No. _____

In The
Supreme Court of the United States

RONALD BLAKE FEARS,

Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A jury convicted petitioner of continuous sexual abuse of a child and related offenses based on the uncorroborated testimony of his teenaged stepdaughter. To bolster her credibility, the State presented without objection the testimony of two law enforcement officers, a Child Protective Services investigator, and two lay witnesses that they believed that she was telling the truth about the sexual abuse. Texas appellate courts strictly prohibit this opinion testimony and have consistently reversed convictions because it was admitted over objection or, alternatively, because counsel was ineffective by failing to object to it. The state habeas trial court concluded that trial counsel performed deficiently and that petitioner was prejudiced and should receive a new trial. A divided Texas Court of Criminal Appeals did not disturb the findings of deficient performance but concluded without analysis that petitioner did not prove prejudice. The Fifth Circuit recognized the "compelling" nature of petitioner's ineffectiveness claim but affirmed on the basis that "double deference" was owed to the TCCA's conclusion that there was "no prejudice." The Fifth Circuit held that a reasonable jurist could conclude that the improper bolstering "gave the jury nothing it didn't already have" in determining the child's credibility.

The questions presented are:

I. Whether 28 U.S.C. § 2254(d)(1) requires that a federal court apply "double deference" to a state court's legal conclusion

QUESTIONS PRESENTED—Continued

that a habeas petitioner was not "prejudiced" by trial counsel's deficient performance.

II. Whether the Fifth Circuit erred by deferring to the TCCA's unreasonable legal conclusion that petitioner did not prove that he was "prejudiced" by trial counsel's deficient performance.

RELATED CASES

- *State v. Fears*, No. 2012-DCR-00986-B, 138th District Court of Cameron County, Texas. Judgment entered January 29, 2013.
- *Fears v. State*, No. 13-13-00111-CR, Thirteenth Court of Appeals of Texas. Judgment entered April 23, 2015.
- *Fears v. State*, No. PD-0598-15, Texas Court of Criminal Appeals. Judgment entered November 28, 2015.
- *Ex parte Fears*, No. 2012-DCR-00986-B, 138th District Court of Cameron County, Texas. Judgment entered February 28, 2019.
- *Ex parte Fears*, No. WR-86,519-01, Texas Court of Criminal Appeals. Judgment entered September 6, 2019.
- *Fears v. Davis*, No. 1:19-CV-184, United States District Court for the Southern District of Texas (Brownsville Division). Judgment entered August 20, 2020.
- *Fears v. Lumpkin*, No. 20-40563, United States Court of Appeals for the Fifth Circuit. Judgment entered August 30, 2022.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Ronald Blake Fears, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion affirming the district court's denial of habeas corpus relief (App. 1) and final judgment (App. 17) are unpublished; the opinion is available at 2022 WL 3755783. The Fifth Circuit's order granting a certificate of appealability (COA) (App. 19) is unreported. The federal district court's final order denying habeas corpus relief and a COA (App. 21) is unreported. The federal magistrate judge's report and recommendation to deny relief (App. 28) is unreported. The TCCA's order denying habeas corpus relief (App. 59) and reconsideration (App. 57-58) are unreported; the order denying relief is available at 2019 WL 2870316. The state district court's findings of fact and conclusions of law (App. 61) are unreported.

JURISDICTION

The Fifth Circuit entered a final judgment (App. 17) on August 30, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of . . . liberty . . . without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Procedural History

Petitioner pled not guilty to continuous sexual abuse of a child, sexual assault of a child, and three counts of indecency with a child in Cause Number 2012-DCR-00986-B in the 138th District Court of Cameron County, Texas, before Judge Arturo Cisneros Nelson. The jury convicted him on all charges, and the trial court sentenced him to 50 years in prison for continuous sexual abuse and 20 years for the other offenses on January 29, 2013.

The Texas Court of Appeals affirmed petitioner's convictions in a published opinion issued on April 23, 2015. The TCCA refused discretionary review on November 18, 2015. *Fears v. State*, 479 S.W.3d 315 (Tex. App. 2015, pet. ref'd).

Petitioner filed a state habeas corpus application on September 28, 2016, alleging that he was denied the effective assistance of counsel at the guilt-innocence and punishment stages of his trial. Trial counsel, Raynaldo Rodriguez and Victor Ramirez, filed affidavits responding to the allegations. Judge Nelson entered findings of fact and conclusions of law recommending that relief be denied on February 21, 2017 (ROA.2282-91).[1] Petitioner filed objections that the findings were not supported by the record and that Judge Nelson had ignored the gist of his complaints (ROA.2340-45). The TCCA remanded for additional findings and conclusions on June 28, 2017 (ROA.2351-53).

