No. _____

In The

Supreme Court of the United States

ANDREW LEWIS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner was convicted of three counts of injury to a child and sentenced to 99 years imprisonment on the most serious charge. Two pediatricians testified for the prosecution that the infant had sustained a traumatic brain injury (TBI) when petitioner was alone with her. Petitioner's trial counsel did not impeach them with available medical records or call a doctor to testify. Petitioner filed a habeas corpus application alleging that trial counsel was ineffective in this and other respects. A third pediatrician and a radiologist testified at the habeas hearing that, had the infant sustained a TBI, she could not have fed from a bottle for weeks, yet the hospital records reflect that she had normal sucking and fed from a bottle on the morning she was admitted. These doctors also explained why other opinions of the prosecutions' doctors were incorrect. The habeas trial judge—who had presided at the trial—found that trial counsel performed deficiently and, had he presented expert medical testimony, the jury probably would have acquitted petitioner on the most serious charge. The Texas Court of Criminal Appeals (TCCA) held that petitioner did not prove prejudice, citing trial testimony that supported the convictions without discussing how the expert medical testimony presented at the habeas hearing would have affected the verdicts. The question presented is:

> Whether the TCCA, by considering only the trial testimony that supported the convictions rather than how the testimony of petitioner's

QUESTION PRESENTED—Continued

medical experts at the state habeas hearing, if presented at trial, probably would have affected the verdicts, failed to conduct the "probing and fact-specific" prejudice analysis required by *Strickland v. Washington*, 466 U.S. 668 (1984).

RELATED CASES

- *State v. Lewis*, No. 2016-0335, 217th District Court of Angelina County, Texas. Judgment entered November 18, 2016.
- *Lewis v. State*, No. 12-16-00319-CR, Twelfth Court of Appeals of Texas. Judgment entered September 6, 2017.
- *Lewis v. State*, No. PD-1091-17, Texas Court of Criminal Appeals. Judgment entered February 14, 2018.
- *Ex parte Lewis*, No. 2016-0335-A, 217th District Court of Angelina County, Texas. Judgment entered December 12, 2022.
- *Ex parte Lewis*, No. WR-94,433-01, Texas Court of Criminal Appeals. Judgment entered February 1, 2023. Reconsideration denied February 27, 2023.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RELATED CASES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION	1
STATEMENT OF THE CASE	2
A. Procedural History	2
B. Factual Statement	3
1. The Trial	3
2. The State Habeas Corpus Proceeding	11
a. The Testimony	11
b. The State Habeas Trial Court's Findings Regarding Trial Counsel's Deficient Performance	15
c. The State Habeas Trial Court's Conclusions Regarding Prejudice	17
d. The TCCA's "No Prejudice" Holding	20
REASONS FOR GRANTING CERTIORARI	20
The TCCA, By Considering Only The Trial Testimony That Supported The Convictions Rather Than How The Testimony Of Petitioner's Medical Experts At The State Habeas Hearing, If Presented At Trial, Probably Would Have Affected The Verdicts, Failed To Conduct The "Probing And Fact-Specific" Prejudice Analysis Required By *Strickland v. Washington*, 466 U.S. 668 (1984)	20

TABLE OF CONTENTS—Continued

Page

A. The Standard Of Review 21

B. *Strickland* Prejudice..... 23

C. A Summary Reversal Or GVR Is Appropriate 29

CONCLUSION..... 31

APPENDIX

Texas Court of Criminal Appeals Order denying relief (Feb. 1, 2023)..... App. 1

217th District Court Findings Of Fact And Conclusions Of Law (Dec. 12, 2022)..... App. 5

Texas Court of Appeals Opinion affirming convictions on direct appeal (Sept. 6, 2017)..... App. 41

Texas Court of Criminal Appeals Order denying reconsideration (Feb. 27, 2023)..... App. 55

TABLE OF AUTHORITIES

Page

CASES

Andrus v. Texas, 140 S. Ct. 1875 (2020) 23, 30, 31

Ex parte Andrus, No. WR-84,438-01, 2019 WL 622783 (Tex. Crim. App. Feb. 13, 2019) 30

Foster v. Chatman, 578 U.S. 488 (2016) 17

Hinton v. Alabama, 571 U.S. 263 (2014) 16, 19, 28-30

Kaupp v. Texas, 538 U.S. 626 (2003) 29

Kyles v. Whitley, 514 U.S. 419 (1995) 27

Melendez-Diaz v. Massachusetts, 577 U.S. 305 (2009) 28

Porter v. McCollum, 558 U.S. 30 (2009) 29

Sears v. Upton, 561 U.S. 945 (2010) 17, 23, 29

Strickland v. Washington, 466 U.S. 668 (1984) ... 16-18, ... 20-23, 25-27, 30, 31

Turner v. United States, 137 S. Ct. 1885 (2017) 22

United States v. Dominguez, 998 F.3d 1094 (10th Cir. 2021) 27

Wearry v. Cain, 577 U.S. 385 (2016) 29

Wilson v. Sellers, 138 S. Ct. 1188 (2018) 17

CONSTITUTIONAL PROVISION

U.S. CONST. amend. VI 1, 21, 29

TABLE OF AUTHORITIES—Continued

Page

FEDERAL STATUTE

28 U.S.C. § 1257(a).....1

MISCELLANEOUS

Garrett and Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009) 28

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Andrew Lewis, respectfully petitions for a writ of certiorari to review the judgment of the TCCA.

