No. 12-

In The
Supreme Court of the United States

ROSA ESTELA OLVERA JIMÉNEZ,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

BRYCE BENJET
HULL HENRICKS LLP
221 West Sixth Street
Suite 960
Austin, Texas 78701
(512) 494-8097

RYAN P. BATES
Counsel of Record
YETTER COLEMAN LLP
221 West Sixth Street
Suite 750
Austin, Texas 78701
(512) 533-0150
rbates@yettercoleman.com

Counsel for Petitioner Rosa Jiménez

QUESTIONS PRESENTED

Rosa Jiménez was convicted of murder in a case that turned on the credibility of competing interpretations of forensic evidence. Her attorney failed to properly request expert assistance under *Ake* v. *Oklahoma,* thus depriving Jiménez of both adequate expert assistance and the opportunity to appeal the denial of her request.

When Jiménez raised a federal-law actual-innocence claim on state habeas review and presented the expert testimony that could have been heard at trial but for her counsel's errors, the court held that that evidence credibly rebutted the State's case and demonstrated, by a preponderance of the evidence, that no rational juror would find guilt beyond a reasonable doubt. The Texas courts nevertheless denied relief, holding that federal actual-innocence claims require proof by clear and convincing evidence, reinforcing a four-way split among the federal circuits and state high courts that have decided the issue.

The questions presented are:

1. Whether a state habeas petitioner who raises a freestanding actual-innocence claim under the Due Process Clause, and who demonstrates actual innocence by at least a preponderance of the evidence, must instead make that showing by clear and convincing evidence to warrant a new trial.

2. Whether, in light of trial counsel's errors, petitioner received ineffective assistance of counsel in violation of *Strickland* v. *Washington*.

PARTIES TO THE PROCEEDINGS

The petitioner is Rosa Estela Olvera Jiménez, a citizen of Mexico, the applicant for habeas corpus relief in the state courts below, and currently a prisoner in the custody of the respondent, the State of Texas.

TABLE OF CONTENTS

TABLE OF CONTENTS – CONTINUED

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – CONTINUED

TABLE OF AUTHORITIES – CONTINUED

Page

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Petitioner Rosa Jiménez respectfully asks the Court to issue a writ of certiorari to review the final judgment of the Court of Criminal Appeals of Texas denying her a writ of habeas corpus.

OPINIONS BELOW

The unpublished opinion of the Texas state district court finding habeas corpus was warranted and Jiménez should be given a new trial is reprinted in the Appendix at App.49-90.[1]

The subsequent opinion of the Court of Criminal Appeals (CCA) denying the writ is reported as *Ex parte Jiménez*, 364 S.W.3d 866 (2012). It is reprinted in the Appendix at App.1-48.

STATEMENT OF JURISDICTION

On April 25, 2012, the CCA issued its opinion denying Jiménez's application for a writ of habeas corpus. *Ex parte Jiménez*, 364 S.W.3d 866 (2012). No petition for rehearing was filed. The Court has jurisdiction to review the CCA's decision pursuant to 28 U.S.C. §1257(a) and this Court's Rule 13.1. *Sears* v. *Upton*, 130 S.Ct. 3259, 3261, n.1 (2010); see *Smith* v. *Texas*, 550 U.S. 297 (2007) (reviewing CCA's denial of state habeas corpus petition on federal grounds).

---

[1] Citations in the forms "App.___" and "___.RR.____" are to the petition appendix and trial reporter's record, respectively.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

I. B.G.'s ACCIDENTAL INJURY AND DEATH

On January 30, 2003, Rosa Jiménez, a seven-months-pregnant, 20-year-old undocumented Mexican national, was babysitting B.G., a 21-month-old toddler, and her own daughter, who were playing in the next room with a roll of paper towels while Jiménez cooked in the kitchen. App.7-9. According to Jiménez's statement to the police, when she checked on the children, she found B.G. discolored and in distress. App.7-8. Realizing B.G. was choking, Jiménez tried to dislodge the obstruction by slapping B.G.'s back and sweeping anything out of his mouth, but B.G. bit her fingers. *Ibid.* She then carried B.G. to the apartment of a neighbor, Irene Vera, to call 911. *Ibid.*

At Vera's apartment, B.G. was limp and purple, but he was gagging and repeatedly bit Vera's fingers when she reached into his mouth to find the obstruction. *Jiménez* v. *State*, 240 S.W.3d 384, 387-388

(Tex. App. 2007). While Vera assisted B.G., another neighbor called 911. *Id.*, at 388. Police, then EMTs, arrived and performed CPR and rescue breathing on B.G. to little effect. *Id.*, at 388-389. The EMTs checked his mouth for obstructions, then tried to intubate him. *Id.*, at 389. Using a laryngoscope, the EMTs found an obstruction above B.G.'s trachea and used forceps to remove it. *Ibid.* Although the EMTs initially thought the obstruction was food, it was actually a wad of paper towels stained with blood. *Ibid.* Fifteen minutes passed between the time of the 911 call and the EMTs' success in reestablishing B.G.'s airway. App.59.

As a result of his choking, B.G. suffered a devastating brain injury. App.76. His mother decided to end B.G.'s life by removing nutrition and hydration, and B.G. died approximately three months after his injury was sustained. *Ibid.*

II. TRIAL AND APPEAL

Jiménez was charged with injury to a child and felony murder and tried before a jury. She was represented by multiple attorneys, but her lead counsel, serving by appointment, was Leonard Martinez.

The crucial dispute was one of forensics—because there were no eyewitnesses to the event, the determination whether or not Jiménez caused B.G.'s choking rested primarily on expert testimony and on the jury's evaluation of those experts' credibility.

Martinez attempted, largely unsuccessfully, to retain a team of competent experts who could effectively rebut the State's case and persuasively explain how the evidence demonstrated that B.G.'s choking could have occurred without Jiménez's involvement. But "[m]ost experts were unwilling to accept the low pay and then have to wait until the future to be paid. Assurances did not work and even offering to pay expenses out of [Martinez's] own pocket did not work either." App.125.

Among others, Martinez contacted Dr. Frank McGeorge, an emergency-medicine specialist with clinical expertise in choking. App.73. McGeorge came to Martinez's attention after giving a nationally televised interview on unusual child choking incidents. App.24. However, the cost of McGeorge's services exceeded the funds available. App.73. Similarly, Martinez tried to retain Dr. Linda Norton, a clinical and forensic pathologist with significant experience in child death, but Norton "was unwilling to work on a Travis County appointed case because she had not been paid on prior appointments." App.127.

In the end, Martinez could only retain an associate medical examiner from Connecticut, Dr. Ira Kanfer, to testify on the cause of B.G.'s death.[2]

[2] Martinez also retained Dr. George Parker, a psychologist who evaluated Jiménez for sentence-mitigation purposes, and Keith Kristelis, who developed an animated simulation to complement Kanfer's testimony. App.24.

Kanfer, who published edifying papers like "How to Turn a Homicide into an Accident" and commentated for Court TV, yet was not a member of the American Academy of Forensic Sciences, was referred to Martinez by "Dr. Henry Lee (of the O.J. case)." 7.RR.3, 7; App.25. More importantly, Kanfer, a forensic pathologist, lacked any pediatric training and had absolutely no clinical experience, let alone clinical experience in choking. App.73-74.

Believing Kanfer inadequate "to counter the State's case," Martinez before trial asked the judge "for additional funds to retain experts such as Dr. McGeorge." App.126. Martinez followed his usual procedure for Travis County criminal appointments—making an informal *ex parte* request, followed by a formal motion "[i]f the judge decided to authorize payment." *Ibid.* Judge Wisser, however, told Martinez "that he had authorized more experts than usual in a non-capital case, and that he would not pay for any more expert assistance regardless of [Martinez's] need." App.126-127. Accordingly, Martinez filed no motion formally requesting additional assistance.

Working "within the constraints imposed by the Court," Martinez was unable to retain "a doctor with a clinical practice treating injuries similar to B.G.'s to contradict [the State's] witnesses or to assist [him] in cross-examining the treating physicians." App.127. Nor could Martinez retain "an expert on child abuse and child death" to rebut the State's expert on those topics, which Kanfer "did not have the sort of experience required" to do. App.127-128.

At trial, the parties presented conflicting theories of the case—Jiménez, that B.G. was playing with paper towels, put them in his own mouth, and accidentally swallowed them; the State, that Jiménez forced the paper towels down B.G.'s throat. App.3-5. As expected, trial was largely a contest over the experts' dueling explanations of the forensic evidence. App.5. Dr. John Boulet, a pediatric emergency specialist, treated B.G. and opined that an object the size of the paper wad could not go down a child's throat accidentally. App.6-7. Dr. Patricia Oehring, B.G.'s critical-care intensivist, looking at a photo of the paper wad, said it was impossible for B.G. to have put it down his throat alone and that he had to have been held down, "coughing and gagging and bleeding and fighting and struggling," despite the absence of other injuries, bruises, or scrapes on B.G. App.7. Dr. Elizabeth Peacock, a forensic pathologist, flatly stated "the physics of it are impossible," that the only thing a child B.G.'s age could choke on is "something that's round or small." App.8. However, the State did not rely exclusively on experts and treating physicians. Officer Eric de Los Santos's testimony related Jiménez's statements during interviews he conducted, including her inconsistent statements about whether she had initially found B.G. collapsed or walking toward her, and Jiménez's question of what would happen to her if she had done it. App.5.

Jiménez tried to counter the State's case with multiple character witnesses and testimony from

Irene Vera, but her principal witness was Kanfer. His appearance, however, was disastrous.

On direct, Kanfer stated the scientific basis for Jiménez's theory of the case: a toddler B.G.'s age could wet and wad up paper towels to a size small enough to choke on; forcing a wad past the teeth and soft palate would have left unmistakable signs of trauma, absent on B.G.; B.G.'s biting Vera's and the EMTs' fingers indicated he had only been without air for a very few minutes, not 30 to 40; and the efforts to resuscitate B.G. pushed the wad further down and made the obstruction total. App.8-11. But Kanfer admitted he lacked the expertise to provide reliable opinions on critical aspects of the case. He conceded he was unqualified to respond to the State's theory that B.G. was developmentally incapable of putting the paper wad into his mouth or to its contention that inconsistency in Jiménez's statement was indicative of child abuse and guilt. 7.RR.117-118, 146. Jiménez's defense thus failed to contest the State's argument that a single minor inconsistency in her account, during hours of interrogation, was compelling evidence that she murdered B.G., an omission the State's closing capitalized on. See 8.RR.112-117.

Worse, during a break, Kanfer, in an effort to "scare the prosecutors" because he "was pissed" at being treated like "a paid whore," told the prosecutors to "go f*** themselves." App.74, 133. The State repeatedly used this outrageous behavior to undermine his credibility as an unbiased expert. See App.130-131, 133-136. Martinez objected only one of

the three times Kanfer's outburst was raised on cross-examination and even then offered no rejoinder to the State's point that its questions were relevant to Kanfer's obvious bias; the objection was overruled. App.11, 135. Despite Jiménez's sole expert being demolished before his eyes, Martinez neither sought a continuance nor requested a mistrial. App.75.

Jiménez was convicted on both counts; the jury sentenced her to 99 years of imprisonment. On direct appeal, the state court of appeals affirmed her conviction. *Jiménez*, 240 S.W.3d, at 387. The CCA denied Jiménez's petition for discretionary review.

III. Habeas Proceedings Before The District Court

Jiménez filed an application for a writ of habeas corpus pursuant to article 11.07 of the Texas Code of Criminal Procedure on October 6, 2009, supplementing it on October 20, 2010. App.91, 115. She asserted, *inter alia*, a federal-law actual-innocence claim, a due-process claim based on the trial court's failure to authorize additional experts, and claims of ineffective assistance by Martinez.[3] App.96-97, 99-100, 120, 122. Following briefing, the

[3] Texas permits ineffective-assistance and actual-innocence claims to be raised for the first time on collateral review. *Ex parte Amezquita*, 223 S.W.3d 363, 366 (Tex. Crim. App. 2006); *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996).

habeas court heard testimony over four days in December 2010. App.50.[4]

At that hearing, Jiménez called three highly qualified experts—Drs. Karen Zur, John McCloskey, and Janice Ophoven. The State called medical personnel who treated B.G.—Robert Curr, an EMT, and Dr. Patricia Aldridge (née Oehring)—and three experts—Drs. Elizabeth Peacock, James Eskew, and Randell Alexander. The court made extensive findings of fact on the evidence it heard, as well as the various experts' credibility and the weight it gave their several opinions. Those findings are summarized below:

Jiménez's witnesses

Dr. Zur, "one of the leading pediatric airway specialists in the United States" and "an expert on choking, the mechanics of airway obstructions, and the removal of such obstructions," testified to her conclusion, based on a comprehensive review of the evidence and consultation with over a dozen colleagues in the pediatric otolaryngology field, that to a reasonable degree of medical certainty "B.G.'s injuries likely resulted from an accidental choking."[5]

---

[4] Jiménez's application was heard by Judge Charlie Baird, who previously served eight years on the CCA.

[5] Zur stated that no one she consulted "disagreed with her opinion that B.G. accidentally choked on the wad of paper towels. In fact, all were surprised by the expert testimony offered by the State at [Jiménez's] trial, and believed those opinions to be speculation." App.55. One of them, Dr. Brian

(Continued on following page)

App.52-56. She testified that "B.G. was capable of placing the wad of paper towels in his mouth and compressing that wad to a size that could have accidentally slipped back into his throat," and that the wad of paper was not "forcefully lodged in B.G.'s throat," in part because she would have expected additional injuries to B.G. or Jiménez if it had been. App.52-54. The paper wad did not fully obstruct B.G.'s airway at first, Zur explained; it was only a partial obstruction when initial efforts to resuscitate B.G. were made. App.53. But the partial obstruction became full, possibly when adults "attempt[ed] to find the obstruction by placing their fingers in B.G.'s mouth or by the positive pressure of breathing administered to B.G. in CPR efforts." *Ibid.* Accordingly, Dr. Zur concluded that "all of the evidence she reviewed was consistent with an accidental choking." *Ibid*. The court expressly found her testimony "to be reliable, well considered and credible." App.56.

Dr. McCloskey, an attending critical-care physician whose "training, research and clinical practice all involve issues relating to the pediatric airway," likewise testified that, to a reasonable degree of medical certainty, B.G.'s injuries resulted from an

---

Dunham, who had recently treated a child who choked on a wadded piece of bread of similar dimension, stated in an affidavit that "no qualified medical professional could reliably say that B.G.'s injury had to be an intentional attack based on the size of th[e] wad of paper towel." *Ibid.*

accidental choking. App.56-57. According to McCloskey, "a child B.G.'s age was developmentally capable of stuffing his mouth with paper towels and having that wad compressed in his mouth." App.58. Like Zur, he concluded that the evidence, such as Irene Vera's observation of B.G. gasping and biting, was consistent with a partial obstruction that subsequently became total, possibly simply by absorption of saliva, and that "attempts to sweep [B.G.'s] mouth, and to give rescue breaths . . . could have pushed the obstruction further in." *Ibid.* McCloskey specifically disputed trial testimony from Dr. Peacock that B.G. had been without air for 20 to 40 minutes before his airway was cleared by the EMTs, stating that "the only reliable estimate that can be made" is that "B.G. was without air for at least 10 minutes" but that he "could not have been without air for much longer" than that. App.58-59. Based on Vera's observation of B.G. biting and gasping and the duration of the EMTs' response, McCloskey concluded that the obstruction only became total at approximately the time of the 911 call and that B.G. had been without air for less than 15 minutes. App.59. Based on his training and clinical experience in taking children's medical histories, McCloskey also stated that inconsistencies in histories given by parents and caregivers are not unusual and disputed that anything in Jiménez's statements was indicative of child abuse. App.61. As with Zur, the court found Dr. McCloskey's testimony "reliable, well considered and credible," and observed that "his first-hand experience in treating both accidental choking cases

and similar instances of child abuse give him a unique perspective on the evidence that lends additional credibility to his opinions regarding this injury." App.61-62.

Dr. Ophoven, a pediatric forensic pathologist and child abuse expert, testified by affidavit. App.62. She too concluded that, to a reasonable degree of medical certainty, B.G.'s injury "was the result of a tragic accident." App.63-64. Ophoven testified that "there were no relevant indicators of child abuse" revealed by the evidence, specifically noting that B.G. suffered no suspicious injuries, even though stuffing the paper down his throat by force "would have caused significant trauma to the tissues of the throat, mouth and possibly the face." *Ibid.* She likewise "did not find [Jiménez's] statements to the police to indicate child abuse," observing that her inconsistency was "not the sort of inconsistency . . . indicative of abuse," as it "was not misleading, inconsistent with known facts, and did not lessen [Jiménez's] responsibility" and was "reasonable in light of the stress" of the situation. App.64. The court found Dr. Ophoven's affidavit "a reliable, comprehensive and credible review of the evidence." App.65.

The State's witnesses

Curr testified about his efforts to save B.G. He confirmed his trial testimony that photos of the paper wad introduced as evidence and relied on by the State's experts did not accurately reflect the wad's

size, which was smaller when it was removed from B.G.'s throat. App.65-66.

Dr. Aldridge testified to her continued opinion that B.G.'s choking was not accidental, based on:

- information she received third-hand, "from the emergency room doctor who spoke with the EMT";
- the size of the wad, though she was unaware until the habeas hearing that photos she had seen of it did not accurately reflect its size; and
- her perception of an inconsistency in Jiménez's statement, though she never actually reviewed Jiménez's account of what had happened.

App.67. The crucial factor, in Aldridge's view, was her theory that B.G. was without air for 20 to 40 minutes, a contention she based on B.G.'s blood gas levels. *Ibid.* However, she could point to no supporting medical literature and had no response to Dr. McCloskey's opinion that blood gas levels cannot accurately measure the time someone has been without air. *Ibid.* Given Aldridge's failure to review the evidence provided by Jiménez's experts, her failure to review Jiménez's statement despite placing weight on its perceived inconsistency, the fact that at the time she formed her opinion she was only three years out of her medical training, and her defensive demeanor on the stand, the habeas court found her testimony did not "credibly rebut[ ] the testimony of

[Jiménez's] experts that B.G. likely choked accidentally." App.68. Moreover, the court specifically found unreliable her opinion that B.G. was without air for 20 to 40 minutes. *Ibid.*

Dr. Peacock reasserted her view that it was "physically impossible" for B.G. to have choked accidentally. App.4, 69. She based this opinion on her determination—reached after a review only of the inaccurate photos of the paper wad, an incomplete copy of B.G.'s autopsy report, and Dr. Ophoven's affidavit—that the wad had been lodged in B.G.'s trachea, contradicting both Dr. Zur and Curr, who testified it was actually lodged higher, in B.G.'s laryngopharanx, when he removed it. App.69-70. Peacock, who had no pediatric training or clinical experience treating live patients, acknowledged that a pediatric otolaryngologist like Dr. Zur would be more expert on choking. *Ibid.* In part because she was contradicted by other witnesses "on the basic question of where the obstruction was lodged," the court determined Peacock "was not familiar enough with the facts of the case to offer a reliable opinion as to B.G.'s injury" and so "did not credibly rebut" Jiménez's experts' opinions "that B.G. likely choked accidentally." *Ibid.*

Dr. Eskew, an otolaryngologist with clinical pediatric experience, opined that B.G. did not accidentally choke. App.70. However, he "only spent three hours preparing for his testimony and did not review enough information to provide a reliable opinion on B.G.'s injuries." App.71. Moreover, like Aldridge, Eskew based his opinions on photos of the

paper wad, even though those photos inaccurately depicted the wad's size. *Ibid.* Accordingly, the court found that Dr. Eskew's testimony did not credibly rebut Jiménez's experts' opinions that B.G. choked accidentally. *Ibid.*

Finally, Dr. Alexander, a specialist in child abuse, testified by affidavit that nothing in the opinions of Jiménez's experts changed his view that B.G. could not have accidentally choked. App.72. However, because his testimony did "not provide much more than conclusory responses," and in light of "the cursory and inaccurate nature of Dr. Alexander's affidavit," the court found he, like the State's other witnesses, "did not credibly rebut" the testimony provided by Jiménez's experts. *Ibid.*

Other factual findings

The habeas court also made findings, based on the trial record and the uncontested testimony provided in Martinez's affidavits, on the performance of Martinez as Jiménez's trial counsel and the denial of his requests for additional expert assistance.

Martinez, the court found, "recognized the need for expert witnesses including experts on choking" and sought funding to retain such experts "through informal *ex parte* meetings" with the trial judge. App.73. Judge Wisser denied those informal

requests,[6] but Martinez "did not file written motions to document his requests for additional funding for experts in choking and did not document his explanation to the Court for why he needed additional funds for these experts." *Ibid.* Because funds were so limited, Martinez could not hire Norton or another forensic pathologist with a pediatric specialization or experience with child abuse to rebut Alexander's opinions at trial. *Ibid.* Nor was he able to hire an otolaryngologist like Zur or a critical-care specialist with clinical experience in choking like McCloskey or McGeorge to assist with cross-examination or rebut the opinions of the physicians who treated B.G. *Ibid.*

Instead, Jiménez had only Kanfer to rebut the State's forensic case. App.73-74. But "[w]hile Dr. Kanfer gave testimony generally consistent with the history of an accidental choking, he lacked the pediatric specialization and the clinical experience to render a reliable and persuasive opinion . . . that B.G. accidentally choked." *Ibid.* Because of that lack of training and experience, the habeas court found that his testimony "carried little weight at trial" and "was clearly outweighed" by the State's team of physicians. App.74. More importantly, "Dr. Kanfer's testimony

---

[6] The facts surrounding the denial of Martinez's informal *Ake* request—to which he testified by affidavit—were uncontested on the habeas record. App.82. The State had had ample opportunity to contest Martinez's statement; his affidavit was filed two months before the habeas hearing.

revealed clear evidence of bias" against the prosecution, and to the extent it "had any persuasive value (which is highly doubtful), the Court [found] that it was completely and 100% undermined by Dr. Kanfer's unprofessional conduct at trial." *Ibid.*[7] Because his profane abuse of the prosecutors was admissible, the State used it to attack "Dr. Kanfer's qualifications, methodology, and neutrality." App.74-75 (quotation marks omitted). Nor, the habeas court found, did Martinez offer any effective response to the State's attack on Kanfer: he did not initially object to this line of cross-examination, provided no grounds for objection when it was renewed, and "did not request a mistrial or a continuance to remedy the problem or find a new witness." *Ibid.*

Conclusions of law

On Jiménez's federal-law actual-innocence claim, the habeas court found that Jiménez had not met the burden of establishing, by clear and convincing evidence, that no rational juror would have convicted in light of newly discovered evidence. App.77-78 (citing *Ex parte Elizondo*, 947 S.W.2d, at 209). Opinions of experts based on materials available at the time of trial are not "newly discovered" or "newly available" as the CCA's actual-innocence jurisprudence requires,

---

[7] For these same reasons, the court concluded that the testimony of Jiménez's experts on habeas—"the evidence that should have [been] presented to the jury," as the court put it—"was not cumulative" of Kanfer's testimony, despite presenting fundamentally similar conclusions. App.84.

even if the defendant could not have presented them at trial. *Ibid.* And considering those opinions, because they were not "medically indisputable," the court concluded that Jiménez had not shown actual innocence by clear and convincing evidence and thus denied her relief. App.78.

However, the court separately concluded that, when all of the trial and habeas evidence was considered, Jiménez had satisfied the *Schlup* v. *Delo* standard of proving "by a preponderance of the evidence that no rational juror could have found [Jiménez] guilty beyond a reasonable doubt":

> "The testimony of Drs. Zur, McCloskey, and Ophoven both demonstrate[s] the likelihood that B.G. was injured through an accidental choking and that the evidence presented at trial to the contrary was unreliable. The Court has found these experts to be credible [and] that the State did not effectively rebut their testimony. Accordingly, this Court concludes that a reasonable jury would probably not have convicted [Jiménez] had it heard all of the evidence presented in this habeas proceeding." App.78-79.

Turning next to Jiménez's due-process claim based on denial of expert assistance under *Ake* v. *Oklahoma*, the court concluded that there "can be no dispute" that experts were necessary in this case "to assist the defense in confronting the State's case, and to testify to establish the defensive theory" that B.G. choked accidentally. App.81. Noting that "the

evidence on this matter is uncontested," the court offered a blistering assessment of the expert assistance to which Jiménez was limited by the denial of her request for additional experts:

> "The old saying: 'you get what you pay for' is certainly true in the case of Dr. Kanfer; he was wors[e] than Applicant having no witness. In my 30 years as a licensed attorney, 20 years in the judiciary, this Court has never seen such unprofessional and biased conduct from any witness, much less from a purported expert." App.82-83.

Labeling the case a "failure of forensics," the court "easily reached" the conclusion that the denial of adequate funding "to retain experts who could provide relevant testimony regarding the unique issues presented in this case, *e.g.*, a pediatric otolaryngologist, clearly violated *Ake*." App.82.

