IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-40103
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
December 22, 2017
Lyle W. Cayce
Clerk

SCOTT LESLIE CARMELL,

Petitioner—Appellant,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:13-CV-681

Before JOLLY, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:*

Scott Leslie Carmell, Texas prisoner # 777548, was convicted of 15 counts of sexual offenses against his stepdaughter that included eight counts of indecency with a child, five counts of sexual assault, and two counts of aggravated sexual assault. He was sentenced to 13 concurrent 20-year terms of imprisonment on the indecency and sexual assault convictions, and he was

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

sentenced to two terms of life imprisonment for the aggravated sexual assault convictions. Carmell's convictions and sentences were affirmed on direct appeal, *Carmell v. State*, 963 S.W.2d 833, 834-35 (Tex. App.—Fort Worth 1998) (per curiam) (*Carmell I*), but the case was remanded by the Supreme Court on certain counts. *Carmell v. Texas*, 529 U.S 513, 516-53 (2000) (*Carmell II*). On appeal after remand, his convictions and sentences were again affirmed. *Carmell v. State*, 26 S.W.3d 726, 728 (Tex. App.—Fort Worth 2000) (per curiam) (*Carmell III*).

On his initial 28 U.S.C. § 2254 application, Carmell was granted relief in the form of an out-of-time appeal. *Carmell v. Quarterman*, 292 F. App'x 317, 330 (5th Cir. 2008) (per curiam) (*Carmell IV*). His conviction and sentence were again affirmed by the state appellate court. *Carmell v. State*, 331 S.W.3d 450, 455-56 (Tex. App.—Fort Worth 2010) (*Carmell V*).

Carmell then filed the instant § 2254 application. The district court denied relief, but a certificate of appealability was granted on Carmell's claims of ineffective assistance of appellate counsel and his related claim that the district court erred in denying his discovery request.

We "review the district court's findings of fact for clear error and review its conclusions of law *de novo*, applying the same standard of review to the state court's decision as the district court." *Ortiz v. Quarterman*, 504 F.3d 492, 496 (5th Cir. 2007). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (internal quotation marks and citation omitted).

Carmell argues that appellate counsel was ineffective. Specifically, he contends that counsel failed to challenge the lack of jurisdiction in the trial court, the excessiveness of his life sentences, the alleged perjury of the victim,

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the withholding of impeachment evidence by the prosecution, and the cumulative error that affected the trial. He also argues that appellate counsel was deficient for failing to argue that trial counsel was ineffective. Carmell asserts that counsel should have argued on appeal that trial counsel was ineffective for failing to investigate and interview witnesses, failing to preserve a vagueness challenge to Texas Penal Code section 22.021, failing to inform the court that Carmell was eligible to be tried under a second degree statute, failing to object to the introduction of a misdemeanor conviction during the penalty phase, and failing to challenge the trial court's jurisdiction.

To establish ineffective assistance of counsel, a defendant must show that counsel performed deficiently and that he was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The *Strickland* standard applies to allegations of ineffective assistance of appellate counsel. *Amador v. Quarterman*, 458 F.3d 397, 411 (5th Cir. 2006). To establish that appellate counsel's performance was deficient, the applicant must show that counsel was objectively unreasonable in failing to find arguable issues to appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). If the petitioner makes such a showing, he must establish actual prejudice by demonstrating a "reasonable probability" that he would have prevailed on appeal but for counsel's deficient performance. *Id.* Review of the state court's application of the *Strickland* standard is "doubly" deferential when § 2254(d) applies, as it does in this case. *See Richter*, 562 U.S. at 105.

Carmell fails to show that the state court's ruling denying relief on his claims of ineffective assistance of appellate counsel "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Accordingly, the state court's decision that appellate counsel was

not ineffective was not contrary to or an unreasonable application of clearly established federal law, and the district court did not err in denying Carmell § 2254 relief. *See* § 2254(d)(1).

Regarding Carmell's assertion that the district court erred in denying his discovery request, his argument that the requested documents could support his claims is speculative. *See Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir. 2000). Moreover, "federal review of a state prisoner's habeas claim is limited to the record that was before the state court that adjudicated the claim on the merits." *Rabe v. Thaler*, 649 F.3d 305, 308-09 (5th Cir. 2011) (internal quotation marks and citation omitted). Thus, Carmell fails to show that the district court abused its discretion in denying his discovery request. *See Clark v. Johnson*, 202 F.3d 760, 765-66 (5th Cir. 2000).