OPINIONS BELOW

The TCCA's order denying habeas corpus relief (App. 1-4) is available at 2023 WL 1425682. The TCCA's order denying reconsideration (App. 55) is unreported. The state district court's findings of fact and conclusions of law (App. 5-40) are unreported. The Texas Court of Appeals' unpublished opinion affirming the conviction on direct appeal (App. 41-54) is available at 2017 WL 3887310.

JURISDICTION

The TCCA denied relief on February 1, 2023, and denied reconsideration on February 27, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

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."

STATEMENT OF THE CASE

A. Procedural History

Petitioner pled not guilty to five counts of intentionally causing serious bodily injury to a child in the 217th District Court of Angelina County, Texas. On November, 18, 2016, the jury convicted him on one count of intentionally causing serious bodily injury and assessed 99 years in prison and a $10,000 fine and convicted him on two counts of recklessly causing serious bodily injury and assessed 20 years in prison and a $10,000 fine.

The Texas Court of Appeals affirmed petitioner's convictions in an unpublished opinion issued on September 6, 2017. The TCCA refused discretionary review on February 14, 2018. *Lewis v. State*, No. 12-16-00319-CR, 2017 WL 3887310 (Tex. App.—Tyler Sept. 6, 2017, pet. ref'd).

Petitioner filed a state habeas corpus application on May 10, 2021. The trial court, after conducting an evidentiary hearing, recommended relief on the conviction that resulted in the 99-year sentence on December 12, 2022. The TCCA denied relief on February 1, 2023. Petitioner filed a suggestion for reconsideration on February 10, 2023. The TCCA denied reconsideration

on February 27, 2023. *Ex parte Lewis*, No. WR-94,433-01 (Tex. Crim. App. Feb. 1, 2023).

B. Factual Statement

1. The Trial

The indictment alleged that petitioner intentionally and knowingly caused serious bodily injury to A.L., a child younger than 14, by striking her with an unknown object, applying pressure to her chest area, dropping her, or jerking or twisting her leg on or about January 28, 2014; by striking her with an unknown object or applying pressure to her clavicle area on or about March 10, 2014; and by striking her with an unknown object or dropping her on or about March 25, 2014 (1 C.R. 23-24). Petitioner and his wife, Amber Lewis, were tried together.

The evidence at trial showed that Amber, then age 17, and petitioner, then age 18, got married and moved in with her parents, Craig and Michelle Minkner, after Amber became pregnant (3 R.R. 181-84; 5 R.R. 14-15, 91).[1] A.L. was born on January 6, 2014 (3 R.R. 184-86). Petitioner, who worked part-time, was A.L.'s primary caretaker, as Amber worked full-time (3 R.R. 184-86). Michelle took care of A.L. when petitioner and Amber were both unavailable (3 R.R. 189).

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[1] Petitioner will refer to the Lewises and Minkner by their first names to avoid confusion.

Michelle noticed a bruise on A.L.'s eye on Friday, March 21, 2014 (4 R.R. 74-75).[2] She asked petitioner what happened, and he said that he did not know (4 R.R. 75). Michelle did not believe that the bruise required medical treatment and did not suspect abuse (4 R.R. 80-81).

Craig and Michelle took A.L. to church on Sunday, March 23, 2014 (3 R.R. 114, 116; 4 R.R. 83). April Wallace, a friend, noticed that A.L. had a blood blister on the white of her eye and faint bruising on her head but did not believe that it was necessary to call 911 or take her to the hospital (3 R.R. 114, 116, 124). Craig also noticed the bruise at that time but was not concerned, as petitioner and Amber were supposed to take A.L. to the doctor on Monday (3 R.R. 189-90, 216).

A.L. did not go to the doctor on Monday, March 24, 2014 (3 R.R. 190). Craig and Michelle were a little upset but thought that petitioner would take her on Tuesday (3 R.R. 222-23). A.L. looked the same on Monday as she had on Sunday (4 R.R. 65-66).

Craig testified that petitioner entered his bedroom on the morning of Tuesday, March 25, 2014, and said that something was wrong (3 R.R. 196).[3] A.L. was "very limp," "shook," and "felt dead" before she "came back to" (3 R.R. 196-97). Craig told petitioner to call 911 (3

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[2] Michelle did not see any bruises on A.L. before March 21, 2014 (4 R.R. 79).

[3] Michelle was at work, and Amber was at school (3 R.R. 197).

R.R. 196). Petitioner said that he had been feeding her and did not know what happened (3 R.R. 197).

Ivan Tapia, an EMT, testified that he arrived at the residence in response to a "baby not breathing" call (3 R.R. 60-62). Petitioner was holding A.L., who had bruises on the back and sides of her head (3 R.R. 62-63). A.L.'s movements tracked to the left side, which led Tapia to believe that she had a brain injury (3 R.R. 69-70). Petitioner agreed that A.L. should go to the hospital (3 R.R. 63).

Lufkin Police Department Officer Cody Jackson testified that he went to Lufkin Memorial Hospital (LMH), observed bruises on the sides of A.L.'s head and swelling on the back of her head and left eyelid, and took photos (3 R.R. 45-46). Petitioner said that nothing had happened to A.L. other than that she fell off the bed when she was a few weeks old (3 R.R. 48).[4]

Hudson Police Department Chief Jimmy Casper testified that petitioner told Casper that petitioner noticed bruises on A.L.'s face on March 21, 2014, and intended to take her to the doctor on March 24 but could not get an appointment (3 R.R. 79-81, 85-86, 89-90).[5] Petitioner also told Casper that, on March 25, he gave

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[4] Amber subsequently made a similar statement to medical personnel at Texas Children's Hospital (TCH) in Houston (8 R.R. 122)

[5] Chere Crocker, the office manager for Angelina Pediatrics, testified that no one had scheduled an appointment for A.L. for March 24, 2014 (3 R.R. 157-58).