On Jiménez's ineffective-assistance claim, the court's assessment was similarly unforgiving. It specifically found Martinez's performance deficient in his selection of Dr. Kanfer, rather than "qualified experts with the necessary experience and background to offer persuasive and reliable opinions that B.G. likely choked accidentally," as well as in Martinez's failure to "make an adequate written request for such assistance" after denial of his informal requests or to "make an adequate record to document the lack of funding for expert assistance in order to raise the claim on direct appeal." App.82-83. In addition, "the outrageous and completely

unprofessional conduct of Dr. Kanfer, and trial counsel's failure to adequately respond by objection, request for a mistrial, or request for a continuance also constituted deficient performance." App.83-84. These serial failings, "individually and collectively, constitute[d] performance that fell below an objective standard of reasonableness for the conduct of an attorney." *Ibid.*

The court found Martinez's deficient performance prejudicial in two respects. First, based "on th[e] Court's determinations of the credibility of the expert witnesses" at the habeas hearing, including many of the State's original trial witnesses, the court determined that Martinez's "deficient performance was prejudicial to [Jiménez's] case and that there is a reasonable probability that the outcome of the proceeding would have been different" had Martinez performed adequately. App.84. Second, "had trial counsel preserved the *Ake* claim for appeal . . . , the Third Court of Appeals, in light of their thorough review of the trial record and their obvious contempt for the unprofessional conduct of Dr. Kanfer, would have sustained the point of error and reversed the judgment." App.85.

Fundamentally, it said, the "Court has no confidence in the outcome of the trial." App.84. Based on those findings and conclusions, the habeas court held, "[Jiménez's] trial was fatally infected by constitutional error." App.89. Accordingly, the habeas court recommended that the judgment be vacated and a new trial ordered. *Ibid.*

IV. THE CCA'S REVERSAL OF THE HABEAS COURT

The CCA took up Jiménez's case and, following briefing and oral argument, unanimously dismissed her application for habeas relief, overriding the lower court's findings and conclusions.[8]

It first affirmed the denial of relief on Jiménez's actual-innocence claim. Recognizing that the habeas court had found "that the State's witnesses at the habeas hearing did not 'credibly rebut' " the testimony of Jiménez's experts, it nonetheless held that "the credibility of dueling experts is for the jury to decide. Thus applicant failed to show, by clear and convincing evidence, that she was actually innocent." App.16-17.

Turning to Jiménez's *Ake* claim, the CCA acknowledged that due process requires that a

---

[8] Although the CCA "agree[d] with some of the habeas judge's factual findings," it did not adopt them in their entirety because, in its view, some were "not supported by *both* the trial and habeas records." App.2-3 (emphasis added). Instead, it stated it would "make contrary or alternative findings and conclusions when necessary." *Ibid.* (quotation marks omitted). However, it never identified any specific findings with which it disagreed or that it declined to adopt.

It is questionable whether the CCA properly followed its own rules in ignoring the habeas court's factual findings "when necessary," without any deference to that court's role in observing witnesses' demeanor and making first-hand determinations of their credibility. See *Ex parte White*, 160 S.W.3d 46, 50 (Tex. Crim. App. 2004) ("We afford almost total deference to a trial court's factual findings in habeas proceedings, especially when those findings are based upon credibility and demeanor.").

"defendant is entitled to access to at least one expert, who, even if he cannot or will not testify to the defense's theory of the case, is available to consult with counsel, to interpret records, to prepare counsel to cross-examine State's witnesses, and generally to help present [the defendant's] defense in the best light." App.19-20 (quotation marks omitted). However, the CCA was skeptical, despite the absence of any controverting evidence, of Martinez's averment that Judge Wisser denied his informal *Ake* requests, noting repeatedly that the trial record does not mention those requests or denials. See App.24-27.[9] In the end, the CCA declined to address the claim regardless of the facts, because Martinez had failed to preserve it by making a formal written request documenting the need for a pediatric otolaryngologist, a child abuse expert, or other expert assistance in Jiménez's defense. "[W]e cannot review the merits of

[9] The CCA did not specifically set aside the habeas court's relevant factfindings, purport to resolve any contested factual matters, or state that it refused to credit Martinez's supplemental affidavit, which was the only evidence of record on the matter. It noted in passing the State's late effort to provide further evidence by attaching an affidavit from Judge Wisser to a pleading, but the CCA expressly declined consideration of that affidavit (which was the subject of an unresolved motion to strike) as "not necessary to [its] resolution of applicant's claims." App.25-26; see *Ex parte Simpson*, 136 S.W.3d 660, 667 (Tex. Crim. App. 2004) (noting that it lacks "authority to consider additional evidence" not before the habeas court). Regardless, Judge Wisser stated only that he did not recall specifics of his discussions with Martinez, not that such discussions never occurred. See Aff. of Hon. Jon Wisser.

an *Ake* claim on either direct appeal or habeas review if the defendant failed to file a proper pretrial *Ake* motion that the trial judge denied." App.32. It did not apply plain-error review ("fundamental error" in Texas practice) to Jiménez's forfeited claim, instead holding that unpreserved *Ake* errors are simply unremediable.[10] *Ibid.*

Finally, the CCA addressed Jiménez's claim that her counsel was constitutionally ineffective, holding that Martinez's performance was not deficient under *Strickland*'s objective-reasonableness standard. Because Kanfer was qualified to testify, had experience testifying, and as a forensic pathologist was "ideally situated to determine the cause and manner of death," it held retaining Kanfer was not deficient. App.36-38. Nor was Martinez's failure to prevent or respond to Kanfer's "infelicitous incident," as the CCA dismissed it, both because that blow-up could not have been predicted and because the CCA found no grounds for a mistrial or continuance. App.39-44. Finally, it held Martinez's failure to

[10] Again, it is questionable whether this comported with the CCA's precedents. In Texas, constitutional and "fundamental" errors are cognizable on habeas. *Ex parte McCain*, 67 S.W.3d 204, 207 (Tex. Crim. App. 2002). So are due-process violations forfeited by a defendant's failure to make a contemporaneous objection. *E.g.*, *Ex parte Madding*, 70 S.W.3d 131, 136-137 (Tex. Crim. App. 2002). There is no reason to suppose that forfeited *Ake* errors are uniquely not amenable to plain-error review. See *McGowan* v. *State*, 990 So.2d 931, 953-954 (Ala. Crim. App. 2003) (reviewing *Ake* claim for plain error despite failure to request expert).

preserve Jiménez's *Ake* claim was not ineffective assistance, because the lack of an expert besides Kanfer did not create "a high risk of an inaccurate verdict." App.46.

Reasons For Granting The Petition

I. The Court Should Grant The Petition To Resolve The Split Over What Standard Of Review Applies To Actual-Innocence Claims.

Jiménez raised a compelling actual-innocence claim under the Fourteenth Amendment's Due Process Clause. In deciding that claim, the CCA added to a fractured body of lower-court decisions on a question this Court has never answered—what standard of review applies to freestanding actual-innocence claims. Jiménez's claim to a new trial turns on that question, and her case provides an ideal vehicle to resolve the conflict over its answer.

The progression of this Court's decisions now makes clear what past precedents long assumed—the existence of a freestanding actual-innocence claim rooted in due process and its availability to defendants collaterally attacking their convictions. In *Herrera* v. *Collins*, the Court assumed, *arguendo*, that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim," but declined to recognize such a right or define the threshold

showing necessary to invoke it. 506 U.S. 390, 417 (1993). The Court again declined to resolve those questions in *House* v. *Bell*, holding that, "whatever burden a hypothetical freestanding innocence claim would require," House did not satisfy it, and positing that the standard implied in *Herrera* "requires more convincing proof of innocence" than the gateway showing to resuscitate defaulted constitutional claims. 547 U.S. 518, 555 (2006). Most recently, the Court entertained under its original jurisdiction a habeas petition claiming actual innocence, sending it to a district court to determine "whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence." *In re Davis*, 130 S.Ct. 1, 1 (2009). That order implicitly recognized, as *Herrera* and *House* assumed, that due process bars punishment of the actually innocent.

In *Jiménez*, the CCA incorrectly denied just such a federal actual-innocence claim. App.16-17. Jiménez's application expressly asserted a federal claim pursuant to *Davis*. App.120. And the Texas precedent holding actual-innocence claims cognizable on state habeas review, *Ex parte Elizondo*, rests that conclusion on the federal constitution and specifically holds that the Due Process Clause "forbids, not just the execution, but the incarceration as well of an innocent person." 947 S.W.2d, at 204. Jiménez's federal claim is thus preserved for and amenable to this Court's review.

The CCA analyzed that claim under a standard incorrect as a matter of federal law, requiring

Jiménez to demonstrate by clear and convincing evidence that no rational juror would have found guilt beyond a reasonable doubt, then determining that she had not done so. App.17.[11] But the CCA did not disturb the habeas court's finding that Jiménez had met that same legal standard—proving that no rational juror would have found Jiménez guilty beyond a reasonable doubt in light of the trial and habeas evidence taken together—by the lesser quantum of a preponderance of the evidence. App.78-79. Under the clear-and-convincing-evidence standard, Jiménez has not sufficiently established her innocence to warrant a new trial; under the lighter preponderance-of-the-evidence standard—identical to that articulated by this Court in *Schlup* v. *Delo*, 513 U.S. 298, 327 (1995)—she has. Thus, the Court is presented with a clear, narrow question, the resolution of which determines Jiménez's right to relief: what standard of review does the Constitution require for state-court postconviction review of federal actual-innocence claims?

---

[11] Moreover, it applied that standard in a way flatly inconsistent with *House*'s directive that habeas assessments of actual-innocence claims may require "consideration of the credibility of the witnesses presented at trial" "to assess how reasonable jurors would react to the overall, newly supplemented record." 547 U.S., at 538-539 (quotation marks omitted). By instead expressly reserving assessments of "the credibility of dueling experts" to the trial jury alone, App.17, the CCA effectively eviscerated defendants' ability to seek to prove actual innocence through "exculpatory scientific evidence." *House*, 547 U.S., at 537.

On this issue, the state high courts and federal circuits are in hopeless disarray. Montana, for example, applies the *Schlup* standard if, like Jiménez, petitioners seek only a new trial. *Beach* v. *State*, 220 P.3d 667, 673-674 (Mont. 2009) (requiring a "reasonable probability" of a different outcome, defined to incorporate *Schlup*, to petition for new trial on actual-innocence grounds). Illinois similarly requires evidence "of such conclusive character as would probably change the result on retrial." *People* v. *Washington*, 665 N.E.2d 1330, 1337 (Ill. 1996) (quotation marks omitted).[12] Even the CCA's sister court accepted the *Schlup* standard as sufficiently establishing actual innocence for purposes of compensating persons wrongfully imprisoned. *In re Allen*, 366 S.W.3d 696, 710 (Tex. 2012).

Missouri and New Mexico, on the other hand, impose a clear-and-convincing-evidence burden. *State ex rel. Amrine* v. *Roper*, 102 S.W.3d 541, 548 (Mo. 2003) (requiring "a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment"); *Montoya* v. *Ulibarri*, 163 P.3d 476, 484 (N.M. 2007). California and the Ninth Circuit have developed intermediate standards that appear to fall between these two positions. *In re*

---

[12] Illinois and New Mexico apply the standards noted to claims under their respective state constitutions, having interpreted *Herrera* to bar federal actual-innocence claims. The logic expressed in defining those state claims, however, appears equally applicable to a federal due-process analysis.

Lawley, 179 P.3d 891, 897 (Cal. 2008) (evidence of innocence must, if credited, "undermine the entire prosecution case and point unerringly to innocence or reduced culpability"); *Carriger* v. *Stewart*, 132 F.3d 463, 476 (CA9 1997) (en banc) (petitioner "must affirmatively prove that he is probably innocent," in derogation of panel opinion requiring clear and convincing proof). And other courts have adopted requirements that exceed the CCA's clear-and-convincing-evidence standard. *Cornell* v. *Nix*, 119 F.3d 1329, 1335 (CA8 1997) (standard "is at least as exacting as the clear and convincing evidence standard, and possibly more so"); *Miller* v. *Comm'r*, 700 A.2d 1108, 1130 (Conn. 1997) (actual innocence by clear and convincing evidence, *plus* insufficiency of evidence in combined record to support finding of guilt).

Further development of this split is unlikely. In particular, until the Court clearly defines the due-process right, AEDPA likely bars lower federal courts from granting state prisoners habeas relief on actual-innocence claims under any standard, foreclosing further development of the issue by the federal courts. See *Davis*, 130 S.Ct., at 3 (Scalia, J., dissenting). The need for this Court's intervention to define a uniform standard of review is palpable.

Because it comes before the Court in the uncommon posture of a federal actual-innocence claim arising through state habeas review of a state conviction, this case is ideally situated to allow the Court to address that issue without distraction. In

particular, the standard of review applicable to Jiménez's claim is the pure constitutional standard, not mediated by the insulating requirements of AEDPA deference. See 28 U.S.C. §2254(d). Review of Jiménez's case would also avoid another distortion that arises in every federal habeas petition asserting actual innocence following a state conviction—the "substantial deference" federal courts properly give the states "in matters of criminal procedure." *Herrera*, 506 U.S., at 407 (quotation marks omitted). And this case, rather than a federal habeas petition, provides a particularly appropriate vehicle to delineate the rule, because state postconviction process, not federal courts, should be the primary forum for actual-innocence claims.

Absent those distorting influences, the constitutionally proper standard of review to be applied by state courts to federal actual-innocence claims is provided by *Schlup*. A claim satisfying *Schlup* necessarily represents "a fundamental miscarriage of justice," and *Schlup*'s demanding standard already "ensures that [a] petitioner's case is truly extraordinary." 513 U.S., at 325, 327 (quotation marks omitted). Moreover, *Schlup* itself strongly suggests that the CCA's clear-and-convincing-evidence standard, identical to that adopted in *Sawyer* v. *Whitley*, 505 U.S. 333, 336 (1992), is inappropriate for determination of actual-innocence claims. See 513 U.S., at 323-326 ("[A]pplication of [*Sawyer*] . . . would give insufficient weight to the correspondingly greater injustice that is implicated

by a claim of actual innocence."); *id.*, at 326, n.44 ("confining *Sawyer*'s more rigorous standard" to actual-innocence claims involving death-eligibility).

Federalism influences absent here might justify a higher standard on federal habeas than during a state's habeas review of a conviction in its own courts. See *Herrera*, 506 U.S., at 417 (discussing the standard required to "warrant *federal* habeas relief" in light of federalism concerns (emphasis added)). Even without the insulation of AEDPA deference, federal respect for state criminal processes could justify imposition of a higher standard of a claim that could, and may, have been heard by state courts first. See *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982) ("Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."). Accordingly, in federal habeas review, deference to state courts may counsel, as *House* recognized, that a burden of proof greater than *Schlup* may be proper for *federal* relief from a state conviction. 547 U.S., at 555.

But those concerns have no place in a *state* habeas review of a state-court conviction. See *Amrine*, 102 S.W.3d, at 548 (state courts not "required to impose as high a standard as would a federal court" because they are "not affected by the federalism concerns that limit the federal courts' jurisdiction to consider non-constitutional claims of actual innocence"); *Montoya*, 163 P.3d, at 483. Because federal-state comity raises no additional hurdle under

such circumstances, the core constitutional standard, unadorned by any distorting effect of federal-state deference, is correctly expressed by *Schlup*. On that standard, as the habeas court already determined, Jiménez is entitled to a new trial. App.78-79.

Even if an actual-innocence claim challenging a state conviction, raised for the first time in state court, demands an intermediate quantum of proof between *Schlup*'s preponderance-of-the-evidence and Texas's clear-and-convincing-evidence standards, Jiménez's habeas evidence suffices. Unlike *House*, the habeas court's findings and conclusions make clear that Jiménez's satisfaction of the *Schlup* standard is not a close question. See *ibid.*[13] It thus stands to reason that she has already satisfied some burden in excess of *Schlup*. At the least, Jiménez's claim is sufficiently weighty to deserve further review under an intermediate standard.

There is no cause to defer consideration of this issue. The question is cleanly presented for the Court's review, and Jiménez's actual-innocence claim is compelling. Its posture strips away the

[13] The expert opinions presented at Jiménez's habeas hearing unquestionably constitute "new reliable evidence." *Schlup*, 513 U.S., at 324. To the extent the Constitution requires an actual-innocence claim to rely on newly discovered evidence—a component of the very standard-of-review question Jiménez asks this Court to resolve—those opinions suffice, as the denial of Jiménez's *Ake* request and the ineffectiveness of her counsel meant those opinions did not exist and could not have been presented to the trial court.

complications of federal-state deference that clouded the issue in *Herrera*, *House* and other federal habeas cases. The split among lower courts is well-developed and highly fragmented. The Court should grant the petition to formalize the contours of the long-assumed and implicitly recognized actual-innocence claim and define for lower courts the boundaries and burdens such a claim imposes.

II. THE REJECTION OF JIMÉNEZ'S INEFFECTIVE-ASSISTANCE CLAIM CONFLICTS WITH THIS COURT'S PRECEDENTS RECOGNIZING THE VITAL IMPORTANCE OF EXPERT ASSISTANCE IN ENSURING A FAIR TRIAL.

The Sixth Amendment's guarantee of effective assistance of counsel "is critical to the ability of the adversarial system to produce just results." *Strickland* v. *Washington*, 466 U.S. 668, 685-686 (1984). To constitute ineffective assistance, counsel's conduct must have been objectively unreasonable and prejudicial to the defense. *Id.*, at 687. "The benchmark" for such claims is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*, at 686.

Jiménez's trial fails that reliability criterion. Martinez's errors twice robbed her of "the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing," *Crane* v. *Kentucky*, 476 U.S. 683, 690-691 (1986) (quotation

marks omitted)—first when he failed to put on the record Jiménez's request for additional expert assistance and the trial judge's refusal to do so regardless of need, thus failing both to secure adequate assistance and to preserve the judge's error for appeal; and second when he failed to anticipate, prevent, or repair the damage that her sole expert's obvious bias wreaked on Jiménez's defense. Through no fault of her own, Jiménez was left to defend against the State's multidisciplinary team of experts with only the assistance of one doctor with no pediatric training or relevant clinical experience, whose evident bias erupted into profane personal epithets on the record and utterly destroyed whatever credibility he might have had. That "breakdown in the adversarial process" stripped Jiménez's trial of any presumption that it produced a just result. *Strickland*, 466 U.S., at 696.

Failure to make technically sufficient Ake *request and preserve claims for appeal*

Under *Ake* v. *Oklahoma*, courts uniformly recognize that, when issues at the heart of the government's case are beyond the ken of a lay jury, the assistance of an expert to present credible and relevant evidence is among the "basic tools of an adequate defense," the absence of which may "devastate[ ]" a defense and lead to a "fundamentally unfair" trial with an "extremely high" "risk of an inaccurate resolution." 470 U.S. 68, 77, 82-83 (1985). The CCA held that Martinez was not ineffective for failing to make a formal, written request for

additional expert assistance and thereby preserve Jiménez's *Ake* claim. That ruling was error sufficiently egregious to warrant summary reversal.

There was no possible strategic reason for Martinez, his informal request for additional resources denied, not to memorialize that request and secure a ruling on the record. Even if Martinez believed such a request futile, as Judge Wisser stated he would not authorize additional funds "regardless of [Martinez's] need," App.127, that did not relieve Martinez of the obligation to seek a fundamentally fair trial for his client—one, that is, in which Jiménez had the expert assistance she needed to put the State's case through the crucible of meaningful adversarial testing. Nor was it necessarily clear a formal request would have been futile; Judge Wisser had, after all, granted every previous, formal *Ake* request. App.25.[14]

Jiménez's *Ake* claim was strong. When Martinez sought more funds, he knew—and explained to Judge Wisser—that Kanfer was not "adequate to counter the State's case," and an expert with clinical

[14] If, as the CCA baselessly speculated, see App.32, Martinez never made the informal request he swore to, he was even more clearly ineffective for failing to request additional experts at all. Relatedly, Martinez's failure to secure expert assistance covering the waterfront of topics on which the State presented expert testimony, as required for Jiménez's effective defense, likewise fell below an objective standard of reasonable performance, as the habeas court concluded. App.84.

experience treating pediatric choking victims, like McGeorge, was necessary to rebut the testimony of B.G.'s treating physicians. App.126. And he knew Kanfer, unlike Norton, lacked the qualifications to rebut testimony from the State's expert on child abuse. App.127-128. Given Kanfer's inadequacies, and the vital importance of credibly and effectively explaining how B.G. could have accidentally choked, there is no question that *Ake* required appointment of additional experts like McGeorge or Norton upon Martinez's formal request. App.80-82.

The CCA's contrary analysis fundamentally misread *Ake*. In essence, it held, appointment of just one expert, no matter how scientifically or technically complex the case, discharges *Ake*'s obligations and defeats any argument that further assistance should have been "paid for by the taxpayers." App.45-46 (holding *Ake* does not require "an absolute (or even rough) equivalency of experts"). As *Ake* makes plain, however, that view improperly privileges a secondary interest in the due-process equation—keeping costs down—at significant risk to the principal goal of ensuring a reliable, accurate, and just result. See 470 U.S., at 83 ("[W]here the potential accuracy of the jury's determination is so dramatically enhanced, and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield.").

The prejudice accruing to Jiménez from Martinez's deficient performance is undeniable. Had Martinez not forfeited her *Ake* claims, Jiménez

almost certainly would have been granted a new trial. Indeed, in *Rey* v. *State*, the CCA held that an *Ake* violation "defies subjugation to a harm analysis and calls for automatic reversal." 897 S.W.2d 333, 345 (1995). And as the habeas court concluded, were the issue raised on direct appeal, "the Third Court of Appeals, in light of their thorough review of the trial record and their obvious contempt for the unprofessional conduct of Dr. Kanfer, would have sustained the point of error and reversed." App.85.

Alternatively, if Martinez, by making a written request, had changed Judge Wisser's mind, the availability of an additional testifying expert would have dramatically lessened the impact of Kanfer's outrageous conduct, raising a substantial possibility that the jury would have found, as the habeas court later did, that Jiménez's scientific evidence credibly rebutted the State's experts. See App.78-79. Even if *Ake* did not require appointment of additional experts on the record Martinez could have presented to Judge Wisser but did not, that failure was nonetheless prejudicial under *Strickland*. Judge Wisser himself averred that he followed a "rough justice" approach of granting an expert to rebut each of the State's experts. See Aff. of Hon. Jon Wisser. Thus, regardless of whatever floor *Ake* imposes, Martinez forfeited a substantial chance that Judge Wisser would have authorized payment for one or more additional experts. In light of Kanfer's implosion, depriving Jiménez of any credible expert in her defense, getting just *one* additional expert, particularly one like

McGeorge, Zur, or McCloskey, would have made a significant difference—certainly enough so to undermine confidence in this trial's result. See App.83-84.

Failure to ensure competent and effective expert assistance on cause and mechanism of choking

Martinez likewise fell below *Strickland*'s standard in his failure to ensure that Jiménez's defense, which relied entirely on expert testimony to rebut the State's experts and defeat the *res ipsa loquitur* inference at the heart of the State's case, included competent and effective expert assistance on the cause of B.G.'s choking. *Strickland* imposes "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process," 466 U.S., at 688, but because of Martinez's deficient performance, Jiménez's trial fell far short. Individually or cumulatively, these errors constitute objectively unreasonable, and hence constitutionally deficient, performance. App.84.

First, Martinez failed to exercise adequate care in selecting Kanfer to play this critical role in Jiménez's defense. Crucially, Kanfer had zero clinical experience and no training and only minimal experience in pediatrics. App.73-74. He was not even a member of the American Academy of Forensic Sciences. 7.RR.3.

Moreover, Kanfer's resume betrayed his fundamental weakness as a witness—his bias for the

defense. His entire body of freelance pathological work was strictly defense-side. 7.RR.113. But the largest red flag was Kanfer's article titled "How to Turn a Homicide into an Accident." 7.RR.109. In light of Jiménez's defensive theory, that alone should have disqualified Kanfer from Martinez's consideration.

Martinez's lack of care in selecting Kanfer cannot be excused by his choices being limited by the available resources. That is just another way of saying that Martinez's obligation was to prepare a formal *Ake* request for additional funds—an obligation he was constitutionally ineffective for failing to discharge.

Martinez was likewise deficient in not even attempting to control the damage from Kanfer's meltdown. In particular, Martinez failed to respond to the State's exploitation of Kanfer's evident bias by seeking a mistrial or continuance on the basis that Kanfer's own actions had effectively deprived Jiménez of the expert assistance to which she was entitled under *Ake*. In light of that deprivation, the CCA's dismissive response—"what was he supposed to do?" App.40—reveals a striking lack of concern for the fundamental question whether Jiménez's trial was "unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland*, 466 U.S., at 696. Moreover, the CCA's refusal to acknowledge this deficiency in Martinez's performance puts it at odds with courts that have decided similar issues arising under *Ake* and *Strickland*. See *Skaggs* v. *Parker*, 235

F.3d 261, 269-273 (CA6 2000) (counsel ineffective for failing to present competent expert on crucial evidence); *Turpin* v. *Bennett*, 525 S.E.2d 354, 356 (Ga. 2000) (counsel ineffective for failing to request continuance to seek alternative to incompetent expert); see *Clisby* v. *Jones*, 960 F.2d 925, 934, n.12 (CA11 1992) (en banc) (failure to alert court to manifest inadequacy of expert's assistance would violate *Strickland*).