The judgment of the district court is AFFIRMED. Carmell's motion for summary judgment is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-40103

SCOTT LESLIE CARMELL,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Eastern District of Texas

ON MOTION FOR RECONSIDERATION AND REHEARING EN BANC

Before JOLLY, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:

(✓) The Motion for Reconsideration is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Motion for Reconsideration is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

SCOTT LESLIE CARMELL, #777548	§	
VS.	§	CIVIL ACTION NO. 4:13cv681
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

Petitioner Scott Leslie Carmell, a prisoner confined in the Texas prison system, filed the above-styled and numbered petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The case was referred to United States Magistrate Judge Christine A. Nowak, who issued a Report and Recommendation concluding that the petition should be denied. Petitioner has filed objections.

Petitioner is challenging his Denton County convictions for eight counts of indecency with a child, five counts of sexual assault, and two counts of aggravated sexual assault. Petitioner brings ten grounds for relief. Magistrate Judge Nowak concluded that all of Petitioner's claims are procedurally barred other than his supplemental claims alleging ineffective assistance of appellate counsel. In the alternative, she discussed all of Petitioner's claims on the merits and found that he had not shown that he is entitled to federal habeas corpus relief. In his objections, Petitioner argues that none of his claims are procedurally barred. Assuming *arguendo* that he is correct, he is still not entitled to relief on the merits of his claims for reasons explained by Magistrate Judge Nowak.

The Report of the Magistrate Judge, which contains her proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having made a *de novo* review of the objections raised by Petitioner to the Report, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and Petitioner's objections are

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without merit. Therefore the Court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the Court. It is accordingly

ORDERED that the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 is **DENIED** and the case is **DISMISSED** with prejudice. A certificate of appealability is **DENIED**. All other motions not previously ruled on are hereby **DENIED**.

SIGNED this 15th day of December, 2015.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

Appendix D.2

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

SCOTT LESLIE CARMELL, #777548	§	
VS.	§	CIVIL ACTION NO. 4:13cv681
DIRECTOR, TDCJ-CID	§	

FINAL JUDGMENT

The Court having considered Petitioner's case and rendered its decision by opinion issued this same date, it is hereby **ORDERED** that the petition for a writ of habeas corpus is **DISMISSED** with prejudice.

SIGNED this 15th day of December, 2015.

Amos Mazzant

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

SCOTT LESLIE CARMELL, #777548	§	
VS.	§	CIVIL ACTION NO. 4:13cv681
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Scott Leslie Carmell, an inmate confined in the Texas prison system, filed the above-styled and numbered petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred for findings of fact, conclusions of law and recommendations for the disposition of the case.

Procedural History of the Case

On January 14, 1997, in the 367th District Court of Denton County, Texas, following pleas of not guilty, Carmell was convicted of eight counts of indecency with a child, five counts of sexual assault, and two counts of aggravated sexual assault. The jury assessed punishment at twenty years of imprisonment on all counts except for the aggravated sexual assault charges, for which he received life sentences.

Carmell's various convictions were initially upheld on appeal. *Carmell v. State*, 963 S.W.2d 833 (Tex. App. - Ft. Worth 1998, pet. ref'd). The Supreme Court reversed three of the counts on *ex post facto* grounds and remanded the case to the appellate court for further proceedings. *Carmell v. Texas*, 529 U.S. 513 (2000). On remand, the Second Court of Appeals affirmed the convictions once again. *Carmell v. State*, 26 S.W.3d 726 (Tex. App. - Ft. Worth 2000, pet. ref'd). The Supreme Court denied his petition for a writ of certiorari. *Carmell v. State*, 534 U.S. 957 (2001).

Carmell then filed fifteen applications for a writ of habeas corpus in state court, which were denied without written order by the Texas Court of Criminal Appeals. *Ex parte Carmell*, Nos. WR-

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31,863-02-16 (Tex. Crim. App. Nov. 13, 2002). Carmell proceeded to file a petition for a writ of habeas corpus in this Court, which was denied. *Carmell v. Director, TDCJ-CID*, No. 4:02cv421, 2006 WL 543990 (E.D. Tex. March 6, 2006). The Fifth Circuit affirmed, in part, and reversed and remanded solely on the issue of ineffective assistance of appellate counsel. *Carmell v. Quarterman*, 292 F. App'x 317 (5th Cir. 2008). The decision included the following instructions:

> But, with respect to Carmell's ineffective assistance of appellate counsel claim on remand, we REVERSE the district court's judgment denying habeas relief and REMAND the case to the district court for entry of judgment granting habeas relief on Counts 7 though 10, unless the state affords Carmell an out-of-time appeal in the Texas Courts of Appeals, with the assistance of counsel, within such reasonable time as the district court may fix.