A.L. a bottle; she had a seizure; he yelled for Craig; and Craig told him to call 911 (3 R.R. 87).

A.L. was admitted to TCH in Houston (3 R.R. 45). Patrick Brice, a Child Protective Services investigator, testified that he interviewed the family (3 R.R. 97-98). Petitioner told Brice that A.L. had a seizure; he called 911; and the "life came back into her" while they were in the ambulance (3 R.R. 100-01). Petitioner was shocked when Brice said that A.L. had a subdural hematoma and a fractured femur, clavicle, and ribs (3 R.R. 101). Petitioner said that he did not hurt her and did not believe that anyone in the family would do so (3 R.R. 101-02).

Dr. Marcella Donaruma, a pediatrician and assistant professor of pediatrics at Baylor College of Medicine, testified for the State that she examined A.L. at TCH on March 26, 2014, reviewed the chart, and met with the family (4 R.R. 17, 21-22). A.L. was then 78 days old (4 R.R. 21). A.L. had multiple bruises on her face; old and new collections of a "great deal of blood" inside her head; liver trauma; and broken bones in her chest, hand, and leg (4 R.R. 24, 27-28). She was born cesarean because she was breech (4 R.R. 29). Dr. Donaruma opined that: (1) the clavicle injury and the fractures were not caused during birth because, if they had been, they would have already healed (4 R.R. 29-30); (2) the rib fractures probably were caused accidentally by forceful chest compressions (4 R.R. 30-31); (3) the two leg fractures were caused by a twisting type of force that was indicative of child abuse (4 R.R. 32-33); and (4) the liver injury probably was caused by

blunt force trauma (4 R.R. 33). Petitioner told Dr. Donaruma that he might have tapped A.L.'s head on the changing table when he changed her diaper before he fed her (4 R.R. 40-41). According to Dr. Donaruma, A.L. had sustained a traumatic brain injury (TBI), which typically is the result of a forceful whiplash action consistent with someone holding a screaming infant around the chest and shaking her until she stops screaming. Dr. Donaruma believed that A.L. had been abused and sustained serious bodily injury (4 R.R. 36, 60).

Dr. Donaruma also testified that an infant who sustains a TBI will show an immediate change in her level of consciousness but might not have a seizure for hours or days (4 R.R. 40, 45-46). Dr. Donaruma believed that petitioner's account—that he fed A.L., she shrieked, he tried to burp her, and she went limp—was not plausible, as A.L. would not have been able to take a bottle if she had a brain injury at the time of the feeding (4 R.R. 41). Thus, Dr. Donaruma concluded that petitioner inflicted the TBI after he gave A.L. the bottle, when he was alone with her (4 R.R. 41, 43).

Dr. Randell Alexander, a pediatrician and professor of pediatrics at the University of Florida School of Medicine, reviewed A.L.'s medical records and testified that her leg had been twisted twice, as there were two fractures (4 R.R. 116-18, 121-22). Based on petitioner's admission that he was alone with A.L. when she had the seizure, Dr. Alexander believed that A.L.'s brain was injured after petitioner gave her the bottle (4 R.R. 134, 138-39).

Amber testified that she and petitioner started dating in high school and, after she became pregnant at age 17, they got married and moved in with her parents (5 R.R. 14-15). A.L. was born in January 2014 (5 R.R. 15).

Amber testified that her best friend, Bailey Legg, was feeding A.L. in Amber's presence on January 26, 2014, when A.L. started choking (4 R.R. 188-89, 192). Amber called 911 (4 R.R. 192; 5 R.R. 17). Josh Morris, a paramedic, arrived and determined that A.L. was not in physical or respiratory distress (4 R.R. 209-10). He did not observe any sign of abuse (4 R.R. 212). Petitioner was not at home at that time (5 R.R. 85).[6]

Amber testified that A.L. went to the pediatrician for wellness checks at ages five days, two weeks, and two months; she was normal except for being tongue-tied (4 R.R. 229-31; 5 R.R. 21-22). Amber noticed a bruise on A.L.'s eye when she and petitioner had lunch on March 21, 2014 (5 R.R. 27-28). She asked what happened, and he said that he did not know (5 R.R. 28). She told him to take A.L. to the doctor. She did not suspect abuse (5 R.R. 32). Petitioner's mother, Marsha, noticed the bruise on March 22, 2014, and suggested to Amber that A.L. was anemic (5 R.R. 32-33). Amber told

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[6] Dr. Donaruma testified that the January event involved the "same kind of injury as in March" and established "at least one prior event of abusive head trauma" (4 R.R. 48-49). Dr. Alexander testified that there is a statistical likelihood that only one person abused A.L. (4 R.R. 129-30).

her mother, Michelle, on March 23 that A.L. would go to the doctor the next day (5 R.R. 34-35).

Amber testified that she told petitioner on March 24, 2014, that she scheduled an appointment for A.L. for 2:00 p.m. (5 R.R. 35-36). Petitioner said that he could not take A.L. because he had an appointment with a counselor but would take her the next day (5 R.R. 36-37). Amber did not consider it to be an emergency (5 R.R. 37).

Amber testified that she did not see any new bruises on A.L. when she left for work on March 25, 2014 (5 R.R. 39). Craig called her at 9:30 a.m. and said that A.L. had a seizure and was on the way to the hospital. Amber went to LMH and, from there, to TCH in Houston (5 R.R. 39-40).

