Docket No. _____

IN THE SUPREME COURT OF THE UNITED STATES

FIDEL FLORES,
PETITIONER,

-v-

BOBBY LUMPKIN,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
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

Bryan W.L. Garris
Attorney for Fidel Flores

9800 Northwest Freeway, Suite 305
Houston, Texas 77092
Phone: 832-722-8915
Fax: 832-327-9001
Bryan@txdefense.net
Member of the Supreme Court Bar

QUESTION PRESENTED FOR REVIEW

1. Did the Fifth Circuit err in its review of Petitioner's Sixth Amendment claim – and its evaluation of *Strickland* prejudice – when it determined that repeated improper expert and lay testimony regarding the truthfulness of the Complainant and of children, in general, is arguably cumulative evidence of the Complainant's credibility and therefore harmless, if the Complainant testifies at trial?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner:	Fidel Flores
Petitioner's Counsel:	Bryan W.L. Garris 9800 Northwest Freeway, Suite 305 Houston, Texas 77092
Respondent:	Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division
Respondent's Counsel:	Joseph N. Mazzara Assistant Solicitor General Office of the Attorney General Solicitor General Division P.O. Box 12548 (MC-059) Austin, Texas 78711-2548
Federal Court of Appeals:	Fifth Circuit Court of Appeals Honorable Circuit Judges King, Jones, and Duncan 600 S. Maestri Place, Suite 115 New Orleans, LA 70130-3408
Federal Court of Appeals:	United States District Court Honorable Keith P. Ellison 515 Rusk Street Houston, Texas 77002

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

LIST OF PROCEEDINGS

Original Proceedings and Direct Appeal

Trial Court: *State of Texas v. Fidel Flores*, 230th District Court of Harris County, Texas; Cause No. 1454998); Criminal trial resulting in judgment of conviction and sentence, entered August 20, 2015.

Intermediate Court of Appeals: *Fidel Flores v. State of Texas*, 14th Court of Appeals of Texas; Case. No. 14-15-00754-CR; Judgment and Opinion affirming conviction, entered November 29, 2016.

Texas Court of Criminal Appeals: *Fidel Flores v. State of Texas*, Case No. PD-1456-16; Order denying Petition for Discretionary Review entered March 8, 2017.

State Collateral Review Proceedings (State Writ of Habeas Corpus)

Trial Court: *Ex parte Fidel Flores*; 230th District Court of Harris County, Texas; Cause No. 1454998-A; trial court entered findings of fact and conclusions of law recommending granting relief on Petitioner's filed application for a writ of habeas corpus, entered on October 29, 2019.

Texas Court of Criminal Appeals: *Ex parte Fidel Flores*; Case No. WR-89,810-01; denying relief on Petitioner's filed application for writ of habeas corpus, judgment entered June 24, 2020.

Federal Collateral Review Proceedings (Federal Writ of Habeas Corpus)

United States District Court for the Southern District of Texas – Houston Division: *Fidel Flores v. Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division*; Civil Action No. H-20-2252, denying relief on Petitioner's filed petition for writ of habeas corpus and denying application for certificate of appealability, judgment entered on September 28, 2021.

United States Court of Appeals for the Fifth Circuit; *Fidel Flores v. Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division*; Case No. 21-20579; granting in part and denying in part Petitioner's application for certificate of appealability, order entered on May 17, 2022.

United States Court of Appeals for the Fifth Circuit; *Fidel Flores v. Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division*; Case No. 21-20579; affirming U.S. District Court's denial of Petitioner's petition for writ of habeas corpus, judgment and order entered on July 7, 2023.

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Appendix E -- 230th District Court's (State Trial Court) Findings of Fact and Conclusions of Law on Flores' State Application for a Writ of Habeas Corpus, entered October 29, 2019 (*Ex Parte Flores*, Cause No. 1454998-A).

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Appendix F -- Texas Court of Criminal Appeals Order Denying Flores' Petition for Discretionary Review on Direct Appeal, entered March 8, 2017 (*Flores v. State*, PD-1456-16).

Appendix G -- Texas 14th Court of Appeals Judgment and Opinion Affirming Flores' Conviction and Sentence on Direct Appeal, entered November 29, 2016 (*Flores v. State*, 14-15-00754-CR).

Appendix H -- 230th District Court's (State Trial Court) Judgment of Conviction, entered August 20, 2015 (*State v. Flores*, Harris County Cause No. 1454998).

TABLE OF AUTHORITIES

Cases

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Federal Writ Proceedings

The July 7, 2023 opinion and order of the Fifth Circuit Court of Appeals, affirming the U.S. District Court's denial of Petitioner's Petition for Writ of Habeas Corpus, is available at *Flores v. Lumpkin*, 72 F.4th 678 (5th Cir. 2023). A copy of the opinion and order is attached as Appendix A.

The May 17, 2022 order of the Fifth Circuit Court of Appeals, Granting in Part and Denying in Part Petitioner's Application for Certificate of Appealability, is not available on Westlaw. A copy of the order is attached as Appendix B.