Judge Nelson entered additional findings and conclusions recommending that relief be denied on September 22, 2017 (ROA.2357-68). Petitioner filed objections upon learning that Judge Nelson had met *ex parte* with and instructed the prosecutor to submit these findings and conclusions after the prosecutor and petitioner's habeas counsel had agreed to an evidentiary hearing (ROA.2372-77). The prosecutor, in response to this challenge to his integrity, joined petitioner in notifying the TCCA that the State did not oppose a remand for an evidentiary hearing before a judge from outside of Cameron County (ROA.2378-79). The TCCA remanded for an evidentiary hearing on November 8, 2017 (ROA.2380-82).

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[1] The Fifth Circuit's record on appeal ("ROA") is cited by the pagination appearing in the ROA.

The parties filed a joint motion to recuse Judge Nelson (ROA.2378-79). Judge Leonel Alejandro was appointed to preside at the evidentiary hearing (ROA.2388). Trial counsel Rodriguez was the sole witness (ROA.2446). Judge Alejandro entered findings of fact and conclusions of law recommending a new trial on punishment (ROA.2413-20). Petitioner filed objections that Judge Alejandro failed to enter adequate findings and conclusions on the claim of ineffective assistance of counsel at the guilt-innocence stage (ROA.2427-29). The TCCA remanded (for the third time) for additional findings and conclusions on October 24, 2018 (ROA.2550-52).

Judge Alejandro recused himself *sua sponte* without explanation (ROA.2559). Judge Jose Manuel Banales was appointed to preside (ROA.2560). Judge Banales entered findings of fact and conclusions of law recommending a new trial or, alternatively, a new punishment hearing on February 28, 2019 (App. 61; ROA.2620-25).

The TCCA, with two judges dissenting, denied relief on July 3, 2019, on the basis that petitioner "has not shown that he was prejudiced" (App. 59-60; ROA.2630-31). The TCCA denied reconsideration, with one judge dissenting, on September 6, 2019 (App. 57).

Petitioner filed a federal petition for a writ of habeas corpus in the Brownsville Division of the Southern District of Texas on September 26, 2019 (ROA.6). The magistrate judge recommended that the district court deny relief and a COA on July 2, 2020 (App. 28; ROA.104-22). Petitioner timely filed objections

(ROA.123-27). The district court denied relief and a COA on August 20, 2020 (App. 21; ROA.132-36). The Fifth Circuit granted a COA on August 5, 2021 (App. 19). The court, after briefing and oral argument, affirmed the judgment on August 30, 2022 (App. 1).

B. Factual Statement

1. The Indictment

The continuous sexual abuse of a child count alleged that, from September 1, 2007, through May 1, 2011, during a period of more than thirty days, petitioner committed more than two acts of sexual abuse against C.T., a child younger than fourteen years of age, by touching her genitals, causing her to touch his genitals, placing his penis in her mouth, and placing his mouth on her vagina (ROA.1372-73).

The sexual assault count alleged that, on or about July 1, 2011, petitioner intentionally or knowingly caused C.T.'s vagina to contact his penis (ROA.1373).

The three indecency counts alleged that, on or about May 1, 2010, petitioner touched C.T.'s breast with the intent to arouse or gratify his sexual desire; that, on or about September 28, 2011, he touched her breast with that intent; and that, on or about September 20, 2011, he caused her to touch his genitals with that intent (ROA.1373-74).

2. The State's Case

C.T. was born on May 12, 1997 (ROA.868). Petitioner is her stepfather (ROA.882). H.F. is her mother (ROA.1107). C.T. was fifteen years old, and B.F., her step-sister, was eight years old at the time of the trial (ROA.310).

On October 2, 2011, when C.T. was fourteen years old, she told an older friend, Chesney St. John, that her stepfather (petitioner) had been sexually abusing her since she was eight years old (ROA.303, 314-19). Chesney informed her mother, Natalie (ROA.320). Thereafter, C.T. told Natalie that she and petitioner had performed oral sex on each other many times (ROA.355-56, 368-69). Natalie called Child Protective Services (CPS) and took C.T. to the police station to make a report (ROA.371-72). C.T. told Officer Carlos Andrade that petitioner had been touching her private area since she was eight years old (ROA.409, 418).

Francisco Lopez, a CPS investigator, interviewed C.T. the next morning (ROA.717-18, 722-23). C.T. and H.F. gave similar descriptions of petitioner's penis (ROA.728-30). Lopez found "reason to believe" that C.T.'s allegations were true (ROA.723-25, 741).

C.T. was examined at a hospital (ROA.606). She told the nurse that petitioner had digitally penetrated her and made her touch his penis the previous week and twice tried to put his penis in her vagina the previous summer (ROA.608). Her hymen was intact, and there was no evidence of physical trauma (ROA.609-10, 627).

Detective Manuel Cisneros testified that the original charge of indecency with a child was increased to continuous sexual abuse as he acquired additional information about the abuse (ROA.459, 473). He watched C.T.'s videorecorded interview and believed that a crime had been committed based on her consistent statements and emotional reactions (ROA.473-74, 540).