Absent Martinez's failures, there is, as the habeas court concluded, "a reasonable probability that the outcome of the proceeding would have been different." App.84. Left with a defense expert who was worse than no witness at all, *ibid.*, and prosecution experts who testified uniformly that an accidental choking was physically impossible, the jury's choice is unsurprising. Yet other experts like Zur or McCloskey could credibly have "demonstrate[d] the likelihood that B.G. was injured through an accidental choking" and that the State's contrary evidence "was unreliable." App.79. Because those experts could have "effectively rebutted the State's theory of guilt," as they did on habeas, App.84, the probability of a different result at trial "undermine[s] confidence in the outcome." *Strickland*, 466 U.S., at 694; see App.84 ("Certainly, this Court has no confidence in the outcome of the trial.").

CONCLUSION

The Court should grant the petition and issue a writ of certiorari to review the final judgment of the Court of Criminal Appeals.

Respectfully submitted,

RYAN P. BATES
Counsel of Record
YETTER COLEMAN LLP
221 West Sixth Street, Suite 750
Austin, Texas 78701
(512) 533-0150
rbates@yettercoleman.com

BRYCE BENJET
HULL HENRICKS LLP
221 West Sixth Street, Suite 960
Austin, Texas 78701
(512) 494-8097

Counsel for Petitioner
Rosa Jiménez

[COURT SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-76,669

EX PARTE ROSA ESTELA OLVERA JIMENEZ, Applicant.

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. D-1-DC-04-904165 IN THE 299TH DISTRICT COURT TRAVIS COUNTY

COCHRAN, J., delivered the opinion of the Court in which KELLER, P.J., and PRICE, WOMACK, JOHNSON, KEASLER, HERVEY, and ALCALA, JJ., joined. MEYERS, J., did not participate.

This is a tragic case involving the death of a toddler who choked on a wad of paper towels while applicant was babysitting him. The question at trial was whether the child stuffed the towels down his own throat and died accidentally or whether applicant forced the towels into his mouth and caused his death.

A jury convicted applicant of felony murder and injury to a child and sentenced her to 75 years in prison for the murder and 99 years in prison for the injury to a child. The court of appeals affirmed applicant's convictions,[1] and we denied applicant's petition for discretionary review. Applicant then filed an application for a writ of habeas corpus and, after conducting extensive hearings, the habeas judge recommended that we grant applicant a new trial.[2] The habeas judge concluded that (1) applicant's due process rights under *Ake v. Oklahoma*[3] were violated because she was denied adequate funding to hire experts, and (2) trial counsel was ineffective because he failed to (a) retain qualified experts, (b) make a written request for such experts, and (c) object and request a mistrial and a continuance in response to his own expert's testimony. Although we agree with some of the habeas judge's factual findings, we do not adopt them all because some of them are not supported by both the trial and habeas records. As the ultimate fact finder, we will "exercise our authority to make contrary or alternative findings and conclusions" when necessary.[4] After reviewing all of the evidence, we find that applicant has failed to show

---

[1] *Jimenez v. State,* 240 S.W.3d 384 (Tex. App.—Austin 2007, pet. ref'd).

[2] The habeas judge was not the judge at the original trial.

[3] 470 U.S. 68 (1985).

[4] *Ex parte Reed,* 271 S.W.3d 698, 727-28 (Tex. Crim. App. 2008).

that she is entitled to a new trial. Therefore, we deny relief.

I.

A. Background.

According to applicant, she was babysitting 21-month-old B.G. when she saw him walking toward her and noticed that he was "limp and purple." After a neighbor called 911, paramedics arrived and extracted a "large mass" of "blood soaked" paper towels stuffed into B.G.'s throat. B.G. died three months later from brain damage due to the prolonged lack of oxygen during the choking. The court of appeals's opinion described the trial testimony in detail and summarized the theories of both the defense and the State:

> Jimenez's theory was that the entire incident was an accident. B.G. liked to play with paper towels and put things in his mouth. On the day in question, he put the paper towels in his mouth and accidentally swallowed them. Jimenez discovered B.G. choking, tried to help him in the bathroom (thus explaining the blood found there), and when she was unable to do so, immediately carried him to her neighbor's apartment. Jimenez found support in the fact that witnesses who had tried to look inside B.G.'s mouth had been unable to do so because B.G. kept biting their fingers. That would have been impossible, according to Jimenez, if B.G.'s airway

had been occluded for a long period of time. The defense also portrayed Jimenez as a young pregnant woman who would not have been physically able to commit the crime of which she was accused. Additionally, the defense claimed that Jimenez's various explanations of the incident were largely consistent, and that any minor inconsistencies were the result of the trauma that she had just experienced and the fact that she did not have a proper understanding of the English language. Her possibly incriminating statements to Officer De Los Santos were also attributed to trauma and De Los Santos's aggressive questioning. Jimenez also argued that the State's medical experts were biased in the State's favor because of the emotional nature of the case. Finally, Jimenez argued that her expert, Dr. Kanfer, provided testimony that the blood on the paper towels was primarily the result of pulmonary edema and that if the paper towels had been forced down B.G.'s throat, there should have been evidence of injury to the child's face or mouth and evidence that the paper towels had been shredded by the child's teeth.

The State's theory was that Jimenez had forced the wad of paper towels down B.G.'s throat. The blood found on the paper towels and in Jimenez's bathroom, in the State's view, was evidence of force, not an accidental choking. The State's medical experts had testified that it was physically impossible for a 21-month-old child to place five paper towels down his throat, and that the child's gag

> reflex would prevent the child from accidentally swallowing such a large object. Furthermore, the State argued that Jimenez provided inconsistent explanations of how she found the child and that her statements to Officer De Los Santos were incriminating. Additionally, the State referred to photographic evidence of what appeared to be bite marks on Jimenez's hand and Jimenez's admission to Officer De Los Santos that B.G. bit her. Based on this evidence, the State argued, "Folks, we don't need a forensic odontologist to tell you what this is on her hand."[5]

The resolution of this case depended primarily on expert testimony[6] concerning whether B.G. could have stuffed the five wadded-up, double-ply paper towels into his mouth by himself and accidentally choked on them or whether that was "physically impossible," in which case applicant must have forced the wad down his throat.

---

[5] *Jimenez,* 240 S.W.3d at 397-98.

[6] The State also relied on applicant's "private" talk with Officer De Los Santos in which she asked if she could speak with him "as a friend" outside the police station. Unbeknownst to applicant, the officer recorded this conversation in which applicant asked, "If I were to tell you that I did it, what would happen?" She also asked the officer about how long she could go to prison, to which Officer De Los Santos replied that he did not know.

B. The Trial Testimony Concerning "Accident" or "Homicide."

At trial, Dr. John Boulet testified that he was a board-certified pediatric emergency physician who first treated B.G. at the hospital. He stated that he saw the wad of paper towels that had been removed from B.G.'s throat, and that it was nearly the size of his own fist.[7] In his opinion, an object of that size could not go down a child's airway accidentally; "it would have to be put down there."

Dr. Patricia Oehring testified that she is a pediatric critical-care physician. She was B.G.'s primary doctor once he was moved from the emergency room to the intensive care unit. When shown a photograph of the wad of paper towels, she said that it was not possible for B.G. to put this wad down his throat all by himself. Although toddlers "definitely" put things that look like candy or food into their mouths, "[i]f it doesn't taste good or have an interesting texture, they're not going to leave it in their mouths. They're not going to shove it to the back of their mouth." She stated that slippery items-like buttons or coins-might

[7] The paramedic who had removed the "wad" after several unsuccessful attempts, stated that, in a photograph taken about an hour and a half later, the wad appeared to have dried out a little and expanded. At the time he pulled it out of B.G.'s throat, it was the size of a large egg, about 3 inches long and close to 3 inches wide. The paramedics immediately "bagged" the wad and gave it to police because they suspected that it was evidence of a potential crime.

slide down their throats, but that "children don't suck on paper towels."

She concluded that B.G.'s gag reflex would have prevented him from forcing a large object down his throat: "[H]e'll gag as soon as you hit the soft palate" and the gag reflex operates all the way down the airway. In her opinion, an adult forced the paper towels into B.G.'s throat: "He'd have to be held down. . . . [H]e would have been coughing and gagging and bleeding and fighting and struggling up to the point where his brain didn't get enough oxygen to where he became limp."[8]

Finally, Dr. Oehring said that a child of B.G.'s age would not have the strength or dexterity to "wad" the paper towels together into a small ball. She thought that the wad must have been soaked in "water or something" before being put into his mouth.[9]

---

[8] The defense argued that this scenario could not be accurate because B.G. had no other injuries, bruises, or scrapes on his body, and applicant had only a small bite mark on her hand where B.G. had bitten her as she tried to pull the wad out of his mouth when she first saw his distressed breathing.

[9] A roll of paper towels was found on the sofa in applicant's living room. Applicant told the police that both B.G. and her daughter had runny noses that day. She used a paper towel to wipe B.G.'s nose, then left the roll on the sofa, and went into the kitchen to cook. She noticed that both B.G. and her daughter were playing with the paper towels, tearing sheets from the roll and throwing them. She told the children to stop playing with the towels, but they continued to do so. She saw B.G. go into the bedroom, leaving the roll of towels on the sofa. Applicant called

(Continued on following page)

Dr. Elizabeth Peacock, a forensic pathologist and deputy medical examiner,[10] testified that B.G.'s death was a homicide caused by damage to the brain from a lack of oxygen. This finding was "not a close call" because "the physics of it [being an accidental death] are impossible." She explained that the back of the throat of a 21-month-old child is small, less than an inch in diameter. "The only things that can really get down there and obstruct, in my opinion, and in the . . . forensic texts are something that's round or small to that degree."

The defense expert, Dr. Ira Kanfer, is a forensic pathologist and medical examiner. In his opinion, B.G.'s choking was accidental. He believed that B.G. would have been able to wad up the paper towels himself, stuff them into his mouth, and accidentally

---

to B.G. to come back where she could see him because she did not want him playing in the bathroom and putting his hands in the toilet bowl. When B.G. came toward her, he was "walking very slowly" with his hand on his throat. He was very red, but when she asked him what was wrong, he did not answer. She saw him choking on something, so she took him into the bathroom, squeezed his cheeks together, tried to put her fingers in his mouth to see what was wrong, and hit him on the back in an effort to dislodge the obstruction. When she could not get the object out of his mouth, she picked him up and ran over to her neighbor's house for help. She said that only a minute or two had elapsed from the time she first saw B.G. choking until she took him to the neighbor's apartment.

[10] Dr. Peacock did not perform B.G.'s autopsy; she reviewed the autopsy report written by Dr. Vladimir Parungao. The defense called Dr. Parungao in its case to impeach his credibility and attack his autopsy finding that B.G.'s death was a "homicide."

swallow them. He explained that he had conducted an experiment to test this theory by wadding up five paper towels, soaking them in water, and compressing them into a ball small enough to fit into a toddler's mouth and throat.

Dr. Kanfer explained that, if someone had forced five paper towels down B.G.'s throat, there should have been some evidence of trauma "around the cheeks, the lips, the teeth, [or] a cut gum" because "[t]he child's going to fight like hell. There's going to be bruises. There's going to be tears."[11] Furthermore, B.G.'s teeth would have ripped the paper towels to shreds as someone tried to force them past his teeth. Dr. Kanfer said that the absence of any evidence of bruising and shredded towels was "crucial" to the investigation and expert conclusions.

Dr. Kanfer also thought that the blood found on the towels was consistent with pulmonary edema, a reaction that can occur when a person is choking, where blood flows into the air sacs in the lungs. He stated that the results of B.G.'s chest x-ray taken

[11] Dr. Kanfer also noted that, because applicant was seven months pregnant, she would likely have a difficult time holding a toddler tight enough to force the wad down his throat. Dr. Oehring, on the other hand, had testified that doctors routinely restrain small children in the ICU without bruising their patients and that she had seen many children who were murdered without any bruises being left on the skin.

several days after the incident were consistent with pulmonary edema.[12]

Dr. Kanfer also disagreed with the State's theory that B.G. had stopped breathing by the time of the 911 call. In his opinion, B.G. was experiencing "agonal" breathing, a result of severe oxygen deprivation. He said that when a person's airway is completely blocked, the heart cannot continue to beat for more than four to five minutes and that, after the heart stops, all "purposeful movement" lasts only a minute or two longer. Thus, B.G. would not have been able to bite the neighbor's or the paramedic's fingers when they tried to open his mouth if the choking occurred earlier than the time applicant said.[13]

Finally, Dr. Kanfer suggested that the various attempts to resuscitate B.G. by applicant, the neighbor, and the paramedic may have driven the wad

---

[12] Dr. Oehring had previously testified that B.G. did not have pulmonary edema, and Dr. Boulet had said that he did not think that the blood on the towel wad was consistent with pulmonary edema. The State's theory was that the blood on the towels resulted from applicant's act of forcing the wad down B.G.'s throat, while the defense theory was that the blood resulted from pulmonary edema regardless of how the towels came to be lodged in B.G.'s throat.

[13] Applicant told police that she scooped up B.G. and ran to the neighbor's within a minute or two of seeing him choking. The State's theory was that she did not take B.G. over to the neighbors for "probably 30 to 40 minutes" after he had been deprived of oxygen.

farther down his throat and accidentally made the obstruction worse.

The defense also called Dr. Randall Alexander, a board-certified pediatrician, as a hostile witness. Dr. Alexander agreed with Dr. Kanfer that, if a child's airway is completely occluded, his heart would not continue to beat for an hour, and that pulmonary edema might (or might not) occur when one's airway is blocked. However, on cross-examination, Dr. Alexander largely agreed with the testimony of the treating doctors.[14]

---

[14] After Dr. Alexander's testimony, the defense recalled Dr. Kanfer to further explain his views. However, this proved to be counterproductive. As the court of appeals stated, "[a]t some point during a break in Dr. Kanfer's testimony and outside the presence of the jury, Dr. Kanfer apparently made a rather contemptuous comment about the prosecutors, which included the use of a profane verb." *Jimenez,* 240 S.W.3d at 403. During her second cross-examination of Dr. Kanfer, the prosecutor brought this incident to the jury's attention three different times:

Q: And you're just here as a completely unbiased expert to educate the jury.

A: Exactly.

Q: Is that why on the break you made the statement that they, referring to Mr. Cobb and myself, could go [expletive] ourselves?

A: Right. That's an exactly correct quote.

Later, the State asked,

Q: Do you remember that you made the statement that Mr. Cobb and I could [expletive] ourselves before I ever asked you about money? Do you remember that?

(Continued on following page)

The jury was presented with two possible, but conflicting, theories concerning B.G.'s death. There was medical evidence to support either possibility: intentional homicide or self-inflicted accidental death. The jury found applicant guilty, rejecting the defense theory of an accidental death. The court of appeals reviewed all of the evidence on appeal and held that, viewing that evidence in the light most favorable to the verdict, "a rational jury could have found that

---

A: I don't know when I made the statement that—that you could both [expletive] yourselves, but I definitely made the statement.

Q: Okay. Yeah, you definitely did.

A: Yeah.

Q: Is that something that you routinely do when you go out of state to testify as an expert witness?

Defense counsel then objected to the State "getting into the personal thing any more." The prosecutor responded that the question was relevant to the issue of Dr. Kanfer's bias, and the trial judge overruled the objection. At the end of her cross-examination, after the prosecutor asked about Dr. Kanfer's disagreement with Dr. Alexander's opinions, the prosecutor said,

Q: But you're not angry at Dr. Alexander.

A: No, he's a nice guy.

Q: Okay. Well, then you don't want to tell him to go [expletive] himself.

A: No.

The court of appeals concluded that the trial judge did not err in permitting this cross-examination because "Dr. Kanfer's admitted use of profanity when referring to the prosecutors revealed potential animosity toward the prosecutors." 240 S.W.3d at 403.

[applicant] forced the wad of paper towels down B.G.'s throat."[15]

C. The Testimony at the Habeas Hearing Concerning "Accident" or "Homicide."

After the court of appeals affirmed her conviction, applicant filed an application for a writ of habeas corpus, claiming, among other things, "actual innocence" based on additional expert evidence that B.G. could have, and most likely did, put the wad of paper towels into his mouth and then accidentally choke on them. During the habeas proceedings, applicant presented the live testimony of two pediatric specialists from the Children's Hospital of Philadelphia, Dr. Karen Zur, a pediatric otolaryngologist, and Dr. John McCloskey, a pediatric anesthesiologist and critical-care specialist. She also submitted an affidavit from Dr. Janice Ophoven, a pediatric forensic pathologist. These were all highly qualified experts who based their opinions upon a scientific methodology, and their opinions were supported by scientific data as well as familiarity with the facts of this case.

They, like Dr. Kanfer, questioned the reliability of the conclusions offered by the two doctors who had cared for B.G., Dr. Alexander (whom applicant had called as a hostile witness) and the two medical

---

[15] *Jimenez,* 240 S.W.3d at 401-02.

examiners who had testified at trial. These new experts, like Dr. Kanfer, testified that B.G.'s injury was likely due to an accidental choking. Their credentials were even more impressive than those of Dr. Kanfer and their examples even more vivid and detailed than his. They, like Dr. Kanfer, presented an eminently plausible theory of how B.G. could have accidentally choked on a wet wad of paper towels.

The habeas judge made detailed factual findings concerning these three experts, their credentials, their opinions, and the factual bases for their opinions.[16] He found the three new defense experts credible and reliable, and he determined that the State's experts did not rebut their conclusions. But he also concluded that their opinions were not "newly discovered" or sufficient to show that applicant was "actually innocent."[17] Furthermore, neither the habeas judge

---

[16] The habeas judge's extensive factual findings concerning Drs. Zur, McCloskey, and Ophoven and their opinions take up six single-spaced pages. Those findings are based upon the habeas record, and we agree with their overall accuracy.

[17] The habeas judge concluded, in pertinent part,

3. The opinions of medical experts who have reviewed materials available at the time of trial are not newly discovered evidence of the type that is sufficient to support an actual innocence claim. *Ex parte Briggs,* 187 S.W.3d 458, 465 (Tex. Crim. App. 2005).

4. The expert opinions produced by Applicant do not constitute newly discovered evidence under actual innocence jurisprudence because they rely on the same evidence as that available at the time of trial. Applicant's experts have merely

(Continued on following page)

nor applicant pointed to any significantly "new"[18] or materially "different" expert opinions than those expressed by Dr. Kanfer at trial, although the new experts may have been even more highly qualified than Dr. Kanfer to express opinions on some specific

---

presented a differing interpretation of the physical and medical evidence that existed at the time of trial.

5. Even if the opinions of Applicant's three experts had been sufficient to qualify as newly discovered evidence, the applicant has not met her burden. Having examined the habeas evidence against the trial evidence of guilt, this court finds Applicant has not shown by clear and convincing evidence that no reasonable juror would have convicted her in light of the habeas evidence. The evidence presented by the applicant's three experts is not medically indisputable, but rather offers a differing view of the medical evidence from that presented by the State.

[18] These experts provided additional anecdotal evidence about other children who had accidentally swallowed or choked on foreign objects, including a large wad of bread and a "super ball." Dr. McCloskey "also testified that he did not find the inconsistencies in applicant's statements regarding the injury to be evidence of child abuse. He testified that he has received training in taking such histories and that a police officer would not have the level of training needed to obtain a reliable medical history." Dr. Ophoven's affidavit stated that, based on her experience in evaluating child abuse cases, she found "no relevant indicators of child abuse" because B.G. had no "suspicious injuries" on his throat, mouth, or face, which he would have had if someone had stuffed a wad of paper down his throat. She, like Dr. McCloskey, did not find that the variations in applicant's statements indicated child abuse, but rather were "entirely understandable in light of the crisis in which it was given, and the absence of any other indication of child abuse."

aspects of this case.[19] Some of the original witnesses from the trial also testified during the habeas hearing, including the EMT who removed the wad of towels from B.G.'s throat, Dr. Oehring (now known as Dr. Aldridge), the treating pediatric critical-care doctor, and Dr. Peacock, the forensic pathologist. Dr. Alexander—the consulting pediatrician—submitted an affidavit. They all reaffirmed their trial testimony. The State also called Dr. James Eskew, an otolaryngologist like Dr. Zur, who stated that he did not believe that B.G. accidentally choked on the wad of paper towels. He, like Drs. Boulet, Oehring, Peacock, Parangao, and Alexander, did not believe it likely that a child could wad up paper towels of this size and put that wad down his throat.

Although the habeas judge concluded that the State's witnesses at the habeas hearing, did not "credibly rebut[ ] the testimony of applicant's experts that B.G. likely choked accidentally on the wad of

---

[19] For example, the habeas judge found that "Dr. Zur's credentials demonstrated that she is one of the most qualified persons in the nation to give an opinion on this case. She was extremely well versed in the anatomy and mechanism[s] of choking, and based her opinions on this superior knowledge, training, and a complete review of all of the relevant medical information in the case." He found that "Dr. McCloskey's credentials as [a] researcher and clinician who is board certified in pediatrics, anesthesiology, and pediatric critical care as well as his first-hand experience in treating both accidental choking cases and similar instances of child abuse give him a unique perspective on the evidence that lends additional credibility to his opinions regarding this injury."

paper towels," he acknowledged, in his legal conclusions, that the credibility of dueling experts is for the jury to decide. Thus applicant failed to show, by clear and convincing evidence, that she was actually innocent of murder or injury to a child. As the United States Supreme Court recently noted, in the context of upholding the sufficiency of the evidence in a "shaken baby" homicide case, "Because rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold."[20] We, like the court of appeals and the habeas judge, are legally constrained to uphold the jury's verdict in this case. We therefore adopt the habeas judge's recommendation and deny relief on applicant's "actual innocence" claim.

We requested additional briefing on two of applicant's claims, one based on *Ake v. Oklahoma,* the other on ineffective assistance of counsel. We turn now to those claims.

II.

Applicant contends that she was denied due process and the effective assistance of counsel because the trial judge denied her the necessary funds for expert assistance as guaranteed under *Ake v.*

---

[20] *Cavazos v. Smith,* 132 S.Ct. 2, 4 (2011).

Oklahoma.[21] In this case, applicant requested, and was given, funds for the appointment of two experts, but she asserts that she should have had additional expert assistance, including an expert on choking such as a pediatric otolaryngologist, to "level the playing field" with the State's experts.

A. The Constitutional Right of an Indigent Defendant to Expert Assistance at Trial.

In *Ake,* the United States Supreme Court held that due process may require that an indigent defendant be granted access to expert assistance if "the expert can provide assistance which is 'likely to be a significant factor' at trial."[22] Three interests must be balanced in determining whether the State must provide such access:

> The first is the private interest that will be affected by the action of the State.
>
> The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.[23]

---

[21] 470 U.S. 68 (1985).

[22] *Id.* at 74; *see also Taylor v. State,* 939 S.W.2d 148, 152 (Tex. Crim. App. 1996).

[23] 470 U.S. at 77.

This analysis is conducted with a view towards whether failing to provide the defendant with the expert help he claims is necessary creates "a high risk of an inaccurate verdict."[24]

However, the State need not "purchase for an indigent defendant all the assistance that his wealthier counterparts might buy."[25] Nor is a defendant entitled to choose an expert of his own personal liking or one who will agree with his defense theory.[26] A defendant does not have a due-process right to "'shop' for experts—at government expense—until he unearths a person who supports his theory of the case."[27] But if the defendant makes a sufficient threshold showing of the need for expert assistance on a particular issue, the defendant is entitled to access to at least one expert,[28] who, even if he cannot or will not testify to the defense's theory of the case, is "available to consult with counsel, to interpret records, to prepare counsel to cross-examine State's witnesses, and generally to help present appellant's defense in the

---

[24] *Busby v. State,* 990 S.W.2d 263, 271 (Tex. Crim. App. 1999) (per curiam).

[25] *Ake,* 470 U.S. at 77.

[26] *Griffith v. State,* 983 S.W.2d 282, 286 (Tex. Crim. App. 1998) (noting that "the purpose of the appointment is to level the playing field; to give a defendant access to a competent expert who can assist in the evaluation, preparation, and presentation of the defense.").

[27] *Taylor,* 939 S.W.2d at 152.