The September 28, 2021 Final Judgment and Memorandum Opinion and Order of the U.S. District Court, denying Petitioner's Petition for Writ of Habeas Corpus, is available at *Flores v. Lumpkin*, No. CV H-20-2252, 2021 WL 4442795 (S.D.Tex. Sept. 28, 2021), aff'd, 72 F.4th 678 (5th Cir. 2023). A copy of the judgment and opinion is attached as Appendix C.

State Writ Proceedings

The June 24, 2020 order of the Texas Court of Criminal Appeals, denying Petitioner's state application for a writ of habeas corpus, is available on Westlaw at *Ex parte Flores*, No. WR-89,810-01, 2020 WL 2467990 (Tex. Crim. App. June 24, 2020). A copy of the order is attached as Appendix D.

The October 29, 2019 trial court order entering Findings of Fact and Conclusions of Law on Petitioner's State Application for a Writ of Habeas Corpus, is

not available on Westlaw. A copy of the Findings of Fact and Conclusions of Law are attached as Appendix E.

Original Trial Level Proceedings

The March 8, 2017 Texas Court of Criminal Appeals order, denying Petitioner's petition for discretionary review on direct appeal is not available on Westlaw. A copy of the order is attached as Appendix F.

The November 29, 2016 judgment and opinion of the Texas 14th Court of Appeals, affirming the judgment of conviction in Petitioner's case, is available at *Flores v. State*, 513 S.W.3d 146 (Tex.App.—Houston [14th Dist.] 2016, pet. ref'd). A copy of the opinion and judgment are attached as Appendix G.

A copy of the trial court's judgment of conviction, entered on August 20, 2015, is not available on Westlaw. A copy of the judgment of conviction is attached as Appendix H.

STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals entered an order and opinion affirming the District Court's denial of Petitioner's Petition for Writ of Habeas Corpus on July 7, 2023. *See* Appendix A. Pursuant to Rule 13(1) of the Rules of the Supreme Court of the United States, the deadline for filing this Petition for Writ of Certiorari is 90 days from the date of entry of that judgment, and is October 5, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecution, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 1254 provides in pertinent part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petitioner of any party to any civil or criminal case, before or after rendition of judgment or decree. . . ."

28 U.S.C. § 2254(a) and (d) provide in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Petitioner – who was 53 years old, disabled, and with no criminal history – was charged, by indictment, with a single count of aggravated sexual assault. In August 2015, Petitioner entered a not-guilty plea to the charge and a two-day jury trial commenced.

The Original Trial – A Contest of Credibility

This trial involved the pitting of the credibility of the four-year-old Complainant's outcry of abuse and his trial testimony, directly against the testimony of Petitioner, who also testified at trial and directly denied the allegations made against him.

However, the credibility of the Complainant's allegations received a significant boost from five expert witnesses: a medical doctor, a police officer, a PhD-level psychologist, and forensic interviewer specializing in sexual abuse investigations, and a psychotherapist specializing in treating sexual abuse victims – all well-educated and experienced specialists, who presented testimony that the jury should believe the Complainant because his credibility was supported by medicine, science, psychology, and their professional experience.

During its case-in-chief, the State of Texas called several noticed expert witnesses, including: Dr. Ciro Porras (the Complainant's pediatrician); Officer Montoyis Knotts (police officer, Houston Police Department); Tasha Rogers-James (forensic interviewer, Children's Assessment Center); Dr. Danielle Madera (psychologist, Children's Assessment Center). In addition, the State called as lay

witnesses the Complainant's mother, Mrs. Reina Guzman Reyes, and the Complainant.

The defense, during its case-in-chief, called one of the State's noticed experts, Staci Passe (therapist, Children's Assessment Center), and as lay witnesses, Petitioner, and the Complainant's father.[1]

During the trial, each of these five experts provided inadmissible expert opinion testimony establishing that either the Complainant was truthful and/or children are truthful and do not lie about sexual abuse. In addition, the State presented inadmissible opinion testimony through lay witnesses Mrs. Reyes (Complainant's mother) and even through Petitioner himself that the Complainant was truthful.

At various points throughout the trial, trial counsel objected to the inadmissible testimony, but his objections were overruled. At other points, trial counsel objected and his objections were sustained. Finally, at several points, trial counsel wholly and repeatedly failed to object to the inadmissible evidence – comprising the basis of the presented ineffective assistance of trial counsel claim presented herein.

[1] Dr. Passe testified that the Complainant told her during a therapy session that he had not been improperly touched. The Complainant's father testified that the Complainant had denied the allegations told her that the abuse did not occur, and the Complainant's father testified that the Complainant denied the allegation to him, saying it was a trick – and that his mother had planned it to get Petitioner to move out of their home.

