No. 19-7406

IN THE

SUPREME COURT OF THE UNITED STATES

Bartholomew Antonio Guzman — PETITIONER
(Your Name)

vs.

Lorie Davis, Director, TDCJ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO, And Application for A Certificate of Appealability

United States Court of Appeals for The Fifth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI, And Application for A Certificate of Appealability

Bartholomew Antonio Guzman
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QUESTION(S) PRESENTED

Question/Issue No. 1: Is the judgment of the United States District Court denying a petition for federal habeas relief void ab initio due to lack of jurisdiction because the habeas petitioner's State habeas proceedings are still pending before the State habeas court?

Question/Issue No. 2: Did the United States District Court commit an error in law when it granted the Respondent's Motion for Summary Judgment upon a material fact issue in dispute.

Question/Issue No. 3: Did the United States District Court commit an error in law when it accorded the presumption of correctness to the State court's legal conclusion that the Petitioner was not deprived of his constitutional rights to effective assistance of counsel?

Question/Issue No. 4: Is a Criminal Defendant deprived of his or her constitutional rights to Due Process under the 14TH Amendment to the United States Constitution and appellate review when a Court Appeals fails to address the specific issue presented for a certificate of appealability?

Question/Issue No. 5: Is a Criminal Defendant deprived of his constitutional rights to effective assistance of counsel under the 6TH Amendment to the United States Constitution when trial counsels fails to conduct an independent investigation of the facts of the case; fails to have a firm command of the facts of the case as well as governing law; and fails to educate himself as to the medical issues involved and aquire an expert witness to test the States expert witnesses.

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: Grethen Berumen Merendez, Assistant Attorney General - State of Texas, P.O. Box 12548, Austin, Texas, 78711-2548.

RELATED CASES

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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, or that a Certificate of Appealability issue in this case.

OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A. 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 B. 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 ______ 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 ______________________ 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.

JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 23, 2019.

[✓] No petition for rehearing was timely filed in my case. (Appendix C).

[ ] 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. __A______.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1), and Title 28 U.S.C., Section 2253(c)(1)(A)

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was ______________. A copy of that decision appears at Appendix ______.

[ ] A timely petition for rehearing was thereafter denied 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. __A______.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C., Section 2253(c)(1)(A) - Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of a process issued by a State court.

Title 28 U.S.C., Section 2253(c)(2) - A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Title 28 U.S.C., Section 2244(d)(2) - The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Title 28 U.S.C., Section 2254(a) - The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States.

Title 28 U.S.C., Section 2254(d) - An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

Title 28 U.S.C., Section 2254(e)(1) - In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

Texas Code of Criminal Procedure, Article 11.07, Section 5 - The Court of Criminal Appeals may deny relief upon the findings and conclusions of the hearing judge without docketing the cause, or may direct that the cause be docketed and heard as though originally presented to said court or as an appeal. Upon reviewing the record the court shall enter it's judgment remanding the applicant to custody or ordering his release, as the law and facts may justify. The mandate of the court shall issue to the court issuing the writ, as in other criminal cases. ~~After conviction~~ the procedures outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner.

STATEMENT OF THE CASE

On October 5, 2006 the Petitioner was convicted by a jury upon a plea of not guilty before the 262ND Judicial District Court of Harris County, Texas in Cause No. #1053411, Styled: The State of Texas v. Bartholomew Antonio Guzman, for the alleged offense of Injury to A Child by causing serious bodily injury with two (2) prior convictions alleged for enhancement of punishment. The jury assessed punishment at ninety (90) years confinement. (Appx. B; p. 2).