[28] *Id.*

best light."[29] The question in each case is "how important the scientific issue is in the case, and how much help a defense expert could have given. . . . The nature of an expert's field and the importance and complexity of the issue will bear directly upon whether the appointment of an expert will be helpful."[30]

If the trial judge appoints an expert, and the defendant requests another or a different expert, the trial judge may deny further expert assistance unless the defendant proves that the original appointed expert could not adequately assist the defendant.[31] The Constitution does not entitle "a defendant to the best (or most expensive) expert, or to more than one expert if the first does not reach a conclusion favorable to the defense. Just as a defendant who relies on counsel at public expense must accept a competent

---

[29] *DeFreece v. State,* 848 S.W.2d 150, 161 n.7 (Tex. Crim. App. 1993).

[30] *Rey v. State,* 897 S.W.2d 333, 338 (Tex. Crim. App. 1995) (citation and internal quotation marks omitted).

[31] *Busby,* 990 S.W.2d at 271 (trial judge did not commit *Ake* error by failing to appoint drug-abuse expert when psychiatrist had been appointed and trial court "could have reasonably found that [the psychiatrist] could adequately assist [the defendant] as a drug abuse expert with regard to those issues [raised by the defendant]"); *Richards v. State,* 932 S.W.2d 213, 215 (Tex. App.—El Paso 1996, pet. ref'd) (*Ake* was not violated when trial judge appointed a Texas psychologist rather than a California expert on post-traumatic stress disorder who "may have had more impressive credentials" because the defendant failed to prove that the expert appointed was incompetent to assist defendant on his PTSD-based defense).

lawyer, rather than Clarence Darrow, so a defendant who relies on public funds for expert assistance must be satisfied with a competent expert."[32]

The Supreme Court has stated that an indigent defendant is not entitled to the appointment of experts when he offers "little more than undeveloped assertions that the requested assistance would be beneficial."[33] He must provide concrete reasons for requiring the appointment of any particular expert[34] As Professor LaFave notes,

> Courts uniformly stress that the showing of need must set forth in detail what assistance is being requested and why it is needed. The defense must identify the expert, explain what the expert will do, and explain why

---

[32] *United States v. Mikos,* 539 F.3d 706, 712 (7th Cir. 2008) ("Abstract propositions about entitlement to expert assistance go nowhere when the defendant *had* an expert," especially when defendant failed to tell trial judge what a new expert could have done that original expert was unable to do); *see also Moore v. State,* 889 A.2d 325, 339 (Md. 2005) ("It is clear that *Ake* does not mandate handing over the State's checkbook to indigent defendants and their attorneys. The Supreme Court reiterated that it has never 'held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy,' but had rather 'focused on identifying the basic tools of an adequate defense or appeal.' ") (quoting *Ake;* some internal quotation marks omitted).

[33] *Caldwell v. Mississippi,* 472 U.S. 320, 323 n.1 (1985).

[34] *See, e.g., Hansen v. State,* 592 So.2d 114, 125 (Miss. 1991) (citing *Ake*).

> that will be important in representing the defendant.[35]

Thus, courts have held that a trial judge does not err in denying funds for an appointed expert if the defense fails to set out the name of the requested expert in his motion, why the expert is necessary in the particular case, and the approximate cost of appointing that expert.[36] Article 26.052(f) and

---

[35] 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.2(e) at 654 (3d ed. 2007).

[36] *See, e.g., Johnson v. State,* 529 So.2d 577, 591 (Miss. 1988) (noting "certain requirements of specificity in the [*Ake*] motion . . . such as the name and specific cost for the expert and the purpose and value of such an individual to the defense."). In *State ex rel. Dressler v. Circuit Court for Racine County,* 472 N.W.2d 532 (Wis. Ct. App. 1991) (defendant failed to make necessary showing of particularized need in his written requests for funding for expert assistance), the Wisconsin court of appeals set forth a suggested process for an indigent defendant's showing of particularized need for an appointed expert:

> (1) Defendant shall make an *ex parte* application to the trial court for expert assistance[;]
>
> (2) The application is reviewed *in camera* and sealed until resolution of the pending charges[;]
>
> (3) The application contain a sufficiently plausible explanation showing:
>
> > (a) The requested expert will assist the defendant in the preparation of his or her defense[;]
> >
> > (b) The materiality of the expert-material evidence is that evidence which necessarily enters into the consideration of the controversy, and which by itself or in connection

(Continued on following page)

(g)[37] speak to this specificity requirement in the context of advance funding for appointed counsel for investigation of potential defenses in capital cases, but there is no separate statute for noncapital cases.

---

with other evidence is determinative of the case[;]

(c) The expert is not cumulative to other readily available witnesses [;] and,

(d) The expert is favorable to the defense.

Id. at 540 n.12. This procedure is similar to that used in Texas courts. *See* note 37 *infra.*

[37] TEX. CODE CRIM. PROC. art. 26.052(f) & (g). Paragraph (f) reads: "Appointed counsel may file with the trial court a pretrial ex parte confidential request for advance payment of expenses to investigate potential defenses. The request for expenses must state:

(1) the type of investigation to be conducted;

(2) specific facts that suggest the investigation will result in admissible evidence; and

(3) an itemized list of anticipated expenses for each investigation."

Paragraph (g) reads: "The court shall grant the request for advance payment of expenses in whole or in part if the request is reasonable. If the court denies in whole or in part the request for expenses, the court shall:

(1) state the reasons for the denial in writing;

(2) attach the denial to the confidential request; and

(3) submit the request and denial as a sealed exhibit to the record."

B. Factual Background to Applicant's *Ake* Claim.

In his first habeas affidavit, applicant's lead trial counsel explained the composition of the defense team as consisting of himself; second-chair counsel; a third counsel who joined the team shortly before trial; the defense investigator and his assistant; Dr. Ira Kanfer; Dr. George Parker, a psychologist; and Keith Kristelis, another expert who was experienced in graphics and simulation. Counsel explained that he "would have liked to have been able to afford Dr. McGeorge,[38] [as well as] experts in biomechanical engineering, human factors research, and child development, but the willingness of people contacted to take appointed cases and the fee in the tens of thousands of dollars were beyond our limited resources." There is nothing in trial counsel's first affidavit that suggests that he had requested further monetary assistance from Judge Wisser, the trial judge, or that the judge denied any such request.

The trial record does show that applicant's trial counsel was able to obtain monetary assistance from the trial judge when he filed written motions requesting such assistance. On June 13, 2003—six months after applicant's arrest—Judge Wisser granted applicant funds for the appointment of an investigator.

---

[38] Counsel stated that he had consulted Dr. McGeorge who had appeared on "Good Morning America" to talk about unusual children's choking accidents, including one child who swallowed a table fork.

He granted additional investigative funds on October 1, 2004. On January 16, 2004, Judge Wisser, "after considering the evidence and argument of counsel," signed an order approving funds for applicant to retain an expert in forensic medicine. Several months later, trial counsel wrote a letter to the prosecutor informing her that he had retained Dr. Kanfer whom he had found "through Dr. Henry Lee (of the O.J. case). . . .He is a forensic pathologist. He was the expert in the Boston Nanny case.[39] . . . Dr. Kanfer is even willing for you to depose him, assuming that Judge Wisser will allow him to be paid for it. . . . We have a tragic accident and I think that Dr. Kanfer might be able to shed some light." A few days before trial, Judge Wisser signed another order, granting applicant's "Sealed Ex parte Motion for Approval of Expert Witness," approving funds for "Keith Kristelis of Ichabod.com for simulation, animation, and demonstrative evidence." There is nothing in the trial record that shows that the trial judge denied any *Ake* motions or other requests for monetary assistance to retain experts.[40]

---

[39] The "Boston Nanny" case involved a young English au pair who was convicted of "shaken baby" manslaughter in the death of an eight-month-old child she was babysitting. *See* http://en.wikipedia.org/wiki/Louise_Woodward_case.

[40] The State attached an affidavit from Judge Wisser to its objections to the habeas judge's findings of fact. The State argues that it could not have submitted its objections or Judge Wisser's supporting affidavit to the habeas judge because that judge signed his findings on the very last day of his judicial

(Continued on following page)

Applicant's initial habeas application did not contain any *Ake* claim. It was only when she filed a supplement to that application that she raised an *Ake* claim and attached a new affidavit from trial counsel in which he stated,

> During my pre-trial preparations, I met with Judge [Wisser] to ask for additional funds to retain experts such as Dr. McGeorge and a biomechanical expert. I explained to the judge why we needed these experts, and I did not think that my current team was adequate to counter the State's case. Judge [Wisser] told me that he had authorized more experts than usual in a non-capital case, and that he would not pay for any more expert assistance regardless of my need. Based on the judge's ruling, I was forced to work within the constraints imposed by the Court. Ms. Jimenez was indigent, and I could not afford to hire these experts out of pocket.

There is nothing in the trial record that reflects this conversation. And there is nothing in either the trial or habeas record that shows when this conversation occurred. This is a critical omission because the reasonableness of a trial judge's denial of an *Ake* motion depends upon the specific information that the trial judge had in front of him at the time that he

---

office. The habeas record was then transmitted to this Court. Although we could remand this case for further proceedings and consideration of Judge Wisser's affidavit, that is not necessary to our resolution of applicant's claims.

denied that motion.[41] Further, applicant did not include any such assertions or evidence supporting her *Ake* claim in her motion for new trial. And she did not raise this issue on direct appeal.

C. May an *Ake* Claim Be Considered When It Is First Raised in a Post-Conviction Writ of Habeas Corpus?

We ordered the parties to brief a threshold issue to determine whether applicant could raise her *Ake* claim for the first time in an application for a writ of habeas corpus. Ordinarily a convicted person may not raise an issue in a habeas proceeding if the applicant

---

[41] *See, e.g., Moore v. Kemp,* 809 F.2d 702, 710 (11th Cir. 1987) (rejecting defendant's habeas claim that the trial judge erred in denying his *Ake* motion based on the materials he had before him at the time of his ruling; "we must assess the reasonableness of the trial judge's action at the time he took it. This assessment necessarily turns on the sufficiency of the petitioner's explanation as to why he needed an expert. That is, having heard petitioner's explanation, should the trial judge have concluded that unless he granted his request petitioner would likely be denied an adequate opportunity fairly to confront the State's case and to present his defense?"); *Conklin v. Schofield,* 366 F.3d 1191, 1208 (11th Cir. 2004) ("In determining the reasonableness of the trial court's refusal to provide independent expert assistance, we consider only the facts available to the trial judge when he made a ruling on the particular motion"); *State v. Moore,* 364 S.E.2d 648 (N. C. 1988) ("In determining whether the defendant has made the requisite showing of his particularized need for the requested expert, the court should consider all the facts and circumstances known to it at the time the motion for psychiatric assistance is made.") (internal quotation marks omitted).

could have raised that issue on direct appeal.[42] Even constitutional claims are "forfeited if the applicant had the opportunity to raise the issue on appeal. This is because the writ of habeas corpus is an extraordinary remedy that is available only when there is no other adequate remedy at law."[43] Indeed, we recently noted our "trend . . . to draw stricter boundaries regarding what claims may be advanced on habeas" petitions because " 'the Great Writ should not be used' to litigate matters 'which should have been raised on appeal' or at trial [.]"[44]

Applicant admits that, under normal circumstances, a defendant must preserve an *Ake* claim in

---

[42] *See Ex parte Nelson,* 137 S.W.3d 666, 667 (Tex. Crim. App. 2004) ("We have said countless times that habeas corpus cannot be used as a substitute for appeal, and that it may not be used to bring claims that could have been brought on appeal."); *Ex parte Goodman,* 816 S.W.2d 383, 385 (Tex. Crim. App. 1991) (it is well settled "that the writ of habeas corpus should not be used to litigate matters which should have been raised on direct appeal."); *Ex parte Bagley,* 509 S.W.2d 332, 334 (Tex. Crim. App. 1974) ("We, therefore, hold that the contemporaneous objection rule serves a legitimate State interest in this question, and that the failure of petitioner, as defendant, to object at the trial, and to pursue vindication of a constitutional right of which he was put on notice on appeal, constitutes a waiver of the position he now asserts" in an application for habeas corpus relief).

[43] *Ex parte Townsend,* 137 S.W.3d 79, 81-82 (Tex. Crim App. 2004).

[44] *Ex parte Richardson,* 201 S.W.3d 712, 713 (Tex. Crim. App. 2006).

the trial court and raise it on direct appeal.[45] This is because it is a record-based claim—dependent upon a written motion and formal ruling—that must be made and resolved before the trial begins.[46] Applicant claims that we should make an exception to that rule because here "the record is not adequate to evaluate her *Ake* claim because of the established informal practice of considering funding requests utilized by trial counsel and the Court."[47] According to trial counsel's second affidavit, his routine practice for implementing *Ake* requests was to meet informally with the trial judge and explain his need for an expert.

> If the judge decided to authorize payment, I would then file a motion requesting expert assistance that would simply state my need for the expert. This motion would be granted, as authorized in the prior *ex parte* conversation in chambers.

---

[45] Applicant's Brief at 30 ("Ordinarily an *Ake* claim can be considered on appeal because the record will reflect a written motion requesting funds and an order denying those funds.").

[46] *See Moore v. Kemp,* 809 F.2d at 710. ("[A]n indigent defendant who did not have the assistance of an expert in preparing and presenting his case cannot be heard to complain about his conviction on due process grounds unless he made a timely request to the trial court for the provision of expert assistance, the court improperly denied the request, and the denial rendered the defendant's trial fundamentally unfair.").

[47] Applicant's Brief at 31.

But *Ake* does not authorize such an informal methodology in seeking expert assistance, and such an off-the-record informal meeting will not itself preserve a claim to the entitlement of expert assistance for judicial review by the appellate courts in Texas either on direct appeal or habeas review. The contemporaneous objection rule applies to *Ake* claims just as it applies to other constitutional claims.[48]

Before an indigent defendant is entitled to appointment and payment by the State for expert assistance, he must make a pretrial "preliminary showing" that is based upon more "than undeveloped assertions that the requested assistance would be beneficial."[49] Thus, in Texas, an indigent defendant

---

[48] *See Ex parte Medellin,* 280 S.W.3d 854, 860 (Tex. Crim. App. 2008) (Cochran, J., concurring) ("In Texas, we have a contemporaneous objection rule which requires all litigants to make a timely request, claim, or objection or forfeit the right to raise that request, claim, or objection after trial. This same rule applies in every jurisdiction in America. As the Supreme Court explained over thirty years ago, the contemporaneous objection rule serves important judicial interests in American criminal cases and deserves respect throughout the land."); *see also Wainwright v. Sykes,* 433 U.S. 72, 88 (1977) ("A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding. It enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question.").

[49] *Williams v. State,* 958 S.W.2d 186, 192 (Tex. Crim. App. 1997) (quoting *Caldwell v. Mississippi,* 472 U.S. 320, 323-24 n.1 (1985)).

will not be entitled to funding for experts absent adequate factual support in the written motion that he presents to the trial judge.

> In cases holding that a sufficient showing was not made under *Ake,* the defendant typically has failed to support his motion with affidavits or other evidence in support of his defensive theory, an explanation as to what his defensive theory was and why expert assistance would be helpful in establishing that theory, or a showing that there was reason to question the State's expert and proof.[50]

In *Williams,* we reiterated the importance of presenting affidavits or other information to the trial judge in making the required threshold showing.[51] We held that the defendant is entitled to present his motion and evidence in an *ex parte* hearing outside the presence of the prosecutor to protect the defendant from disclosing his defensive theory to the State before the trial has begun.[52]

But a trial judge does not err in denying an informal, off-the-record request for additional funding for experts when he is not presented with a written motion that contains affidavits or other evidence that would support the defendant's request.[53] If Judge

---

[50] *Rey,* 897 S.W.2d at 341.

[51] *Williams,* 958 S.W.2d at 193-94.

[52] *Id.*

[53] *Id.*

Wisser had denied an informal, off-the-record request for additional funding for experts, applicant could have preserved that constitutional issue by filing a formal motion *ex parte* with the appropriate affidavits or information supporting the request before trial. Then she could have raised that claim in her motion for a new trial or on direct appeal. But we cannot review the merits of an *Ake* claim on either direct appeal or habeas review if the defendant failed to file a proper pretrial *Ake* motion that the trial judge denied. In this case, applicant forfeited consideration of her *Ake* claim on habeas review because she failed to preserve her constitutional claim in the trial court by filing a proper written *Ake* motion and ensuring that the trial judge formally ruled on it.[54]

---

[54] *See Ex parte Medellin,* 280 S.W.3d at 860 ("Texas courts have long followed the Supreme Court's reasoning concerning the importance of the contemporaneous objection rule in the fair, effective, and efficient operation of its state courts."). As the United States Supreme Court has explained,

> The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event. A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources

(Continued on following page)

We therefore deny relief on this claim.

III.

Applicant also claims that she is entitled to a new trial based on her lead counsel's ineffective assistance. Specifically, she asserts that her lead counsel was deficient because (1) he hired Dr. Kanfer; and he failed to (2) object and request a mistrial and a continuance in response to Dr. Kanfer's cross-examination testimony; (3) retain other qualified experts; and (4) make a written request under *Ake* for retaining those experts. Applicant's counsel refers to this case as a "failure of forensics" because of these four interrelated deficiencies.

In *Strickland v. Washington,*[55] the United States Supreme Court recognized a criminal defendant's Sixth Amendment right to effective assistance of counsel because the "right to counsel plays a crucial role in the adversarial system" and "access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of

---

> have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.

Sykes, 433 U.S. at 90.

[55] 466 U.S. 668 (1984).

the prosecution to which they are entitled."[56] A person claiming that counsel was ineffective must prove, by a preponderance of the evidence, (1) that counsel's performance was deficient, falling below an "objective standard of reasonableness," and (2) that the deficient performance prejudiced the defense such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[57]

We "'indulge in a strong presumption that counsel's conduct [fell] within the wide range of reasonable assistance,' and that 'the challenged action might be considered sound trial strategy.'"[58] The mere fact that another attorney might have pursued a different tactic at trial does not suffice to prove a claim of ineffective assistance of counsel.[59] The *Strickland* test is judged by the "totality of the representation," not by counsel's isolated acts or omissions, and the test is applied from the viewpoint of an attorney at the time he acted, not through 20/20 hindsight.[60]

---

[56] *Id.* at 685.

[57] *Id.* at 694.

[58] *Ex parte White,* 160 S.W.3d 46, 51 (Tex. Crim. App. 2004) (quoting *Strickland,* 466 U.S. at 689).

[59] *Ex parte Miller,* 330 S.W.3d 610, 616 (Tex. Crim. App. 2009).

[60] *See Ex parte Wellborn,* 785 S.W.2d 391, 393 (Tex. Crim. App. 1990); *Strickland,* 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the

(Continued on following page)

A. Counsel's Qualifications and Preparation.

Lead counsel did not testify at any of the habeas hearings, but he did submit two affidavits setting forth his qualifications, his strategy in this case, and explanations for his tactics. Counsel stated that he has been in practice for "more than 28 years . . . with never any disciplinary issue or finding of ineffectiveness." He is board certified in criminal law and is on the appointed-attorney capital-murder list for Travis County.[61] He and his co-counsel, as well as his investigator, "undertook extensive interviews" with applicant and made every attempt to talk to the witnesses who had knowledge of the case and of applicant's character. Because many of the witnesses "aligned with the State" declined to talk to lead counsel, he sent them letters almost a year before trial again asking them to talk with him. Not one of them responded. He and his team did speak to many witnesses who knew applicant "as well as family in Mexico with the help of the Mexican Consulate." They learned as much as possible "about child abuse, the most common types of abuse, and the character traits of abusers." Their research included "treatises,

---

circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

[61] Counsel noted that he had tried "10 or more jury trials within the [past] 18 months alone." He listed some of the them as a capital murder trial, four homicides, an aggravated robbery, aggravated kidnapping, and aggravated assault. He had submitted three appellate briefs, and settled numerous other felony cases.

articles, cases reported, and speaking with experts," but they found no case of abuse similar to the present one.

"The theory of the [defense] case was that the child had accidentally swallowed the paper towels and that the efforts to help the child aggravated the condition resulting in complete occlusion of his airway for between 7 to 10 minutes. . . . The probable cause affidavit, offense reports, our client's statement, our experts' opinions, medical records, etc. were in many respects consistent with our theory." The defense planned to put on character evidence to show that applicant was not the type of person who would abuse a child. They worked with Dr. Parker, a psychologist, concerning applicant's mental state.

"The next part of the plan was to explain the accident with the testimony of Dr. Kanfer and the demonstrative evidence of Mr. Kristelis. We would demonstrate how the accident could have happened, which was consistent with the evidence and explained why the child had no injury." Experienced counsel was not ineffective in his pretrial preparation and focus upon the primary contested issue.

B. The Retention of Dr. Kanfer.

Counsel stated that it was very hard to find an expert willing to accept the low pay of an appointed case and "we do not have the type of funds that give us the luxury of getting anyone we want. . . . Dr. Kanfer was willing to take the appointed case and

worked very hard to find the truth. He worked on this case for a year and did not even charge all his time." He worked with Dr. Henry Lee (of the O.J. Simpson case) who had referred Dr. Kanfer to lead counsel. "Dr. Kanfer worked numerous difficult cases and had extensive experience in testifying." Dr. Kanfer had worked as a medical examiner for the State of Connecticut for almost twenty years by the time of trial. He had testified as an expert witness about 350 times. In the hearing outside the jury to qualify Dr. Kanter as an expert witness, the trial judge concluded that "in all candor, obviously, this gentleman's going to be able to testify. . . . I mean, this isn't a close call so—it should be apparent to everyone."

Dr. Kanfer's direct testimony clearly and cogently laid out the scientific and medical basis for his opinion that B.G.'s choking was accidentally caused by the toddler's act of wadding up the paper towels and stuffing them into his own mouth. Dr. Kanfer had even conducted an experiment to show how that could have occurred. Nowhere does applicant find fault with the direct testimony of Dr. Kanfer, the content of his opinions, or the scientific basis for those opinions.

Indeed, applicant acknowledges that "Dr. Kanfer's opinions were generally sound and supportive of her case,"[62] but she complains about his lack of pediatric training. Dr. Kanfer may not have been a

---

[62] Memorandum in Support of Supplemental Application at 41.

specialist in pediatric forensic pathology, but trial counsel concluded that he had some pediatric experience, both as an expert in the "Boston Nanny" case and because he filed a motion for continuance shortly before the trial was originally scheduled in September of 2004, asking for additional preparation time and noting that "Counsel is not ready in that he has just very recently gotten an expert to aid in the case. There were several difficulties in finding and employing an expert with experience in pediatrics." The trial was postponed for almost a full year, during which time counsel worked with Dr. Kanfer, who, as counsel stated, had some experience in pediatrics. A forensic pathologist like Dr. Kanfer (and Drs. Peacock and Parangao who testified at trial) is ideally situated to determine the cause and manner of death in suspicious circumstances. That is what pathologists do. Dr. Peacock testified that "the discipline of forensic pathology is a discipline where common sense meets science and we utilize both articles that are written with their statistical probabilities and we use common sense." We have noted that "[c]ausation or mechanism of death are examples of important medical questions addressed by pathologists that require more than an objective or rote determination."[63] Counsel was not, therefore, ineffective for retaining Dr. Kanfer.

---

[63] *Rey v. State,* 897 S.W.2d 333, 338 (Tex. Crim. App. 1995).

C. Trial Counsel's Failure to Request a Mistrial or Continuance in Response to Dr. Kanfer's Use of Profanity.

The real problem that applicant notes (and the habeas judge found) was in Dr. Kanfer's unfortunate remark, including an expletive verb, to the lead prosecutor in the hallway during a break in the proceedings and the prosecutor's repeated references to that remark in front of the jury.[64] This was an infelicitous incident and probably quite damaging to Dr. Kanfer's credibility as a neutral scientific expert. However, trial counsel had done his best to prepare Dr. Kanfer for the prosecutor's aggressive and confrontational style. Counsel stated that he was well aware of both the prosecutor's penchant for attacking defense witnesses and the trial judge's willingness to give the attorneys leeway in their questioning:

> We knew [she] would attack our expert. We calculated that if Dr. Kanfer could withstand the attack, it would hurt the State. I also felt that if I tried to protect the witness he would lose credibility. . . . No one regretted the exchange between Dr. Kanfer and [the prosecutor] more than Dr. Kanfer himself. He had been prepared and knew what to expect and was supposed to be ready to handle it. Some judges would never have allowed some of the prosecutors' tactics, objection or no objection,

---

[64] *See supra* note 14.

> but I knew Judge Wisser would, that is why Dr. Kanfer was prepared.

We conclude that counsel's belief was reasonable under the circumstances as Dr. Kanfer was an experienced forensic pathologist who had testified in some 350 trials. Applicant does not explain how lead counsel could have, or should have, known that Dr. Kanfer would "blow up" at the prosecutor in the hallway.

Applicant also asserts that, after Dr. Kanfer's outburst, lead counsel should have asked for a continuance or a mistrial because of this "highly prejudicial conduct." But applicant does not explain the legal basis for such a request, other than to say counsel "failed to act appropriately." But what was he supposed to do? The trial judge overruled his objection, and the court of appeals held that the prosecutor was entitled to refer to the hallway colloquy to show Dr. Kanfer's bias against the prosecutor and the State's position.[65] And the correctness of those legal rulings is not before us in this habeas proceeding.

