strickland*'s prejudice prong to non-capital sentencing regimes that, like Texas, involve the application of unrestrained sentencing discretion over a large range. Nevertheless, Carver's petition does not present an opportunity to revisit *Wiggins* in the non-capital context because Texas's non-capital sentencing regime still fully applies *Strickland*'s prejudice standard.

### **C. Certiorari Should be Denied because Carver fails to establish a Sixth Amendment Violation.**

Carver asserts that Waggener provided ineffective representation during the sentencing phase of his trial. His reliance on *Wiggins* suggests that

he argues the CCA's judgment was erroneous because it relied on a less "defendant friendly" test for *Strickland* prejudice applicable to non-capital sentences, instead of the measure used in capital sentencing—and asks the Court to eliminate the supposed distinction. *See id.*

This Court has yet to pronounce the precise measure for *Strickland* prejudice for non-capital sentencing regimes like Texas.<sup>2</sup> Citing similar concerns as the Court in *Strickland*, the Fifth Circuit has recognized that "a rigid application" of *Strickland*'s prejudice prong to Texas' non-capital sentencing regime, i.e., "requiring a reasonable probability that but for counsel's error the result of the sentencing hearing would have been different," could turn "*Strickland* into an automatic rule of reversal[.]" *Spriggs v. Collins*, 993 F.2d 85, 88 (5th Cir. 1993), *as corrected on reh'g* (July 29, 1993), *abrogated on other grounds as recognized in, Dale v. Quarterman*, 553 F.3d 876, 880 n.2 (5th Cir. 2008). *Spriggs* held that when counsel is claimed to be ineffective at the punishment phase of trial, "the relevant inquiry is whether, absent counsel's errors, there is a reasonable probability that the defendant's sentence would have been 'significantly less harsh,' taking into account 'such factors as

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<sup>2</sup> The holding in *Glover* was justified by the precision with which federal circuit courts might determine sentencing-prejudice under the federal Sentencing Guidelines. *See Glover v. United States*, 531 U.S. 198, 204 (2001) ("Here we consider the sentencing calculation itself, a calculation resulting from a ruling which, if it had been error, *would have been correctable on appeal.*") (emphasis added). Such precision is impossible with respect to non-determinate, unconstrained sentencing-discretion.

the defendant's actual sentence, the potential minimum and maximum sentences that could have been received, the placement of the actual sentence within the range of potential sentences, and any relevant mitigating or aggravating circumstances.” *Dale*, 553 F.3d at 880 (quoting *Springgs*, 993 F.2d at 88–89 and *United States v. Segler*, 37 F.3d 1131, 1136 (5th Cir. 1994)) (internal citations omitted). This Court has also favorably cited the prejudice standard set by the Fifth Circuit in *Springgs*. *See Glover*, 531 U.S. at 204.

Carver asserts that defense counsel’s representation during the punishment phase of his trial was deficient because he failed to make a case for mitigation, specifically by presenting testimony from his friends and family as character witnesses. *See* Pet. Cert. 9–17. In considering this claim, the state habeas court had the affidavits of four individuals: Christa Carver, Benji Brandow, Tony Vigil, and Deavah Campbell-Vigil. *See* Resp’t App’x. 2a–10a. All four stated that they were present during the trial and willing to testify on Carver’s behalf. *Id.* In her affidavit, Christa Carver states she would have testified that Carver “was a loving, caring and supportive father to S.C.” *Id.* at 25. She maintains that Carver is innocent. *Id.* Benji Brandow attested that he has been Carver’s friend for over ten years and that Carver is “a dedicated, hard-working, devoted father and husband.” *Id.* at 27. He also maintains that Carver is innocent and has been falsely imprisoned. *Id.* Tony Vigil stated in his affidavit that Carver “was always dedicated to making sure his family was

taken care of" and "was a great role model for others." *Id.* at 31. Deavah Campbell-Vigil, Carver's sister, did testify during the guilt-innocence phase of the trial. Resp't App'x. 1c–23c. She testified that she did not believe Carver was capable of committing the crime because it was not in his character and that Carver and S.C. had a very good relationship. *Id.* In her affidavit, she states she would have testified during the punishment phase of trial that Carver "is an amazing person" and "has always been an amazing husband, brother, friend, and father." See Resp't App'x. 9a.