Amber—who has chronic multifocal osteomyelitis, a rare bone disease—testified that she wanted to believe that A.L. has a similar genetic or medical condition (5 R.R. 41). She did not hurt A.L. or see her parents or petitioner do so (5 R.R. 42-43, 80). She and petitioner voluntarily relinquished their parental rights to A.L. because a lawyer told them that, if they did, there would be no criminal charges and they possibly could remain in A.L.'s life; however, if they did not, and a court terminated their rights, they would face criminal charges and would never see A.L. again (5 R.R. 75-76).

Amber's parents, Craig and Michelle, testified that they did not hurt A.L. or see Amber or petitioner do so (4 R.R. 237-41).

Petitioner's sister, Jessica Lewis, testified that he was very loving towards A.L., but Amber handled her aggressively (4 R.R. 174-75).

Petitioner's mother, Marsha, testified that she heard Amber say to Michelle during an argument at the hospital, "You had her the last two weeks. What did you do to her?" (4 R.R. 246). Marsha saw the bruise on A.L.'s eye the previous weekend and suggested to Amber that A.L. was anemic (4 R.R. 249-50).

Petitioner testified that he did not injure A.L. and did not know how she got the bruise (5 R.R. 91, 94, 104). He understood that the March 24 doctor's appointment would be rescheduled (5 R.R. 95). He awoke on the morning of March 25, 2014, when A.L. started crying (5 R.R. 97). He tried to feed her, and she appeared to take four big gulps. When he put her on the changing table, her body twitched, her arms shook, and her eyes rolled (5 R.R. 98). He awoke Craig, who told him to call 911 (5 R.R. 99). A.L. became stiff, let out a shrill cry, spit up, and started to breathe normally (5 R.R. 99-100). Paramedics arrived and took her to the hospital (5 R.R. 100). Petitioner testified that he did not injure A.L. and was not accusing anyone else of doing so (5 R.R. 100). His lawyer persuaded him to relinquish his parental rights (5 R.R. 101-02, 116-18).

The prosecutors argued during their closing arguments that petitioner injured A.L., and Amber failed to protect her (5 R.R. 199, 234). They emphasized that Drs. Donaruma and Alexander believed that A.L.'s most recent brain injury occurred after petitioner gave

her the bottle, when he was alone with her, as a child cannot swallow after sustaining a TBI (5 R.R. 198, 233). Amber's lawyer essentially blamed petitioner for causing the injuries (5 R.R. 201). Petitioner's lawyer shifted the blame to Amber and argued that petitioner had been accused because he was the last person with A.L. (5 R.R. 220-23).

The jury convicted petitioner of recklessly causing serious bodily injury to A.L. on or about January 28 and March 10, 2014 (the leg and clavicle fractures) and of intentionally causing serious bodily injury to her on or about March 25, 2014 (the alleged TBI) (6 R.R. 12-13). The jury acquitted Amber of recklessly causing serious bodily injury but failed to reach a verdict on injury to a child by omission (6 R.R. 13).

2. The State Habeas Corpus Proceeding

Petitioner filed a habeas corpus application alleging that he was denied the effective assistance of counsel because his trial counsel, John Tunnell, failed to impeach Drs. Donaruma and Alexander with the LMH records and to present expert medical testimony to rebut their opinions.

a. The Testimony

The state habeas trial judge conducted an evidentiary hearing at which Tunnell, Dr. Don Schaffer, and

Dr. Frank Powell testified.[7] The State did not call Dr. Donaruma or Dr. Alexander to testify, and the prosecutor refused to inform the judge and petitioner's habeas counsel whether she had spoken to them about the opinions contained in the affidavits of Drs. Schaffer and Powell that petitioner had filed with the habeas application (1 H.R.R. 24-27).

Tunnell testified that he had no medical education or training and had never before tried an injury to a child case (1 H.R.R. 32-33, 35). He did not consult with or hire a doctor to review the medical records or challenge Drs. Donaruma's and Alexander's timelines because he assumed that the jury would conclude that A.L. had been injured by criminal conduct and, as a result, it was "more of a matter of whodunit" (1 H.R.R. 47-48). He reviewed the medical records before trial and saw nothing beneficial to petitioner, even though he did not understand everything in them (1 H.R.R. 45-46, 56-57). After reading the affidavits of Drs. Schaffer and Powell, Tunnell better understood the importance of hiring a medical expert and agreed that their testimony would have been beneficial at trial (1 H.R.R. 47, 57). He admitted that he could have asked the court to appoint an expert if petitioner did not have the funds, regretted that he did not do so, and asserted that he would do so if he were handling the case today (1 H.R.R. 57-58).

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[7] Dr. Schaffer is a pediatrician (1 H.R.R. 107-08). Dr. Powell is a radiologist (1 H.R.R. 162).

In response to Dr. Donaruma's suggestion at trial that A.L., was a victim of Shaken Baby Syndrome (SBS) (now referred to as abusive head trauma or AHT), Drs. Schaffer and Powell testified at the habeas hearing that A.L. was *not* a victim of SBS because, although she presented to TCH with old subdural hematomas, she did not have the retinal hemorrhages and brain damage required to diagnose SBS (1 H.R.R. 118-20, 167-68; App. 27).

In response to Drs. Donaruma's and Alexander's trial testimony that A.L. had sustained a TBI when she was with petitioner on March 25, 2014, Drs. Schaffer and Powell testified at the habeas hearing that (1) the LMH records reflect that A.L. had normal sucking and feeding at 9:50 a.m. and took a bottle at 12:30 p.m., and (2) the TCH records do not indicate that A.L. had a TBI on March 25, 2014. Therefore, Drs. Schaffer and Powell testified that Drs. Donaruma and Alexander erroneously concluded that A.L. sustained a TBI after petitioner gave her a bottle, as she was able to feed later that morning at the hospital. They explained that an infant with a TBI loses the muscle coordination necessary to feed and swallow for weeks, if not months (1 H.R.R. 121-22, 124, 167, 170-72, 197; App. 28-29). They concluded that, consistent with petitioner's description of the events, A.L. probably had a seizure instead of a TBI (1 H.R.R. 121-22, 173, 202-03; App. 29).