The following testimony was elicited during the trial:

Expert Testimony

Dr. Ciro Porras, the Complainant's Pediatrician:

- "[T]he consistency of the child's history" is "the most important piece of evidence to know if that child is being truthful." **[Objection overruled.]**
- "[I]t was very convincing, very, very – I would say very difficult not to believe a child four years of age with so many details." **[Objection sustained.]**
- What the Complainant told the officer was consistent with what he told Dr. Porras. **[No proper objection.]**
- It was important and significant that Complainant's statement to the officer was consistent with the statement given to the Dr. Porras, because "In my pediatric training and all the courses available for sexual abuse, physical abuse and physical negligent [sic], there is always a remark that consistencies in the history are the most important part that makes a credibility a primer. And in the patients that – or families that start bringing up inconsistent statements are immediate red flags for whether this is a fabrication or not. In this case the history was consistent." **[Objection overruled.]**
- "We had reason to believe that there was some sort of a sexual encounter." **[No objection.]**

Officer Montoyis Knotts, Houston Police Department

- As an officer investigating a sexual assault crime, sensory details "are important because they lend to the credibility of the outcry," and the

Complainant was able to provide sensory details – explaining sights he'd seen, sensations and feelings, and able to describe things like texture. **[No objection.]**

- After coming to the scene, and seeing and talking to the witnesses, this did not appear contrived in any way. **[Objection sustained.]**

Tasha Rogers-James, Forensic Interviewer, Children's Assessment Center

- The Complainant was able to provide sensory details, which are important to her as a forensic interviewer because they "add validity to what the child has experienced . . . it would be difficult to describe something that is memorized as opposed to having a sensory attached to it." **[No objection.]**
- The Complainant was consistent in telling of his abuse. **[No objection.]**

Dr. Danielle Madera, Psychologist, Children's Assessment Center[2]

- There is no specific type of emotion you would expect to see with a kid to think that you should be able to believe their word that the sexual abuse did or didn't happen – she has seen all sorts of emotions from kids. **[No objection.]**

[2] Dr. Madera testified that that she had been a staff psychologist for almost ten years at the time of the trial and that she was involved in individual therapy with kids and adults who had been sexually abused, or who were dealing with issues of sexual abuse. She testified that she runs the Children's Assessment Center's Domestic Human Trafficking Program, supervises interns, does psychological evaluations and community trainings. She testified that she graduated with a Bachelor's degree in psychology, and then worked as a Child Protective Services worker before going to the University of Florida school of psychology for her PhD, and then worked as a forensic interviewer. She testified that she then completed two years post-PhD work under a licensed psychologist before she became fully licensed.

- Sensory details are important to her in determining the reliability or validity of the disclosure. **[No objection.]**
- It is not typical in her experience for children to lie about sexual abuse. **[Objection overruled.]**
- "Children can lie about a lot of things in their lives, but sexual abuse is not typically one of them. It is one of the most shameful, embarrassing things for a child to talk about. It's not something that would ever be chosen as a form of lying just for fun. It's not a fun experience for children. And oftentimes their lives significantly change in a negative way." **[No objection.]**
- Kids do not know how to lie about things that they have no knowledge of, such as sex – "[a] child to make up something that they have no knowledge – because a child that young shouldn't know anything about that. So, it wouldn't make sense that they'd even be able to conjure up an incident, you know, such as sexual abuse to come up with something to lie about." **[No objection.]**
- If a kid doesn't know what anal sex is or anal penetration, it's not within his wheelhouse to even try to make up something about it. **[No objection.]**

Staci Passe, Psychotherapist, Children's Assessment Center

- These things [the emotion and trauma he was bringing to the table] aren't the kinds of things that five, six year olds come in and just fake and go through the motions about. "Absolutely he seemed very authentic." **[No objection.]**

Lay Testimony

Reina Guzman Reyes, Complainant's mother

- When she was present to hear what the Complainant told his father, the Complainant was consistent. **[No objection.]**
- The Complainant was consistent when he told Reina's friend Rosa about the abuse. **[No objection.]**
- The Complainant told Dr. Porras the same thing that he had told her. **[No objection.]**
- "I believed the words of the child because he was only four years old. And the words that he was saying to me were terrible." **[No objection.]**

Fidel Flores, Petitioner

Petitioner testified during the State's cross-examination that:

- He heard all the witnesses that have testified, and in all of the witnesses that have testified, the Complainant had been very consistent about what abuse he says happened. **[Objection overruled.]**
- The Complaint has been consistent about the type of sexual abuse with every single witness that has testified. **[No objection.]**

<u>Contested Medical Evidence</u>

During the trial, the State presented medical examination reports and the testimony of Dr. Porras to show that there was medical evidence supporting the allegation of abuse. The medical evidence firmly supports the presented defense that the Complainant suffered from constipation, and did not support sexual assault.

The timeline in the record is clear.