Counsel explained his strategy in not always objecting to the prosecutor's sarcasm, sidebar remarks, and "mistreatment of defense witnesses":[66]

---

[65] *Jimenez,* 240 S.W.3d at 403 (citing *London v. State,* 739 S.W.2d 842, 846 (Tex. Crim. App. 1987) ("The State is clearly entitled to show any bias a defense witness might have against the State or the prosecutor.").

[66] Applicant raised several issues about the prosecutor's tactics on appeal, but the court of appeals noted that "the prosecutor's

(Continued on following page)

> It was my decision based on what I thought was an outlandish theory by the State to give [the prosecutor] a great deal of leeway as I thought her behavior would alienate a jury and combined with an outlandish theory would enure to our benefit. We knew, and it is basic, that if you attack a witness, who is not a party, juries do not like it.
>
> . . .
>
> [Counsel's strategy] was considered after trial counsel had received feedback from prior jurors who completely disliked her and her sarcastic, mean-spirited approach. It was determined that we would allow her some freedom to be[ ] herself.

Given these considerations, trial counsel's strategy was not unreasonable. First, the reasonableness of his decision to retain and call Dr. Kanfer as an expert witness must be assessed at the time counsel retained Dr. Kanfer and at the time he called him to the witness stand—not at the time Dr. Kanfer used an expletive during a break in the proceedings.[67]

---

sarcasm in this case was not directed at the defendant personally," and it held that her conduct did "not rise to a level that it 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " 240 S.W.3d at 411-12.

[67] *Strickland,* 466 U.S. at 690 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."); *see also Lockhart v.*

(Continued on following page)

Second, in this case, unlike the two cases applicant cites in her brief,[68] Dr. Kanfer was clearly competent to testify to applicant's theory of B.G.'s cause of death, and he testified on direct examination exactly as predicted and anticipated.

Fretwell, 506 U.S. 364, 372 (1993) ("Ineffective-assistance-of-counsel claims will be raised only in those cases where a defendant has been found guilty of the offense charged, and from the perspective of hindsight there is a natural tendency to speculate as to whether a different trial strategy might have been more successful."); *Ingham v. State,* 679 S.W.2d 503, 509 (Tex. Crim. App. 1984) (when determining the validity of an ineffective assistance of counsel claim, any judicial review must be highly deferential to trial counsel and avoid "the distorting effects of hindsight").

[68] Applicant cites *Turpin v. Bennett,* 525 S.E.2d 354, 355 (Ga. 2000) (counsel was ineffective in putting psychiatrist who had AIDS dementia on witness stand when he knew psychiatrist, who looked "deathly ill," was physically and mentally disabled; witness became incoherent and irrational and jury "laughed out loud at his testimony"), and *Skaggs v. Parker,* 235 F.3d 261, 273 (6th Cir. 2000) (although attorneys were not ineffective for failing to investigate fraud artist who claimed to be a psychiatrist before trial and for sponsoring his testimony at guilt stage (he "was awful. He was incoherent. He was talking about things that didn't make sense. You couldn't stop him. You couldn't reel him back in. People in the audience were laughing at him."), they were ineffective for recalling him during retrial punishment hearing when they knew, by then, he was incompetent and incoherent), but in each of those cases, defense counsel were clearly on notice as to the serious mental deficiencies of the expert before calling them to the witness stand. The same is not true in this case. Dr. Kanfer testified exactly as anticipated on direct examination and throughout the first cross-examination session.

Third, a reasonable attorney could not have been expected to predict that, despite defense counsel's warning about the prosecutor's aggressive style, his experienced expert would make profane remarks during a break.

In hindsight, counsel clearly should not have let Dr. Kanfer come anywhere near the prosecutor during any breaks, but that single failure does not make counsel ineffective. In sum, trial counsel's performance in retaining Dr. Kanfer and calling him as an expert witness was not deficient.

Furthermore, counsel was not deficient for failing to ask for a mistrial or continuance. A mistrial is "a remedy appropriate for a narrow class of highly prejudicial and incurable errors."[69] But applicant has failed to show that there was any error in the prosecutor impeaching Dr. Kanfer with his inappropriate remark to show his bias. Indeed, the trial judge overruled counsel's objection to this line of questioning, so he clearly would not have granted a mistrial or continuance if counsel had requested one.[70] The

---

[69] *Wood v. State,* 18 S.W.3d 642, 648 (Tex. Crim. App. 2000).

[70] Judge Wisser, the judge present in the courtroom and most attuned to the tone of the questions asked and responses given, was in the best position to decide whether this line of questioning required either a mistrial or a continuance. Having overruled defense counsel's objection, he had determined that the questioning was permissible and thus no remedial action (such as an instruction to disregard) was necessary, much less the more extreme remedy of a continuance or mistrial. A trial judge may grant a continuance when a fair trial becomes impossible

(Continued on following page)

failure to object to proper questions and admissible testimony (and the failure to request a mistrial or continuance based upon that questioning) is not ineffective assistance.[71]

---

due to an unexpected occurrence during trial. *Cooper v. State,* 509 S.W.2d 565, 567 (Tex. Crim. App. 1974). Applicant has failed to show what a continuance would have achieved as there has been no showing that counsel could have found, retained, and sponsored another expert to supplement Dr. Kanfer's testimony within a reasonable amount of time. *See Rische v. State,* 746 S.W.2d 287, 290 (Tex. App.—Houston [1st Dist.] 1988, no pet.) (recently deceased crime-reconstruction expert's opinion testimony was not sufficiently "material" to defense to warrant mistrial or indefinite continuance to locate new expert; defendant elicited same expert opinion from State's expert that his own expert would have offered, so testimony of another expert would have been merely cumulative; noting that "if an applicant for a continuance . . . does not present evidence to the court that indicates a probability that a substitute [witness] can be secured or that the continuance will not result in an indefinite delay, the motion may be properly denied.").

[71] *See, e.g., Ex parte White,* 160 S.W.3d 46, 53 (Tex .Crim. App. 2004) (defense counsel is not ineffective for failing to object to admissible evidence); *Muniz v. State,* 851 S.W.2d 238, 258 (Tex. Crim. App. 1993) (the failure to object to admissible evidence is not ineffective assistance of counsel); *Weinn v. State,* 281 S.W.3d 633, 641 (Tex. App.—Amarillo 2009) ("The failure of appellant's counsel to request a mistrial could only be termed an act of ineffective assistance of counsel if a mistrial should have been granted."), *aff'd on other grounds* 326 S.W.3d 189 (Tex. Crim. App. 2010).

D. The Failure to Retain or Request Funding for Additional Experts.

Applicant asserts that her trial defense team—a team composed of three lawyers, two investigators, and two expert witnesses—retained with funding approved by the trial judge and paid for by the State, was inadequate. She states that she has now found Dr. Zur (an expert in accidental choking), Dr. McCloskey (an expert in pediatric critical care anesthesiology and general pediatrics with training in child abuse), and Dr. Ophoven (an expert in pediatric forensic pathology), and that they could have testified at the time of trial as a "multidisciplinary team." Indeed, they might have been able to, but that is not the issue. It is certainly true that this trial was not a perfectly "level playing field" in terms of the number of expert witnesses on each side.

In an ideal world, it might well be wise to have an equal number of experts on each side of a lawsuit, each one matching the skill and experience of his opposing expert. Applicant makes a compelling argument that she was outclassed and outmatched by the State's numerous experts. But the issue before us is whether the constitution requires that an indigent defendant be provided with an absolute (or even rough) equivalency of experts when the primary contested issue at trial involves the cause of death. We cannot find that *Ake* stretches that far. Instead, we must conclude that applicant does not have a constitutional right to a "team of experts" paid for by

the taxpayers, and applicant's counsel is not ineffective in failing to request such a team.

The issue is whether counsel's failure to hire (or to request the trial judge to appoint and provide funding for) additional experts created "a high risk of an inaccurate verdict."[72] This case depended, in large part, upon medical forensics and the question of whether B.G. could have accidentally stuffed the wad of paper towels into his mouth by himself or whether someone else—presumably applicant—must have done so. Applicant was clearly entitled to access to an expert who could speak knowledgeably on that question to build an effective defense, but she has not shown that the failure to have additional experts, beyond Dr. Kanfer, to address that question created "a high risk of an inaccurate verdict."[73]

The additional experts that applicant has now produced are perhaps even more qualified than Dr. Kanfer, but she has not shown how their testimony would be significantly different or more persuasive than was Dr. Kanfer's. They reached exactly the same

---

[72] *Ake,* 470 U.S. at 77 (State must ensure that an indigent defendant "has access to the raw materials integral to the building of an effective defense," but "the State need not "purchase for an indigent defendant all the assistance that his wealthier counterparts might buy,"); *Busby v. State,* 990 S.W.2d 263, 271 (Tex. Crim. App.) (per curiam) ("The key question [under *Ake*] appears to be whether there is a high risk of an inaccurate verdict absent the appointment of the requested expert.").

[73] *Id.*

ultimate opinion as Dr. Kanfer and for almost precisely the same reasons. Applicant implies that because a "multidisciplinary team of experts (including three pediatric specialists) testified for the State," she was entitled to a similar team. First, the State called two treating doctors—not retained experts—to testify to the facts they observed and the care that they provided to B.G. Their opinions concerning the cause of his death were based upon their first-hand involvement with the toddler; the State did not retain them as part of a multidisciplinary team of testifying experts. So far as we can tell from the record, Dr. Alexander was the only expert specifically retained by the State. Second, *Ake* does not require the appointment of a defense expert to match every State expert. *Ake* ensures that an indigent defendant has access to at least the "basic tools" of a defense, but applicant cites no case from any jurisdiction that states that an indigent defendant is entitled to multiple experts to testify to the same ultimate opinion on the same topic or that such a defendant is entitled to match the State expert for expert.

Applicant's counsel was not ineffective for failing to file a written *Ake* request for additional funding to retain more experts to testify on the defense theory that B.G. could have crumpled up the paper towels by himself, stuffed that wad into his mouth, and accidentally choked on it. The defensive theory, buttressed by Dr. Kanfer's testimony, was cogently, coherently, and completely presented to the jury. Additional defense medical experts would surely have

been helpful, but they were not constitutionally required. Applicant has not shown that, if his attorney had retained (or requested funding for) more experts to testify to the same theory, the result of the trial likely would have been different.[74]

We therefore conclude that counsel was not ineffective under the *Strickland* standard.

IV.

Because we conclude that applicant has failed to prove, by a preponderance of the evidence, any of the claims set out in either her original or supplemental application for a writ of habeas corpus, we deny relief.

Delivered: April 25, 2012
Publish

[74] *Ake,* 470 U.S. at 77.

CAUSE NO. D-1-DC-04-904165

EX PARTE	§	**IN THE DISTRICT COURT**
ROSA ESTELLA OLVERA JIMENEZ	§ § §	**TRAVIS COUNTY TEXAS**
	§	**299TH JUDICIAL DISTRICT**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Dec. 31, 2010)

This court, having considered the application for a writ of habeas corpus, the State's answer, the pleadings, briefs, the exhibits, and the testimony and official court records from the trial and the testimony and exhibits from the habeas corpus proceeding, makes the following findings of fact and conclusions of law:

PROCEDURAL HISTORY AND PRELIMINARY STATEMENT

1. Applicant was convicted of murder and injury to a child in the 299th Judicial District Court of Travis County, Texas on September 1, 2005. Judge Jon Wisser, former judge of the 299th District Court, presided over the trial.

2. The Third Court of Appeals affirmed the judgment of the trial court. *Jimenez v. State*, 240 S.W.3d 384 (Tex. App.—Austin 2007).

3. Applicant's petition for discretionary review was refused by the Court of Criminal Appeals on April 2, 2008.

4. The United States Supreme Court denied Applicant's petition for writ of certiorari from the direct appeal decision.

5. Applicant filed this application for writ of habeas corpus on October 6, 2009, and supplemented it on October 20, 2010.

6. On November 19, 2010, the Court designated the issues to be resolved at the habeas hearing. *See*, *infra*.

7. This Court conducted the habeas hearing on December 9, 17, 21 and 22, 2010. Applicant did not appear at the hearing but was represented through her counsel of record Bryce Benjet and Susan Henricks, Hull Henricks LLP. The State of Texas appeared through the Travis County District Attorneys Office, through Assistant District Attorneys, Bryan Case, Sissi Phillips, and Alison Wetzel. 4. Judge Charles F. (Charlie) Baird, the undersigned and current judge of the 299th District Court, presided over habeas hearing.

8. These findings of fact and conclusions of law are based on all of the evidence admitted in this habeas proceeding. The evidence includes all affidavits and evidence attached to the pleadings filed in the case, the testimony and evidence introduced at the hearing, and record of the trial which was admitted in its entirety. These findings are not intended as a recitation of the evidence, but only to resolve the contested issues of fact. Further, to the extent the Court's findings of fact are more akin to conclusions of law, the Court adopts them as such. To the extent the Court's conclusions of law are more akin to findings of fact, the Court adopts them as such.

DESIGNATED ISSUES

The following issues were designated for resolution at the habeas hearing:

1. Whether Applicant is actually innocent

2. Whether Applicant was denied due process of law when her requests for additional expert assistance were denied.

3. Whether Applicant was denied effective assistance of counsel.

4. Whether the State committed prosecutorial misconduct.

FINDINGS OF FACT

1. The decedent, B. G., was 21 months of age when he choked on a wad of paper towels.

2. He died approximately three months later.

3. The instant case was prosecuted under the theory that Applicant forced the paper towels down the decedent's throat.

Findings of Fact Regarding Medical/Forensic Issues

Dr. Karen Zur: Pediatric Otolaryngologist

4. Karen Bracha Zur, M.D. is one of the leading pediatric airway specialists in the United States, she is an attending surgeon at the Children's Hospital of

Philadelphia and an Assistant Professor of Otohinolatyngology: Head and Neck Surgery at the University of Pennsylvania School of Medicine. Dr. Zur's academic research, teaching, and clinic practice focuses on removing airway obstructions and otherwise treating the pediatric airway. She is an expert on choking, the mechanics of airway obstructions, and the removal of such obstructions.

5. Dr. Zur conducted a comprehensive review of the evidence in Applicant's case. Dr. Zur's review of the evidence included all of the relevant medical histories regarding the choking incident in this case as well as consultation with other medical professionals. She gave all of her opinions to a reasonable degree of medical certainty. Dr. Zur submitted an affidavit and testified at a hearing on December 9, 2010.

6. Dr. Zur concluded that B.G.'s injuries likely resulted from an accidental choking. She believes that B.G. was capable of placing the wad of paper towels in his mouth and compressing that wad to a size that could have accidentally slipped back into his throat. Dr. Zur explained that the wad of paper towels did not initially cause a complete obstruction of B.G.'s airway, but was a partial obstruction at the time of the initial attempts to resuscitate the child. Dr. Zur described this partial obstruction as "ball valving" in which the wad of paper towels was caught in the larygopharanx extending partially into the esophagus. The obstruction was partially hooding over and obstructing the airway intermittently. By "ball valving" Dr. Zur explained that when B.G. exhaled,

the obstruction was pushed out of the way of the airway, but was then drawn back in to cover the airway when B.G. inhaled. This would have allowed B.G. some air, but not full inhalation.

7. Dr. Zur explained that, over time, the partial obstruction became a full obstruction. This could have happened either through the actions of Irene Vera or Officer William Torres when they attempting to find the obstruction by placing their fingers in B.G.'s mouth or by the positive pressure of breathing administered to B.G. in CPR efforts. The wad may have also been pushed further into the aerodigestive tract though B.G.'s own reflexive swallowing.

8. Dr. Zur testified that all of the evidence she reviewed was consistent with an accidental choking. The blood found in Applicant's bathroom was what Dr. Zur would expect from B.G. biting his lip, tongue, or cheek or injuring his teeth when he was gagging and Applicant attempting to remove the wad through back slaps and abdominal thrusts as described in her lengthy statement to the police. The blood could also have resulted from a scratch to these tissues when Applicant attempted to sweep B.G.'s mouth with her finger. Based on her clinical practice, Dr. Zur is familiar with the amount of blood caused by such injuries and how it could be smeared, and stated that the amount of blood smeared is very similar to what she would see in the operating room setting.

9. Dr. Zur also testified that the amount of blood on the wad of paper towels was consistent with what she

would expect from an accidental choking and the attempts to remove the object. The stains on the wad of paper towels appeared to be bloody saliva that could have resulted from injuries to the mouth during efforts to resuscitate B.G. or from tears in the lining of the throat from the extraction of the obstruction.

10. Dr. Zur testified that she did not believe that the wad of paper towels was forcefully lodged in B.G.'s throat. She explained that the mechanisms of choking can move objects both up and down the airway. Moreover, she explained that the object could be easily lodged into the airway, but that the machanisims of the throat could make it much more difficult to remove the object.

11. Dr. Zur described how difficult it is to examine an unwilling child's airway in the clinical setting, and that it often required one person to physically restrain a child of B.G.'s age and another to hold the child's mouth open for Dr. Zur to examine the airway. Based on this experience, Dr. Zur would expect additional injuries to B.G. or Applicant, if the wad of paper towels was intentionally lodged in an attack.

12. Dr. Zur also explained that the history of the injury provided by Applicant during the transcribed police interrogation was consistent with the medical histories she takes every day in her practice. Dr. Zur stated that parents and caregivers commonly give inconsistent and incomplete medical histories about children. Dr. Zur found nothing suspicious about the level of detail or the timing of disclosures of information by

Applicant to the police. In fact, Dr. Zur believed that Applicant, a young woman with no relevant medical knowledge or training, would not have been able to fabricate a description of the choking event that so closely matched the injury.

13. In reaching her conclusions, Dr. Zur relied on consultation with over a dozen colleagues in the pediatric otolaryngology field. She reported that none of these persons disagreed with her opinion that B.G. accidentally choked on the wad of paper towels. In fact, all were surprised by the expert testimony offered by the State at Applicant's trial, and believed those opinions to be speculation.

14. Dr. Zur also considered a recent incident that presented to a colleague, Brian P. Dunham, MD at the Children's Hospital of Philadelphia on November 13, 2010. Dr. Dunham is a pediatric Otolaryngologist who trained at Stanford University, Johns Hopkins, and the Children's Hospital of Philadelphia. This incident involved a child that choked on a large wad of bread. Although a significant amount of bread was removed in pieces during six attempts to dislodge it, the final piece measured 4 cm across. Dr. Dunham reviewed photographs of the wad of paper towel removed from B.G.'s airway and concluded that the wad of paper towel was not appreciably larger than the wad of bread he removed from his patient. Dr. Dunham stated in his affidavit that no qualified medical professional could reliably say that B.G.'s injury had to be an intentional attack based on the size of this wad of paper towel. He also offered the opinions that

the amount of blood depicted on the wad of paper towel was consistent with what he would expect in an accidental choking.

15. The Court finds Dr. Zur's testimony to be reliable, well considered and credible. Dr. Zur's opinions were based on a comprehensive review of the evidence in Applicant's case. Based on the Court's personal observation of Dr. Zur's demeanor and courtroom presentation, it is clear that she was not motivated to work on this case by profit, but by her medical opinion that B.G.'s injuries were the result of an accidental choking and not the act of a third party. Dr. Zur's credentials demonstrated that she is one of the most qualified persons in the nation to give an opinion on this case. She was extremely well versed in the anatomy and mechanism's of choking,[1] and based her opinions on this superior knowledge, training, and a complete review of all of the relevant medical information in the case.

Dr. John J. McCloskey: Pediatric Anesthesiologist and Critical Care Physician

16. John J. McCloskey M.D. is an attending anesthesiologist and critical care physician at the Children's Hospital of Philadelphia. He is also an associate

---

[1] In fact, the State's witness forensic pathologist Dr. Elizabeth Peacock identified a pediatric otolaryngologist as the most qualified expert on issues relating to the mechanisms of choking. *See*, ff. 48, *infra*.

professor of clinical anesthesiology and critical care at the University of Pennsylvania School of Medicine. Dr. McCloskey has been board certified in pediatrics and anesthesiology since 1989 and in pediatric critical care since 1992. His training, research and clinical practice all involve issues relating to the pediatric airway. He has published peer reviewed articles on performing pediatric airway procedures.

17. Dr. McCloskey conducted a comprehensive review of all of the medical evidence at trial as well as all available medical evidence offered prior to his testimony in this habeas proceeding. Dr. McCloskey also spoke directly with Irene Vera, an eyewitness who attempted to resuscitate B.G. Dr. McCloskey testified at the habeas hearing and stated his opinions within a reasonable degree of medical certainty.

18. Dr. McCloskey concluded that B.G.'s injuries were likely the result of an accidental choking. Dr. McCloskey concluded that B.G. likely suffered a partial obstruction of his airway that later became a total obstruction resulting in cardiac arrest. He also described the obstruction as "ball valving" as did Dr. Zur. See ff. 6, *supra*.

19. Dr. McCloskey actually treated, in his capacity as a critical care doctor, the child mentioned in Dr. Dunham's affidavit. Dr. McCloskey explained that inconsistent descriptions in the record of whether B.G. was breathing, as well as Irene Vera's account of the child gasping for air, biting, and going in and out of consciousness, was consistent with a partial obstruction.

20. Dr. McCloskey testified at the habeas hearing that a child B.G.'s age was developmentally capable of stuffing his mouth with paper towels and having that wad compressed in his mouth. He believes that the wad could have then become accidentally lodged in B.G.'s throat. Dr. McCloskey's opinion regarding the ability of children to place large objects in their mouths was informed by a case in which he treated a child that placed a large super ball in his mouth and had that ball become lodged in his throat in a very similar place as the wad of paper towels. He described a sucking noise when it was removed, just as described by Mr. Curr in removing the wad of paper towels from B.G. Dr. McCloskey also stated that the super ball did not easily clear the child's teeth just as the wad of paper towels was described as not easily clearing B.G.'s teeth.

21. As a specialist in pediatric anesthesiology and critical care, Dr. McCloskey has particular expertise and training in cardiopulmonary resuscitation and its effect on the airway. Dr. McCloskey testified that the wad of paper towels could have become a total obstruction on its own simply by absorption of saliva. Dr. McCloskey also testified that attempts to sweep the mouth, and to give rescue breaths and provide air with a bag could have pushed the obstruction further in.

22. Dr. McCloskey testified that B.G. was not without air for 20-40 minutes as advanced by Dr. Patricia Aldridge at trial and in the habeas hearing. He explained that Dr. Aldridge's conclusion was erroneously

reached based on a blood gas reading. Dr. McCloskey testified that there is no literature to support an estimate of time without air based on a blood gas reading. He explained that such an estimate would ignore variations in metabolism as well as questions regarding the effectiveness of CPR efforts. Dr. McCloskey has conducted research on the effectiveness of CPR in children and found that physicians administering CPR often are ineffective even when they believe they are being effective. Because there is no way to account for these variables, Dr. McCloskey concluded that the only reliable estimate that can be made from the blood gas level and extent of brain injury is that this B.G. was without air for at least 10 minutes.

23. Dr. McCloskey also concluded that B.G. could not have been without air for much longer than 10 minutes. This conclusion was based on the timeline of events in treatment as well as B.G.'s response to efforts to revive him. First, B.G. was observed to be gasping and biting, a volitional act, by Irene Vera during the 911 call. If B.G. had been without air and in cardiac arrest at that time, he could not have been gasping and biting. Because the 911 call was at 13:28 and the EMTs reported establishing an airway at 13:43, Dr. McCloskey concluded that B.G. could only have been without air during this 15 minute timeframe. Dr. McCloskey also determined that a child who had been without air for 30-40 minutes would not have responded to resuscitative efforts as quickly as B.G. and would have sustained a brain injury so

severe as to prevent B.G. from ever breathing on his own.

24. Dr. McCloskey testified that the blood in the bathroom and the blood seen on B.G. and on the paper towel were consistent with an accidental choking. Dr. McCloskey stated that B.G. could have sustained injuries to his mouth during the attempts to resuscitate him in Applicant's bathroom. He viewed photographs of blood in Applicant's bathroom and concluded that this amount of blood was consistent with that sort of injury. This opinion was based on his first hand experience with smearing blood that he had on his own hands when working in the operating room as an anesthesiologist.

25. Dr. McCloskey testified that the blood on the wad of paper towels could have resulted simply from the presence and movement of the obstruction itself, from injuries to the mouth from choking or resuscitative efforts, as well as from tearing of the throat lining in removing the object with a Magill forceps.

26. Dr. McCloskey testified that he did not believe that the injury could have been intentional because of the absence of significant injury to B.G. or Applicant. Dr. McCloskey testified that he would expect more blood than was seen in this case if the wad of paper towel had been forced down B.G.'s throat. He would expect to see injuries to the teeth, gums, mouth, and face as well as more significant bite marks on Applicant.

27. Dr. McCloskey compared the case to other patients that he had treated in which it was know that a person intentionally shoved a large object into a child's mouth. He testified that those resulted in injuries not found in B.G..