On February 7, 2008 the First Court of Appeals for The State of Texas affirmed the Judgment and Sentence of the trial court in Cause No. #01-06-00946-CR, Styled: Bartholomew Antonio Guzman v. The State of Texas. On September 10, 2008 the Texas Court of Criminal Appeals refused the Petitioner's Petition for Discretionary Review in Cause No. # PD-0262-08, Styled: Bartholomew Antonio Guzman v. The State of Texas. On February 1, 2017 the Texas Court of Criminal Appeals denied the Petitioner's State habeas corpus application without written order on the Findings of Fact and Conclusions of Law of the convicting court in Cause No. #WR-75,864-03, Styled: Ex Parte Bartholomew Antonio Guzman. (Appx. B; pp. 3-5). No Mandate was issued by the State habeas Court.

On February 8, 2017 the Petitioner filed a federal habeas petition pursuant to Title 28 U.S.C., Section 2254 before the United States District Court for the Southern District of Texas, Houston Division, in No. #4:17-CV-00596, Styled: Bartholoman Antonio Guzman v. Lorie Davis, Director, Texas Department of Criminal Justice-Correctional Institutions Division. The district court never ascertained it's jurisdiction over the parties and subject matter. (Appx. B; p. 1).

Before the district court, the Petitioner argued that: (1) the prosecution withheld exculpatory evidence in violation of Brady v. Maryland, 83 S.Ct. 1194 (1963); (2) the prosecution engaged in misconduct by failing to inform the jury that E.A.'s injuries could have been caused by an accidental fall; (3) he was denied effective assistance of counsel because his trial counsel - failed to investigate E.A.'s history of epilepsy and other falls that could have explained her injuries - failed to request funds to hire a forensic pathologist to controvert the State's medical experts - failed to present evidence in the form of letters from Daniel's elementary school teachers about his irrational and sometimes violent behavior towards the other children; and (4) he was denied due process when the State court of appeals used flawed reasoning to reject his challenge to the sufficiency of the evidence. (Appx. B; pp. 4-5).

On February 14, 2018 the district court issued a Memorandum Opinion and Order holding that the Petitioner failed to establish any valid claim for relief, thus, granting the Respondent's Motion for Summary Judgment, and sua sponte denied a certificate of appealability. (Appx. B; pp. 28-29, 30).

On March 13, 2018 the Petitioner gave a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit, and requested the issuance of a certificate of appealability in No. #18-20162, styled: Bartholomew Antonio Guzman v. Lorie Davis, Director, Texas Department of Criminal Justice - Correctional Institutions Division

Before the court of appeals, the Petitioner questioned as to whether a certificate of appealability should be issued to review the Order of the district court findings that the Respondent was entitled to summary judgment as a matter of law when the magistrate judge incorrectly stated that the State habeas court had determined that defense expert witness, Dr. John Plunkett [an expert pathologist for the defence] was not a credible expert, when in fact the State habeas court had found Dr. Plunkett to be a credible witness that precluded the granting of summary judgment.

On October 23, 2019 the court of appeals without first ascertaining the jurisdiction of the district court and it's own jurisdiction issued an Order, that was conclusionary and did not address the issue presented for a certificate of appealability, denying the Petitioner's motion for a certificate of appealability. (Appx. A; pp. 1-2). The court of appeals denied the Petitioner's request for extension of time to file a petition for panel rehearing on November 12, 2019. (Appx. C).

REASONS FOR GRANTING THE PETITION

Outside the scope and requirements for the issuance of a a writ of certiorari and review thereof under Rule 10 of the Supreme Court Rules, this Court's jurisdiction is extended by virtue of Title 28 U.S.C., Section 2253(c)(1)(A) to issue a certificate of appealability (COA). Section 2253(c)(1)(A) provides that: "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from; the final order in a habeas corpus proceeding in which the detention arises out of process issued by a State court. Thus, under the clear language of the Statute the Petitioner can seek the issuance of a COA from the Circuit Justice of this Court by means other than review by way of a writ of certiorari. Therefore, the foregoing pleading as one for a writ of certiorari and application for a COA is rightly before this Court.