Accepting *arguendo* that all these witnesses were available and would have testified as in their affidavits, Waggener's decision not to call them was not objectively unreasonable, and thus was not deficient performance. The jury had already heard the testimony of Deavah Campbell-Vigil earlier in the trial and—as evidenced by their finding of guilt—was unpersuaded by it. The proposed testimony of the other character witnesses was of the same nature and would have provided no additional information to the jury. The decision not to call these character witnesses was a matter of reasonable trial strategy.

Carver also fails to establish prejudice, i.e. that, but for Waggener's alleged deficiencies, he would have received a significantly less harsh sentence. The testimony of four individuals who believed the accusations against Carver were fabricated and spoke about him as a loving family man and good friend was unlikely to persuade a jury that had just convicted Carver of continuously

sexually abusing his daughter. Carver fails to establish a Sixth Amendment violation and certiorari should thus be denied.

### **III. The Texas Statute Criminalizing Continuous Sexual Abuse of Young Children Does Not Violate Due Process.**

Carver argues Texas Penal Code § 21.02, continuous sexual abuse of a young child, is unconstitutional because it allows a non-unanimous verdict.<sup>3</sup>

*See Pet. Cert. 17–28.* Specifically, Carver points to section (d) which states:

If a jury is the trier of fact, members of the jury are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. The jury must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse.

Carver further argues that the phrase “committed two or more acts of sexual abuse” is unconstitutionally vague because it encourages arbitrary and

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<sup>3</sup> As of the time he committed the offense, the statute defined the constituent “act of abuse” to be any violation of one or more of the following penal laws:

- (1) aggravated kidnapping under Section 20.04(a)(4), if the actor committed the offense with the intent to violate or abuse the victim sexually;
- (2) indecency with a child under Section 21.11(a)(1), if the actor committed the offense in a manner other than by touching, including touching through clothing, the breast of a child;
- (3) sexual assault under Section 22.011;
- (4) aggravated sexual assault under Section 22.021;
- (5) burglary under Section 30.02, if the offense is punishable under Subsection (d) of that section and the actor committed the offense with the intent to commit an offense listed in Subdivisions (1)-(4);
- (6) sexual performance by a child under Section 43.25;
- (7) trafficking of persons under Section 20A.02(a)(7) or (8); and
- (8) compelling prostitution under Section 43.05(a)(2).

Tex. Penal Code § 21.02(c) (2020).

discriminatory enforcement. *Id.* In essence, Carver challenges Texas's characterization of his continuous, but technically discreet, acts of sexual abuse against his daughter as a single crime, as to which the verdict need not have been limited to any one statutory alternative.<sup>4</sup>

However, the individual acts of sexual abuse Carver committed against his daughter, acts occurring over years, are not themselves individual elements of the offense for which he was charged; they are merely evidentiary facts. They represent the manner and means by which the *actus reus* element of the Texas criminal statute was committed. And that element, as it applied to Carver's prosecution, was his continuing course of sexual abuse, resulting in the cumulative injury to his daughter.

When properly framed, the relevant statutory element is more than just the sum of its constituent offenses; rather, it targets a class of offenders who repeatedly abuse and molest children. The *actus reus* is repeated child-molestation. When construed as the Texas Legislature intended, it is irrelevant whether a jury "unanimously" selected the same two or more of the numerous and discreet incidents of sexual abuse because Texas here is punishing the continuous and repeated sexual exploitation of children.

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<sup>4</sup> "The issue in this case, then, is one of the permissible limits in defining criminal conduct, as reflected in the instructions to jurors applying the definitions, not one of jury unanimity." *Schad v. Arizona*, 501 U.S. 624, 631 (1991) (plurality op.).

No appellate court has ever determined that any of the numerous continuing-sexual-abuse statutes like the one at issue here violate the federal constitution. The decision below is consistent with the Court's opinion in *Schad v. Arizona*, 501 U.S. 624, 630–45 (1991), and it is also consistent with the reasoning of both the majority and the dissent in *Richardson v. United States*, 526 U.S. 813 (1999). There is thus no compelling reason for this Court to exercise its discretion to review this case.