28. Dr. McCloskey also testified that he did not find the inconsistencies in Applicant's statements regarding the injury to be evidence of child abuse. Dr. McCloskey explained that he routinely takes medical histories from parents and caregivers regarding children he treats. He testified that he has received training in taking such histories and that a police officer would not have the level of training needed to obtain a reliable medical history. Dr. McCloskey also stated that it is not unusual for parents and caregivers to give inconsistent histories or to not provide all of the relevant information. Based on this experience and training, Dr. McCloskey did not find anything about Applicant's statements to be indicative of child abuse.

29. The Court finds that Dr. McCloskey's testimony to be reliable, well considered and credible. Dr. McCloskey's opinions were based on a comprehensive review of the medical evidence of the case and a first hand interview with an eyewitness, Irene Vera, and based on his decades of experience and training. Based on the Court's personal observation of Dr. McCloskey's demeanor and courtroom presentation, it is clear that he was not motivated to work on this case by profit, but by his medical opinion within a reasonable degree of medical certainty that B.G.'s injuries

were the result of an accidental choking and not the act of a third party. Further, Dr. McCloskey's credentials as researcher and clinician who is board certified in pediatrics, anesthesiology, and pediatric critical care as well as his first-hand experience in treating both accidental choking cases and similar instances of child abuse give him a unique perspective on the evidence that lends additional credibility to his opinions regarding this injury.

Dr. Janice Ophoven: Pediatric Forensic Pathologist

30. Pediatric forensic pathologist Janice Ophoven testified by affidavit. Dr. Ophoven has been board certified in pathology and forensic pathology since 1981 and has completed residencies in both pediatrics and pathology. Dr. Ophoven also completed fellowships in both pediatric pathology and forensic pathology. Dr. Ophoven has also received special training in quality assurance. She has worked in the hospital setting as the Medical Director of Quality Management at the St. Paul Children's Hospital and has also worked as a forensic pathologist for various medical examiners offices and coroners in the state of Minnesota. She has also worked extensively as an expert witness and consultant in her practice as a pediatric forensic pathologist. The focus of Dr. Ophoven forensic pathology training and experience has been the evaluation of injuries and death in children. She is an expert in child abuse.

31. Dr. Ophoven testified within a reasonable degree of medical certainty that B.G. suffered a hypoxic brain injury after accidentally choking on a wad of paper towels. She based this opinion on a comprehensive review of all of the medical evidence in the case, including her review of Applicant's transcribed interview with the police. Dr. Ophoven stressed the importance to her opinion of a review of the reported history of an injury.

32. Based on her training and experience in pediatrics and forensic pathology, Dr. Ophoven testified that a child B.G.'s age was capable of compressing the wad of paper towels at issue in this case in his mouth and having that wad accidentally lodged in his throat. Dr. Ophoven also explained that the amount of blood seen in the case was consistent with injuries that could have been sustained in an accidental choking. She also determined that the size of the wad of paper towels could be lodged in the child's throat in light of the expandable nature of the tissues in the back of the mouth and the throat, including the hypopharanx. Dr. Ophoven also based her conclusions on a review of the affidavits of airway specialists Dr. Zur and Dr. McCloskey.

33. Drawing on her experience in evaluating child abuse cases, Dr. Ophoven testified that B.G.'s brain injury was the result of a tragic accident. She stated that there were no relevant indicators of child abuse. Specifically Dr. Ophoven noted that there were no suspicious injuries found on B.G. and that stuffing a wad of paper towels down B.G.'s throat would have caused significant trauma to the tissues of the throat,

mouth and possibly the face. These injuries were not seen and there is no evidence of a complex restraint process on the child that might have avoided such injuries. Dr. Ophoven did not find the small bite mark on Applicant's finger to be relevant in light of the account of B.G. biting Irene Vera during her attempts to examine his mouth.

34. Dr. Ophoven also did not find Applicant's statements to the police to indicate child abuse. Specifically, the variation in history as to whether Applicant discovered B.G. standing or on the floor was not the sort of inconsistency that Dr. Ophoven found to be indicative of abuse. Dr. Ophoven explained that the variation was reasonable in light of the stress under which Applicant's initial report to the police was given. Further, the inconsistency was not misleading, inconsistent with known facts, and did not lessen Applicant's responsibility. Instead, Dr. Ophoven concluded that the variation in the account was entirely understandable in light of the crisis in which it was given, and the absence of any other indication of child abuse.

35. The State introduced a transcript of a post conviction hearing and findings of the court in a Minnesota case as impeachment of Dr. Ophoven's testimony. In that case, the issue was whether the applicant's due process rights were violated because a state actor had prevented Dr. Ophoven from testifying for the defense at trial. The district court held that due process was not violated in that case because Dr. Ophoven's testimony was not prevented by a state actor and that any violation was harmless because Dr. Ophoven's testimony would have been cumulative

of the evidence presented at trial. As a further alternative holding, the Minnesota trial court found that Dr. Ophoven had a tendency to over exaggerate her experience and displayed an inability to remain professional on the stand in that case.

36. The state did not present evidence that Dr. Ophoven exaggerated her experience in her affidavit or that anything in her affidavit indicated a lack of professionalism. In fact, the State's witness, forensic pathologist Dr. Peacock, testified that she had reviewed the transcript from Minnesota and offered no opinion that any of this evidence impacted the reliability of Dr. Ophoven's opinions.

37. The Court finds that Dr. Ophoven's affidavit is a reliable, comprehensive and credible review of the evidence. The opinions offered are based on Dr. Ophoven's extensive experience and training as a pediatric forensic pathologist and expert in child abuse. While the Court acknowledges the criticisms of Dr. Ophoven lodged in the Minnesota transcript and findings, this Court gives virtually no weight to that impeachment evidence and further notes that Dr. Ophoven relied on the opinions of clinical experts Dr. Zur and McCloskey whose objectivity and superior qualifications were clearly demonstrated at the hearing.

Robert Curr: EMT Who Removed the Obstruction

38. Robert Curr testified at the hearing regarding his efforts in saving B.G.'s life by removing the

obstruction. Mr. Curr confirmed that, except for spelling errors, he believed that his testimony at trial was accurate. Mr. Curr testified that he was sure that he did not injury B.G. when he used a laryngoscope to look into B.G.'s airway or when he removed the obstruction. He was also sure that he used pediatric instruments despite the trial testimony of his co-worker at the scene, Jordan Rojo, that adult forceps and laryngoscope were used.

39. In response to the Court's questioning, Mr. Curr confirmed his prior testimony that the photos of the wad of paper towels introduced as evidence in this case did not accurately depict the object when it was removed from B.G.'s airway. Mr. Curr could not quantify how much smaller the object was, but indicated through the use of wadded up tissues and his hands that the object was compressed on all sides.

Patricia Aldridge: Treating Pediatric Critical Care

40. Dr. Patricia Aldridge testified at the habeas hearing regarding her opinion that Applicant intentionally injured B.G. by stuffing a wad of paper towel down his throat.[2] Dr. Aldridge is a pediatric critical care doctor. Dr. Aldridge treated B.G. for his brain injuries

[2] At the time of trial Dr. Aldridge went by the surname Oehring. That is the name also used in the appellate opinion. However, she will be referred to as Aldridge in these findings and conclusions.

while he was in the ICU for approximately one week before he was transferred to hospice care. At the time Dr. Aldridge treated B.G., she had been out of training for approximately 3 years. Dr. Aldridge testified that she received two days of child abuse training in her pediatrics residency and had not been trained as a child abuse investigator.

41. Dr. Aldridge's habeas testimony did not meaningfully differ from the opinions she offered at trial. Dr. Aldridge testified at the hearing that she formed the opinion that the choking was non-accidental on the first night she saw B.G. She based this conclusion on reports of the history of the accident that she received from the emergency room doctor who spoke with the EMT. She never reviewed any statements made by Applicant. Dr. Aldridge based her opinion in part on the size of the wad of paper towels, but admitted that she did not know until the time she was asked at the habeas hearing that the photos of the wad of paper towels did not accurately reflect the actual size of the wad removed from B.G.'s airway.

42. The most significant factor in Dr. Aldridge's opinion that this was an intentional injury is her belief that B.G. was without air for 20-40 minutes based on his blood gas levels. Dr. Aldridge did not provide any medical literature supporting her opinion that she could estimate the time he was without air based on blood gas levels. Nor did Dr. Aldridge respond to Dr. McCloskey's opinions that blood gas levels are not an accurate measure of how long a person has been without air.

43. Dr. Aldridge also testified that she placed weight on the inconsistent statement of Applicant as to whether she discovered B.G. standing or lying down. However, Dr. Aldridge did not personally reviewed Applicant's statements.

44. Having personally observed Dr. Aldridge's testimony, the Court does not find that she credibly rebutted the testimony of applicant's experts that B.G. likely choked accidentally on the wad of paper towels. Dr. Aldridge's demeanor on the witness stand was defensive. Although Dr. Aldridge did treat B.G. in the ICU for his brain injury, she did not conduct the comprehensive review of the evidence that was completed by Drs. Zur, McCloskey, and Ophoven. As a pediatric critical care doctor, Dr. Aldridge is familiar with pediatric airway, but is not a specialist in the field of choking or the removal of foreign objects from the airway. When she treated B.G. and formed her opinion, Dr. Aldridge was only three years out of training. Further, Dr. Aldridge did not review Applicant's account of what happened even though she based her opinion on what she perceived as inconsistencies with that account. Dr. Aldridge also discussed the size of the wad of paper towels, but was not aware of the fact that the photos of the wad of paper towels did not accurately represent the obstruction when it was removed. Mr. Curr confirmed this in his testimony that the obstruction was smaller in size. Further, based on Dr. McCloskey's testimony, the eyewitness accounts of B.G., and the chronology of events, this Court finds that Dr. Aldriges opinion that B.G. was without air for between 20-40 minutes to be unreliable.

Dr. Elizabeth Peacock: Forensic Pathologist

45. Dr. Elizabeth Peacock is an experienced forensic pathologist, currently working as an assistant medical examiner with the San Antonio Medical Examiner's Office. Dr. Peacock was previously with the Travis County Medical Examiner's Office. Dr. Peacock has no pediatric training and has never treated a live patient in a professional capacity. Dr. Peacock did not conduct the autopsy of B.G.

46. Dr. Elizabeth Peacock opined at the habeas hearing that it was impossible for B.G. to have accidentally choked on the wad of paper towels. She based this opinion on her determination that the wad of paper towels was lodged in B.G.'s trachea. Dr. Peacock's testimony at trial reflected that she had reviewed only the photographs of the wad of paper towels and the autopsy report in reaching her conclusion.

47. At the habeas hearing, Dr. Peacock testified that her review of materials relevant to B.G.'s injury consisted only of Dr. Ophoven's affidavit, the photographs of the wad of paper towels and an incomplete copy of the autopsy report by Dr. Purangao. Dr. Peacock also reviewed materials regarding Dr. Ophoven's testimony in the Minnesota case, but did not offer an opinion regarding those materials.

48. Having personally reviewed Dr. Peacock's testimony, the Court finds that she did not credibly rebut the opinions of Drs. Zur, McCloskey, and Ophoven that B.G. likely choked accidentally on a wad of paper towels. While the Court does not question Dr.

Peacock's objectivity, she was not familiar enough with the facts of the case to offer a reliable opinion as to B.G.'s injury. Dr. Peacock acknowledged that a pediatric otolaryngologist would be the primary expert on choking. As noted above, Dr. Zur is such an expert. *See* ff. 4, *supra*. Dr. Zur's opinions contradicted those of Dr. Peacock on the basic question of where the obstruction was lodged. Furthermore, Mr. Curr, who removed the obstruction, did not testify that it was lodged in the trachea. Rather he indicated an area within the laryngopharanx.

Dr. James Eskew: Otolaryngologist

49. Dr. James Eskew, who testified at the habeas hearing, is an otolaryngologist and well established member of the medical community in Travis County. Although Dr. Eskew has no pediatric training, he regularly treats pediatric cases in his office and as an on call physician at the Dell Children's Hospital in Austin, Texas.

50. Dr. Eskew testified that he did not believe B.G. accidentally choked on the wad of paper towels. Dr. Eskew also testified that he did not believe it likely that a child could wad up a paper towel of this size and put it in his mouth or compress it in his mouth. He based his beliefs on his review of the photographs of the wad of paper towels, Dr. Zur's affidavit, the trial testimony of Dr. Ira Kanfer, and the trial testimony of Mr. Curr. Dr. Eskew also spoke with Mr. Curr in person.

51. Having observed Dr. Eskew, this Court does not believe that he has credibly rebutted the testimony of Drs. Zur, McCloskey, and Ophoven that B.G. likely accidntally choked on a wad of paper towels. Although Dr. Eskew is certainly a well regarded member of the medical community, he only spent three hours preparing for his testimony and did not review enough information to provide a reliable opinion on B.G.'s injuries. Specifically, Dr. Eskew did not review the statements of Applicant or Irene Vera who witnessed B.G. before he went into cardiac arrest. Dr. Eskew based his opinion in part on the appearance of the wad of paper towels in the photographs even though Mr. Curr clearly stated that these photographs did not accurately depict the size of the wad when it was removed. Further, Dr. Eskew is not a pediatric specialist and has not done research on airway issues or the removal of foreign objects from the pediatric airway. Finally, Dr. Eskew did not consult with a critical care physician in reaching his opinions, even though the State's expert Dr. Aldridge, explained that such consultation was important because a critical care doctor has the expertise to see the entire picture of the injury.

Randell Alexander, M.D., Ph.D.: Child Abuse

52. Dr. Randell Alexander testified by affidavit at the habeas hearing. Dr. Alexander's affidavit is responsive to the opinions offered by Drs. Zur, McCloskey, and Ophoven. Alexander's affidavit states that nothing in these affidavits changes his trial testimony and his

opinion that B.G. could not have accidentally choked on the wad of paper towels.

53. The affidavit appears to be responsive notes to statements made in the affidavits of Drs. Zur, McCloskey, and Ophoven but does not provide much more than conclusory responses to the issues raised.

54. In response to Dr. McCloskey's opinion that a forcible attach would leave "signs of a struggle," Dr. Alexander mentioned a case that he testified in "where a step-mother forced a taco into a child's throat and killed her without such injuries." This case involved the death of Sandra Martinez in Williamson County. That autopsy report was admitted into evidence at the habeas hearing. As confirmed by Dr. Peacock, this autopsy report shows multiple injuries to the face of the child.

55. Based on the cursory and inaccurate nature of Dr. Alexander's affidavit, the Court finds that Dr. Alexander did not credibly rebut the testimony of Drs. Zur, McCloskey, and Ophoven that B.G. likely choked accidentally on a wad of paper towels.

Findings Relating to Performance of Counsel and Denial of Resources

56. Trial counsel Leonard Martinez testified by affidavit. He filed an Affidavit of Trial Counsel and a First Supplemental Affidavit. Mr. Martinez's statements in these affidavits were not controverted by any witness.

57. Mr. Martinez recognized the need for expert witnesses including experts on choking. He sought funding for experts through informal *ex parte* meetings with Judge Wisser. However, Mr. Martinez's informal *ex parte* requests for additional experts were denied by Judge Wisser.

58. Mr. Martinez did not file written motions to document his requests for additional funding for experts in choking and did not document his explanation to the Court for why he needed additional funds for these experts. Instead, Mr. Martinez worked within the budgetary constraints imposed by Judge Wisser.

59. Because of the limitations on funding, Mr. Martinez was unable to hire Linda Norton, a pediatric forensic pathologist. And due to the funding limitations, Mr. Martinez was unable to hire a physician with clinical expertise in choking cases such as Dr. Zur and Dr. McCloskey. In fact, Mr. Martinez communicated with a specialist in emergency medicine who had expertise in choking, Dr. Frank McGeorge, but was unable to hire him because of the lack of funding.[3]

60. Because Mr. Martinez did not obtain adequate funding, he was only able to retain Dr. Kanfer, a forensic pathologist from Connecticut without pediatric training or specific clinical expertise in choking. While Dr. Kanfer gave testimony generally consistent

---

[3] Additional information regarding Dr. McGeorge may be found at his hospital website: http://www.henryfordhealth.org/body.cfm?id=38441&action=detail&ref=932

with the history of an accidental choking, he lacked the pediatric specialization and the clinical experience to render a reliable and persuasive opinion that B.G. accidentally choked on the wad of paper towels.

61. Because of his lack pediatric training or specific clinical expertise in choking, Dr. Kanfer's carried little weight at trial, and was clearly outweighed by the trial testimony of Dr. John Boulet, Dr. Aldridge, Dr. Alexander and Dr. Peacock. For example, "none of the State's experts agreed with Dr. Kanfer's opinion that the blood on the paper towels was a result of pulmonary edema." 240 S.W.3d at 401. Moreover, none of Applicant's experts at the habeas hearing, Drs. Zur, McCloskey or Ophoven, testified that the blood was a result of pulmonary edema.

62. To the extent Dr. Kanfer's testimony had any persuasive value (which is highly doubtful), the Court finds that it was completely and 100% undermined by Dr. Kanfer's unprofessional conduct at trial. Dr. Kanfer's testimony revealed clear evidence of bias demonstrated by his admitted statement that the prosecutors could go "fuck themselves" in order to "scare the prosecutors." Dr. Kanfer admitted on cross examination "I was pissed."

63. The Third Court of Appeals held this evidence was properly admitted by at trial by Judge Wisser because "Dr. Kanfer's admitted use of profanity when referring to the prosecutors revealed potential animosity toward the prosecutors," to the extent that it was "obvious to the jury Dr. Kanfer's [low] regard for

the prosecutor." 240 S.W.3d at 403, 406. Consequently, the State was permitted to argue this matter as an attack on "Dr. Kanfer's qualifications, methodology, and neutrality." *Id.* at 408.

64. Mr. Martinez did not initially object to the cross examination of Dr. Kanfer regarding his comment that the prosecutors could go "fuck themselves," and he did not provide any grounds to support his objection when the State brought it up for second time. Mr. Martinez also did not request a mistrial or a continuance to remedy the problem or find a new witness.

Finding Relating to Applicant's Interview

65. Mr. Martinez did not request a pretrial hearing on the admissibility of Applicant's lengthy interview, explaining in his affidavit that he did not request the hearing because he did not believe Applicant's statements were inculpatory.[4] Based on the evidence offered at the habeas hearing, this Court agrees that Applicant's interview was not inculpatory.[5]

---

[4] "Interview" is the term ascribed to the video-taped conversation between Applicant and Detective Eric De Los Santos. 240 S.W.3d at 391. The interview was viewed by the jury along with a Spanish and English transcription of the conversation. *Ibid* at n.5.

[5] This finding is limited to the video-taped interview and is in no way related to any statement(s) Applicant made to De Los Santos "as a friend" which he recorded on a digital audio recorded. 240 S.W.3d 393.

Findings Relating to Cause of Death

66. Dr. McCloskey and Dr. Ophoven both testified that the B.G.'s choking and related brain injury did not actually cause B.G.'s death. Although it is undisputed that B.G. suffered a devastating brain injury, he was stable and breathing on his own. B.G.'s mother made a legitimate choice to discontinue nutrition and hydration based on her assessment of B.G.'s quality of life. However, B.G. could have lived indefinitely if provided food and water and appropriate nursing and medical care for his disability.

67. While B.G. was in hospice B.G.'s treating physician permitted B.G.'s mother to bottle feed him. B.G.'s treating physician testified that B.G. died as a result of aspiration related pneumonia.

Findings Regarding Bite marks

68. During the trial, the State argued to the jury that marks on Applicant's fingers were bite marks sustained while she was forcing a wad of paper towel down B.G.'s throat. No medical expert confirmed this theory, and Dr. Kanfer directly refuted the notion. The prosecution argued to the jury that "Folks, we don't need a forensic odontologist to tell you what this is on her hand."

69. In a letter submitted in the habeas proceeding, Dr. Bruce Schrader, a forensic odontologist, stated that he consulted with the Austin Police Department and was shown photographs of Applicant's hands. Dr.

Schrader stated was unable to opine that that the injuries to Applicant's hands were necessarily the bite marks from B.G. Dr. Schrader's statements in his letter were uncontroverted at the hearing.

CONCLUSIONS OF LAW

The following conclusions are listed in the order of the "Designated Issues," *supra*, with Applicant's claims noted parenthetically.

I. WHETHER APPLICANT IS ACTUALLY INNOCENT (CLAIMS 5 & 6)

1. Applicant's fifth claim raises a freestanding claim of innocence under *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996). "In order to grant relief, the reviewing court must believe that no rational juror would have convicted the applicant in light of the newly discovered evidence." *Ex parte Thompson*, 153 S.W.3d 416, 417 (Tex. Crim. App. 2005). The standard of proof is by clear and convincing evidence. *Elizondo*, 947 S.W.2d at 209.

2. "Newly-discovered" or "newly-available" evidence "refers to evidence that was not known to the applicant at the time of trial and could not be known to him even with the exercise of due diligence." *Ex parte Brown*, 205 S.W.3d 538, 545-46 (Tex. Crim. App. 2006) (citations omitted).

3. The opinions of medical experts who have reviewed materials available at the time of trial are not

newly discovered evidence of the type that is sufficient to support an actual innocence claim. *Ex parte Briggs*, 187 S.W.3d 458, 465 (Tex. Crim. App. 2005).

4. The expert opinions produced by Applicant does not constitute newly discovered evidence under actual innocence jurisprudence because they rely on the same evidence as that available at the time of trial. Applicant's experts have merely presented a differing interpretation of the physical and medical evidence that existed at the time of trial.

5. Even if the opinions of Applicant's three experts had been sufficient to qualify as newly discovered evidence, the applicant has not met her burden. Having examined the habeas evidence against the trial evidence of guilt, this court finds Applicant has not shown by clear and convincing evidence that no reasonable juror would have convicted her in light of the habeas evidence. The evidence presented by the applicant's three experts is not medically indisputable, but rather offers a differing view of the medical evidence from that presented by the State.

6. For the following reasons, this conclusion of law is included as an alternative. As noted above, Applicant filed this application for writ of habeas corpus on October 6, 2009, and supplemented it on October 20, 2010. This Court does not conclude that the supplement is a subsequent writ. However, if the Court of Criminal Appeals holds it to be a subsequent writ this Court concludes that the evidence presented at the habeas hearing satisfies the applicant's burden under

article 11.07 §4(a)(2) to show by a preponderance of the evidence that no rational juror could have found applicant guilty beyond a reasonable doubt. *See Ex Parte Reed*, 271 S.W.3d 698, 733 (Tex. Crim. App. 2008) (describing identical provision in article 11.071 as a codification of *Schlup v. Delo*, 513 U.S. 298 (1995). This standard has a lower burden of proof and does not require the evidence of innocence to be newly available or newly discovered. The testimony of Drs. Zur, McCloskey, and Ophoven both demonstrate the likelihood that B.G. was injured through an accidental choking and that the evidence presented at trial to the contrary was unreliable. The Court has found these experts to be credible that the State did not effectively rebut their testimony. Accordingly, this Court concludes that a reasonable jury would probably not have convicted Applicant had it heard all of the evidence presented in this habeas proceeding. Based on this showing, any procedural default through Applicant's supplementation of her application is excused.

7. Applicant's sixth claim contends that, even if there was evidence that Applicant choked B.G., "there is not evidence to support a conviction of murder." This Court finds that this contention is a challenge to the sufficiency of the evidence rather than as an actual innocence claim. *Ex parte Santana*, 227 S.W.3d 700, 705 (Tex. Crim. App. 2007) (where applicant alleged he was actually innocent of the offense of aggravated robbery with a deadly weapon because he claimed he only attempted to commit the offense).

8. A challenge to the sufficiency of the evidence is not cognizable on a habeas application. *Santana*, 227 S.W.3d at 705.

9. Applicant has challenged the legal and factual sufficiency of the evidence on direct appeal. *Jimenez*, 240 S.W.3d at 398-402. The Third Court of Appeals found the evidence sufficient to support both convictions. *Id.* at 402. Issues raised and rejected on direct appeal are not cognizable on a habeas application. *Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984).

10. Applicant's claims 5 and 6 lack merit and habeas relief is not required.

II. WHETHER APPLICANT WAS DENIED DUE PROCESS OF LAW WHEN HER REQUESTS FOR ADDITIONAL EXPERT ASSISTANCE WERE DENIED. (CLAIM 10)

11. Under *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985), due process requires access to the raw materials integral to the building of an effective defense. Under certain circumstances, those raw materials include an appointed expert. *Ake* sets forth three considerations relevant to determining whether an indigent defendant is constitutionally entitled to the requested appointed expert: the defendant's interest, the State's interest, and "the probable value of the . . . procedural safeguards that are sought, and the risk of the erroneous deprivation of the affected interest if those safeguards are not provided." *Id.* at 77; *Jackson v. State*, 992 S.W.2d 469, 472-73 (Tex. Crim. App. 1999).