C.T. testified that petitioner touched her vagina with his fingers when she was eight years old and told her that it was their secret and not to tell her mother (ROA.887-90). He placed his mouth on her breast, touched her vagina with his fingers and his mouth, and had her place her mouth on his penis many times when she was ten to fourteen years old (ROA.893-99, 905). She would spit out his semen (ROA.905). He twice tried to put his penis in her vagina (ROA.899, 908). He occasionally shaved his pubic area (ROA.903). C.T. told her friend Chesney about the abuse because she did not want petitioner to abuse B.F., who was about to turn eight years old (ROA.913-15). C.T. admitted on direct examination that she had lied to her parents to get out of trouble when she was younger (ROA.886-87). She admitted on cross-examination that she had lied to her teachers about being blind to gain attention and also had stolen money and makeup from her mother (ROA.959, 962).

B.F. testified that petitioner took care of C.T. and her when they arrived home from school in the afternoons until H.F. returned from work (ROA.806). She asserted that petitioner and C.T. were never alone, but acknowledged that she had told the police that they

were frequently alone in the bedroom with the door closed (ROA.808-10, 1329).

M.T., C.T.'s biological father, testified that H.F. told him that C.T. had accused petitioner of molesting her (ROA.819, 828). He spoke to C.T., explained that the allegations were serious, and asked whether she was lying (ROA.831-33). She insisted that she was telling the truth (ROA.833-34).

3. The Defense's Case

Melinda Hockaday and Dorraine Arraiza, who taught C.T. in the sixth and seventh grade, testified that she was a compulsive liar and attention-seeker who had a bad reputation at school (ROA.1049-51, 1063-66). For example, she pretended to be blind, told her teachers that she was transferring to a school for the blind, and convinced them she was blind until they observed her on a security camera (ROA.1051-53).

H.F., who taught kindergarten, testified that C.T., her daughter, stole money from her and lied to her (ROA.1108, 1112). C.T. did not appear to be uncomfortable around petitioner, and H.F. never saw any indication of sexual abuse (ROA.1117). C.T. became angry when petitioner would not allow her to go to a football game because she did not do the laundry (ROA.1132-33). Petitioner occasionally shaved his pubic area during the summers (ROA.1148-49). H.F. took photos of petitioner's penis to demonstrate that C.T.'s description was inaccurate (ROA.1138-42).

B.G., who taught high school, testified that C.T., her granddaughter, had a history of stealing money and lying and did not appear to be depressed or scared (ROA.1071, 1080). B.G. initially believed C.T. but changed her mind because C.T. gave different versions regarding the frequency of the abuse (ROA.1076, 1079, 1091-92).[2]

4. The Closing Arguments

The prosecutors argued that petitioner should be convicted because C.T. consistently maintained that the sexual abuse occurred and knew what semen looks like and that petitioner had shaved his pubic area (ROA.1191, 1221).

Defense counsel argued that petitioner should be acquitted because C.T.'s teachers testified that she lied to get attention; that neither C.T.'s mother nor her grandmother believed her; that C.T. made inconsistent statements during various interviews; that there was no medical evidence of sexual abuse; and, that C.T.'s repeating the accusations to various people did not corroborate that she had been sexually abused (ROA.1200, 1202-07, 1212-14).

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[2] B.G. did not like petitioner because he had moved her family out of town and, thus, had no motive to testify falsely (ROA.1087-88).

5. The State Habeas Corpus Proceeding

Petitioner alleged that his trial counsel were ineffective because, among other things, they did not object to (and, in some instances, elicited) the improper opinion testimony of five witnesses—two police officers, a CPS investigator, and two lay witnesses—that they believed C.T.'s allegations:

- Chesney St. John testified on direct examination that she believed that C.T. and petitioner had engaged in oral sex (ROA.327).
- Natalie St. John testified on cross-examination that she was close enough to C.T. to believe that C.T. would not mislead her (ROA.386).
- Officer Andrade testified on cross-examination that he determined that a crime had been committed based solely on C.T.'s "testimony" (ROA.425-27, 432).
- Detective Cisneros testified on direct examination and redirect examination that he believed that a crime had been committed based on C.T.'s consistent statements and emotional reactions during the videotaped interview (ROA.463, 473-74, 540). Counsel elicited on cross-examination that Cisneros did not believe that a child would falsely accuse a parent of sexual abuse (ROA.492).
- CPS investigator Lopez testified on direct examination that he had to determine

> whether to believe C.T.'s allegations and, after he completed the investigation, found "reason to believe" they were true (ROA.723-25, 741).

The prosecutor acknowledged during his closing argument in the state habeas proceeding that petitioner probably had been wrongly convicted: "I think the jury was well aware of the fact that there is reasonable doubt on this case. Now, you say to me, well, how could they have come to this conclusion?. . . . Was this a runaway jury? Possibly so. Probably so, based on what I've read" (ROA.2535).