The last allegation of sexual assault – the last time at which Petitioner last had any unsupervised contact with the Complainant – was in late September 2012. The Complainant went to the doctor on October 2, 2012, and no tear was observed – as the testimony and medical evidence makes clear: "There you go. The genitalia part the anus without – or edema without redness or swelling or any lesions" and "anus without erythema, edema or any lesions, when patient face down, at 6 o-clock there is an area where the skin appears thinner." Based on his observations, Dr. Porras prescribed a stool softener as treatment for constipation.

Despite the last allegation of sexual assault having taken place in late September, a tear was observed on a follow-up doctor visit on October 23, 2012.

Dr. Porras testified that based on the type of skin comprising the anus – *mucosa* – that the tear he observed was present for three to five days, and that one would not expect to see such a tear seven to fourteen days after someone had been sexually assaulted – because this type of skin heals quickly. Based on Dr. Porras' timeline, the tear could not have occurred until long after the last allegation of sexual abuse was alleged to have taken place – and thus, firmly supported the defense contention that the Complainant suffered from constipation.

Contested Evidence of Alleged "Flight"

The State also presented contested evidence that months following a CPS investigation into the Complainant's outcry, and months after having been contacted by CPS (with whom he voluntarily spoke and denied the allegations), that Petitioner

traveled to El Salvador – in August 2013. Petitioner learned of the allegations in or around October 2012 – and no charges had been filed at the time he left.

The evidence is uncontroverted that while Petitioner was in El Salvador, he was contacted by a Houston Police Department investigator concerning the allegation, and that he again voluntarily spoke to police, answering all the officer's questions and denying the allegations – and that Petitioner voluntarily returned to the United States after speaking with that officer.

Closing Arguments and Verdict

During closing arguments, the State heavily relied on and emphasized the inadmissible expert opinion testimony that this allegation was truthful. Petitioner was convicted and sentenced to 45 years imprisonment, without the possibility of parole. *See* Appendix H.

Contesting of Improper Opinion Testimony on Direct Appeal

Petitioner presented to the Texas 14th Court of Appeals on direct appeal the issue of whether certain portions of expert testimony from Dr. Porras, Dr. Madera, and Officer Knotts (the evidence to which trial counsel properly objected) constituted inadmissible expert opinion testimony in light of *Yount v. State*, 872 S.W.2d 706, 712 (Tex.Crim.App. 1993). *See* Appendix G.

The Texas 14th Court of Appeals determined that the trial court erred in admitting portions of expert testimony from each of these expert witnesses – that it was improper opinion testimony of the credibility of the complainant and of children, in general. *Flores v. State*, 513 S.W.3d 146, 165, 169-71 (Tex.App.—Houston [14th

Dist.], 2016, pet. ref'd). However, the Court determined that because trial counsel repeatedly failed to object to the same or similar testimony at various other points in the record, it could not find that Petitioner was harmed on account of the trial court's errors. *Id.* at 165, 168, 172 (citing *Chapman v. State*, 150 S.W.3d 809, 814 (Tex.App.—Houston [14th Dist.] 2004, pet. ref'd) ("[I]mproper admission of evidence is not reversible error if the same or similar evidence is admitted without objection at another point in the trial.")).

The Texas Court of Criminal Appeals denied Petitioner's Petition for Discretionary Review. *See* Appendix F.

State Writ Proceedings

In light of the Texas 14th Court of Appeals holding on direct appeal, Petitioner filed a State application for a writ of habeas corpus, presenting his Sixth and Fourteenth Amendment claim that his trial counsel was ineffective for repeatedly failing to object to the inadmissible expert and lay testimony regarding the truthfulness of the Complainant and of children, in general. This is where the claim presented herein was first raised in State court.

After taking evidence by affidavit, the 230th District Court (the trial court, but now on habeas review) issued Findings of Fact and Conclusions of Law recommending that relief be denied on this claim, but that relief be granted on a separate jury unanimity claim (also an ineffective assistance of counsel claim) not presented herein. *See* Appendix E. The Findings of Fact related to this claim were all determinations that it was trial counsel's strategy to not object to the evidence. The court determined

there was both no deficient performance and no prejudice under a *Strickland v. Washington*, 466 U.S. 668 (1984) analysis.

The Texas Court of Criminal Appeals issued an order denying Petitioner's application – appearing to only address the jury unanimity claim in its analysis – finding that Petitioner failed to establish *Strickland* prejudice.[3] *See* Appendix D.

Federal Writ Proceedings

Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254(a), (d), in the U.S. District Court for the Southern District of Texas, continuing to present his Sixth and Fourteenth Amendment claim that his trial counsel was ineffective for repeatedly failing to object to the inadmissible expert and lay testimony regarding the truthfulness of the Complainant and of children, in general. The U.S. District Court entered a Memorandum Opinion and Order denying relief and denying his request for a certificate of appealability. *See* Appendix C.

Petitioner filed an Application for Certificate of Appealability with the Fifth Circuit Court of Appeals, which was granted with respect to the instant claim. *See* Appendix B.