In response to Dr. Donaruma's trial testimony that A.L.'s liver probably was damaged as a result of blunt force trauma, Dr. Schaffer testified at the habeas hearing that Dr. Donaruma had ignored indisputable

medical evidence to the contrary. When A.L. was admitted to TCH, her x-rays and physical examination were normal, revealed no trauma to the abdomen or the liver, and she had a fever of 101 degrees (1 H.R.R. 115-16). A fever can cause elevated liver functions and seizures (1 H.R.R. 117). The LMH records also reflect that A.L. was feeding that morning (1 H.R.R. 118). An infant cannot feed with a significant abdominal injury. Dr. Schaffer testified that, because A.L. had a fever and the x-rays and physical examination at the hospital were normal, Dr. Donaruma had no medical basis to conclude that A.L.'s liver probably was damaged as a result of blunt force trauma (1 H.R.R. 117-18).

In response to Dr. Donaruma's trial testimony that A.L. presented at TCH with both old and new collections of blood over the brain (without clarifying the relative size of each), Dr. Schaffer testified at the habeas hearing that the radiologist's report in the TCH records reflects that, when A.L. was examined in the emergency room, the CT scan revealed "a small amount of extra-axial hemorrhage," a "tiny amount of blood," and "subtle R front scalp swelling" (1 H.R.R. 122-23). Dr. Powell testified at the habeas hearing that 98 to 99 percent of A.L.'s subdural hematomas were old, and there was only a small amount of new blood (1 H.R.R. 163). Subdural hematomas are not necessarily the result of abuse; they can occur spontaneously and for no reason; and infants can be born with them (1 H.R.R. 164). Dr. Powell concluded that Dr. Donaruma's trial testimony was misleading to the extent that she did not quantify the percentages of the old and new blood and she

suggested that the new blood was the result of recent acute trauma (1 H.R.R. 165-67).

In response to Dr. Donaruma's trial testimony that A.L. had seizures within 48 hours of arriving at TCH as a result of a TBI, Dr. Powell testified at the habeas hearing that the TCH records reflect that A.L. has a congenital absence of her olfactory bulbs; that one-third of infants born without olfactory bulbs have a seizure disorder; and that the absence of olfactory bulbs made A.L. more susceptible to seizures, which could explain her seizures in January and March (1 H.R.R. 174-75).

b. The State Habeas Trial Court's Findings Regarding Trial Counsel's Deficient Performance

The state habeas trial judge—who also presided at the trial—found that Drs. Schaffer and Powell were competent doctors and that their testimony was credible (App. 17). Based on their testimony, the judge found that Tunnell performed deficiently by failing to call a pediatrician and a radiologist to impeach the testimony of the prosecution's doctors. Specifically, the judge found that the testimony of Drs. Schaffer and Powell established that:

- A.L.'s brain was not injured as a result of her being shaken (App. 27);
- petitioner did not inflict a TBI on A.L. after she took a bottle on March 25, 2014 (App. 29);

- A.L.'s highly elevated liver enzymes were caused by a viral infection that resulted from a fever rather than from blunt force trauma (App. 23);
- although a CT scan revealed a "great deal of blood" inside A.L.'s head, the TCH records reflect that there was a large amount of old blood but only a small amount of new blood (App. 26); and,
- the absence of A.L.'s olfactory bulbs made her more susceptible to seizures (App. 30).

Additionally, the judge found that Tunnell performed deficiently by failing to present expert testimony and argue that, if A.L. had been the victim of abusive head trauma in January, it was inflicted by Amber rather than petitioner, who was not present when A.L. had a seizure (App. 20-21).

The testimony of Drs. Schaffer and Powell overwhelmingly supported the state habeas trial judge's findings that Tunnell performed deficiently by failing to consult with and call a pediatrician and a radiologist to testify. *See generally Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"); *see also Hinton v. Alabama*, 571 U.S. 263, 273 (2014) (*per curiam*) ("Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence. . . . This was such a case.") (citations and internal quotation marks omitted).

The TCCA acknowledged and did not reject the state habeas trial judge's findings of deficient performance. However, as discussed below, the TCCA simply disagreed that Tunnell's deficient performance resulted in "prejudice." *Ex parte Lewis*, No. WR-94,433-01, 2023 WL 1425682 at *1 (Tex. Crim. App. Feb. 1, 2023). ("The trial court finds and concludes that no reasonable trial strategy could justify defense counsel's omission in failing to call a pediatrician or radiologist to impeach the State's doctors' testimony. However, Applicant has not shown prejudice."). Therefore, the state habeas trial judge's factual findings and legal conclusions regarding deficient performance are attributable to the TCCA. *See Foster v. Chatman*, 578 U.S. 488, 498 n.3 (2016); *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

c. The State Habeas Trial Court's Conclusions Regarding Prejudice

The state habeas trial judge conducted the "probing and fact-specific" prejudice analysis required by *Strickland*, 466 U.S. at 687-90; *see also Sears v. Upton*, 561 U.S. 945, 955 (2010) (*per curiam*) ("[W]e have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below."). The judge found that the key issue at trial concerning the most serious charge of intentionally causing serious bodily injury to a child was whether A.L. had a seizure as a result of a TBI inflicted by petitioner on March 25, 2014 (App. 31). The jury heard

only the State's theory that A.L. sustained a TBI after petitioner gave her a bottle, as Tunnell failed to impeach Drs. Donaruma and Alexander with the hospital records and present expert medical testimony in rebuttal (App. 31). As a result, the jury did not know, *inter alia*, that Dr. Donoruma diagnosed SBS without considering that A.L. did not present at TCH with retinal hemorrhages and brain damage; and that Drs. Donaruma and Alexander concluded that petitioner inflicted a TBI on the morning of March 25, 2014, without considering the hospital records that she had normal sucking and feeding at 9:50 a.m. and took a bottle at 12:30 p.m. on the same day—*which she could not have done had she sustained a TBI before she arrived at the hospital*.

