No. 22-5619

In the Supreme Court of the United States

DEONTE LEWIS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the presumption of reasonable trial strategy that this Court articulated in *Strickland* created an irrebuttable bar to performance competency challenges in the ineffective assistance of counsel context? If the answer to that question is no, then the presumption of competence in assessing counsel's tactics must be overcome when the record demonstrates that counsel's strategy was predicated upon a misunderstanding of the law surrounding the defendant's case.

LIST OF PARTIES

All parties appear in the caption of the cover page.

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JURISDICTION

The petitioner is seeking review, pursuant to 28 U.S.C. § 1257(a), of his conviction which was affirmed on appeal on November 12, 2020. *State v. Lewis,* 2020-Ohio-5265, 2020 Ohio App. LEXIS 4112 (Ohio Ct. App. Nov. 12, 2020). The Supreme Court of Ohio declined jurisdiction on February 8, 2022. *State v. Lewis*, 2022-Ohio-364, 165 Ohio St. 3d 1532, 180 N.E.3d 1157. Petitioner sought reconsideration and the Supreme Court of Ohio denied that application on April 12, 2022. *State v. Lewis*, 2022-Ohio-1163, 166 Ohio St. 3d 1469, 185 N.E.3d 114

CONSTITUTIONAL PROVISIONS

United States Constitution, Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Fourteenth Amendment

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT OF THE CASE

Petitioner-Deonte Lewis and co-defendant Sierra Day were prosecuted in Cuyahoga County, Ohio for the death of Day's four-year old daughter, A.D. The medical examiner who performed the autopsy described

> that A.D. had been dead for a day and half at the time of the autopsy. Dr. Felo described A.D. as "severely malnourished" and weighing only 26 pounds. Her skin was loose because she had lost muscle and fat below the skin. Dr. Felo observed that A.D. had a bruise on the right side of her forehead that was approximately one week old, and a black eye that she sustained two days before her death. A.D. also had some abrasions on her left arm and back. Some skin had "sloughed off" her lower legs and feet, and she had bed sores on her lower legs. (Tr. 1064-1065, 1073.)
>
> An internal examination revealed that A.D. developed a subdural hematoma, or blood clot, in the brain following blunt trauma to the left side of her head. The brain injury caused pressure to build on A.D.'s brain, which caused her to have a stroke. (Tr. 1066.) Dr. Felo estimated that the stroke would have occurred somewhere between two weeks and three months before A.D.'s death. The injury also caused a lack of oxygen in the brain that caused the back part of the brain to die. The back part of the brain controls muscle coordination. (Tr. 1070.) Dr. Felo explained that if A.D. could walk after the back part of her brain had died, her gait would have been clumsy and uncoordinated. (Tr. 1070.)
>
> According to Dr. Felo, A.D.'s body slowly withered away after the stroke because brain damage and starvation caused her organs to deteriorate. Her lungs were collapsed because they were not taking deep breaths. Her pancreas was digesting itself because she was not eating. Dr. Felo also found acute hemorrhagic gastrophy, i.e., the formation of stomach ulcers, caused by excessive stomach acid and no food.
>
> Dr. Felo opined that a lay person would have known that A.D. was dying because she was unable to walk for a period of time due to her injuries. (Tr. 1116.) Moreover, her gaunt face and emaciated body made it obvious that she was dying. (Tr. 1117.) Dr. Felo explained that A.D. gradually declined, having less and less appetite and becoming more and more lethargic over time. A.D.'s ability to use motor and cognitive skills also would have gradually diminished until the time of her death. (Tr. 1114.)

Lewis, 2020-Ohio-5265, 2020 Ohio App. LEXIS 4112 (Ohio Ct. App. Nov. 12, 2020), ¶¶19-23.

Petitioner was charged with aggravated murder in violation of Ohio Revised Code §2903.01(C), murder in violation of Ohio Revised Code §2903.02(B), felonious assault in violation of Ohio Revised Code §2903.11(A)(2), permitting child abuse in violation of 2903.15(A), three counts of child endangering in violation of Ohio Revised

Code §§2919.22(B)(1), 2919.22(B)(2), and 2919.22(A), and one count of tampering with evidence in violation of Ohio Revised Code §2921.12(A)(1) in connection with A.D.'s death.