This Court has explicitly held, that under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) a habeas petitioner must obtain a COA before he or she can appeal the district court's decision. See, Miller-El v. Cockrell, 123 S.Ct. 1029 (2003), and Slack v. McDaniel, 120 S.Ct. 1595 (2000). A COA will be granted only if the habeas petitioner makes a substantial showing of the denial of a constitutional right. See, Title 28 U.S.C, Section 2253(c)(2). In light of the clear language of the Statute, this Court through it's own creative interpretation of the Statute judicially re-wrote the Statute to hold that in order to make a substantial showing, a habeas petitioner must demonstrate that a reasonable jurist would find the district court's assessment of the constitutional claims debatable or correct. This Court holds that a habeas petitioner will satisfy this standard by demonstrating that "jurist of reason" could disagree with the district court's resolution the case or that the issue presented are adequate to deserve encouragement to proceed further. This Court expounded on the fact that a habeas petitioner does not need to convince a judge, or, for that matter, three (3) judges that he or she will prevail, but must demonstrate that reasonable jurist would find the constitutional claim debatable or wrong. See, Miller-El, Supra. Further, it is the same with respect for a COA to issue a habeas petitioner must show that reasonable jurist could debate whether the district court was correct in it's procedural ruling. See, Slack, Supra. The reviewing court is to resolve any doubts whether to grant a COA from the district court's denial of a habeas petition in the habeas petitioner's favor. See, Hill v. Johnson, 210 F.3d 481 (5th Cir. 2000).

Issue No. 1: The dismissal of the foregoing habeas petition by the district court and the granting of the Respondent's motion for summary judgment by the district court is void ab initio because the district court lacked jurisdiction to entertain the petition.

Every federal appellate court has a special obligation to satisfy itself not only of it's own jurisdiction, but also that of the lower court in a cause under review, even though the parties are prepared to concede it. If, a district court lacked jurisdiction, the appellate court's jurisdiction extends not to the merits but merely for the purpose of correcting the error of the lower court entertaining the case. See, Steel Co. v. Citizens for A Better Env't., 118 S.Ct. 1003 (1998).

This Court has held that the jurisdiction over an application for federal habeas corpus is controlled by Statutes as it specifically addresses the federal courts by providing that this Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court. See, Brown v. Allen, 73 S.Ct. 397 (1953) and Title 28 U.S.C., Section 2254 et seq.

In this case the district court assumed jurisdiction pursuant to Section 2254 and the court of appeals assumed that the district court properly had jurisdiction over the case, thus, it properly had jurisdiction over the case, however, neither of these courts addressed and ascertained it's jurisdiction over the case under the record and the law...

Comity requires that the State court should have the first opportunity to review a State prisoner's federal habeas claim and provide any necessary relief. See, O'Sullivan v. Boerckel, 119 S.Ct. 1728 (1999).

Federal courts are required to apply governing State procedural law in determining whether an application for State post-conviction relief is "properly filed" or "pending." See, Artuz v. Bennett, 121 S.Ct. 361 (2000). Under Texas law, prior to the issuance of "Mandate" a judgment is not final. See, Carter v. State, 510 S.W.2d 323 (Tex. Cr. App. 1974), and Ex Parte, Johnson, 12 S.W.2d 472 (Tex. Cr. App. 2000). Under the Texas post-conviction habeas corpus procedures, the Texas Court of Criminal Appeals is required to issue the Mandate of that court to the court issuing the writ as in other criminal cases. See, Article 11.07, Section 5 of the Texas Code of Criminal Procedure. Upon the filing of a writ of habeas corpus with the convicting court, a writ of habeas corpus shall issue by operation of law to the Texas Court of Criminal Appeals. See, Article 11.07, Section 2 of the Texas Code of Criminal Procedure.

In Payne v. Kemna, 441 F.3d 570 (8th Cir. 2006) the habeas petitioner argued that his State post-conviction relief proceedings were pending within the meaning of Title 28 U.S.C., Section 2244(d)(2) until Mandate was issued. The court held that it must examine the particular State's procedural process to determine when the process has reached completion or final resolution. This Court also held the same in Carey v. Saffold, 122 S.Ct. 2134 (2002). Accord, Nyland v. Moore, 216 F.3d 1264 (11th Cir. 2000). Cf., Lookingbill v. Cockrell, 293 F.3d 256 (5th Cir. 2002); in the absence of a mandate jurisdiction over a case remains in the State appellate court, and an attempt to proceed below, prior to the return of a mandate is a clear invasion of an appellate's court jurisdiction.