Judge Banales entered the following relevant findings of fact and conclusions of law:

- The opinion testimony of five prosecution witness that "C.T. was telling the truth" was inadmissible under Texas law (App. 66).
- "The trial court would have granted a motion in limine to exclude [any] opinion testimony of the credibility of the victim" (App. 67).
- "The inadmissible opinion testimony of a detective, of a police officer, of a CPS investigator and of lay witnesses that, in essence, C.T. was telling the truth about the alleged sexual abuse made C.T. more believable than not and the State's case significantly more persuasive by improperly bolstering C.T.'s credibility in a case where her credibility was paramount. . . .

> [S]uch inadmissible and prejudicial opinion testimony greatly undercut the defense's case. . . ." (App. 68-69).
>
> - Defense counsel's "failure to keep out opinion testimony of [C.T.'s] credibility fell far below an objective standard of reasonableness [within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984)]. . . ." (App. 69).
>
> - "But for counsel's deficient conduct, taken as a whole, there is a reasonable probability the result at [the guilt-innocence stage of the trial] would have been different" (App. 69).

The TCCA did not disturb the trial court's factual findings that counsel had performed deficiently but concluded without any analysis that petitioner "has not shown that he was prejudiced" (App. 59-60).

6. The Federal Habeas Corpus Proceeding

The Fifth Circuit affirmed the federal district court's denial of relief based on its conclusion that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)—in particular 28 U.S.C. § 2254(d)(1)—requires "double deference" to the TCCA's conclusion that petitioner was not "prejudiced" within the meaning of *Strickland*, *supra.* The Fifth Circuit elaborated on why petitioner could not overcome the "double deference" owed to the TCCA's "no prejudice" conclusion:

> Because we conclude that Fears cannot satisfy the AEDPA standard on the prejudice prong, our inquiry begins and ends there. . . . A defendant shows prejudice where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [*Strickland*, 466 U.S. at] 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*
>
> Fears must show that the CCA's application of that standard was "unreasonable." *See [Harrington v.] Richter*, 562 U.S. [86,] 112 [(2011)]. And our deference to the CCA in this area is further heightened—we must apply "doubly deferential judicial review." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). Our review is doubly deferential because AEDPA and *Washington* require deference to the state court and the trial lawyer, respectively. *Richter*, 562 U.S. at 105. Double deference applies to both the deficiency and prejudice prongs [of the *Strickland v. Washington* standard].
>
> Satisfying that doubly deferential standard means that "every reasonable jurist would conclude that it is reasonabl[y] likely that" Fears would have been acquitted had his trial counsel objected to the bolstering testimony. *Adekeye v. Davis*, 938 F.3d 678, 684 (5th Cir. 2019). "[E]ven a strong case for relief" may not be enough. *Id*. (quoting *Richter*, 562 U.S. at 102).

App. 12-13.

The Fifth Circuit concluded:

> Fears's strongest rationale for finding prejudice is that the state's case turned on C.T.'s credibility. He thinks the bolstering testimony—particularly that of the three investigators with substantial experience investigating child sex-abuse cases—"carr[ied] exceptional weight and an aura of reliability" in the jurors' minds. (Quotation omitted.) Although those witnesses were not qualified as experts, Fears contends the jury likely thought of them as similarly authoritative. The case, he maintains, "depended on [C.T.'s] credibility," and the conflicting evidence on that point meant that the jury needed help deciding whom to believe.
>
> But the importance of C.T.'s credibility cuts both ways. As the state observes, the jury knew that its task was to decide whether C.T. was telling the truth. The jury had plenty of opportunities to assess her credibility itself—it could compare her trial testimony with her prior accounts, scrutinize her demeanor in court, and consider the evidence of her past perfidy. What's more, even if the investigators had kept their assessments of C.T.'s truthfulness to themselves, their belief in her story would have been implicit anyway because the investigation progressed to an indictment and a trial based on their conclusions.
>
> On that view, the challenged testimony was just cumulative evidence of C.T.'s credibility.

> And the introduction of cumulative evidence is harmless.

App. 14-15.

> . . . One rationally could conclude that the bolstering evidence gave the jury nothing it didn't already have. From that perspective, the investigators' conclusions were based on the same facts available to the jury, and their belief in C.T.'s story was already implicit because each of them advanced the case against Fears. That perspective is reconcilable with the applicable Supreme Court caselaw.
>
> AEDPA requires us to defer to the CCA's no-prejudice decision.

App. 16.

REASONS FOR GRANTING REVIEW

The Court should grant certiorari to resolve the circuit split concerning whether a federal habeas court must apply "double deference" to a state court's legal conclusion that a petitioner was not "prejudiced" by his trial counsel's deficient performance within the meaning of *Strickland v. Washington*. The Court also should grant certiorari to decide whether, in applying the appropriate degree of deference under the AEDPA, the TCCA's conclusion that petitioner was not "prejudiced" was objectively unreasonable.

I. The Court Should Grant Certiorari To Resolve The Circuit Split Concerning Whether A Federal Habeas Court Must Apply "Double Deference" To A State Court's Legal Conclusion That A Defendant Was Not "Prejudiced" By Trial Counsel's Deficient Performance Within The Meaning Of *Strickland v. Washington*.