On *de novo* review, the Fifth Circuit Court of Appeals determined it need not address the deficient performance prong of Petitioner's presented *Strickland* claim,

[3] The Fifth Circuit Court of Appeals failed to apply the look-through doctrine in its released opinion on the instant claim, but because the 230th District Court also entered a finding that Petitioner failed to establish prejudice under *Strickland* specifically related to this claim, this Court may not need to reach that question should review be granted.

as it determined that under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the Court had to defer to the Texas Court of Criminal Appeals determination of no prejudice. *See* Appendix A. Thus, the Fifth Circuit only addressed the prejudice prong of *Strickland*.

In a departure from well-established case law from virtually every State and Federal court to have considered the issue – including recognized fundamental principles of law established by this Court – the Fifth Circuit determined that the expert and lay testimony that the Complainant and children, in general, are truthful was:

> "[A]rguably cumulative evidence of (the Complainant's) credibility – and therefore harmless – where the jury had other opportunities to assess the complainant's credibility itself. Here, the jury heard from (the Complainant) directly, providing it with the opportunity to evaluate his demeanor in court firsthand . . . .
>
> Because '[o]'ne rationally could conclude that the bolstering evidence gave the jury nothing it didn't already have,' whether trial counsel's supposed error prejudiced (Petitioner) is debatable by reasonable jurists."
>
> *See* Appendix A at 9.

In a sufficiency-of-the-evidence type analysis, the Fifth Circuit also determined that the Complainant had also informed multiple people – including his mother and his pediatrician about the assaults, and that the medical evidence and Petitioner's flight to El Salvador were evidence supporting his conviction. *See* Appendix A at 10-11.

ARGUMENT: REASONS FOR GRANTING RELIEF

1. Did the Fifth Circuit err in its review of Petitioner's Sixth Amendment claim – and its evaluation of *Strickland* prejudice – when it determined that repeated improper expert and lay testimony regarding the truthfulness of the Complainant and of children, in general, is arguably cumulative evidence of the Complainant's credibility and therefore harmless, if the Complainant testifies at trial?

The Fifth Circuit radically departed from axiomatic principles of American jurisprudence, from decisions of this Court, from decisions of federal circuit courts, and from the decisions of state courts of last resort around the United States, when it held that the repeated improper expert and lay testimony commenting on the truthfulness of the Complainant and of children, in general, was "arguably cumulative evidence of (Complainant's) credibility – and therefore harmless" in its evaluation of the prejudice prong of *Strickland*, in reviewing Petitioner's Sixth Amendment claim that his trial counsel was ineffective for repeatedly failing to object to this testimony throughout Petitioner's trial, as presented in his petition for a writ of habeas corpus. *Strickland v. Washington*, 466 U.S. 668 (1984). The Fifth Circuit's fundamentally flawed prejudice analysis led to its erroneous decision to defer to the State court finding of "no prejudice" under *Strickland*, pursuant to AEDPA. The Fifth Circuit's analysis was flawed, the State court finding of no prejudice was objectively unreasonable, and Petitioner was prejudiced by his trial counsel's errors.[4]

[4] To satisfy the second prong of *Strickland*, the defendant must show the deficient performance prejudiced the defense. This requires showing counsel's errors were "so serious as to deprive the defendant of a fair trial, a trial whose result was reliable." Strickland, 466 U.S. at 687. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the

"A fundamental premise of our criminal trial system is that the *jury* is the lie detector." *U.S. v. Scheffer*, 523 U.S. 303, 313 (1998) (emphasis from original); *see also Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891) ("(t)he jury were the judges of the credibility of the witnesses . . . (t)hat part of every case, such as the one at bar, belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and, so long as we have jury trials, they should not be disturbed in their possession of it . . . .").

This fundamental principle has led to a consensus of jurisdictions, including Texas, to uniformly prohibit the admission of testimony that comments on the credibility and truthfulness of witnesses – including both expert and lay testimony. *Yount v. State*, 872 S.W.2d 706, 712 (Tex.Crim.App. 1993); *Skidmore v. Precision Printing & Pkg., Inc.*, 188 F.3d 606, 618 (5th Cir. 1999) (stating that "[c]redibility determinations, of course, fall within the jury's province" in relation to a challenge to expert testimony); *U.S. v. Hill*, 749 F.3d 1250, 1258 (10th Cir. 2014); *Engesser v.*

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proceeding." *Id.* at 693. "The defendant must show that there is 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. In reviewing an ineffectiveness claim, the court must weigh the evidence that was unaffected by the alleged error, along with the evidence that was affected by the error and the degree to which it was affected, and then assess whether the petitioner "has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id.* at 695-96; *see also Neal v. Vannoy*, 78 F.4th 775, 794 (5th Cir. 2023).