12. The third consideration is the focus of most cases addressing the appointment of an expert in the due-process context. *Rey v. State*, 897 S.W.2d 333, 337-38 (Tex. Crim. App. 1995). The *Ake* Court explained that the risk of erroneous deprivation is too high when it is clear that the issue on which the expert is sought is likely to be a significant factor at trial. *Ake*, 470 U.S. at 83. Therefore, an indigent defendant has the right to have an expert appointed upon a preliminary showing that the matters that the expert will address will likely be significant factors at trial. *See Ake*, 470 U.S. at 74.

13. No one disputes that Applicant was indigent. And there can be no dispute that because of the unique nature of B.G.'s choking, his injuries, his medical treatment provided and his subsequent death, that experts would be necessary to assist the defense in confronting the State's case, and to testify to establish the defensive theory.

14. The affidavit of Mr. Martinez, lead defense counsel, recognized the need for additional expert witnesses including experts on choking. He sought funding for experts through informal *ex parte* meetings with Judge Wisser but Judge Wisser denied those requests. Accordingly, Mr. Martinez worked within the budgetary constraints imposed by Judge Wisser.

15. Due to these limitations, Mr. Martinez was unable to hire Linda Norton, a pediatric forensic pathologist. And could not hire to hire a physician with

clinical expertise in choking cases such as Dr. Zur and Dr. McCloskey.[6]

16. Due to this lack of funding, Mr. Martinez was only able to retain Dr. Kanfer, a forensic pathologist with no pediatric training or specific clinical expertise in choking. The old saying: "you get what you pay for" is certainly true in the case of Dr. Kanfer; he was worst than Applicant having no witness. In my 30 years as a licensed attorney, 20 years in the judiciary, this Court has never seen such unprofessional and biased conduct from any witness, much less from a purported expert.

17. Mr. Martinez admits and this Court concludes that this case amounted to a "failure of forensics."

18. The failure of Judge Wisser to provide Mr. Martinez adequate funding to retain experts who could provide relevant testimony regarding the unique issues presented in this case, e.g., a pediatric otolaryngologist, clearly violated *Ake v. Oklahoma*, and *Rey v. State*. Accordingly, Applicant's claim 10 is meritorious and habeas relief is required.[7]

---

[6] As noted, at ff. 59, *supra*, Mr. Martinez contacted Dr. Frank McGeorge, but was unable to hire him based on a lack of funding.

[7] This conclusion is easily reached because the evidence on this matter is uncontested. Court also concludes Applicant is entitled to habeas relief in a related matter: Mr. Martinez was ineffective for failing to make an adequate record to document the lack of funding for expert assistance in order to raise the claim on direct appeal. *See*, cl. 20 & 23, *infra*.

III. Ineffective Assistance of Counsel. (Claims 1, 3, 4, 7, 8, 9)

19. To obtain habeas corpus relief for ineffective assistance of counsel under the *Strickland v. Washington*, 466 U.S. 668 (1984) standards, applicant must show that counsel's performance "was deficient and that a probability exists, sufficient to undermine our confidence in the result, that the outcome would have been different but for counsel['s] deficient performance." *Ex parte White*, 160 S.W.3d 46, 49 (Tex. Crim. App. 2004); *Ex parte Amezquita*, 223 S.W.3d 363, 366 (Tex. Crim. App. 2006). Counsel's performance is deficient if it is shown to have fallen below an objective standard of reasonableness. *Ex parte Amezquita*, 223 S.W.3d at 366.

20. Trial counsel admits and this Court has concluded this case amounted to a "failure of forensics." *See* cl 18, *supra*. Based on the evidence discussed above, this Court concludes that trial counsel's performance was deficient because counsel failed to hire qualified experts with the necessary experience and background to offer persuasive and reliable opinions that B.G. likely choked accidentally on a wad of paper towels. Additionally, trial counsel was deficient in failing to make an adequate written request for such assistance when it became clear to Mr. Martinez that Judge Wisser would not provide the necessary funds. Doing so would have preserved the issue for appellate review. Furthermore, the outrageous and completely unprofessional behavior of Dr. Kanfer, and trial counsel's failure to adequately respond by objection,

request for a mistrial, or request for a continuance also constituted deficient performance. Counsel's conduct in failing to hire qualified experts, failing to make an adequate record for such funding, and hiring Dr. Kanfer, individually and collectively, constitutes performance that fell below an objective standard of reasonableness for the conduct of an attorney.

21. This Court heard the evidence that should have presented to the jury, namely that B.G. likely choked accidentally on a wad of paper towels. Three highly qualified pediatric specialist reached this conclusion. These experts effectively rebutted the State's theory of guilt and were not effectively impeached by the State at the habeas hearing. Although this Court acknowledges that Dr. Kanfer offered many of the same opinions as presented Applicant's experts at the habeas hearing, the habeas evidence was not cumulative due to Dr. Kanfer's lack of pediatric training or specific clinical expertise, and the fact that Dr. Kanfer's lack of professionalism which completely undermined his credibility. As noted above, Dr. Kanfer; he was worst than Applicant having no witness. *See*, cl. 17, *supra*.

22. Based on this Court's determinations of the credibility of the expert witnesses in the case, the Court concludes that trial counsel's deficient performance was prejudicial to Applicant's case and that there is a reasonable probability that the outcome of the proceeding would have been different. Certainly, this Court has no confidence in the outcome of the trial.

23. This Court further concludes that had trial counsel preserved the *Ake* claim for appeal and had that issue been raised on direct appeal, the Third Court of Appeals, in light of their thorough review of the trial record and their obvious contempt for the unprofessional conduct of Dr. Kanfer, would have sustained the point of error and reversed the judgment of the trial court.

24. Applicant's claims 1, 3 and 4 are meritorious and habeas relief is required.

25. Applicant's claim 7 contends trial counsel was ineffective for failing to present evidence that B.G.'s death was not caused by the choking injury in this case. According to Drs. McCloskey and Ophoven, B.G. could have lived indefinitely and that his death was the result of a legitimate decision to discontinue food and water, and a grossly negligent decision to allow B.G. to be bottle fed. Applicant argues that had this evidence been presented to the jury, there is a reasonable likelihood that Applicant would not have been convicted of murder. *See Turner v. State*, 505 S.W.2d 558, 560 (Tex. Crim. App. 1974).

26. Applicant was convicted of felony murder, Penal Code Section 19.02(b)(3), which provides:

(b) A person commits an offense if he:

(3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt,

he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

Additionally, Penal Code Section 6.04 provides:

(a) A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

(b) A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that:

(1) a different offense was committed; or

(2) a different person or property was injured, harmed, or otherwise affected.

27. Per these statutes, Applicant caused the decedent's death: but for the decedent choking on the wad of paper towels which, the jury found, was the result of applicant's conduct, the decedent would not have sustained a hypoxic brain injury and died. Any actions by the decedent's mother or his doctors were clearly insufficient, on their own, to cause the injury and the applicant's actions clearly sufficient. Applicant's claim 7 lacks merit and habeas relief is not required.

28. Applicant's claim 8 contends trial counsel was deficient in failing to suppress her interview with

Detective Eric De Los Santos. However, as noted in ff. 65, *supra*, trial counsel did not request a pretrial hearing on the admissibility of Applicant's lengthy interview, because he did not believe Applicant's statements were inculpatory. And this Court agreed that Applicant's interview was not inculpatory. *Id.* Trial counsel's strategic decision to not attempt to suppress the interview may not be second guessed by a habeas court. Moreover, there is no showing that the interview would have been suppressed if that strategic avenue had been chosen. Applicant's claim 8 lacks merit and habeas relief is not required.

29. Applicant contends in her ninth claim that interim appellate attorney rendered ineffective assistance in failing to investigate and present a prosecutorial misconduct claim relating to the State's argument that marks on Applicant's fingers were bite marks. However, for the reasons stated at cl. 34, *infra*, this Court concludes there was no prosecutorial misconduct. Consequently, the interim appellate attorney was not deficient in not investigating and presenting that claim. Applicant's claim 9 lacks merit and habeas relief is not required.

IV. WHETHER THE STATE COMMITTED PROSECUTORIAL MISCONDUCT. (CLAIM 2)

30. In her fourth point of error on direct appeal, Applicant contended interim appellate counsel was ineffective at the motion for new trial for abandoning a claim that the State elicited testimony and argued

to the jury that Applicant's forefinger had bite marks. 240 S.W.3d at 412. This claim arose from Mr. Martinez's belief that the State had a report from an odontologist's to the contrary. However, there was no evidence of such a report in the appellate record nor was there any evidence as to why interim appellate counsel abandoned this contention. Consequently, the Third Court of Appeals overruled this point of error. 240 S.W.3d at 416. But in footnote 17 stated:

> We again note that if, as Jimenez alleges, there is evidence outside the record that the State suppressed material evidence, [Jimenez] should raise her ineffective assistance of counsel claim in a petition for writ of habeas corpus.

Ibid.

31. The original source for the allegation about a forensic odontologist is the offense report, which reflects that one of the Austin Police Department (APD) detectives pursued this line of investigation. OR at 18-24. The detective's last entry on this matter, on February 14, 2003, reads: "[Forensic odontologist] Dr. Schrader arrived for the meeting. He evaluated the photographs of the susps hands and the alleged bite marks on them. He advised that impressions of [B.G.'s] teeth may be difficult to tie in with the bite marks on the photos."

32. In a letter submitted in the habeas proceeding, Dr. Bruce Schrader, a forensic odontologist, stated that he consulted with APD and was shown photographs

of Applicant's hands. Dr. Schrader informed them that marks on Applicant's fingers were not necessarily bite marks.

33. The Third Court of Appeals found that Applicant admitted to Det. De Los Santos that the decedent had bitten her. 240 S.W.3d at 409.

34. In light of Applicant's admission and the ambiguous opinion of Dr. Schrader, this Court cannot say the prosecutors engaged in misconduct. Consequently, Applicant's claim 2 lacks merit and habeas relief is not required.

RECOMMENDATION AND ORDER

Based on the foregoing findings of fact and conclusions of law, this Court determines that Applicant's trial was fatally infected by constitutional error. Accordingly, this Court recommends that the judgment be vacated and that applicant be remanded to the custody of the Travis County Sheriff to answer the indictment.

The District Clerk is ordered to prepare a transcript of all papers in this cause and send same to the Court of Criminal Appeals as provided by Article 11.07 of the Code of Criminal Procedure. The transcript shall include:

a. the application for a writ of habeas corpus and supplement;

b. the briefs;

c. the exhibits;

d. the State's answer;

e. the Clerk's Record and Reporter's Record of the trial;

f. the Reporter's Record of any habeas hearing;

g. applicant's proposed findings of fact and conclusions of law;

h. the State's proposed findings of fact and conclusions of law, if any;

i. this court's findings of fact and conclusions of law; and

j. any objections filed by either party to the court's findings of fact and conclusions of law.

The District Clerk shall send a copy of this document to applicant, his counsel, and counsel for the State.

Signed on the 31st day of December, 2010.

/s/ Charles F. Baird
Charles F. (Charlie) Baird
Judge Presiding
299th District Court

[Filed in the District Courts of Travis County, Texas
12/31/10
6:09 PM

Amalia Rodriguez-Mendoza
District Clerk,
Travis County, Tx.]

Case No. D-1-DC-04-904165-A
(The Clerk of the convicting court will fill this line in.)

[COUNT I]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

APPLICATION FOR A WRIT OF HABEAS CORPUS SEEKING RELIEF FROM FINAL FELONY CONVICTION UNDER CODE OF CRIMINAL PROCEDURE, ARTICLE 11.07

(Filed Oct. 6, 2009)

NAME: Rosa Estela Olvera Jimenez

DATE OF BIRTH: [Omitted in Printing]

PLACE OF CONFINEMENT: Christina Melton Crain Unit

TDCJ-CID NUMBER: 1326763

SID NUMBER: _____

(1) This application concerns (check all that apply):

X	**a conviction**	☐	**parole**
☐	**a sentence**	☐	**mandatory supervision**
☐	**time credit**	☐	**out-of-time appeal or petition for discretionary review**

(2) What district court entered the Judgment of the conviction you want relief from? (Include the court number and county.)

299th Judicial District Court of Travis County, Texas

(3) What was the case number in the trial court?

D-1-DC-04-904165

(4) What was the name of the trial judge?

Jon Wisser

Revised: March 5, 2007

(5) Were you represented by counsel? If yes, provide the attorney's name:

Leonard Martinez

(6) What was the date that the judgment was entered?

September 1, 2005

(7) For what offense were you convicted and what was the sentence?

Count I Murder – 75 years; Count II Injury to a Child – 99 years

(8) If you were sentenced on more than one count of an indictment in the same court at the same time, what counts were you convicted of and what was the sentence in each count?

See number 7 above

(9) What was the plea you entered? (Check one.)

☐	**guilty-open plea**	☐	**guilty-plea bargain**
X	**not guilty**	☐	***nolo contendere*/ no contest**

If you entered different pleas to counts in a multi-count indictment, please explain:

_____

_____

(10) What kind of trial did you have?

☐ **no jury**

☐ **jury for guilt, judge for punishment**

X jury for guilt and punishment

(11) Did you testify at trial? If yes, at what phase of the trial did you testify?

No.

(12) Did you appeal from the judgment of conviction?

X yes ☐ **no**

If you did appeal, answer the following questions:

(A) What court of appeals did you appeal to? Third Court of Appeals

(B) What was the case number? 03-05-00633-CR

(C) Were you represented by counsel on appeal? If yes, provide the attorney's name:

Leonard Martinez

(D) What was the decision and the date of the decision? 8/31/07

rehearing denied 9/27/07

(13) Did you file a petition for discretionary review in the Court of Criminal Appeals?

X yes ☐ no

If you did file a petition for discretionary review, answer the following questions:

(A) What was the case number? PD-1669-07

(B) What was the decision and the date of the decision? Refused, 4/2/08

(14) Have you previously filed an application for a writ of habeas corpus under Article 11.07 of the Texas Code of Criminal Procedure challenging *this conviction*?

☐ yes X no

If you answered yes, answer the following questions:

(A) What was the Court of Criminal Appeals' writ number? _____

(B) What was the decision and the date of the decision? _____

(C) Please identify the reason that the current claims were not presented and could not have been presented on your previous application.

_____

_____

(15) Do you currently have any petition or appeal pending in any other state or federal court?

☐ yes X no

If you answered yes, please provide the name of the court and the case number:

_____

(16) If you are presenting a claim for time credit, have you exhausted your administrative remedies by presenting your claim to the time credit resolution system of the Texas Department of Criminal Justice? (This requirement applies to any final felony conviction, including state jail felonies)

☐ **yes** ☐ **no**

If you answered yes, answer the following questions:

(A) What date did you present the claim?

_____

(B) Did you receive a decision and, if yes, what was the date of the decision?

_____

If you answered no, please explain why you have not submitted your claim:

_____

_____

(17) Beginning on page 6, state *concisely* every legal ground for your claim that you are being unlawfully restrained, and then briefly summarize the facts supporting each ground. You must present each ground on the form application and a brief summary of the facts. *If your grounds and*

brief summary of the facts have not been presented on the form application, the Court will not consider your grounds.

If you have more than four grounds, use page 10 of the form, which you may copy as many times as needed to give you a separate page for each ground, with each ground numbered in sequence.

You may attach a memorandum of law to the form application if you want to present legal authorities, but the Court will *not* consider grounds for relief in a memorandum of law that were not stated on the form application. If you are challenging the validity of your conviction, please include a summary of the facts pertaining to your offense and trial in your memorandum.

GROUND ONE:

Applicant was denied the effective assistance of counsel when trial counsel failed to object to any of the improper comments and incidents of prosecutorial misconduct committed by the prosecutors in this case.

FACTS SUPPORTING GROUND ONE:

One of the grounds for appeal was that the State had committed prosecutorial misconduct throughout the trial, engaging in a "juggernaut" of snide and unprofessional comments, at least some of which were found to be improper by the Third Court of Appeals; thus rendering Applicant's

trial to be unfair. While trial counsel represented to appellate counsel that he had preserved many errors for appeal, the fact is that he preserved none at all. One thing his failure to object accomplished was to allow the State to decimate his only expert witness in a case he still insists turned on the forensic evidence. While trial counsel claims now that allowing the State to improperly undermine the expert to which Applicant was constitutionally entitled under Ake was partly strategy because he wanted the jury to hate the prosecutor, this strategy ultimately deprived applicant of the effective assistance of counsel, the effective use of an expert to which Applicant was constitutionally entitled, and caused the court of appeals to review this very serious claim under the egregious harm standard set out under Almanza. Trial counsel also failed to object to improper comments during closing argument that, had he timely objected or developed the record, the Third Court of Appeals agreed the claim would have entitled Applicant to a reversal of her conviction.

GROUND TWO:

The prosecution committed prosecutorial misconduct, this depriving Applicant of a fair trial, and violating the Giglio/Napue line of cases under Brady.

FACTS SUPPORTING GROUND TWO:

One of the contested issues at trial was whether marks of Applicant's hands were "bite marks,"

consistent with having stuffed a wad of paper towels deep down a child's throat in order to kill him, or were older healed marks that had nothing to do with the crime. One of the comments made by the prosecutor at the end of guilt/innocence was to the effect that the State did not need a forensic odontologist to prove that marks on Applicant's hands were bite marks and were evidence of the crime. However, the State had in fact engaged a forensic odontologist, who did not confirm that State's theory with regard to the marks on Applicant's hands. The State's comments to the jury left the jury with a false impression, in violation of Giglio/Napue.

GROUND THREE:

Applicant was denied the effective assistance of counsel at the Motion for New Trial ("MNT") hearing.

FACTS SUPPORTING GROUND THREE:

MNT counsel rejected the Giglio/Napue claim in the timely filed motion for new trial hearing, and elected instead to proceed on a late and improperly filed amendment that raised no meritorious claims. While MNT counsel claimed that he "jettisoned" the properly filed motion of new trial, and proceeded on the improper amendment, because the claims in the original motion were without merit; the fact is the forensic

odontologist had been consulted by the state and had declined to support the State's theory of the case, which was raised in the timely filed MNT and which the Third Court of Appeals said would have been a winning claims, assuming that the facts pled in the original MNT were true. The MNT hearing made the front page of the newspaper because one of the witnesses repeatedly called trial counsel a "hack" who he said need to take first-year evidence. It was more of an attack on the overall court appointments system in Travis County than it was on this conviction in particular, and fight in which the Applicant had no legal interest. The late-filed motion for new trial was not properly before the trial court – and did not raise any meritorious claims. The trial judge also disallowed the late-filed amendment, and the state objected to it. Again, the Third Court of Appeals said that assuming that the facts as stated in the original motion for new trial were true, it was ineffective not to pursue them as Applicant would have been entitled to relief.

GROUND FOUR:

Applicant was denied due process and a fair trial, as well as the assistance of an expert that she was entitled to under Ake, due to the conduct of trial counsel, MNT counsel, and the prosecutors in this case.

FACTS SUPPORTING GROUND FOUR:

Applicant's only scientific expert witness at trial was destroyed by the prosecutor, with at least some assistance from defense counsel, who did not object when the prosecutor was allowed to ask the expert questions like, "do you need to go to the bathroom" right after a break because the witness was allegedly fidgeting; and who the expert wanted "to go fuck themselves." This left almost unanswered the State's multiple experts, who were allowed to testify that it is possible be alive a half an hour have your oxygen supply has been cut off. This was a high profile case that was made into an award-winning documentary called "Mi Vida Dentro," and the consciousness of that by the lawyers in this case seemed to put everyone on their worst behavior. Trial counsel became very emotional and failed to object to anything. MNT counsel's actions made almost no sense at all, and were contrary to the law as it existed then and as it exists now. This was more like a free-for-all than a trial.

GROUND:

FACTS SUPPORTING GROUND:

WHEREFORE, APPLICANT PRAYS THAT THE COURT GRANT

APPLICANT RELIEF TO WHICH HE MAY BE ENTITLED IN THIS PROCEEDING.

VERIFICATION

(Complete *EITHER* the "oath before a notary public" *OR* the "inmate's declaration.")

OATH BEFORE NOTARY PUBLIC

STATE OF TEXAS, COUNTY OF _____.

_____, BEING FIRST DULY SWORN, UNDER OATH, SAYS: THAT HE/SHE IS THE APPLICANT IN THIS ACTION AND KNOWS THE CONTENT OF THE ABOVE APPLICATION AND ACCORDING TO APPLICANT'S BELIEF, THE FACTS STATED IN THE APPLICATION ARE TRUE.

_____

Signature of Applicant

SUBSCRIBED AND SWORN TO BEFORE ME THIS ___ DAY OF _____.

_____

Signature of Notary Public

INMATE'S DECLARATION

I, ROSA ESTELA OLVERA JIMENEZ, BEING PRESENTLY INCARCERATED IN CHRISTINA MELTON CRAIN UNIT, DECLARE UNDER PENALTY OF PERJURY THAT, ACCORDING TO MY BELIEF, THE FACTS STATED IN THE APPLICATION ARE TRUE AND CORRECT.

SIGNED ON September 27, 2009.

/s/ Rosa Estela Olvera Jimenez
Signature of Applicant

/s/ [Illegible]
Signature of Attorney

Attorney Name: Karyl Krug

SBOT Number: 00786033

Address: 812 San Antonio, Suite G-12
Austin, Texas 78746

Telephone: (512) 474-5544
Fax: (512) 478-2828

Case No. D-1-DC-904165-A
(The Clerk of the convicting court will fill this line in.)

[COUNT II]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

APPLICATION FOR A WRIT OF HABEAS CORPUS SEEKING RELIEF FROM FINAL FELONY CONVICTION UNDER CODE OF CRIMINAL PROCEDURE, ARTICLE 11.07

(Filed Oct. 6, 2009)

NAME: Rosa Estela Olvera Jimenez

DATE OF BIRTH: [Omitted in Printing]

PLACE OF CONFINEMENT: Christina Melton Crain Unit

TDCJ-CID NUMBER: 1326763

SID NUMBER: _____

(1) This application concerns (check all that apply):

X	**a conviction**	☐	**parole**
☐	**a sentence**	☐	**mandatory supervision**
☐	**time credit**	☐	**out-of-time appeal or petition for discretionary review**

(2) What district court entered the Judgment of the conviction you want relief from? (Include the court number and county.)

299th Judicial District Court of Travis County, Texas

(3) What was the case number in the trial court?

D-1-DC-04-904165

(4) What was the name of the trial judge?

Jon Wisser

Revised: March 5, 2007

(5) Were you represented by counsel? If yes, provide the attorney's name:

Leonard Martinez

(6) What was the date that the judgment was entered?

September 1, 2005

(7) For what offense were you convicted and what was the sentence?

Count I Murder – 75 years; Count II Injury to a Child – 99 years

(8) If you were sentenced on more than one count of an indictment in the same court at the same time, what counts were you convicted of and what was the sentence in each count?

See number 7 above

(9) What was the plea you entered? (Check one.)

☐	**guilty-open plea**	☐	**guilty-plea bargain**
X	**not guilty**	☐	***nolo contendere*/ no contest**

If you entered different pleas to counts in a multi-count indictment, please explain:

_____

_____

(10) What kind of trial did you have?

☐ **no jury**

☐ **jury for guilt, judge for punishment**

X jury for guilt and punishment

(11) Did you testify at trial? If yes, at what phase of the trial did you testify?

No.

(12) Did you appeal from the judgment of conviction?

X yes ☐ **no**

If you did appeal, answer the following questions:

(A) What court of appeals did you appeal to? Third Court of Appeals

(B) What was the case number? 03-05-00633-CR

(C) Were you represented by counsel on appeal? If yes, provide the attorney's name:

Leonard Martinez

(D) What was the decision and the date of the decision? 8/31/07

rehearing denied 9/27/07

(13) Did you file a petition for discretionary review in the Court of Criminal Appeals?

X yes ☐ no

If you did file a petition for discretionary review, answer the following questions:

(A) What was the case number? PD-1669-07

(B) What was the decision and the date of the decision? Refused, 4/2/08

(14) Have you previously filed an application for a writ of habeas corpus under Article 11.07 of the Texas Code of Criminal Procedure challenging *this conviction*?

☐ yes X no

If you answered yes, answer the following questions:

(A) What was the Court of Criminal Appeals' writ number? _____

(B) What was the decision and the date of the decision? _____

(C) Please identify the reason that the current claims were not presented and could not have been presented on your previous application.

_____

_____

(15) Do you currently have any petition or appeal pending in any other state or federal court?

☐ yes X no

If you answered yes, please provide the name of the court and the case number:

_____

(16) If you are presenting a claim for time credit, have you exhausted your administrative remedies by presenting your claim to the time credit resolution system of the Texas Department of Criminal Justice? (This requirement applies to any final felony conviction, including state jail felonies)

☐ **yes** ☐ **no**

If you answered yes, answer the following questions:

(A) What date did you present the claim?

_____

(B) Did you receive a decision and, if yes, what was the date of the decision?