In *Yarborough v. Gentry*, 540 U.S. 1 (2003) (per curiam), this Court rejected a federal habeas corpus petitioner's ineffectiveness claim based on the "double deference" owed to the state court's factual finding that counsel did not perform deficiently during his closing argument:

> The right to effective assistance extends to closing arguments. . . . Nonetheless, counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. . . . Judicial review of a defense attorney's summation is therefore highly deferential —and *doubly deferential* when it is conducted through the lens of federal habeas [under the AEDPA].

Id. at 4 (emphasis added).

The deference owed is "double" in that (1) *Strickland v. Washington* requires deference to counsel's reasonable strategic decisions in determining whether he performed deficiently and (2) the AEPDA requires

deference to a state court's legal conclusion that counsel did not perform deficiently. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009); *cf. White v. Wheeler*, 577 U.S. 73, 78 (2015) (per curiam) ("double deference" owed to state court's finding that a juror was properly disqualified for bias because it involves an assessment of the juror's demeanor).

The Court has consistently applied "double deference" to the "deficient performance" prong of an ineffectiveness claim. *See*, *e.g.*, *Yarborough*, 540 U.S. at 4; *Burt v. Titlow*, 571 U.S. 571 U.S. 12, 15 (2013) (per curiam) ("When a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel during plea bargaining, our cases require that the federal court use a "doubly deferential" standard of review that gives both the state court and the defense attorney the benefit of the doubt."); *Woods v. Etherton*, 578 U.S. 113, 117 (2016) (per curiam); *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (per curiam).

The Court also has stated in *dicta*, without explaining the rationale, that "double-deference" applies to the "prejudice" prong of an ineffectiveness claim. *See Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). *Pinholster* appears to be in tension with the Court's prior precedent on this issue, which deemed the prejudice determination to be a mixed question of law and fact (that, by its nature, does not warrant deference beyond that due to the state court's ruling). *See id.* at 202 (citing cases in which the Court reviewed *de novo* the state court's "no prejudice" conclusion); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (reviewing *de novo* whether

petitioner was "prejudiced" despite state court's finding that counsel did not perform deficiently); *see also Porter v. McCollum*, 558 U.S. 30, 42 (2009) (per curiam) ("The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough—or even cursory—investigation is unreasonable.").

The Court's observation in *Pinholster* that "double deference" applies to the "prejudice" prong was *dicta* because the Court articulated this standard of review without applying it to the facts. *See Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 476-77 (1989); *see also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

The *dicta* in *Pinholster* has caused the circuit courts to disagree about whether "double deference" applies to the "prejudice" prong of an ineffectiveness claim. The Fifth, Sixth, Tenth, and Eleventh Circuits apply such "double deference."[3] The Ninth Circuit does

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[3] *See Foust v. Houk*, 655 F.3d 524, 534 (6th Cir. 2011) ("We therefore afford double deference to . . . both prongs of the *Strickland* test."); *Simpson v. Carpenter*, 912 F.3d 542, 599 (10th Cir. 2018) ("This is a decision on the merits, and we review the [Oklahoma Court of Criminal Appeals'] prejudice determination under AEDPA's and *Strickland*'s doubly deferential standard of review."); *Frazier v. Bouchard*, 661 F.3d 519, 534 (11th Cir. 2011) ("Bearing in mind the 'doubly' deferential nature of *Strickland* review under AEDPA, we cannot hold that Frazier has made the requisite showing of prejudice.").

not.[4] The Third Circuit has noted the issue without resolving it:

> The Supreme Court has stated that when the *Strickland* analysis is combined with Section 2254(d), the analysis is "doubly" deferential. *Premo v. Moore*, 562 U.S. 115, 122 (2011) (citation omitted). However, it is an open question in this Circuit whether this language applies to the prejudice prong. Indeed, we recently granted panel rehearing to remove references to "doubly deferential" review from a *Strickland* prejudice analysis. *Compare Mathias v. Superintendent*, 869 F.3d 175, 189, 191 (3d Cir. 2017) (applying doubly deferential review), *vacated by Mathias v. Superintendent*, 876 F.3d 462 (3d Cir. 2017), *with Mathias*, 876 F.3d at 477 n.4 (declining to resolve the issue). In Lazar's case, the District Court found that doubly deferential review does not apply to the prejudice prong of *Strickland*. *See* App. 16 n.3 (citing *Evans v. Secretary*, 703 F.3d 1316, 1334 (11th Cir. 2013) (en banc) (Jordan, J., concurring) (distinguishing prejudice from deficient performance)). We assume *arguendo* that this is correct, as we will nevertheless affirm the denial of the writ.

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[4] *See Hardy v. Chappell*, 849 F.3d 803, 825 (9th Cir. 2016) ("Double deference refers to the layering of the reasonableness test from § 2254(d) on top of another reasonableness test, such as the deficiency prong of *Strickland*'s two-part standard. Because only the prejudice prong is at issue here, double deference does not apply.").