Petitioner's characterization of the facts to this Court clashes with the facts presented at trial;he was more than just a passive presence in A.D.'s life. The facts at trial showed that on March 11, 2018, upon responding to a 9-1-1 call placed by Petitioner, A.D. was found lifeless underneath an air conditioner with a large black eye and laceration above her left eye, as well as other bruises, cuts, and burns scattered across her body. *Lewis,* ¶¶13-17. A.D. was described as being emaciated and the apartment where she was found smelled of bleach but a smell of decomposition emanated from A.D.'s mouth. *Id,* ¶13. Petitioner identified himself as A.D.'s stepfather. A.D.'s mother claimed that A.D. stopped eating and became sick after the family went to a restaurant on the previous Thursday. A.D.'s mother claimed that earlier in the morning, A.D. fell of the toilet and hit her head and that she found A.D. on the ground unresponsive. *Id.,* ¶14. Upon police investigation, only Petitioner and A.D.'s mother had access to A.D. before her death. *Id.,* ¶18.

Those who knew Sierra Day believed that Petitioner lived with her because they were together every day and they had been romantically involved since July 2017. *Id.,* ¶6. Before the romantic relationship A.D. regularly saw her maternal relatives but that was no longer the case after Day and Petitioner began dating. *Id.* During this time, several child-care workers observed a change in A.D.'s demeanor

and on different occasions in May 2017, daycare workers observed different injuries and the daycare reported the suspected child abuse. *Id.*, ¶8-10.

In affirming the conviction for murder, the Eighth District opined:

> Lewis argues that because not a single witness testified that he ever touched A.D., and there was no evidence that he lived with Sierra and A.D., there is insufficient evidence to support his aggravated murder conviction. However, Isaiah testified that Lewis was living with Sierra. (Tr. 890.) Moreover, whether Lewis was officially living with Sierra is irrelevant to the issue of whether he purposely caused A.D.'s death. The evidence showed that Sierra and Lewis were always together. (Tr. 948.) On February 9, 2018, a little over month before A.D.'s death, police received a call for a disturbance between a man and woman in Day's apartment building. Police arrived on the scene and identified the man and woman as Lewis and Day. Officer Edington testified that, at that time, he observed Lewis in the hallway of the apartment holding a bag of clothes, shoes, and other belongings, which suggested that Lewis had been living in the apartment in Day. (Tr. 514-515.) Day and Lewis apparently reconciled because Lewis later identified himself as A.D.'s stepfather to first responders and to the 911 dispatcher when he called to report that A.D. was nonresponsive on March 11, 2018. According to Officer Edington, Lewis produced the key to the apartment when the police came with the search warrant. Therefore, there was sufficient evidence that Lewis had unfettered access to A.D.
>
> There is also evidence that Lewis knew A.D. was unable to walk and had stopped eating. Yet he did nothing to help her. Rather, he made concerted efforts with Sierra to conceal A.D.'s plight. Isaiah testified that A.D. had lost the ability to walk by the time he visited her on an unspecified date in February 2018. Lewis and Sierra spoke with police at the apartment on February 21, 2018, when Sierra reported the theft of a laptop computer, but Lewis never told police there was an injured child in the apartment. When Lewis called 911 to report that A.D. was unresponsive, he neglected to tell the dispatcher that she had stopped breathing until he had been on the phone for almost four minutes. Lewis's failure to report the truth of A.D.'s demise to the dispatcher demonstrates a specific intent to conceal the harm that was done to her before her death. Lewis further concealed the harm done to A.D. when he falsely told police that she became ill after dining at a Red Lobster a few days before she died. By purposely concealing A.D.'s condition from people who would have helped her, Lewis purposely let her die. He,

> therefore, collaborated with Sierra in purposely causing her death. And because it is undisputed that A.D. was under 13 years of age at the time of her death, there was sufficient evidence to support Lewis's aggravated murder conviction under R.C. 2903.01(C).
>
> Lewis was convicted of felony murder pursuant to R.C. 2903.02(B), which states, in relevant part, that "[n]o person shall cause the death of another as a proximate result of the offender's committing * * * an offense of violence that is a felony of the first or second degree * * * ." Lewis was charged with one count of felonious assault in violation of R.C. 2903.11(A)(1), three counts of child endangering in violation of R.C. 2919.22(B)(1), 2919.22(B)(2), and 2919.22(A), and one count of permitting child abuse in violation of R.C. 2919.22(A). The felonious assault charge is a second-degree felony offense of violence; permitting child abuse is a first-degree felony offense of violence; and the child-endangering charges under R.C. 2919.22(B)(2) and 2919.22(B)(1) are second-degree felony offenses of violence. Therefore, in order to convict Lewis of felony murder, the state only had to prove that Lewis committed one count of felonious assault, one count of permitting child abuse and/or at least one second-degree felony child endangering charge.

Id., ¶¶ 27-29 (Ct. App.)