Id. at 329. Relief was granted because Carmell's appellate counsel on remand failed to file a brief on his behalf. *Id.* The Supreme Court denied Carmell's petition for a writ of certiorari. *Carmell v. Quarterman*, 557 U.S. 922 (2009). In light of the Fifth Circuit's instructions, this Court issued an order granting Carmell habeas corpus relief unless the State afforded him an out-of-time appeal with the assistance of counsel. *Carmell v. Director, TDCJ-CID*, No. 4:02cv421 (E.D. Tex. Nov. 19, 2008). The State, in turn, afforded Carmell the opportunity to file an out-of-time appeal with the assistance of counsel. In the out-of-time appeal, the Second Court of Appeals once again affirmed Carmell's convictions, entertaining three additional issues, two of which had not been previously litigated. *Carmell v. State*, 331 S.W.3d 450 (Tex. App. - Ft. Worth 2010, pet. ref'd). The Supreme Court denied his petition for a writ of certiorari. *Carmell v. Texas*, 132 S. Ct. 409 (2011).

Carmell then filed a new application for a writ of habeas corpus in state court. The Texas Court of Criminal Appeals denied Carmell's "supplemental claims alleging ineffective assistance of appellate counsel after remand from the Supreme Court." *Ex parte Carmell*, No. WR-31,863-17, 2013 WL 5424967, at *1 (Tex. Crim. App. 2013). His remaining grounds were dismissed as a subsequent application pursuant to Tex. Code Crim. Proc. art. 11.07 § 4. *Id.*

Carmell placed the present petition in the prison mail on November 4, 2013. The petition was filed on November 8, 2013. He also attached a memorandum in support of the petition.

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Carmell brings the following grounds for relief:

1. Trial court lacked jurisdiction (claims one and two);

2. The imposition of two life sentences violated the Eighth Amendment Cruel and Unusual Punishment Clause;

3. The Second Court of Appeals erred by failing to rule on the void-for-vagueness claim;

4. The prosecutor engaged in prosecutorial misconduct by using perjured testimony;

5. Ineffective assistance of trial counsel;

6. The Second Court of Appeals erred in affirming Carmell's convictions seven through ten;

7. The prosecutor withheld favorable impeachment evidence;

8. Constitutional violations throughout the trial tainted the trial and the results are unreliable, in violation of the Due Process Clause.

9. Ineffective assistance of appellate counsel; and

10. The Texas Court of Criminal Appeals erred in denying, in part, and dismissing, in part, his state habeas application.

The Director filed an answer (docket entry #18). Carmell filed a reply (docket entry #24). Pursuant to an order of the Court, the Director filed an amended answer (docket entry #45) on August 7, 2015. Carmell filed a reply (docket entry #55) on October 8, 2015.

Facts of the Case

The Second Court of Appeals summarized the facts of the case as follows:

> Ron Borchert and Eleanor Alexander married in 1972. K.M. was born on March 24, 1978. Eleanor began to see [Carmell], a counselor specializing in counseling victims of incest, because she was an incest survivor. In early 1987, Eleanor divorced Ron and married [Carmell] the next year.
>
> By the time K.M. was twelve, [Carmell] would give her a back rub every night after she said her prayers. Soon the back rubs changed, and [Carmell] would tell K.M. to take her shirt off and pull her shorts down a little. In the spring of 1991, [Carmell] touched her "on the pubic hair" during one of the back rubs. [Carmell] then decided that he and K.M. needed to "date" and spend every Tuesday night together. This included sleeping in the same bed. [Carmel] claimed that this was part of the family's bonding process.
>
> In the summer of 1991, [Carmell] took his clothes off, got in a sleeping bag with K.M., and pulled her on top of him. He put his erect penis between her legs, and his penis touched her "genital area." Later that summer, [Carmell] and K.M. were sleeping together