**A. Certiorari Should Be Denied Because the Decision Below Is Fully Consistent with This Court's Precedent.**

This Court has touched on the Question Presented twice before, in *Schad* and *Richardson*. Carver relies on the Court's analysis in *Richardson* as the basis of his claim that Texas Penal Code §21.02(d) violates Due Process. But the Court in *Richardson* expressly contrasted the law at issue in that case with continuing-course offenses involving the sexual abuse of children. And even putting this court's express statement of approval aside, Texas's law is fully consistent with the fairness factors that the Court pointed to in both *Schad* and *Richardson*.

**1. In *Richardson* this Court favorable cited the use of continuing course offenses for child sexual abuse**

Both the majority and the dissent in *Richardson* favorably acknowledged, and explicitly distinguished, state laws permitting convictions for continuing-course offenses involving the sexual abuse of children despite

the lack of jury agreement as to the specific underlying acts. *See Richardson*, 526 U.S. at 821 (“The state practice may well respond to special difficulties of proving individual underlying criminal acts...which difficulties are absent here.”); *id.* at 833 (Kennedy, J., dissenting) (“States have also chosen to define as continuous some crimes that involve repeated conduct where the details of specific instances may be difficult to prove, as in cases of child molestation or promoting prostitution.”). These statutes are distinct because of the “special difficulties of providing individual underlying criminal acts” when crimes involve children. *Id.* at 821. Because the Court in *Richardson* effectively gave its stamp of approval to laws like Texas’s, there is no need to grant certiorari to consider this issue.

**2. Texas’s use of continuing course offenses for child sexual abuse is consistent with the factors that the Court recognized in *Schad* and *Richardson***

In *Schad*, a plurality of the Court confirmed that a constitutionally valid conviction could be obtained by means of a general verdict, even where jurors did not agree on either the probative force of any particular item of evidence, or the particular means a defendant used to commit an element of a crime. *Schad*, 501 U.S. at 631–32. In such cases, as in litigation generally, “different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.”

*Schad*, 501 U.S. at 631–32 (plurality opinion). Furthermore, six members of the Court in *Richardson* refer to this portion of the *Schad* plurality with approval. *Richardson*, 526 U.S. at 817 (“The question before us arises because a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime.”) (citing *Schad*, 501 U.S. at 631–32).<sup>5</sup>

As the *Schad* plurality further reasoned, “[t]he question whether statutory alternatives constitute independent elements of the offense . . . is a substantial question of statutory construction.” *Schad*, 501 U.S. at 636. This is because “legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes[.]” *Id.* at 636.

The *Schad* plurality also acknowledged that the Due Process Clause nevertheless placed limits on that legislative power. To this end the plurality reasoned that “nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of ‘Crime’ so generic that any combination of jury findings of embezzlement, reckless driving,

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<sup>5</sup> Although the Court’s majority opinion in *Richardson* was ultimately premised upon principles of statutory construction, the majority’s reasoning was informed, at least in part, by the doctrine of constitutional avoidance, and the possibility that the Government’s broad interpretation could test the constitutional limits described in *Schad*. *Richardson*, 526 U.S. at 820.

murder, burglary, tax evasion, or littering, for example, would suffice for conviction.” *Schad*, 501 U.S. at 633. As the plurality reasoned, such a statute might well violate the due process norms of “fundamental fairness” and “rationality.” *Id.* at 637.

The *Schad* plurality identified and examined three general considerations to be used when analyzing the constitutionality of continuing-offense statutes like Texas Penal Code § 21.02, *Schad*, 501 U.S. at 637. First, the plurality confirmed that the decision of whether a particular “fact” constitutes an element of the offense—or is merely a “manner and means” upon which the jury need not agree—is a “value choice[] more appropriately made in the first instance by a legislature than by a court,” and further, that the Court’s respect “for this legislative competence counsels restraint against judicial second-guessing.” *Id.* at 638. Ultimately, a legislature’s definition of the elements of the offense “is usually dispositive.” *Id.* at 639 (internal quotation marks omitted).

Second, the plurality reasoned that where a legislature’s statutory definition of a particular crime has either a long history, or is in widespread use, such a statute would be more difficult to challenge. *Schad*, 501 U.S. at 640. Conversely, “freakish” definitions, or those that create a single, “umbrella” crime by fusing multiple, “inherently separate” offenses together, would be subject to greater scrutiny, and hence easier to challenge. *Id.* at 640.