As a matter of first instance this Court has jurisdiction to determine whether the district court and the court of appeals had jurisdiction over the case, and whether the district court overstepped the bounds of comity and the requirement of exhaustion of State remedies by entering a judgment while the Petitioner's State habeas proceedings are still pending...

The district court did not address or note its jurisdiction over the case, and did not find or address when the mandates were issued by the State courts in each of the proceedings before the State courts. The court of appeals did not do so either. In the attempt to raise and bring the matter to the attention of the court of appeals, the court of appeals denied the Petitioner's motion for extension of time to file a petition for panel rehearing.

The question of this Court's jurisdiction arises on the issue of the district court and court of appeals jurisdiction.

In the instant case, there was never a mandate issued by the State habeas court. The district court's Order makes no reference to the matter, and the court of appeals did not make reference to or address the matter of it's jurisdiction over the case. Thus, as far as this record is concerned the State habeas court or the State intermediate court of appeals has issued a mandate.

This Court made clear in Slack, supra., that if those materials are unclear or incomplete, then a COA should be granted, and if this Court decides the jurisdictional issue favorably to the Petitioner, it may have to remand the case for further proceedings. The Petitioner has clearly shown that reasonable jurists could debate or even find it debatable as to whether the district court had jurisdiction over the case, and on the issue of jurisdiction the matter deserves encouragement to proceed further.

In view that a petition for a writ of certiorari will be granted only for compelling reasons, this Court's jurisdiction extends not to the merits but merely for the purpose of correcting the error of the lower court's lack of jurisdiction to entertain the case. See, Steel Co., supra. Such calls for an exercise of this Court's supervisory power under Rule 10 of the Supreme Court Rules. As this Court has an obligation to satisfy itself of it's jurisdiction, as well as the district court's jurisdiction because the lack of jurisdiction render's its judgment denying habeas relief is void ab initio.

Issue No. 2: The court of appeals erred by failing to consider and address the issue presented for the issuance of a COA from that court.

This Court has explicitly held that the right to Due Process as implicated by the 14TH Amendment to the United States Constitution assures the right to be heard and guarantees a full hearing before a court having jurisdiction over the matter, the right to introduce evidence and have judicial findings based upon that evidence. See, Fuentes v. Shevin, 92 S.Ct. 1983 (1972).

Before the court of appeals the Petitioner requested the issuance of a COA on two (2) issues: (1) should a COA be issued to review the Order of the district court's findings that the Respondent was entitled to summary judgment as a matter of law when the Magistrate Judge incorrectly stated that the State habeas court had determined that the Defense Expert Witness, Dr. John Plunkett, an Expert Pathologist was not a credible witness, when in fact the State habeas court had found Dr. Plunkett to be a credible witness that precludes the granting of summary judgment, and (2) should a COA be issued to review the Order of the district court's finding that the Respondent was entitled to summary judgment as a matter of law based upon all the pleadings before the district court at the time summary judgment was granted to the Respondent.

In the Order denying the Petitioner's request for a COA, the court of appeals assigned a plethora of issues assumed to have been presented by the Petitioner in request for a COA. (Appx. A; pp. 1-2). As reflected, the Order in no shape or form addresses the issues presented by the Petitioner in request for the issuance of a COA. The issue presented directly concern whether the district court's summary judgment ruling was correct, when there was a genuine issue of material fact in dispute that would preclude summary judgment that was suppose to have been reviewed de novo. See, Woods v. Cockrell, 307 F.3d 353 (5th Cir. 2002).