The state habeas trial judge concluded that petitioner had shown *Strickland* prejudice—that is, but for Tunnell's deficient performance, there is a reasonable probability that the jury would have acquitted petitioner of the most serious charge of intentionally causing serious bodily injury or, at least, deadlocked; and, as a result, this conviction (and the corresponding 99-year prison sentence) was not worthy of confidence and should be vacated (App. 31-33).[8]

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[8] The state habeas trial judge recommended that relief be denied on petitioner's two convictions for recklessly causing serious bodily (the leg and clavicle fractures) (App. 33, 38-39). The State did not present any testimony at trial that petitioner caused these fractures. A.L. lived in a home with four adults, each of whom testified and denied causing the injuries or knowing who did. The jury convicted petitioner of intentionally causing the head injury based on the incorrect, but unimpeached, opinions of the

Significantly, the State did not file an answer to the habeas application or object to the state habeas trial judge's findings of fact and conclusions of law recommending relief on the most serious conviction. As noted, the State did not call Drs. Donaruma and Alexander at the habeas hearing to challenge the opinions of Drs. Schaffer and Powell, whose testimony the judge expressly credited. In short, the State made minimal effort to defend this conviction. *Cf. Hinton*, 571 U.S. at 270 ("All three [defense] experts examined the physical evidence and testified that they could not conclude that any of the six bullets had been fired from the Hinton revolver. The State did not submit rebuttal evidence during the postconviction hearing, and one of Hinton's experts testified that, pursuant to the ethics code of his trade organization, the Association of Firearm and Toolmark Examiners, he had asked the State's expert, Yates, to show him how he had determined that the recovered bullets had been fired from the Hinton revolver. Yates refused to cooperate.").

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prosecution's doctors. Petitioner objected to the findings recommending that relief be denied on the other convictions, as the judge failed to consider that, because the jury relied on these opinions to conclude that petitioner caused the head injury, the jury also held him responsible for causing the fractures despite the lack of evidence. Had Tunnell presented expert medical testimony to rebut the opinions of the prosecution's doctors, there is a reasonable probability that the jury also would have acquitted petitioner on the other two counts or, at least, deadlocked.

d. The TCCA's "No Prejudice" Holding

The TCCA denied relief, stating, "The trial court finds and concludes that no reasonable trial strategy could justify defense counsel's omission in failing to call a pediatrician or radiologist to impeach the State's doctors' testimony. However, Applicant has not shown prejudice." (App. 2).[9]

REASONS FOR GRANTING CERTIORARI

THE TCCA, BY CONSIDERING ONLY THE TRIAL TESTIMONY THAT SUPPORTED THE CONVICTIONS RATHER THAN HOW THE TESTIMONY OF PETITIONER'S MEDICAL EXPERTS AT THE STATE HABEAS HEARING, IF PRESENTED AT TRIAL, PROBABLY WOULD HAVE AFFECTED THE VERDICTS, FAILED TO CONDUCT THE "PROBING AND FACT-SPECIFIC" ANALYSIS REQUIRED BY *STRICKLAND v. WASHINGTON*, 466 U.S. 668 (1984).

Petitioner was convicted of intentionally causing serious bodily injury to a child and sentenced to 99 years in prison based on the medically untenable opinion testimony of Drs. Donaruma and Alexander that the timing of A.L.'s seizure established that petitioner inflicted a TBI on her after he gave her a bottle on the morning of March 25, 2014. Petitioner's trial counsel,

[9] Petitioner will discuss the TCCA's prejudice analysis in more detail, *infra*.

Tunnell, did not impeach them with the hospital records or consult with and call a doctor to testify in rebuttal.

Petitioner's habeas counsel presented the testimony of Drs. Schaffer and Powell at the evidentiary hearing. The state habeas trial judge found that they were competent doctors and credible witnesses; that Tunnell had performed deficiently; and that the deficient performance resulted in prejudice. The judge recommended a new trial on the conviction that resulted in the 99-year sentence.

The TCCA held that petitioner failed to prove prejudice, citing trial testimony that supported the convictions *without discussing in any meaningful manner* how the expert medical testimony presented at the habeas hearing probably would have affected the verdicts. This Court's Sixth Amendment jurisprudence demands a more probing and fact-specific prejudice analysis that addresses how the prosecution's evidence at trial would have been viewed by a rational jury had trial counsel presented the expert testimony.

A. The Standard Of Review

Petitioner had a right to the effective assistance of counsel at trial. *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, this Court addressed the federal constitutional standard to determine whether counsel rendered reasonably effective assistance. The defendant first must show that counsel's performance was deficient under prevailing professional norms. *Id.* at

687-88. The defendant also must show that counsel's deficient performance prejudiced the defense by depriving him of a fair trial with a reliable result. *Id.* at 687.