Dooley, 457 F.3d 731, 736 (8th Cir. 2006) ("An expert may not opine on another witness's credibility"); *Nimely v. City of New York*, 414 F.3d 381, 398 (2nd Cir. 2005) ("[T]his court, echoed by our sister circuits, has consistently held that expert opinions that constitute evaluations of witness credibility, even when such evaluations are rooted in scientific or technical expertise, are inadmissible under Rule 702"); *U.S. v. Vest*, 116 F.3d 1179, 1185 (7th Cir. 1997) ("Credibility is not a proper subject for expert testimony; the jury does not need an expert to tell it whom to believe, and the expert's stamp of approval on a particular witness' testimony may unduly influence the jury."; *United States v. Gonzalez–Maldonado,* 115 F.3d 9, 16 (1st Cir.1997) ("An expert's opinion that another witness is lying or telling the truth is ordinarily inadmissible pursuant to Rule 702 because the opinion exceeds the scope of the expert's specialized knowledge and therefore merely informs the jury that it should reach a particular conclusion." (quotation omitted)); *United States v. Beasley,* 72 F.3d 1518, 1528 (11th Cir.1996) ("Absent unusual circumstances, expert medical testimony concerning the truthfulness or credibility of a witness is inadmissible ... because it invades the jury's province to make credibility determinations.").

Texas law itself is well established that Rule 702 of the Texas Rules of Evidence does not permit an expert to give an opinion that the complainant or class of persons to which the complainant belongs is truthful. *Yount v. State*, 872 S.W.2d 706, 712 (Tex.Crim.App. 1993); TEX. R. EVID. 702. In *Yount*, the Texas Court of Criminal Appeals reaffirmed what it recognized in *Duckett v. State*, 797 S.W.2d 906 (Tex.Crim.App. 1990), that such expert testimony "does more than 'assist the trier of

fact to understand the evidence or to determine a fact in issue,' but rather, it *decides* an issue *for* the jury." *See Yount*, 872 S.W.2d at 709 (emphasis from original); *see also Blackwell v. State*, 193 S.W.3d 1, 21 (Tex.App.—Houston [1st Dist.] 2006, pet ref'd) ("It is generally improper for a witness to offer a direct opinion as to the truthfulness of another witness and such opinion is therefore inadmissible evidence.") The Texas Court of Criminal Appeals has recognized that when an expert testifies that a complainant or the class of persons to which the complainant belongs is truthful, they are "essentially telling the jury that they can believe the victim in the instant case as well." *Yount*, 872 S.W.2d at 711; *Fuller v. State*, 224 S.W.3d 823, 832 (Tex.App.—Texarkana 2007, no pet.) (stating that experts on child sexual abuse are not "human lie detectors.") Moreover, *Yount* recognized that a consensus of jurisdictions across the nation addressing this issue have held such testimony inadmissible. *Id.* at 711-12.

Following *Yount*, reviewing courts in Texas have routinely reversed cases based on ineffective assistance of trial counsel grounds when trial counsel fails to object to this type of harmful and inadmissible expert testimony – with far less egregious testimony that that presented in Petitioner's case. *See Fuller v. State*, 224 S.W.3d 823 (Tex.App.—Texarkana 2007, no pet.); *Sessums v. State*, 129 S.W.3d 242 (Tex.App.—Texarkana 2004, pet. ref'd); *Miller v. State*, 757 S.W.2d 880 (Tex.App.—Dallas 1988, pet. ref'd.).

Despite this vast consensus prohibiting such testimony, the Fifth Circuit determined that the prejudice of such testimony becomes arguable – and thus AEDPA

deference required – so long as the jury also had the opportunity to evaluate the credibility of the Complainant itself – by hearing him testify. Thus, the Fifth Circuit concludes, all that improper expert and lay testimony commenting on the Complainant's truthfulness is merely merely cumulative of the Complainant's credibility which the jury already could decide for itself. The Fifth Circuit stated: "Because one rationally could conclude that the bolstering evidence gave the jury nothing it didn't already have, whether trial counsel's supposed error prejudiced (Petitioner) is debatable by reasonable jurists." Appendix A at 9.

Such a flawed prejudice analysis both obliterates the rule prohibiting such testimony, and fails to account for the fact that the central question for the jury in the first place is whether to find the Complainant's accusation credible on its own accord, not whether to find the Complainant credible based on the Complainant's accusation sandwiched in between repetitive experts opining that the Complainant, and children in general, do not and cannot lie about sexual abuse.

That is precisely what happened in Petitioner's case – and he was prejudiced by his trial counsel's repeated failure to object to the inadmissible expert and lay testimony concerning the truthfulness of the Complainant and of children, in general. Moreover, the State court finding of no prejudice was objectively unreasonable.

The credibility of the Complainant's testimony received the benefit of five expert witnesses: a medical doctor, a police officer, a PhD-level psychologist, a forensic interviewer specializing in sexual abuse investigations, and a psychotherapist specializing in treating sexual abuse victims – who all presented

testimony that the Complainant, and children in general, are truthful, and do not lie about sexual abuse.