In the instant case the court of appeals alluded the issue presented as to whether the district court properly granted the Respondent's motion for summary judgment upon a disputed fact issue, that clearly deprived the Petitioner of an adequate federal appellate review. For the purpose of the issuance of a COA by this Court, reasonable jurists could debate or even find it debatable as to whether the court of appeals erred when it fail to consider and address the issue presented by the Petitioner for the issuance of a COA. In view that a petition for a writ of certiorari will be granted only for compelling reasons, this Court in the exercise of it's supervisory power under Rule 10 of the Supreme Court Rules should grant a writ of certiorari and remand the case to the court of appeals with instructions to consider and address the issue presented to that court for the issuance of a COA.

Issue No. 3: The court of appeals erred in it's determination that the Petitioner fail to make the requisite showing for a COA, because reasonable jurists would find the district court's assessment of the Petitioner's constitutional claim that he was denied his constitutional right to effective assistance debatable, where (1) the district court applied the presumption of correctness to the State court's legal conclusion as to whether trial counsel was ineffective rather than to the State court's factual findings as permitted by Title 28 U.S.C., Section 2254(e)(1); (2) trial counsel admitted that he did not conduct any investigation to determine whether the injuries sustained by the alleged victim were caused by an accidental fall on the basis that it was evident that the injuries sustained by the alleged victim were caused by some-one shaking the alleged victim violently; and (3) trial counsel admitted that he did not pursue additional investigation or hire a medical expert

The standard of review to the extent the claims presented were adjudicated upon the merits by the State court, a federal habeas court may not grant habeas relief unless the State court's adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. See, Title 28 U.S.C., Section 2254(d)(1). Likewise, if a claim presents a question of fact, a habeas petitioner cannot obtain federal habeas relief unless he or she shows that the State court's denial of relief was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. See, Title 28 U.S.C., Section 2254(d)(2). A State court's factual determination are also entitled to deference on federal habeas review. The findings of fact of the State court are presumed to be correct unless the habeas petitioner rebuts those findings with clear and convincing evidence. See, Title 28 U.S.C., Section 2254(e)(1), and Rushing v. Spain, 104 S.Ct. 453 (1983).

A federal court has an independent duty to determine whether there is a constitutional violation, and in sum the statute directs the federal courts to attend to every State court judgment with the utmost care, but it does not require a federal court to defer to the opinion of every reasonable State court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a State court's judgment a federal court is convinced that a habeas petitioner's custody violates the United States Constitution, that independent judgment prevails. See, Williams v. Taylor, 120 S.Ct. 1495 (2000). A State court judgment must be upheld unless, after the closest examination of the State court judgment, a federal court is firmly convinced that a federal constitutional right has been violated.

Before the district court the Petitioner argued that he was deprived of his constitutional rights to effective assistance of counsel because trial counsel: (1) failed to investigate the alleged victim's history of epilepsy and other falls that could have explained the alleged victim's injuries, and (2) failed to request funds to hire a forensic pathologist to rebut and/or controvert the testimony of the State's medical experts.

In addressing the claims, the district court made reference to the State habeas proceedings, that the Petitioner claimed that his defense counsel was ineffective for failing to adequately investigate or hire a defense expert to contest the State's theory of "Shaken Baby Syndrom" by presenting evidence that the alleged victim's injuries could have been caused by a fall. (Appx. B; p. 15). The district court furthered that the Petitioner contended that his defense counsel was deficient for failing to investigate whether the alleged victim's injuries could have been caused by other means, such as a fall in the bathtub as the result of an epileptic seizure or a fall down the stairs; and that his counsel should have hired a medical expert to present evidence of this theory and to counter the testimony from the State's expert witnesses who diagnosed the alleged victim with shaken baby syndrome.

In support of the claims, the Petitioner presented the affidavit of Dr. John Plunkett, a Forensic Pathologist who reviewed the medical records of the alleged victim from the date of the purported incident, and concluded that the alleged victim suffered from a low-velocity head impact injury. Dr. Plunkett furthered that the "Retinal Hemorrhage" of the alleged victim was a cascade phenomenon, a secondary event, as it merely indicated that the alleged victim had either a structural or functional occlusion of the veins returning blood from the eyes to the heart, not that the alleged victim had been shaken. Dr. Plunkett provided that malignant cerebral edema following an initial lucid interval caused the alleged victim's catastrophic clinical course.