Lazar v. Superintendent Fayette SCI, 731 Fed. App'x 119, 122 n.4 (3d Cir. 2018).

Eleventh Circuit Judge Jordan cogently explained in his concurring opinion in *Evans* why "double deference" should not apply to a state court's "no prejudice" conclusion, *Pinholster* notwithstanding:

> Where the performance prong of *Strickland* is concerned, habeas review is indeed doubly deferential. See, e.g., *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("Judicial review of a defense attorney's summation is . . . highly deferential—and doubly deferential when it is conducted through the lens of federal habeas."). This is because, as the Supreme Court told us in *Strickland*, counsel's performance is itself due a base level of deference: "Judicial scrutiny of counsel's performance must be highly deferential." 466 U.S. at 689. When we layer the "deferential lens of § 2254(d)" atop that first level of deference, the end result is "doubly deferential" review of counsel's performance. *See Knowles v. Mirzayance*, 556 U.S. 111, 121 n. 2 (2009).
>
> This case, however, involves only the prejudice prong of *Strickland*, and with respect to that prong there is no underlying deference. Unlike the performance evaluation, which asks us to assess what counsel did or did not do, *see Strickland*, 466 U.S. at 688 (explaining that the measure of attorney performance under the Sixth Amendment is "reasonableness under prevailing professional norms"), the prejudice question is, in the end, a legal one.

> There is no "what" to analyze. There is only the *ex post* legal determination, by a court based on a hypothetical construct with counsel's errors corrected, as to whether the defendant was or was not prejudiced by his counsel's actions or omissions. *See*, *e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (to determine whether prejudice resulted from counsel's deficient performance at a capital sentencing hearing, a court must "reweigh the evidence in aggravation against the totality of available mitigating evidence"). . . . It therefore makes no sense to say that initial judicial review as to whether prejudice resulted from counsel's deficient performance—on its own, before adding AEDPA deference—involves any deference. . . .
>
> There is language in [a] Supreme Court . . . opinion[ ] suggesting that doubly deferential review applies to the prejudice prong. *See Cullen v. Pinholster*, 563 U.S. 170, 131 S. Ct. 1388, 1403 (2011) ("Our review of the California Supreme Court's decision [as to performance and prejudice] is . . . doubly deferential."). But there is a strong argument that such language is *dicta*, for . . . the Supreme Court [did not] actually appl[y] double deference to the question of prejudice.

Evans, 703 F.3d at 1333-34 (Jordan, J., concurring).

The Court should grant certiorari to resolve the circuit split on this important, recurring issue. Ineffective assistance of counsel claims are, by far, the most commonly litigated claims in federal habeas corpus

petitions filed by state prisoners. *See* Nancy J. King *et al.*, *Executive Summary: Habeas Litigation in U.S. District Courts: An Empirical Study Of Habeas Corpus Cases Filed By State Prisoners Under The Antiterrorism and Effective Death Penalty Act of 1996* 5 (2007) (noting that most federal habeas petitions raise an ineffectiveness claim), available at https://www.ojp.gov/pdffiles1/nij/grants/219558.pdf.

II. The Court Should Grant Certiorari To Decide Whether The Fifth Circuit Erred By Deferring To The TCCA's Unreasonable Legal Conclusion That Petitioner Did Not Prove That He Was "Prejudiced" By Trial Counsel's Deficient Performance.

The Court should grant certiorari to decide whether, applying the appropriate amount of deference, the TCCA's "no prejudice" conclusion was objectively unreasonable. The state habeas trial court's legal conclusion that trial counsel's deficient performance resulted in prejudice was well-reasoned and indisputably correct:

> The inadmissible opinion testimony of a detective, of a police officer, of a CPS investigator and of lay witnesses that, in essence, C.T. was telling the truth about the alleged sexual abuse made C.T. more believable than not and the State's case significantly more persuasive by improperly bolstering C.T.'s credibility in a case where her credibility was paramount. . . . [S]uch inadmissible and prejudicial opinion

> testimony greatly undercut the defense's case. . . .

App. 68-69. The TCCA did not articulate why it rejected this conclusion.

A reviewing court must determine whether there is a "reasonable probability" that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696. The prosecutor candidly acknowledged during his closing argument in the state habeas proceeding that petitioner probably had been wrongly convicted: "I think the jury was well aware of the fact that there is reasonable doubt on this case. Now, you say to me, well, how could they have come to this conclusion?. . . . Was this a runaway jury? Possibly so. Probably so, based on what I've read" (ROA.2535).