These witnesses – all well-educated and experienced specialists, established that the jury should believe the Complainant because his credibility was supported by medicine, science, psychology, and their professional experience. Contrary to the Fifth Circuit's erroneous contention that "the bolstering evidence gave the jury nothing it didn't already have," this improper expert and lay opinion testimony gives the jury much more than it has without it – it sources the truth of the Complainant to those experts' fields. This expert testimony "[did] more than 'assist the trier of fact to understand the evidence or to determine a fact in issue,' but rather, it *decide[d]* an issue *for* the jury." *See Yount*, 872 S.W.2d at 709 (emphasis from original). In addition, the credibility of the Complainant's allegations received a significant boost from his mother, and even through Petitioner, himself, on account of trial counsel's failure to properly object.

Through the medical doctor, Dr. Porras, the State was able to establish that in pediatric training and all the courses available for sexual abuse, the most important piece of evidence, and indeed "the hallmark" to know if that child is being truthful is the consistency of the child's history, and that in this case, the Complainant was consistent. The State improperly elicited that Complainant was consistent on at least nine different occasions during the trial, including through Dr. Porras, the forensic interviewer Rogers-James, Complainant's mother, and the Petitioner himself.

The State repeatedly emphasized this inadmissible testimony about "the most important piece of evidence to know if that child is being truthful," in its closing argument, arguing: "And you heard from Dr. Porras. What did he tell you? The No. 1 thing that he needs diagnosing a child to believe that they're being sexually abused is the word of the kid alone. And he said children that young can't consistently over and over and again continue the exact same lie to as many people as [Complainant] has told." The State further argued: "But the only two people that were in that room with that child were Officer Knotts and Dr. Porras . . . . And you know what he did to a uniformed officer? He said the exact same thing that he told Dr. Porras. And then this investigation starts." The State further argued: "And don't you know that if there was anything inconsistent about what that child said . . . you would have heard about it, but you didn't."

The State was also able to benefit from Dr. Madera's (a staff psychologist with the Children's Assessment Center, see footnote 2 *supra*) elaborate and emphatic continuation of her statement that it was not typical in her experience for children to lie about sexual abuse.

It was predicated on Dr. Madera's significant background and experience from which she was able to give emphatic, persuasive, and completely unchallenged improper opinion testimony:

> "Children can lie about a lot of things in their lives, but sexual abuse is not typically one of them. It is one of the most shameful, embarrassing things for a child to talk about. It's not something that would ever be chosen as a form of lying just for fun. It's not a fun experience for children. And oftentimes, their lives significantly change in a negative way."

Dr. Madera continued her unobjected-to testimony by testifying that children do not know how to lie about things such as sex, stating that "it wouldn't make sense that they'd even be able to conjure up an incident, you know, such as sexual abuse to come up with something to lie about." The testimony continued with her stating that it is not even within a child's wheelhouse to even try to make up something about it.

Finally, the State was able to benefit from the improper testimony of Officer Knotts, forensic interviewer Ms. Rogers-James and psychologist Dr. Madera, who all testified that sensory details were important when investigating a sexual assault crime because they lend to the credibility and reliability of the outcry.

This testimony was also emphasized in the State's closing argument, where the State argued "But she told you about what the child said. And she told you about the details, those sensory details. And what it means when a child gives a sensory detail . . . Those aren't things that a mom tells their child to come up with while they're spewing this story back out to the next stranger. Those are things that that child experienced. And don't you know that if there was anything inconsistent about what that child said . . . you would have heard about it, but you didn't."

The breadth, volume, pervasiveness, and emphasis of the improper and unobjected-to testimony exceeds that of cases reversed on ineffective assistance of counsel grounds following *Yount*. Moreover, this barrage of inadmissible testimony, and its corresponding impact and harm, greatly exceeds that of the cases where ineffective assistance of counsel was not found on these same grounds.

For these reasons, there is a reasonable probability that but for counsel's error in failing to object to this extensive, inadmissible, and critical testimony, the result of the proceedings would have been different. This trial cannot be relied upon as having produced a just and reliable result.

The Fifth Circuit's prejudice evaluation fails to weigh the impact of any of this testimony, offered both before and after the Complainant testified, and which set up the framework in which the jury was to evaluate the Complainant's testimony – but instead simply concludes that because the Complainant testified, the jury got to determine his credibility itself – and that the inadmissible expert testimony is "arguably cumulative evidence of (Complainant's) credibility." *See* Appendix A at 9.

The Fifth Circuit's analysis also misunderstands, or at least minimizes, the concept of cumulative evidence in this regard. Black's Law Dictionary defines "cumulative evidence" as "additional evidence that supports a fact established by the existing evidence (especially that which does not need further support)." *See* Cumulative Evidence, Black's Law Dictionary (11th Ed. 2019).

The improper expert (and even the lay opinion testimony) regarding the truthfulness of the Complainant and of children, in general, was offered to root the believability of the Complainant in medicine, science, psychology, and their professional experience. It was independent evidence of its own character, portrayed to be rooted in expert fields – and offered to supplement and strengthen the testimony of the Complainant – not merely to repeat the same point.