Finally, and most importantly, the constituent facts that underlie the relevant element “must reasonably reflect notions of equivalent blameworthiness or culpability.” *Schad*, 501 U.S. at 643. The more the underlying, constituent incidents are morally equivalent, the less reason to require juror concurrence—even with respect to relatively novel offenses. *See id.* at 643–44. To this end, moral equivalence carries considerable weight in the plurality’s analysis. *Id.* at 643 (subsuming due-process considerations of history and current practice into a “critical examination” of moral equivalence); *id.* at 651 (Scalia, J., concurring in part and concurring in the judgment) (noting that the plurality utilizes moral equivalence as “a substitute for reliance upon historical practice”). If “it is clear that such equivalence could reasonably be found,” then it “is enough to rule out the argument that moral disparity bars treating them as alternative means to satisfy the [elements] of a single offense.” *Schad*, 501 U.S. at 644.

Here, each of these factors—1) legislative intent; 2) widespread and historic practice; and 3) the moral equivalence of the constituent incidents—strongly supports the constitutionality of Texas Penal Code § 21.02.

### **3. Texas Penal Code § 21.02 and Legislative Intent**

Texas Penal Code § 21.02 criminalizes the continuous sexual abuse of a child under the age of fourteen. Tex. Penal Code § 21.02 (2020). As defined by that statute, a jury must “unanimously” agree that the defendant, during a

period that is thirty or more days in duration, committed two or more acts of sexual abuse, against one or more children. *Id.* Again, pursuant to the Texas Legislature's explicit command, whether the defendant committed two or more acts of sexual abuse against a child under fourteen, over a specified time period—i.e., the pattern of behavior or the series of acts which the statute defines as a criminal offense—is the element as to which the jurors must be unanimous in order to convict. *Kennedy v. State*, 385 S.W.3d 729, 731 (Tex. App. 2012). To this end, § 21.02(d) explicitly provides that the jury is not required to agree unanimously on which two specific and discreet acts of sexual abuse a defendant committed in support of the actus reus element in the statute, or the exact date when those acts were committed. *Id.*

The Legislature's explicit statutory command in § 21.02(d) establishes that the underlying facts—in this case the constituent sexual incidents making up the continuous offense—are merely the manner and means upon which the jury need not agree. *Jacobsen v. State*, 325 S.W.3d 733, 737 (Tex. App. 2010); Tex. Penal Code § 21.02(d). This decision about which facts are necessary to constitute a crime (and which therefore must be proved individually), and what facts are mere means thereto, is given considerable deference by this Court because they represent value choices more appropriately made by a legislature, rather than by a court. *Schad*, 501 U.S. at 638 (plurality opinion). Given that the legislative intent is explicit on this point, the question then shifts to the

other factors described in *Schad*, and utilized by both the majority and dissent in *Richardson*.

#### **4. History of Continuous Sexual Abuse Statutes**

As this Court recognized in *Richardson*, 526 U.S. at 821, Texas's continuous sexual abuse of a child statute, like those in other jurisdictions, is a response to the serious and legitimate concern that many children who have been victimized by repeated incidents of sexual abuse over a period of time, and by the same assailant, are unable to identify those discrete acts of molestation.<sup>6</sup> As such, these children "may have no practical way of recollecting, reconstructing, distinguishing or identifying by specific incidents or dates all or even any" of the acts of sexual assault. *Calloway*, 176 Misc. 2d 161 (quotations omitted). Continuous course of conduct crimes targeting the sexual abuse of children also address the cumulative—and greater—injury resulting from repeated incidents occurring over a substantial period of time. Such a pattern constitutes a distinct crime from a single incident of sexual abuse. *See Dixon*, 201 S.W.3d at 737 (Cochran, J., concurring) ("[T]he simple

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<sup>6</sup> *See Dixon v. State*, 201 S.W.3d 731, 737 (Tex. Crim. App. 2006) (Cochran, J., concurring) (urging the Texas Legislature to "consider enacting a new penal statute that focuses upon a continuing course of conduct crime—a sexually abusive relationship that is marked by a pattern or course of conduct of various sexual acts"); e.g. *People v. Whitham*, 38 Cal. App. 4th 1282 (1995); *People v. Longoria*, 862 P.2d 266, 270–71 (Colo. 1993) (noting that a similar statute was enacted due to "the difficulties young children have distinguishing references to time, namely, recalling specific dates and places, particularly where a young child is subjected to abuse over a prolonged period of time"); *People v. Calloway*, 176 Misc. 2d 161 (N.Y. Co. Ct. 1998).

fact that the criminal conduct at issue is not really one specific act at one specific moment.”).