In the affidavit of the Petitioner's trial counsel, trial counsel admitted that he did not conduct any investigation to determine whether the injuries of the alleged victim were caused by an accidental fall because it was evident that the injuries were caused by someone shaking the alleged victim violently, and that he did not pursue additional investigation or hire a medical expert. (Dkt. No. #12-5; pp. 2-3).

In light of the affidavit of Dr. John Plunkett, trial counsel admitted that he did not believe it would have made a difference if he had presented this evidence at the Petitioner's trial.

The State habeas court concluded that if Dr. Plunkett had testified at the Petitioner's trial, it was not reasonably probable that the jury would have rejected the expert opinions of Dr. Mintz-Hitner and Dr. Tanaka and excepted Dr. Plunkett's expert opinion in order to acquit the Petitioner, and therefore trial counsel was not objectively deficient for failing to investigate or present evidence from Dr. Plunkett that the alleged victim's injuries were the result of an accidental fall, nor was he prejudiced by the purportedly deficient conduct. The district court concluded that the Petitioner fail to show that the State's court's decision to deny relief on this claim was unreasonable entitling the Respondent to summary judgment. On this conclusion the district court held that in considering the detailed testimony testimony by the State's experts and the severe nature of the alleged victim's injuries, the Petitioner failed to show that the result would have been different if "trial counsel" had presented the proposed testimony from Dr. Plunkett or if he had pursued another strategy at trial.

Texas has adopted the federal standard of review for analyzing an ineffective assistance of counsel claim as set out in Strickland v. Washington, 104 S.Ct. 2054 (1984). See, Hernandez v. State, 726 S.W.2d 53 (Tex. Cr. App. 1986).

To prevail on a complaint of ineffective assistance of counsel, the defendant must satisfy the two (2)-prong test set out in Strickland that requires the defendant to (1) show that counsel's performance was so deficient that counsel was not functioning as the counsel guaranteed by the 6TH Amendment to the United States Constitution, and (2) there is a reasonable probability that but for the deficient performance, the result of the trial would have been different.

On review of the denial of a federal habeas petition, the court of appeals reviews the district court's factual findings for clear error, but decides any issue of law de novo. See, Earhart v. Johnson, 132 F.3d 1062 (5th Cir. 1998). In as much as claims concerning ineffective assistance of counsel generally involves mixed question of law and fact the court of appeals review them de novo. See, United States v. Faubion, 19 F.3d 226 (5th Cir. 1994). Further, the grant of summary judgment is reviewed de novo applying the same criteria used by the district court in first instance. See, Goodwin v. Johnson, 132 F.3d 162 (5th Cir. 1998). However, this standard of review has no place in the determination of whether the Petitioner is entitled to the issuance of a COA by this Court.

The issue is whether reasonable jurists would find the district court's assessment of the Petitioner's constitutional claim that he was denied his rights to effective assistance of counsel, debatable or wrong, or that claim presented is adequate to deserve encouragement to proceed further, or for that matter, should the court of appeals have issued a COA.

Before an attorney can render reasonable effective assistance of counsel as envisioned by the 6TH Amendment to the United States Constitution, the attorney must have a firm command of the facts of the case as well as governing law. The attorney has an independent duty to make an independent investigation of the facts of his or her client's case and to prepare for trial. See, Matthew v. State, 830 S.W.2d 342 (Tex. App. 14th Dist. 1992). Simply labeling an attorney's actions as "trial strategy" does not insulate the attorney from a finding of ineffective assistance of counsel. An attorney's strategy can be so ill-chosen as to render a trial fundamentally unfair. See, United States v. Rusmel, 716 F.2d 301, 310 (5th Cir. 1983). As this Court explained in Strickland, strategy decisions should be judged by an objective standard of reasonableness.