Although *Strickland* set a high bar to prove deficient performance, once it has been proven, the prejudice prong is much more attainable. *Strickland* requires a reasonable probability of a different result *by less than a preponderance of the evidence*. *Strickland*, 466 U.S. at 694; *see also United States v. Dominguez Benitez*, 542 U.S. 74, 82 n.9 (2004) ("The reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different. *See Kyles v. Whitley*, 514

U.S. 419, 434 (1995).”). A “reasonable probability” is essentially the same as “probable cause,” which has been defined as a “reasonable probability” or “reasonable likelihood” that a crime has been committed.[5] Both “probable cause” and “reasonable probability” require proof by less than a preponderance of the evidence.[6] As recently as 2014, every justice of the Court agreed that the “probable cause” requirement is “not a high bar” or is a “low bar.”[7] So is *Strickland* prejudice.

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[5] *See*, *e.g.*, *United States v. Schenck*, 3 F.4th 943, 946 (7th Cir. 2021) (“Probable cause is not a high standard. It simply means there is a reasonable likelihood evidence of wrongdoing will be found.”); *United States v. Rivera*, 825 F.3d 59, 64 (1st Cir. 2016) (“[P]robable cause does not demand . . . even proof by a preponderance of the evidence—it demands only ‘a fair probability’—[which is] another way of saying ‘reasonable likelihood.’ ”). (citations omitted); *United States v. Gordon*, 173 F.3d 761, 766 (10th Cir. 1999) (“Probable cause rests on a reasonable probability that a crime has been committed[.]”); *United States v. Humphrey*, 140 F.3d 762, 764 (8th Cir. 1998) (finding probable cause exists when “the evidence as a whole creates reasonable probability that the search will lead to the discovery of evidence”); *United States v. Magluta*, 44 F.3d 1530, 1535 (11th Cir. 1995) ([P]robable cause itself is a doctrine of reasonable probability and not certainty.”). “Reasonable likelihood” and “reasonable probability” are synonymous. *United States v. Acosta-Colon*, 741 F.3d 179, 195 (1st Cir. 2015); *Fadiga v. Attorney General*, 488 F.3d 142, 154 (3d Cir. 2007).

[6] *Brown v. Texas*, 460 U.S. 730, 742 (1983) (probable cause “does not demand any showing that [a police officer’s belief] be . . . more likely true than false”).

[7] *Kaley v. United States*, 571 U.S. 320, 338 (2014) (“Probable cause, we have often told litigants, is not a high bar[.]”) (majority opinion); *id.* at 354 (Roberts, C.J., dissenting, joined by Breyer & Sotomayor, JJ.) (referring to probable cause as a “low bar”).

The Fifth Circuit erroneously required petitioner to demonstrate a reasonable probability that, but for his trial counsels' errors, he would have been acquitted (App. 13). Yet a reasonable probability of any different result—including a hung jury—is sufficient. *Cf. Turner v. United States*, 137 S. Ct. 1885, 1898 (2017) (Kagan, J., dissenting) (stating that both the majority and the dissent "agree on the legal standard by which to assess the materiality of undisclosed evidence for purposes of applying the constitutional rule: Courts are to ask whether there is a 'reasonable probability' that disclosure of the evidence would have led to a different outcome—*i.e.*, an acquittal or hung jury rather than a conviction"). The standard for determining whether undisclosed evidence is "material" is identical to the standard for determining whether counsel's deficient performance resulted in "prejudice." *See Kyles*, 514 U.S. at 434.

The TCCA unreasonably concluded that trial counsels' deficient performance did not "prejudice" petitioner. The prosecution relied on the testimony of a teenager who was shown to be a liar, thief, and actress so accomplished that she convinced her teachers that she was blind. Her testimony was not corroborated by an eyewitness, physical or medical evidence, or a confession. The prosecution presented the inadmissible opinions of five witnesses that she was telling the truth about the sexual abuse to bolster an otherwise weak case.

The Fifth Circuit unreasonably concluded that the opinions of the prosecution witnesses that C.T. was

telling the truth about the sexual abuse did not inform the jurors of anything they did not already know (App. 16). The record does not demonstrate that, absent these opinions, the jurors necessarily would have assumed that the police officers and CPS investigator believed C.T. "because the investigation progressed to an indictment and a trial based on their conclusions." (App. 14). To the contrary, a rational jury probably would have believed that the police and CPS provided reports of the investigation to the district attorney's office; that a prosecutor presented the case to a grand jury; and, that the grand jury found probable cause to indict based on C.T.'s accusations—nothing more, and nothing less.

The prosecution obviously believed that it was necessary to throw a legal "Hail Mary" by presenting prejudicial opinion testimony that was clearly inadmissible under well-settled precedent. These opinions gave the jury an improper reason to believe C.T. despite her bad reputation—that experienced police officers and a CPS investigator believed her. If the Fifth Circuit is correct that these opinions were cumulative of C.T.'s testimony, the admission of opinions of this nature over objection would be harmless in every case, and trial counsel would never be ineffective if they failed to object, as there would be "no prejudice."