Numerous other states have adopted similar continuous sexual abuse of a child criminal statutes. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-1417; Cal. Penal Code § 288.5; Del. Code Ann. tit. 11, §776; Haw. Rev. Stat. § 707-733.; Md. Code, Crim. Law § 3-315; N.D. Cent. Code § 12.1-20-03.1; N.Y. Penal Law §130.75; Wis. Stat. Ann. §948.025. Many of their state courts have also determined that these criminal statutes do not violate Due Process. *See, e.g.*, *State v. Young*, 150 Haw. 365, 376 (Ct. App. 2021); *State v. Ramsey*, 211 Ariz. 529, 537 (Ct. App. 2005); *State v. Johnson*, 243 Wis. 2d 365 (2001). While the Texas statute cannot trace its ancestry to a firmly rooted common-law practice, such statutes do go back nearly forty years and were recognized by the Court as early as 1999. *Richardson*, 526 U.S. at 821. Such contemporary acceptance of continuous sexual abuse statutes is “a strong indication that they do not offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Schad*, 501 U.S. at 642 (internal citations omitted).

## **5. Moral Equivalence of Constituent Elements**

Finally, there is nothing “freakish” about this statute. *Schad*, 501 U.S. at 640. Texas Penal Code § 21.02 is compact, and the underlying incidents of sexual abuse are tightly interwoven, both logically and morally. Indeed, the

overarching legislative purpose of the statute—to punish those who repeatedly sexually abuse children—serves an overwhelming and distinct function, one which is far more focused than the federal statute at issue in *Richardson*.

The majority in *Richardson* utilized several factors when analyzing the potential unfairness that could unfold if the Court interpreted the relevant federal statute as treating each statutory “violation” as a means (and not as an element). All of these factors point to the constitutionality of Texas Penal Code § 21.02.

First, the Court noted with concern that the term “violations” as defined in the federal statute, covered a wide range of behavior with varying degrees of seriousness, spread out over approximately ninety statutory sections. *Richardson*, 526 U.S. at 819. Here, however, the “acts of sexual abuse” defined by Texas Penal Code § 21.02(c) are found in only eight penal statutes (although these statutes sometimes define more than one offense). *See note 4, supra*. All of the constituent acts are morally and conceptually similar: they are either first- or second-degree felonies and all involve the actual or intended sexual abuse of a child. *Schad*, 501 U.S. at 637; *Jacobsen*, 325 S.W.3d at 739. In the instant case, all the constituent acts of sexual abuse on which Carver was charged involved the actual sexual abuse and sexual assault of his daughter, S.C. *See Resp’t App’x. 1e–2e.*

Second, the Court in *Richardson* stated its concern that the wide range of constituent criminal incidents defined by the federal statute might permit a jury to avoid discussing the specific factual details of each violation, which could in turn mask wide disagreement among the jurors about what the defendant did or did not do. *Richardson*, 526 U.S. at 819. To this end, the majority reasoned that where the jury is presented with such a wide range of dissimilar and potentially illegal misconduct, jurors might not focus on specific factual details, and simply convict based only on allegations of wide-ranging criminal acts because “where there is smoke there must be fire.” *Id.* But again, these concerns are largely absent from Texas Penal Code § 21.02, which involves a limited number of constituent acts involving sexual abuse of one or more children.

Furthermore, the Texas statute is also consistent with the reasoning of the dissent in *Richardson*, which reached the underlying constitutional issue. *Richardson*, 526 U.S. at 825–37 (Justice Kennedy dissenting, joined by Justices O’Connor and Ginsburg). “The . . . statute does not in any way implicate the suggestions in *Schad* that an irrational single crime consisting of, for instance, either robbery or failure to file a tax return would offend due process.” *Id.* at 835. The dissent reasoned that other elements of the federal statute, including the “series” element (i.e., a requirement that the defendant act in concert with five or more persons, in a leadership role, with substantial

criminal proceeds), all “work together to channel the jury’s attention toward a certain kind of ongoing enterprise.” *Id.* at 836.