To illustrate with a simple hypothetical: if 50 witnesses saw an accident from the same vantage point – after calling one witness to describe the accident, calling the remaining 49 witnesses to describe the same accident might be considered cumulative evidence. By contrast, after calling one witness to describe the accident, calling the remaining 49 witnesses to describe how in their expert opinions, the one witness who testified is a truthteller, or shares characteristics with truthtellers – is not merely cumulative evidence. It is improper believability testimony – offered to add separate substance to the idea that the story given by one witness should be accepted as the truth.

Finally, the Fifth Circuit's flawed prejudice analysis failed to account that there was scant other evidence to support Petitioner's conviction – and that all other evidence was firmly contested at trial.

With respect to the purported "medical evidence," the Fifth Circuit wholly fails to acknowledge that the undisputed timeline established that the last allegation of sexual assault was alleged to have taken place at the very end of September 2012. Just two days later, on October 2, 2012, the Complainant went to the doctor, and the doctor saw no anal tear. The medical evidence is clear: "There you go. The genitalia part the anus without – or edema without redness or swelling or any lesions" and "anus without erythema, edema or any lesions, when patient face down, at 6 o-clock there is an area where the skin appears thinner." The doctor prescribed constipation medicine.

However, three weeks later, and despite no intervening allegation of sexual abuse, nor any unsupervised contact between the Complainant and Petitioner, a tear is observed at a doctor's visit on October 23, 2012. The doctor's testimony made clear that the tear he observed was present for three to five days, and that one would not expect to see such a tear seven to fourteen days after someone had been sexually assaulted – because this type of skin heals quickly. Based on Dr. Porras' timeline, the tear could not have occurred until long after the last allegation of sexual abuse was alleged to have taken place (the end of September 2012) – and thus, firmly supported the defense contention that the Complainant suffered from constipation – and which the doctor himself recognized.

Instead, in a sufficiency-of-the-evidence type analysis and not a *Strickland*-prejudice type analysis, which requires weighing the evidence, the Fifth Circuit summarily concluded that the medical evidence supported conviction.

Similarly, with the allegation of "flight," the Fifth Circuit fully ignores that this contention was controverted at trial – with strong support that Petitioner did not flee from anything. Petitioner learned of the allegation in October 2012, was interviewed and fully cooperated and interviewed with CPS investigators, and only months later, in August 2013, went to El Salvador.

While in El Salvador, Petitioner was contacted by a Houston Police Department investigator, fully cooperated with that investigator, and answered all his questions, and denied the allegations made against him. Finally, as the Fifth Circuit opinion does recognize (just not in its legal analysis of prejudice) Petitioner

"voluntarily returned to the United States after speaking with a Houston police officer about the charge." *See* Appendix A at 3. It should be noted that there was no discussion with the police officer about any charge, and that no charging instrument even existed until long after the telephone discussion between the investigator and Petitioner. Despite these unassailable facts, the Fifth Circuit again concludes in a sufficiency-of-the-evidence type analysis that this evidence supported conviction.

The Fifth Circuit conducted a flawed review – applying a "cumulative evidence" test to inadmissible expert and lay testimony concerning truthfulness and in failing to properly evaluate prejudice in light of the full developed record – of Petitioner's Sixth Amendment claim that he was deprived of his right to the effective assistance of counsel when his trial counsel repeatedly failed to object to the inadmissible expert and lay opinion testimony regarding the Complainant and children, in general. This flawed review led to its erroneous determination to defer to the unreasonable State court finding of no prejudice under *Strickland*.

Petitioner was deprived of his right to the effective assistance of counsel, as he was prejudiced by his trial counsel's deficient performance in failing to object to the inadmissible expert and lay testimony concerning truthfulness.

CONCLUSION

Petitioner requests that this Court find these issue merit review by this Court, grant this petition for a writ of certiorari, order briefing and argument, and reverse the Fifth Circuit's judgment by finding that Petitioner established prejudice for his *Strickland* claim under the appropriate standard of review, or alternatively, find that

the Fifth Circuit conducted an erroneous prejudice analysis and AEDPA analysis, vacate that decision, and remand to that Court so that it can conduct a proper evaluation in light of well-established precedent, and so that it can ultimately fully evaluate Petitioner's raised Sixth Amendment claim and determine that his petitioner for a writ of habeas corpus should be granted. Petitioner requests any and all further relief to which he may be entitled.

Respectfully submitted,

Bryan W.L. Garris
Attorney for Fidel Flores
9800 Northwest Freeway, Suite 305
Houston, Texas 77092
Phone: 832-722-8915
Fax: 832-327-9001
Bryan@txdefense.net

CERTIFICATE OF MAILING

I hereby certify that, on the 5th day of October, 2023, this pleading was served on the Court via the United States Postal Service and filed electronically.

Bryan W.L. Garris

CERTIFICATE OF COMPLIANCE

I hereby certify that this document is within the page limits prescribed by Rule 33.2(b).

Bryan W.L. Garris