The defendant must identify specific acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. *Strickland*, 466 U.S. at 690. The reviewing court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance. *Id.* Ultimately, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. A reasonable probability is *less* than a preponderance of the evidence. *Id.* ("The result of a proceeding can be rendered unreliable and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.").

Petitioner need not show a reasonable probability that, but for counsel's errors, he would have been acquitted. A reasonable probability of any different result—including a deadlocked jury—is sufficient. *Cf. Turner v. United States*, 137 S. Ct. 1885, 1897 (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").

B. *Strickland* Prejudice

The state habeas trial judge applied the *Strickland* prejudice test and, in a probing and fact-specific analysis, concluded that, but for Tunnell's failure to impeach the prosecution's doctors with the hospital records and to consult with and call a pediatrician and a radiologist to testify in rebuttal, there is a reasonable probability that the jury would have acquitted petitioner of intentionally causing serious bodily injury or, at least, deadlocked; and, as a result, that conviction is not worthy of confidence (App. 31-33). The TCCA denied relief, summarily concluding that " . . . it is unlikely that a defense doctor's testimony such as [petitioner] describes, or a cross-examination informed by consulting with a doctor, would have affected the result" (App. 4).

This Court has instructed lower courts to conduct a "probing and fact-specific" analysis of the prejudice prong of an ineffective assistance of counsel claim when it has found deficient performance. *Sears v. Upton*, 561 U.S. 945, 955 (2010) (*per curiam*); *see also Andrus v. Texas*, 140 S. Ct. 1875, 1887 (2020) (*per curiam*) (requiring a "weighty and record-intensive record analysis" of *Strickland* prejudice). The TCCA did not conduct such an analysis, even though it acknowledged

and did not reject the findings that Tunnell performed deficiently (App. 2). Rather, the TCCA concluded, in essence, that sufficient evidence supported the convictions without analyzing the probable impact that the testimony of Drs. Schaffer and Powell probably would have had on the verdicts (App. 2-4).

The TCCA cited Drs. Donaruma's and Alexander's trial testimony that A.L.' s "shrill cry, loss of alertness, and going limp while in [petitioner's] care would have immediately followed the infliction of a brain injury"; that the swelling on her forehead originated shortly before she went to the hospital, as swelling appears and subsides quickly; and that Drs. Schaffer and Powell "did not contradict this testimony" (App. 2-3).

The TCCA's statement was clearly erroneous. Drs. Schaffer and Powell indisputably contradicted this testimony at the state habeas hearing. Dr. Powell testified that A.L. had "no brain parenchyma injury . . . whatsoever," and "no edema, . . . no diffuse axonal injury, there was nothing. All she had was these chronic and tiny acute subdural hematomas," and the swelling on her forehead did not establish that she sustained a TBI (1 H.R.R. 168). Dr. Donaruma testified at trial that petitioner told her that he might have tapped A.L.'s head on the changing table when he changed her diaper before he fed her (4 R.R. 40-41). Dr. Alexander testified that the swelling on A.L.'s forehead suggested that it may have originated that morning because "swelling kind of goes away quicker than bruises, for the most part" (4 R.R. 137-38). However, whether the swelling on A.L.'s forehead indicated recent head trauma was

not the issue. Rather, the issue was whether petitioner inflicted a TBI after he gave A.L. a bottle that morning. Drs. Donaruma and Alexander failed to read, or read but disregarded, the LMH records, which completely refute their theory. Had Drs. Schaffer and Powell testified at trial, their testimony would have totally undermined the premise underlying Drs. Donaruma's and Alexander's opinions that petitioner inflicted a TBI that morning.

Drs. Donaruma and Alexander testified at trial that, when an infant sustains a TBI, she is not able to take a bottle and feed because she cannot swallow, which means that petitioner inflicted the TBI after he gave A.L. the bottle, when he was alone with her (4 R.R. 40-43, 62; 134, 138-39). *The TCCA ignored the critically important fact that the LMH records reflect that, on March 25, 2014, A.L. had normal sucking and feeding at 9:50 a.m. and took a bottle at 12:30 p.m.* The TCCA's conclusion that petitioner "has not shown prejudice"—made without discussing whether the hospital records and expert testimony presented at the habeas hearing probably would have affected the verdicts—did not constitute the "probing, fact-specific" prejudice analysis required by *Strickland*.

The TCCA also erred in relying on the trial testimony of Ivan Tapia, the EMT who responded to the 911 call, that "all [A.L.'s] movements tracked to the left side," which led Tapia to believe that she had a brain injury (App. 3). Tapia testified that he had been an EMT since July 2013 (eight months before the March

2014 seizure) (3 R.R. 59-60). His partner, who was a paramedic, assessed A.L. because Tapia was just a "basic" EMT and does "what he [his more experienced partner] tells me to do" (3 R.R. 62-63, 75). When Tapia testified that the fact that A.L.'s movements tracked to the left side indicated that she had a brain injury "based on my education," the trial judge commented that Tapia had not been qualified as an expert to assess a brain injury (3 R.R. 69-70). Although Tapia's opinion had no probative value at trial—and certainly could not objectively negate the testimony of Drs. Schaffer and Powell at the habeas hearing—*the TCCA remarkably cited it to support its conclusion that petitioner did not show prejudice.* This is a prime example of the TCCA's failure to consider the probable impact that the testimony of Drs. Schaffer and Powell would have had on the verdicts.

Finally, the TCCA observed that petitioner "neglects to mention" that a doctor noted in a report in April 2015 that A.L. was diagnosed with "spastic monoplegic cerebral palsy" in her left leg that was "most likely" a result of head trauma (App. 3). This diagnosis does not negate that Tunnell's failure to consult with or call a doctor resulted in prejudice—especially in the absence of any testimony that the palsy was in fact caused by head trauma, much less trauma inflicted by petitioner.