If the statute at issue in *Richardson* met constitutional muster, then the Texas statute at issue here surely does, especially given the factual and moral equivalence of the constituent incidents of sexual abuse. In the instant case, the jury was not presented a wide range of behavior with varying degrees of seriousness, spread out over dozens of statutory provisions. *Richardson*, 526 U.S. at 819. On the contrary, the jury’s focus here was undoubtedly channeled to the “ongoing” pattern of sexual abuse committed by Carver against his daughter.

Texas Penal Code § 21.02 is not remotely akin to a statute permitting a conviction on any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering to suffice for conviction, *Schad*, 501 U.S. at 633, or a crime consisting of either robbery or failure to file a tax return, *id.* at 650 (Scalia, J., concurring in part and concurring in the judgment). Rather, Carver’s present conviction was premised on a narrow subset of constituent (and numerous) incidents of actual sexual abuse, committed against his daughter. As such, § 21.02, is far removed from the Court’s concerns in *Schad* and *Richardson*.

## **B. Certiorari Should Be Denied Because There Is No Conflict Between the Decision Below and The Decision of Any Appellate Court.**

The question actually presented by Carver's claim advances nothing of substance for the Court to decide. *See* Sup. Ct. Rule 10. In his entire brief, Carver is unable to cite even a single reported opinion in which an appellate court determined that a continuous sexual-abuse-of-a-child statute was unconstitutional. *See* Pet. Cert.<sup>7</sup> Instead, Carver relies on an article from the Texas Law Review. *Id.* at 17.

Carver fails to cite (and the State is unaware of) any published or unpublished opinion in which any state or federal appellate court has ever declared a continuous-sexual-abuse of a child statute to be a violation of the federal constitution.<sup>8</sup> This is perhaps unsurprising given the Court's recognition of the likely validity of these provisions in *Richardson*. *See* Section 1, *supra*. Carver's petition should thus be denied because there is no conflict at issue.

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<sup>7</sup> Although not cited by Carver, the State is aware of one case where a court struck down a law on state constitutional grounds, *State v. Rabago*, 103 Haw. 236 (2003). However, the Hawaii legislature later amended its constitution to reverse the *Rabago* result, *see* Haw. Const. Art. I, § 25, S.B. 2246 (2006), ratified Nov. 7, 2006; and the state legislature subsequently reenacted the continuous sexual abuse statute in 2006, *see* 2006 Hawaii Laws Act 60 (H.B. 2207) (codified as amended at Haw. Rev. Stat. § 707-733.6).

<sup>8</sup> Many States have passed legislation similar to the Texas statute at issue here and their state courts have held that there is no Due Process violation. *See* Section 3, *supra*.

### **C. The Court Should Not Grant Certiorari to Exercise Broad Supervisory Power Over the State Courts.**

Carver urges the Court to grant certiorari because the CCA has not yet decided the question. *See Pet. Cert. 32.* He further asks the Court to “overrule” Texas intermediate appellate court opinions, starting with *Jacobsen v. State*, 325 S.W.3d 733 (Tex. App. 2010), that concluded Penal Code §21.02 does not violate Due Process. *See Pet. Cert. 19–25.* But these arguments are neither a compelling invocation of this Court’s jurisdiction under 28 U.S.C. § 1257(a), nor a motivating assertion under Rule 10.

In exercising its authority under § 1257(a), the Court has made clear that it 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). Hence, absent the existence of a compelling federal constitutional question, Carver’s arguments present the Court with no independent jurisdictional basis upon which to grant certiorari—either to “fill-in” for the Court of Criminal Appeals, or to “overrule” the Texas intermediate appellate courts. *See id.* Nor does Carver’s observation regarding the insular affairs of the Texas courts provide any marginal support for this petition. *See* Sup. Ct. Rule 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.”).

#### **IV. Due Process Does Not Require a Live Evidentiary Hearing for State Collateral Review.**

Carver argues that the CCA violated his constitutional right to “have a meaningful opportunity to be heard before a tribunal.” *See* Pet. Cert. 28–35. He complains that the habeas trial court did not hold a hearing to develop the habeas record and the CCA denied his petition without written order. *Id.* Ultimately, Carver asks the Court to intervene in the State’s post-conviction writ proceedings.

This Court has long understood that it holds “no supervisory power over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.” *Smith*, 455 U.S. at 221; *Dickerson v. United States*, 530 U.S. 428, 438 (2000); *see also Sanchez-Llamas v. Oregon*, 548 U.S. 331, 345–46 (2006) (Supreme Court lacked authority to order the state court to suppress Sanchez-Llamas’s statements made to state police officers). Here, the CCA’s ultimate authority to decide the process for state habeas proceedings is not reviewable by this Court.