The burden of proving ineffective assistance of counsel rests on the convicted defendant by a preponderance of the evidence. See, United States v. Cronic, 104 S.Ct. 2039 (1984). However of course faces the heavy burden of showing ineffective assistance of counsel as set forth in Strickland, enhanced by the added hurdle posed by Congress under the highly deferential review accorded State court adjudications under Title 28 U.S.C., Section 2254(d)(1) and (2). Notwithstanding these obstacles, if certain omissions cannot be explained by trial counsel convincingly as a result of a sound trial strategy, but instead arose from oversight, carelessness, ineptitude, or laziness, it would be found that the quality of representation is sufficiently deficient to grant the writ. See, Eze v. Senkowski, 321 F.3d 110 (2nd Cir. 2003).

It is perfectly legitimate for a court to find, based on all the evidence in the record that certain witnesses are credible or is not credible including trial counsel.

In the instant case, the Petitioner's conviction rests upon the infamous debunk theory of "Shaken Baby Syndrome," that is based exclusively on the finding of subdural hematoma and retinal hemorrhage absence of any other indicia of abuse which is the classical markers known as the "Tried-Proven Guilt" theory. See, (American Journal Forensic Medical Pathology, 1999; 20:17-21).

Most criminal defendant(s) will lose an "ineffective assistance of counsel claim," even when their convictions highlight the profound dysfunctionality within the Anglo-American Jurisprudence System. In far too many shaken baby syndrome cases, the conduct of both defense attorney and prosecutor seems to depart from adversarial system norms. Yet the Court(s) and the Law remedies these failings.

The record supports the following omissions made by trial counsel: (1) he did feel that it was necessary or beneficial to investigate if the alleged victim's injuries were caused by a fall in the bathtub; (2) he did not conduct any investigation into determining whether the injuries sustained by the alleged victim were caused by a fall in the bathtube; (3) he did not attempt to educate himself as to the medical issues involved; (4) he did not dispute the prosecution's theory of shaken-baby syndrome; (5) he went solely on the State's theory that the injuries exhibited by the alleged victim were the results of the alleged victim being violently shaken; (6) that the fall in the bathtub was a significant issue but he did not investigate it; (7) he believed it was an accident; (8) that the low-velocity impact fall in the bathtub may have constituted a complete defense; and (9) that getting an "expert" would have helped due to the conflicting testimony.

In light of these omissions by trial counsel as conceded and admitted by trial counsel, the State habeas court concluded that the Petitioner's trial counsel made a reasonable strategic decision based primarily upon the information provided by the Petitioner not to investigate whether the alleged victim's injuries resulted from the fall in the bathtub.

In regards to the Petitioner's ineffective assistance of counsel claim, the Petitioner tendered the affidavit of Dr. John Plunkett that revealed an alternative explanation and exculpatory medical theory that was never presented to the jury. The State habeas court merely attempted to undermined the probative value of the affidavit by Dr. Plunkett in reference to the Petitioner's ineffective assistance of counsel claim to the extent that it was not reasonably probable that the jury would have rejected the expert opinion of Dr. Mintz-Hittner and Dr. Tanaka and accepted Dr. Plunkett's expert opinion in order to acquit the Petitioner.