A *Strickland* prejudice analysis does not focus on whether there was sufficient evidence to support the verdict after considering the effect of trial counsel's

deficient performance. Rather, it focuses counterfactually[10] on the effect of trial counsel's deficient performance. *See Strickland*, 466 U.S. at 695-96 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. . . . Some errors will have had a pervasive effect on the inferences to be drawn from the evidence altering the entire evidentiary picture. . . . Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors."); *cf. Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995) (holding that the analogous "materiality" standard concerning a prosecutor's failure to disclose favorable evidence "is not a sufficiency of evidence test" and that "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict").[11]

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[10] *United States v. Dominguez*, 998 F.3d 1094, 1120 (10th Cir. 2021) ("*Strickland*'s prejudice analysis involves a 'counterfactual' inquiry that hinges on counsel's alleged ineffective representation—that is, the inquiry turns on whether, but for such ineffective representation, there is a reasonable probability that the outcome of the proceeding would have been different.").

[11] Furthermore, this Court has recognized that, when the prosecution's case was based on *unchallenged* expert witnesses, particular scrutiny is required of an ineffectiveness claim that trial counsel failed to call a rebuttal expert:

A proper prejudice analysis in petitioner's case must focus on whether, had Tunnell impeached Drs. Donaruma and Alexander with the hospital records and called a pediatrician and a radiologist to testify in rebuttal, there is a reasonable probability that the outcome of the trial would have been different. The state habeas trial judge—who was intimately familiar with the evidence after presiding at the trial and the habeas hearing—concluded that the outcome probably would have been different and recommended a new trial. The TCCA disagreed and held that there was no prejudice without discussing the compelling medical evidence that the lower court relied on in recommending relief.

> That the State presented testimony from two experienced expert witnesses that tended to inculpate Hinton does not, taken alone, demonstrate that Hinton is guilty. Prosecution experts, of course, can sometimes make mistakes. Indeed, we have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts, noting that "[s]erious deficiencies have been found in the forensic evidence used in criminal trials . . . One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) (citing Garrett & Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 14 (2009)). This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses; it is maximized when the defense instead fails to understand the resources available to it by law.

Hinton v. Alabama, 571 U.S. 273, 276 (2014) (*per curiam*).

The TCCA's conclusion that petitioner did not show prejudice erroneously ignored the critically important testimony that medical experts could have given in rebuttal to refute the opinions of Drs. Donaruma and Alexander and thereby establish reasonable doubt. *Cf. Hinton*, 571 U.S. at 273 ("Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence. . . . This was such a case.") (citation and internal quotation marks omitted).

C. A Summary Reversal Or GVR Is Appropriate

This Court "has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law." *Wearry v. Cain*, 577 U.S. 385, 396 (2016) (*per curiam*) (summary reversal where state habeas court erroneously denied relief on Fourth Amendment suppression of evidence claim); *Kaupp v. Texas*, 538 U.S. 626, 633 (2003) (*per curiam*) (same); *see also Hinton v. Alabama, supra* (summary reversal on Sixth Amendment ineffective assistance of counsel claim); *Sears v. Upton*, 561 U.S. 945, 955 (2010) (*per curiam*) (same); *Porter v. McCollum*, 558 U.S. 30, 44 (2009) (*per curiam*) (same).

Because the TCCA's prejudice analysis so clearly violated this Court's well-established precedent, the Court should grant certiorari, reverse the judgment, and remand with instructions to grant habeas corpus relief. At the very least, in view of the TCCA's clearly inadequate review of the prejudice prong of petitioner's

ineffectiveness claim, this Court should grant certiorari, vacate the TCCA's judgment, and remand ("GVR") for a proper prejudice analysis. *Cf. Hinton*, 571 U.S. at 276 ("Because no court has yet evaluated the prejudice question by applying the proper inquiry to the facts of this case, we remand the case for reconsideration of whether [petitioner's] attorney's deficient performance was prejudicial under *Strickland*.").

Petitioner's case is hardly an outlier with respect to the TCCA's misapplication of *Strickland*'s prejudice test. This Court addressed the TCCA's inadequate prejudice review in *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (*per curiam*). The state habeas trial court had recommended a new trial on punishment because trial counsel was ineffective. The TCCA denied relief, curtly stating that Andrus "fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of the proceedings would have been different, but for counsel's deficient performance." *Ex parte Andrus*, No. WR-84,438-01, 2019 WL 622783, at *2 (Tex. Crim. App. Feb. 13, 2019). This Court granted certiorari, concluded that counsel performed deficiently, vacated the judgment, and remanded to the TCCA to conduct a proper prejudice analysis. The Court faulted the TCCA for failing to analyze prejudice in any meaningful respect. *Andrus*, 140 S. Ct. at 1886. "Given the uncertainty as to whether the Texas Court of Criminal Appeals adequately conducted the weighty and

record-intensive analysis in the first instance, we remand for the Court of Criminal Appeals to address *Strickland* prejudice in light of the correct legal principles articulated above." *Id.* at 1887. Therefore, at the very least, the Court should vacate the judgment and remand to the TCCA—as it did in *Andrus*—to conduct a probing and fact-specific analysis regarding whether Tunnell's deficient performance resulted in prejudice where the jury heard only the State's version of the medical evidence.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the judgment of the TCCA. Alternatively, the Court should remand to the TCCA for a meaningful prejudice analysis.

Respectfully submitted,

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