REASONS FOR DENYING THE WRIT

Petitioner-Deonte Lewis was not entitled to a jury instruction on reckless homicide in violation of Ohio Revised Code §2903.041 as indicated by the trial court's rejection of his co-defendant's request for that instruction – which the court of appeals affirmed on direct appeal. As such, his argument that trial counsel was ineffective for requesting a lesser-included jury instruction on negligent homicide in violation of Ohio Revised Code §2903.05 as opposed to the jury instruction for reckless homicide lacks merit. Lewis unnecessarily asks the Court for a rule of law, when applied to these facts, that would depart from the settled rule in *Strickland v. Washington,* 466 U.S. 668 (1984), that the test for prejudice resulting from the ineffectiveness of

criminal defense counsel requires the defendant to make a showing that there is a reasonable probability that, but for counsel's unreasonable errors, the result of the proceeding would have been different. Without conceding that Petitioner's trial counsel's performance fell below an objective standard of reasonableness, Petitioner cannot demonstrate that he was entitled to have the jury instructed on a lesser-included offenses of reckless homicide.

Under settled law in Ohio, a defendant is entitled to a jury instruction on a lesser-included offense only if the offense is in fact a lesser-included offense and if a jury could reasonably find the defendant not guilty of the charged offense, but guilty of the lesser-included offense. *State v. Evans,* 122 Ohio St. 3d 381 (Ohio 2009). He also concludes without showing that reckless homicide (which requires that someone recklessly cause the death of another person) is a lesser-included offense of felony murder which only requires proof that Petitioner committed the predicate offense, which proximately resulted in the death of another person.

Each case that Petitioner relies on are distinguishable as none of those cases stand for the legal proposition that the failure to request a jury instruction constitutes ineffective assistance of counsel. Instead, in each case the holding was based on the evidence at trial making each case fact specific. For instance in *Baynum v. State*, 211 A.3d 1075 (Del. 2019) the determination that counsel's performance was counsel's performance was objectively unreasonable given the evidence of injury, and the significant risk the verdict would have been different had the jury so been instructed. In *State v. Resh*, 448 P.3d 1100 (Mont. 2019) error was found where defense counsel

failed to object to jury instructions that was incorrect which is not the claim here. And in applying the *Strickland* standard, the courts in *Wiley v. State*, 183 S.W.3d 317 (Tenn. 2006) and *State v. Davis*, 951 N.W.2d 8 (Iowa 2020) denied challenges to counsel's decisions based on the facts of those cases. Indeed, the Iowa Supreme Court described its analysis as requiring examination of the record and consideration of the evidence presented. *Davis,* 19. And while Petitioner points to several federal cases, these cases also stand on the facts of those cases rather than a tangible conflict with this case.

While Ohio appellate courts often cite State v. *Griffie*, 658 N.E.2d 764 (Ohio 1996) for the proposition that there is a presumption that the failure to request a jury instruction is a matter of trial strategy, nothing holds that requesting an improper jury instruction – standing alone – constitutes ineffective assistance of counsel such that a new trial is warranted. Without conceding that counsel's performance here was objectively unreasonable, Petitioner would be hard pressed to show that he would be entitled to a new trial. A separate panel of the court of appeals affirmed Day's conviction and sentence and rejected her argument that she was entitled to an instruction on reckless homicide. In doing so, the court held in *State v. Day*, 2020-Ohio-5259, 2020 Ohio App. LEXIS 4103 (Ohio Ct. App. Nov. 12, 2020) that

> the totality of the abuse and neglect of A.D. was so extreme that it far exceeded recklessness. The evidence simply does not support a finding that appellant acted merely recklessly in her actions toward A.D., and no jury would have been able to find appellant guilty of reckless homicide, but not guilty of aggravated murder or murder. Accordingly, the evidence did not reasonably support an acquittal of aggravated murder and a conviction of reckless homicide or an acquittal of murder and a conviction on the lesser included offense of involuntary

> manslaughter. We therefore cannot find that the trial court abused its discretion in denying a reckless homicide or involuntary manslaughter instruction.

Day, ¶ 89.

Petitioner's trial counsel's decision not to request a jury instruction on reckless homicide is consistent with trial strategy, particularly when it was Petitioner's position that he should not be deemed responsible for A.D.'s death. In any event, the facts make it difficult for Petitioner to prove that a different outcome would have occurred had Petitioner's trial counsel requested a jury instruction on reckless homicide.

CONCLUSION

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

Respectfully submitted,

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PROOF OF SERVICE

I, Daniel T. Van, counsel of record for Respondent and a member of the Bar of this Court, hereby certify that on October 20, 2022 he served a copy of the Brief in Opposition to Petition for Writ of Certiorari to Erika Cunliffe, Assistant Public Defender, 310 Lakeside Ave., Suite 200, Cleveland, Ohio 44113 and via electronic mail.

Respectfully submitted,

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