When a state does provide a non-discretionary right to appeal a conviction, the state must then provide a fair opportunity for criminal defendants to present their claims as laid out in that state’s procedures. *See Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *Ross v. Moffitt*, 417 U.S. 600, 610–11 (1974). But Carver is not alleging that the State has violated his due process

protections during the direct appeal process as established under Texas law. Rather, he is challenging the State's procedures during his state habeas proceeding after he has already been tried, convicted, and availed himself of an appeal under Texas law. *See Pet. Cert.* 28–35.

The Due Process Clause “does not establish any right to an appeal . . . and certainly does not establish any right to collaterally attack a final judgment of conviction.” *United States v. MacCollom*, 426 U.S. 317, 323 (1976); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (“States have no obligation to provide [postconviction] relief”). Because the Constitution does not require a postconviction remedy *at all*, then “free-standing” due process protections surely do not extend to review a state court’s equitable application of a discretionary procedural bar in a postconviction proceeding. *C.f. Martinez v. Ct. of Appeal of California, Fourth App. Dist.*, 528 U.S. 152, 165–166 (2000) (Scalia J., concurring in judgment) (“Since a State could . . . subject its trial-court determinations to no review whatever, it could a fortiori subject them to review which consists of a nonadversarial reexamination of convictions by a panel of government experts”).

When a state provides post-conviction proceedings, “the Federal Constitution [does not] dictate[] the exact form such assistance must assume.” *Pennsylvania*, 481 U.S. at 555. If a state offers post-conviction review, that review has to comply with basic procedural due process. *See, e.g., Williams v.*

*Pennsylvania*, 579 U.S. 1 (2016); *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 68–69 (2009). A state habeas applicant’s “right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief.” *Id.* at 69. This narrow, procedural protection does not incorporate all the rights that apply in a full criminal trial, but it does require the state procedure to be in accord with fundamental fairness. *Id.* at 69. In the criminal law context, this Court has “defined the category of infractions that violate ‘fundamental fairness’ very narrowly” premised on “the recognition that, ‘[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.’” *Medina v. California*, 505 U.S. 437, 443 (1992) (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990) (alterations in original)). Moreover, “it has never been thought” that this Court functions “as a rule-making organ for the promulgation of state rules of criminal procedure.” *Spencer v. State of Tex.*, 385 U.S. 554, 564 (1967). “Federal courts may upset a State’s postconviction procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.” *Osborne*, 557 U.S. at 69.

In his state habeas proceedings, Carver obtained the core protection of due process—the opportunity to be heard. *See Ford v. Wainwright*, 477 U.S. 399, 413 (1986) (“The fundamental requisite of due process of law is the

opportunity to be heard.”) (citation omitted); *Tercero v. Stephens*, 738 F.3d 141, 148 (5th Cir. 2013) (noting that “states retain discretion to set gateways to full consideration and to define the manner in which habeas petitioners may develop their claims” and that “[d]ue process does not require a full trial on the merits; instead, petitioners are guaranteed only the ‘opportunity to be heard.’”) (footnotes and citations omitted). Carver’s claim concerning Texas postconviction proceedings thus lacks merit and his petition for certiorari review should be denied.

Important too, the Rules Governing Section 2254 Cases in the Federal Courts expressly preclude evidentiary hearings unless: 1) a petitioner’s claims rely on a new rule of constitutional law or a factual predicate previously undiscoverable through the exercise of due diligence; and 2) the petitioner establishes by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty. 28 U.S.C. § 2254(e)(2).

Given that evidentiary hearings in federal habeas district courts are discretionary and subject to limitations, it is hard to see how States could be prohibited from applying their own similar limitations on evidentiary hearings during state habeas review. Carver’s constitutional claim fails for this reason alone. *See Smith*, 455 U.S. at 218 (“It seems to us to follow ‘as the night the day’ that if in the federal system a post-trial hearing such as that conducted here is sufficient to decide allegations of juror partiality, the Due Process

Clause of the Fourteenth Amendment cannot possibly require more of a state court system.”).

Because Carver fails to present a constitutional violation by the CCA’s state habeas procedures, this Court should deny certiorari.

## **CONCLUSION**

For all the reasons discussed above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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