The Fifth Circuit's ultimate conclusion that "the bolstering evidence gave the jury nothing it didn't already have" (App. 16) also ignored a time-honored principle of the law of evidence. *See United States v. Price*, 722 F.2d 88, 90 (5th Cir. 1983) ("'No principle in the

law of evidence is better settled,' the court said in *United States v. Holmes*, 26 F.Cas. 349, 352 (C.C.D.Me. 1858) (No. 13,382) [(Clifford, J., Circuit Justice)], 'than . . . the rule . . . that testimony in chief of any kind, tending merely to support the credit of the witness, is not to be heard except in reply to some matter previously given in evidence by the opposite party to impeach it. . . .' When bolstering testimony suggests to the jury that it may shift to a witness the responsibility for determining the truth of the evidence, its admission may constitute reversible error."); *accord Sessums v. State*, 129 S.W.3d 242, 248 (Tex. App. 2004) (categorizing this opinion as "clearly and unquestionably objectionable testimony of the most outrageous and destructive type"); *Matter of G.M.P.*, 909 S.W.2d 198, 206 (Tex. App. 1995) (observing that opinion of police officer, whom jury could perceive as an expert, that child is telling the truth about sexual abuse "would likely carry exceptional weight and an aura of reliability which could lead the jury to abdicate its role in determining [the child's] credibility").

Two police officers, a CPS investigator, and two lay witnesses testified to their prejudicial opinions that C.T. was telling the truth about the sexual abuse. Their opinions enabled the prosecution to avoid a deadlocked jury, if not an acquittal, in a case that was so weak that the prosecutor acknowledged during his closing argument in the state habeas proceeding that petitioner was convicted by a "runaway jury" that did not hold the prosecution to its burden to prove guilt beyond a reasonable doubt. The Fifth Circuit acknowledged that

petitioner's ineffectiveness claim is compelling (App. 2). If petitioner cannot obtain relief on these facts, this Court should pronounce federal habeas corpus dead, give it a proper burial, and relegate it to the scrap heap of rights that have no remedy.

Texas appellate courts have consistently reversed sexual abuse convictions that depended on a child's credibility when the trial court overruled an objection to opinion testimony that the child was telling the truth.[8] These cases encompass the opinions of a police officer,[9] medical doctor,[10] psychologist,[11] social worker,[12] staff counselor at a rape crisis center,[13] CPS

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[8] The erroneous admission of opinion testimony that a child is telling the truth arguably could be harmless when the prosecution presented corroborating evidence—such as a confession, a video recording of the abuse, the testimony of a third person who observed the abuse, medical evidence that confirmed the abuse, or physical evidence (such as DNA) that implicated the defendant. The prosecution does not need to offer this inadmissible, prejudicial opinion testimony when it has corroborating evidence.

[9] *Matter of G.M.P.*, 909 S.W.2d 198, 205 (Tex. App. 1995); *Cook v. State*, 636 S.W.3d 35, 42-46 (Tex. App. 2021).

[10] *Ochs v. Martinez*, 789 S.W.2d 949, 958 (Tex. App. 1990); *Wiseman v. State*, 394 S.W.3d 583, 584-86 (Tex. App. 2015).

[11] *Kirkpatrick v. State*, 747 S.W.2d 833, 837-38 (Tex. App. 1987); *Ochs*, 789 S.W.2d at 957; *Aguilera v. State*, 75 S.W.3d 60, 64-65 (Tex. App. 2002).

[12] *Ochs*, 789 S.W.2d at 958; *Kelly v. State*, 321 S.W.3d 583, 600-01 (Tex. App. 2010).

[13] *Black v. State*, 634 S.W.2d 356, 357 (Tex. App. 1982).

caseworker,[14] school counselor,[15] and relative.[16] Alternatively, Texas appellate courts have reversed convictions based on ineffective assistance of counsel when counsel failed to object to this opinion testimony and there is a reasonable probability that it affected the verdict.[17] The clear, unequivocal caselaw on this issue demonstrates that the TCCA's conclusion that petitioner was not prejudiced was objectively unreasonable.

CONCLUSION

The Court should grant certiorari and reverse the Fifth Circuit's judgment. At the very least, the Court should vacate the judgment and remand to the Fifth Circuit to reconsider petitioner's "compelling"

[14] *Edwards v. State*, 107 S.W.3d 107, 115-16 (Tex. App. 2003).

[15] *Arrington v. State*, 413 S.W.3d 106, 113-15 (Tex. App. 2013).

[16] *Ochs*, 789 S.W.2d at 956.

[17] *See Garcia v. State*, 712 S.W.2d 249, 251-53 (Tex. App. 1986) (detective and CPS caseworker); *Miller v. State*, 757 S.W.2d 880, 881-84 (Tex. App. 1988) (doctor, staff counselor at rape crisis center, and child's mother); *Sessums v. State*, 129 S.W.3d 242, 247-48 (Tex. App. 2004) (psychologist and CPS investigator); *Fuller v. State*, 224 S.W.3d 823, 833-35 (Tex. App. 2007) (police officer, forensic interviewer, child's mother, and teacher).

ineffectiveness claim (App. 2) without applying "double deference" to the TCCA's "no prejudice" conclusion.

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