The gatekeeping function of a "court" is restricted to keeping out unreliable "expert testimony," not assessing the weight of the testimony, this latter role is assigned to the jury. In the instant case the State habeas court "weighed" the medical opinion of Dr. Plunkett against the medical opinion of the State's expert witnesses to resolve the Petitioner's claim of ineffective assistance of counsel that the district court erroneously afforded deference to in granting the Respondent's motion for summary judgment when the affidavit of Dr. Plunkett controverted the State's expert witnesses that presented material issue of fact in dispute precluding summary judgment. The medical opinion provided by Dr. Plunkett clearly established and demonstrated that this evidentiary matter was technically available at the time of the Petitioner's trial, but trial counsel fail to consult with an expert witness or investigate the matter so that he could make use of it. This omission clearly bears on the quality of the legal representation provided by trial counsel and questions of whether this was reasonable trial strategy. The Petitioner's trial counsel's failure to call an expert, or the right expert, or to offer a medical theory to undermine the State's theory of trial-proven guilt is entirely a faulty premise for an adversarial testing of the State's case. In the instant case, the Petitioner's trial counsel did not even mount an effective challenge to the testimony of the prosecution expert. The medical opinion of Dr. Plunkett clearly represents a factual matter that could have altered the outcome of the Petitioner's trial, as it would have had a pervasive effect on the inferences to be drawn from the total evidence presented by the State, trial counsel fail to procure expert testimony that the physical evidence was inconsistent the theory of trial-proven guilt.

It cannot be said that trial counsel made a reasonable strategic decision based primarily upon the information provided by the Petitioner not to investigate whether the alleged victim's injuries resulted from the fall in the bathtub. There is nothing contained in the record to support this averment of trial counsel. There is no corroborating evidence to support trial counsel's averment especially when trial counsel's actions is also unsubstantiated by other evidence. The explanation given by trial counsel as to his reasoning provides "no" plausible trial strategy that would justify his actions. It is permissible to say that any criminal defendant forego's a "defense" that he or she is not aware of when defense counsel fails to conduct an independent and adequate investigation.

This is a Novel issue that has been resolved in the Petitioner's favor, as there is a plethora of authority that supports a legal conclusion that as a result of the omissions of trial counsel the Petitioner's trial was fundamentally unfair and calls into question the veracity of the Petitioner's conviction. In Ex Parte Ard, 2009 WL 618982 (Tex. Cr. App. 2009); the court held that trial counsel was ineffective for failure to adequately present expert testimony to the jury; Rylander v. State, 75 S.W.3d 119 (Tex. App. 4th Dist. 2002); trial counsel ineffective for failure to present qualified medical testimony in support of the defendant's only viable and tenable defense; and Ex Briggs, 187 S.W.3d 458 (Tex. Cr. App. 2005); trial counsel ineffective for failure to throughly investigate medical evidence. Cf., Elmore v. Ozmint, 661 F.3d 783 (4th Cir. 2011); trial counsel ineffective for failure to investigate the prosecution's forensic evidence.

It is clear and as demonstrated that the State habeas court finding that trial counsel was not ineffective involves an unreasonable determination of the facts in light of the evidence presented in the State court, and is clearly contrary to or involves an unreasonable application of this Court's precedent under Strickland and Elmore.

The Petitioner clearly meets the requirements for the issuance of a COA and the court of appeals erred by failing to issue a COA, because as demonstrated above jurists of reason could disagree with the district court's resolution of the issue of whether the Petitioner was deprived of his constitutional rights to effective assistance of counsel. Such is adequate to deserve encouragement to proceed further when the record evident's trial counsel's omissions that calls into question the integrity of trial counsel's representation.

To allow the Petitioner to be convicted upon "junk science" and upon an unproven hypothesis at the hands of an inept and incompetent criminal defense attorney is a fundamental miscarriage of justice. The district court's determination that the Petitioner was not deprived of his rights to effective assistance of counsel at best is suspect when the record reflects nine (9) omissions of trial counsel. Thus, this Court should grant a COA.

When looked at under Rule 10 of the Supreme Court Rules, the Texas Court of Criminal Appeals a court of last resort has decided an important federal question in a way that conflicts with it's own decision. Thus, this Court should grant a writ of certiorari because district court's determination is a best suspect that the Petitioner was not deprived of his rights to effective assistance of counsel when the ommissions of trial counsel were totally unreasonable when the district court applied the presumption of correctness to a legal conclusion reached by the State court.

CONCLUSION

The petition for a writ of certiorari should be granted, or alternatively that a COA will be issued for an appeal in this case

Respectfully submitted,

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Bartholomew Antonio Guzman

Date: January 13, 2020