_____

If you answered no, please explain why you have not submitted your claim:

_____

_____

(17) Beginning on page 6, state *concisely* every legal ground for your claim that you are being unlawfully restrained, and then briefly summarize the facts supporting each ground. You must present each ground on the form application and a brief summary of the facts. *If your grounds and*

brief summary of the facts have not been presented on the form application, the Court will not consider your grounds.

If you have more than four grounds, use page 10 of the form, which you may copy as many times as needed to give you a separate page for each ground, with each ground numbered in sequence.

You may attach a memorandum of law to the form application if you want to present legal authorities, but the Court will *not* consider grounds for relief in a memorandum of law that were not stated on the form application. If you are challenging the validity of your conviction, please include a summary of the facts pertaining to your offense and trial in your memorandum.

GROUND ONE:

Applicant was denied the effective assistance of counsel when trial counsel failed to object to any of the improper comments and incidents of prosecutorial misconduct committed by the prosecutors in this case.

FACTS SUPPORTING GROUND ONE:

One of the grounds for appeal was that the State had committed prosecutorial misconduct throughout the trial, engaging in a "juggernaut" of snide and unprofessional comments, at least some of which were found to be improper by the Third Court of Appeals; thus rendering Applicant's

trial to be unfair. While trial counsel represented to appellate counsel that he had preserved many errors for appeal, the fact is that he preserved none at all. One thing his failure to object accomplished was to allow the State to decimate his only expert witness in a case he still insists turned on the forensic evidence. While trial counsel claims now that allowing the State to improperly undermine the expert to which Applicant was constitutionally entitled under Ake was partly strategy because he wanted the jury to hate the prosecutor, this strategy ultimately deprived applicant of the effective assistance of counsel, the effective use of an expert to which Applicant was constitutionally entitled, and caused the court of appeals to review this very serious claim under the egregious harm standard set out under Almanza. Trial counsel also failed to object to improper comments during closing argument that, had he timely objected or developed the record, the Third Court of Appeals agreed the claim would have entitled Applicant to a reversal of her conviction.

GROUND TWO:

The prosecution committed prosecutorial misconduct, this depriving Applicant of a fair trial, and violating the Giglio/Napue line of cases under Brady.

FACTS SUPPORTING GROUND TWO:

One of the contested issues at trial was whether marks of Applicant's hands were "bite marks,"

consistent with having stuffed a wad of paper towels deep down a child's throat in order to kill him, or were older healed marks that had nothing to do with the crime. One of the comments made by the prosecutor at the end of guilt/innocence was to the effect that the State did not need a forensic odontologist to prove that marks on Applicant's hands were bite marks and were evidence of the crime. However, the State had in fact engaged a forensic odontologist, who did not confirm that State's theory with regard to the marks on Applicant's hands. The State's comments to the jury left the jury with a false impression, in violation of Giglio/Napue.

GROUND THREE:

Applicant was denied the effective assistance of counsel at the Motion for New Trial ("MNT") hearing.

FACTS SUPPORTING GROUND THREE:

MNT counsel rejected the Giglio/Napue claim in the timely filed motion for new trial hearing, and elected instead to proceed on a late and improperly filed amendment that raised no meritorious claims. While MNT counsel claimed that he 'jettisoned" the properly filed motion of new trial, and proceeded on the improper amendment, because the claims in the original motion were without merit; the fact is the forensic

odontologist had been consulted by the state and had declined to support the State's theory of the case, which was raised in the timely filed MNT and which the Third Court of Appeals said would have been a winning claims, assuming that the facts pled in the original MNT were true. The MNT hearing made the front page of the newspaper because one of the witnesses repeatedly called trial counsel a "hack" who he said need to take first-year evidence. It was more of an attack on the overall court appointments system in Travis County than it was on this conviction in particular, and fight in which the Applicant had no legal interest. The late-filed motion for new trial was not properly before the trial court – and did not raise any meritorious claims. The trial judge also disallowed the late-filed amendment, and the state objected to it. Again, the Third Court of Appeals said that assuming that the facts as stated in the original motion for new trial were true, it was ineffective not to pursue them as Applicant would have been entitled to relief.

GROUND FOUR:

Applicant was denied due process and a fair trial, as well as the assistance of an expert that she was entitled to under Ake, due to the conduct of trial counsel, MNT counsel, and the prosecutors in this case.

FACTS SUPPORTING GROUND FOUR:

Applicant's only scientific expert witness at trial was destroyed by the prosecutor, with at least some assistance from defense counsel, who did not object when the prosecutor was allowed to ask the expert questions like, "do you need to go to the bathroom" right after a break because the witness was allegedly fidgeting; and who the expert wanted "to go fuck themselves." This left almost unanswered the State's multiple experts, who were allowed to testify that it is possible be alive a half an hour have your oxygen supply has been cut off. This was a high profile case that was made into an award-winning documentary called "Mi Vida Dentro," and the consciousness of that by the lawyers in this case seemed to put everyone on their worst behavior. Trial counsel became very emotional and failed to object to anything. MNT counsel's actions made almost no sense at all, and were contrary to the law as it existed then and as it exists now. This was more like a free-for-all than a trial.

GROUND:

FACTS SUPPORTING GROUND:

WHEREFORE, APPLICANT PRAYS THAT THE COURT GRANT

APPLICANT RELIEF TO WHICH HE MAY BE ENTITLED IN THIS PROCEEDING.

VERIFICATION

(Complete *EITHER* the "oath before a notary public" *OR* the "inmate's declaration.")

OATH BEFORE NOTARY PUBLIC

STATE OF TEXAS, COUNTY OF _____.

_____, BEING FIRST DULY SWORN, UNDER OATH, SAYS: THAT HE/SHE IS THE APPLICANT IN THIS ACTION AND KNOWS THE CONTENT OF THE ABOVE APPLICATION AND ACCORDING TO APPLICANT'S BELIEF, THE FACTS STATED IN THE APPLICATION ARE TRUE.

_____

Signature of Applicant

SUBSCRIBED AND SWORN TO BEFORE ME THIS ___ DAY OF _____.

_____

Signature of Notary Public

INMATE'S DECLARATION

I, ROSA ESTELA OLVERA JIMENEZ, BEING PRESENTLY INCARCERATED IN CHRISTINA MELTON CRAIN UNIT, DECLARE UNDER PENALTY OF PERJURY THAT, ACCORDING TO MY BELIEF, THE FACTS STATED IN THE APPLICATION ARE TRUE AND CORRECT.

SIGNED ON September 27, 2009.

/s/ Rosa Estela Olvera Jimenez
Signature of Applicant

/s/ [Illegible]
Signature of Attorney

Attorney Name: Karyl Krug

SBOT Number: 00786033

Address: 812 San Antonio, Suite G-12
Austin, Texas 78746

Telephone: (512) 474-5544
Fax: (512) 478-2828

Case No. D-1-DC-04-904165-A
(The Clerk of the convicting court will fill this line in.)

[SUPPLEMENTAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

APPLICATION FOR A WRIT OF HABEAS CORPUS SEEKING RELIEF FROM FINAL FELONY CONVICTION UNDER CODE OF CRIMINAL PROCEDURE, ARTICLE 11.07

(Filed Oct. 20, 2010)

NAME: Rosa Estela Olvera Jimenez

DATE OF BIRTH: [Omitted in Printing]

PLACE OF CONFINEMENT: Christina Melton Crain Unit

TDCJ-CID NUMBER: 1326763 **SID NUMBER:** _____

(1) This application concerns (check all that apply):

- **x a conviction** ☐ **parole**
- ☐ **a sentence** ☐ **mandatory supervision**
- ☐ **time credit** ☐ **out-of-time appeal or petition for discretionary review**

(2) What district court entered the judgment of the conviction you want relief from? (Include the court number and county.)

299th Judicial District Court of Travis County Texas

(3) What was the case number in the trial court?

D-1-DC-04-904165

(4) What was the name of the trial judge?

Jon Wisser

(5) Were you represented by counsel? If yes, provide the attorney's name:

Leonard Martinez

(6) What was the date that the judgment was entered?

September 1, 2005

(7) For what offense were you convicted and what was the sentence?

Count I Murder-75 years; Court II Injury to a Child-99 years

(8) If you were sentenced on more than one count of an indictment in the same court at the same time, what counts were you convicted of and what was the sentence in each count?

See number 7 above

(9) What was the plea you entered? (Check one.)

☐ **guilty-open plea** ☐ **guilty-plea bargain**

x not guilty ☐ ***nolo contendere*/ no contest**

If you entered different pleas to counts in a multi-count indictment, please explain:

_____

_____

(10) What kind of trial did you have?

☐ **no jury** **x jury for guilt and punishment**

☐ **jury for guilt, judge for punishment**

(11) Did you testify at trial? If yes, at what phase of the trial did you testify?

No

(12) Did you appeal from the judgment of conviction?

x yes ☐ **no**

If you did appeal, answer the following questions:

(A) What court of appeals did you appeal to? Third Court of Appeals

(B) What was the case number?

03-05-00633-CR

(C) Were you represented by counsel on appeal? If yes, provide the attorney's name:

Leonard Martinez

(D) What was the decision and the date of the decision? 8/31/07

Rehearing denied 9/27/07

(13) Did you file a petition for discretionary review in the Court of Criminal Appeals?

x yes ☐ no

If you did file a petition for discretionary review, answer the following questions:

(A) What was the case number? PD-1669-07

(B) What was the decision and the date of the decision? Refused 4/2/08

(14) Have you previously filed an application for a writ of habeas corpus under Article 11.07 of the Texas Code of Criminal Procedure challenging *this conviction?*

☐ yes x no

If you answered yes, answer the following questions:

(A) What was the Court of Criminal Appeals' writ number? _____

(B) What was the decision and the date of the decision? _____

(C) Please identify the reason that the current claims were not presented and could not have been presented on your previous application.

_____

_____

(15) Do you currently have any petition or appeal pending in any other state to or federal court?

☐ yes x no

If you answered yes, please provide the name of the court and the case number:

_____

(16) If you are presenting a claim for time credit, have you exhausted you administrative remedies by presenting your claim to the time credit resolution system of the Texas Department of Criminal Justice? (This requirement applies to any final felony conviction, including state jail felonies)

☐ yes ☐ no

If you answered yes, answer the following questions:

(A) What date did you present the claim?

_____

(B) Did you receive a decision and, if yes, what was the date of the decision?

_____

If you answered no, please explain why you have not submitted your claim:

_____

_____

(17) Beginning on page 6, state *concisely* every legal ground for your claim that you are being unlawfully restrained, and then briefly summarize the facts supporting each ground. You must present each ground on the form application and a brief summary of the facts. *If your grounds and*

brief summary of the facts have not been presented on the form application, the Court will not consider your grounds.

If you have more than four grounds, use page 10 of the form, which you may copy as many times as needed to give you a separate page for each ground, with each ground numbered in sequence.

You may attach a memorandum of law to the form application if you want to present legal authorities, but the Court will *not* consider grounds for relief in a memorandum of law that were not stated on the form application. If you are challenging the validity of your conviction, please include a summary of the facts pertaining to your offense and trial in your memorandum.

GROUND FIVE:

Actual innocence under *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996) and *In re Davis*, 130 S.Ct. 1 (2009).

FACTS SUPPORTING GROUND FIVE:

See Supplemental Memorandum II(A)

GROUND SIX:

Innocence of Murder under *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996) and *In re Davis*, 130 S.Ct. 1 (2009).

FACTS SUPPORTING GROUND SIX:

See Supplemental Memorandum at II(E)

GROUND SEVEN:

Ineffective Assistance of Counsel: Failure to Contest Murder Charge

FACTS SUPPORTING GROUND SEVEN:

See Supplemental Memorandum at II(E) n.17

GROUND EIGHT:

Ineffective Assistance of Counsel: Failure to Challenge Statement Pretrial (plead in alternative)

FACTS SUPPORTING GROUND EIGHT:

See Supplemental Memorandum at II(D)

GROUND NINE:

Ineffective Assistance of Counsel: Improper Handling of Medical Issues (this ground is plead as Ground 4 in the original application, and is repeated here only in an abundance of caution)

FACTS SUPPORTING GROUND NINE:

See Memorandum and Supplemental Memorandum II(C)

GROUND TEN:

Ake v. Oklahoma: Denial of Funds for Experts (this ground is plead as Ground 4 in the original application, and is repeated here only in an abundance of caution)

FACTS SUPPORTING GROUND TEN:

See Memorandum and Supplemental Memorandum II(B)

INMATE'S DECLARATION

I, Rosa Jimenez, BEING PRESENTLY INCARCERATED IN Gatesville Texas, DECLARE UNDER PENALTY OF PERJURY THAT, ACCORDING TO MY BELIEF, THE FACTS STATED IN THE APPLICATION ARE TRUE AND CORRECT.

SIGNED ON 10/20/10.

Signature of Applicant

/s/ [Illegible] [for Rosa Jimenez]
Signature of Attorney

Attorney Name: Bryce Benjet

SBOT Number: 24006829

Address: 221 W.6th St. Ste: 960, Austin, TX 78701

Telephone: (512) 472-4554

CAUSE NO. D-1-DC-04-904165

	§	**IN THE DISTRICT**
	§	**COURT**
EX PARTE ROSA ESTELLA JIMENEZ	§	**TRAVIS COUNTY**
	§	**TEXAS**
	§	
	§	**299TH JUDICIAL**
	§	**DISTRICT**

FIRST SUPPLEMENTAL AFFIDAVIT OF LEONARD MARTINEZ

(Filed Oct. 22, 2010)

STATE OF TEXAS	§
	§
COUNTY OF TRAVIS	§

BEFORE ME, the undersigned Notary Public, on this day personally appeared Leonard Martinez who identity was proven to me and who after being duly sworn, under oath, stated as follows:

1. My name is Leonard Martinez. I was lead counsel for Rosa Estella Jimenez at her trial in 2005. I am over the age of 18 and fully competent to give this affidavit. All facts stated herein are within my personal knowledge.

2. On April 9, 2010 I filed an affidavit in the above styled case. I am now filing this supplemental affidavit to provide additional information regarding my representation of Ms. Jimenez.

3. In my prior affidavit, I made the following statements regarding the need for expert assistance in the case:

> First of all, to all who have no understanding of the constraints of appointed counsel, we do not have the type of funds that give us the luxury of getting anyone we want. As Ms. Krug notes in footnote 4 page 5, getting funds and finding experts is no easy task. Counsel spent inordinate hours looking for experts willing to take a court appointed case. Most experts were unwilling to accept the low pay and then have to wait until the future to be paid. Assurances did not work and even offering to pay expenses out of my own pocket did not work either. This counsel remains convinced this case was a failure in forensics, strategy decisions notwithstanding.
>
> * * *
>
> Given the limited resources that we had to work with as appointed counsel, we were very lucky to have the assistance of Dr. Kanfer, Dr. Parker, Joe Martinez, and Keith Kristelis. Counsel would have liked to have been able to afford Dr. McGeorge, experts in biomechanical engineering, human factors research, and child development, but the willingness of people contacted to take appointed cases and the fees in the tens of thousands of dollars were beyond our limited resources

4. In my prior affidavit, I did not describe the procedures used for obtaining court funds for expert assistance. In Ms. Jimenez's case, I used the same informal procedures that I had used for over 20 years in handling indigent criminal appointments in Travis County.

5. My general procedure was this. Once I identified a need for an expert, I would meet with judge ex parte in chambers. I would explain to the judge my need for the expert and approximately what I believed the expert would cost. If the judge decided to authorize payment, I would then file a motion requesting expert assistance tha[t /s/ LM] would simply state my need for the expert. This motion would be granted, as authorized in the prior ex parte conversation in chambers.

6. I followed this procedure in Ms. Jimenez's case, and Judge Wiser authorized payment for the experts and investigators that I used in the trial. But as explained in my prior affidavit, the expert assistance I had at trial was not sufficient to adequately defend Ms. Jimenez.

7. During my pre-trial preparations, I met with Judge Wiser to ask for additional funds to retain experts such as Dr. McGeorge and a biomechanical expert. I explained to the judge why we needed these experts, and that I did not think that my current team was adequate to counter the State's case. Judge Wiser told me that he had authorized more experts than usual in a non-capital case, and that he would

not pay for any more expert assistance regardless of my need. Based on the judge's ruling, I was forced to work within the constraints imposed by the Court. Ms. Jimenez was indigent, and I could not afford to hire these experts out of pocket.

8. I have reviewed the affidavits of Karen Zur, M.D. and John McCloskey, M.D. [and Dr. Ophoven /s/ LM] These affidavits contain exactly the sort of testimony that I needed during the trial. The State had the benefit of calling B.G.'s treating physicians to testify that this was not an accidental choking. This included a pediatric ER doctor and a pediatric critical care doctor. I was unable to retain a doctor with a clinical practice treating injuries similar to B.G.'s to contradict these witnesses or to assist me in cross-examining the treating physicians. Without the testimony of a physician who actually treats airway obstructions and accidental choking, the jury was left to credit the unreliable opinions of these treating doctors.

9. In addition to the forensic pathologist from the Travis County Medical Examiner's Office, the State was also able to retain Randaell [/s/ LM] Alexander, M.D., an expert on child abuse and child death. Because of the limitations on funding in the case, I was unable to hire a similar expert to rebut Dr. Alexander's testimony. I attempted to retain Linda Norton, a forensic pathologist who has significant expertise in child death, but she was unwilling to work on a Travis County appointed case because she had not been paid on prior appointments. Although

my expert Dr. Kanfer was able to give opinions based on his background as general forensic pathologist, he did not have the sort of experience required to effectively rebut Dr. Alexander's opinions.

/s/ L Martinez
Leonard Martinez

SUBSCRIBED AND SWORN to before me by the said Leonard Martinez, this 21 day of October, 2010.

/s/ Ranulfo Arias
Notary Public – State of Texas

Ranulfo Arias
[Notary Stamp] Printed/Stamped Name of Notary

Commission Expires: October 31, 2012

REPORTER'S RECORD

VOLUME 7 OF 15 VOLUMES

TRIAL COURT CAUSE NO. 904165

THE STATE OF TEXAS	* IN THE DISTRICT
VS.	* COURT
ROSA ESTELA OLVERA JIMENEZ	* TRAVIS COUNTY, * TEXAS
	* 299TH JUDICIAL
	* DISTRICT

* *

JURY TRIAL

* *

APPEARANCES:

ALLISON WETZEL, 02413500 AND GARY COBB, 04434700, Assistants District Attorney, P.O. Box 1748, Austin, Texas 78767, Tele: 854-9400, Fax: 854-9695

FOR THE STATE OF TEXAS

LEONARD MARTINEZ, 13142750 AND CATHERINE HAENNI, 90001691, Attorneys at Law, 812 San Antonio, Austin, Texas 78701, Tele: 472-0958, 447-1779, and

JON EVANS, 00787445, Attorney at Law, 806 West 11th Street, Austin, Texas 78701, Tele: 476-4075

FOR THE DEFENDANT

* *

On the 29th day of August, 2005, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Jon Wisser, Judge presiding, held in Austin, Travis County, Texas:

* *

* * *

[146] BY MS. WETZEL

Q When we – – is it helpful to the jury to hear from an unbiased expert?

A Sure.

Q And you're an unbiased expert; is that right?

A Yeah.

Q And you've been contacted by Mr. Martinez. Your – – you've been paid by Mr. Martinez. But you're just here to educate the jury about what you believe is the truth.

A Right. I mean, you know, there – – there was no quid pro quo – – first of all, I haven't been paid a nickle. So let's get that straight. You know, Mr. Martinez hasn't paid me anything.

Q The Court has.

A The Court has not paid me any money either.

[147] Q Are you just doing this for free?

A No. Eventually, you know, I – – you know, I have to submit a bill, but – – but – – but there was no quid pro quo when – – when I talked with Attorney Martinez where Attorney Martinez said: "Dr. Kanfer, I will give you $50,000.00 if you would testify in such a fashion." He gave me the case. He said, "Take a look at it and see what you think." There was no quid pro quo. There never is.

Q And you're just here as a completely unbiased expert to educate the jury.

A Exactly.

Q Is that why on the break you made the statement that they, referring to Mr. Cobb and myself, could go fuck ourselves?

A Right. That's an exactly correct quote.

Q Okay. Thank you, sir. That's very helpful.

MS. WETZEL: We'll pass the witness.

* * *

[273] BY MR. MARTINEZ:

Q Dr. Kanfer, when we last left you, you had become upset about something. What – – what made you so upset?

A Well, I was upset with the line of questioning [274] in that approximately eight or ten days ago I had a personal phone conversation with the prosecutor. And she called my home. And she wanted to speak with me. And I – – and I left her a message. I

said, "I don't have any trouble – – I don't mind speaking with, but just check it out with Attorney Martinez. I'll be more than happy to – – to talk with you."

And a few days later she called back and she said, I talked with Attorney Martinez and he has no problem, and we had a – – a very pleasant conversation. And during that conversation I laid out the whole case. I mean, why I thought that this was an accident based on the absence of any trauma to the mouth, the external face, et cetera, et cetera, how the paper could have gotten wadded up and ended up in the – – in the posterior pharynx, how it came out with the Magill clips and the pulmonary edema.

So I lay out my whole case to her. I said, "You know, I have children myself." I asked her, "Do you have children?" She said, "Yes." I said, "Do you watch your kids or have you watched your kids – – you know, be on patrol so they swallow anything?" "Yes." I said, "You know, this is a very unusual case. I've never seen anything like it before in my life." She said, "Yeah, Dr. Kanfer, it's very unusual. I've never seen [275] anything like it either."

We discussed the usual manner. As Dr. Alexander said is it's usually blunt head trauma or blunt trauma to the chest or blunt trauma to the stomach is the way people who are going to kill kids – – this is how they do it, but this paper wad stuff is just – – you know, nobody's heard of it it. And we discussed, "Well, you know, the basis of my conclusion is that the kid is not going to sit still based on our own experience that

we were discussing about giving our kids medicine. If they don't want to take the medicine, they just clamp down, and you can't – – you can't open their mouth. So how are you going to take this wad of paper and stuff it down the child's mouth if – if he doesn't want it without the associated trauma. And that's – – and that's the long and the short of it. And she agreed with me and – – and she was very pleasant.

And then I come in here and, of course, I'm attacked as, you know, a paid whore. I'm getting money from you to say whatever I want, you know, blah, blah, blah. That doesn't offer any information. You know, I got pissed.

* * *

[293] MR. MARTINEZ: I'll pass the witness.

RECROSS-EXAMINATION

BY MS. WETZEL:

Q Dr. Kanfer, are you – – do you need a break?

A No.

Q Are you angry?

A No. I got over it.

Q You seem a little wound up.

A No.

Q Okay. I want to start out by apologizing for calling your home. And it's been – – I want to explain

to you that that was the phone number that I got from Mr. Martinez.

A There's nothing wrong with calling my home.

Q Okay. Because when you were telling the jury about all the things I had done, you – – you seemed – – it seemed like that was inappropriate. And if it was, I – –

A It absolutely was not inappropriate. You called the house. I said, you know, "Talk to Attorney Martinez. I'll be happy to talk to you." And we had a very nice conversation. And I told you everything I just told the jury. We even talked about our kids.

[294] Q Do you remember that you made the statement that Mr. Cobb and I could fuck ourselves before I ever asked you about money? Do you remember that?

A I don't know when I made the statement that – – that you could both fuck yourselves, but I definitely made the statement.

Q Okay. Yeah, you definitely did.

A Yeah.

Q Is that something that you routinely do when you go out of state to testify as an expert witness?

MR. MARTINEZ: Your Honor, we now need to get back to the – –

A Yeah, I mean to scare the prosecutors.

MR. MARTINEZ: I know there's some tension between them, but we need to get back to, you know, manner and means of death. You know, what is the forensic evidence? What is the testimony of it? We need to stick with that, Judge. I object to them getting into the personal thing any more. We've gone through that. I think we've worked through that.

MR. MARTINEZ: I think Mr. Martinez has worked through it, but I – – I think it's relevant, and maybe – – maybe Dr. Kanfer has processed it, but I think it's relevant to his bias and I would certainly like to ask him about it.

[295] THE COURT: We'll overrule the objection.

Q (By Ms. Wetzel) Is this something that you routinely do when you go out of state to testify in a criminal trial?

A No.

Q In a murder trial it's not something that you routinely do?

A No.

Q And is – – you just – – as you say, you got pissed.

A I was pissed.

Q Are you still pissed?

A No.

Q You've calmed down.

A Yes.

Q Well, if you get pissed any more, you just – – you just let know, okay?

A You'll hear it.

* * *

[300] (By Ms. Wetzel) Q So you disagree with Dr. Alexander about – –

A Yeah. This is not a two- or three-day process. Once you start choking, you raise your venous pressure. The fluid starts leaking into the lungs. It happens immediately.

Q But you're not angry at Dr. Alexander.

A No, he's a nice guy.

Q Okay. Well, then you don't want to tell him to go fuck himself.

A No.

Q Okay.

MS. WETZEL: We'll pa ss the witness.

* * *