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> nude when [Carmell] pulled K.M. on top of him. He put his erect penis between her legs and pushed against her "pubic" or "genital" area. In June 1992, [Carmell] took K.M. into his bedroom for a "nap." They undressed, and [Carmell] pulled her on top of his erect penis, touching her "genital area."
>
> These incidents and more finally led to [Carmell] having sex with K.M. in September 1993. Two days later, [Carmell] "married" K.M. in a mock ceremony and continued having sex with her until early 1995. K.M. finally told her mother about the long-term abuse, and her mother took her to the police. At trial, Eleanor testified that once while she visited [Carmell] in jail, he wrote "adultery with [K.M.]" on a piece of paper when she told him that he needed to confess if he was sorry for what he had done to K.M.

Carmell, 963 S.W.2d at 835.

Procedural Bar

The Director initially argues that all of Carmell's claims, save number nine alleging ineffective assistance of appellate counsel, are procedurally barred from federal review. The state court records reveal that the Texas Court of Criminal Appeals denied Carmell's "supplemental claims alleging ineffective assistance of appellate counsel after remand from the Supreme Court." *Ex parte Carmell*, 2013 WL 5424967, at *1. His remaining claims were dismissed as a subsequent application pursuant to Tex. Code Crim. Proc. art. 11.07 § 4. *Id.* The Director argues that all of the claims, save number nine, are barred in light of the decision by the Texas Court of Criminal Appeals.

Carmell asserts, in response, that the present petition is an original petition. He argues that the petition should not be dismissed as a successive petition. *See In re Johnson*, 483 F. App'x 922 (5th Cir. 2012).

Carmell's response misses the point. The issue is not whether the present petition filed in this Court is original or successive; instead, the issue is whether all of his claims other than his supplemental claims alleging ineffective assistance of appellate counsel are procedurally barred because the Texas Court of Criminal Appeals dismissed such claims as an abuse-of-the-writ pursuant to Tex. Code Crim. Proc. art. 11.07 § 4.

The procedural default doctrine that was announced by the Supreme Court in *Coleman v. Thompson*, 501 U.S. 722 (1991). The Court explained the doctrine as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is

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> barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 750. Texas applies the abuse-of-the-writ doctrine regularly and uniformly. *See Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir.) (citing *Ex parte Barber*, 879 S.W.2d 889, 892 n.1 (Tex. Crim. App. 1994)), *cert. denied*, 515 U.S. 1153 (1995). "After *Barber*, dismissals of Texas habeas petitions as an abuse of the writ should create a procedural bar under the *Coleman* standard." *Id.* A petitioner must establish cause and prejudice or a fundamental miscarriage of justice in order to have the claim considered. *Id.* Following *Fearance*, the Fifth Circuit has regularly applied the procedural bar in light of Texas' abuse-of-the-writ doctrine. *Emery v. Johnson*, 139 F.3d 191, 196 (5th Cir. 1997), *cert. denied*, 525 U.S. 969 (1998); *Nobles v. Johnson*, 127 F.3d 409, 423 (5th Cir. 1997), *cert. denied*, 523 U.S. 1139 (1998). The Fifth Circuit has even applied the procedural bar *sua sponte* when the issue was not raised at the district court level. *Smith v. Johnson*, 216 F.3d 521 (5th Cir. 2000).

The Director correctly observed that the Texas Court of Criminal Appeals denied all of Carmell's supplemental claims alleging ineffective assistance of appellate counsel after remand from the Supreme Court. His remaining grounds were dismissed as a subsequent application pursuant to Tex. Code Crim. Proc. art. 11.07 § 4. The procedural default doctrine applies to his remaining grounds. Carmell did not satisfy the exceptions provided by the procedural default doctrine. Stated differently, he did not establish cause and prejudice or a fundamental miscarriage of justice in order to proceed with his claims. Consequently, all of Carmell's claims other than his supplemental claims alleging ineffective assistance of appellate counsel are procedurally barred.

Statute of Limitations

The Director next argues that the petition should be dismissed as time-barred. He asserts that it was filed twenty-two days too late. Carmell argues that the petition was timely filed seventeen days before the deadline.

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On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA") was signed into law. The law made several changes to the federal habeas corpus statutes, including the addition of a one year statute of limitations. 28 U.S.C. § 2244(d)(1). The AEPDA provides that the one year limitations period shall run from the latest of four possible situations. Section 2244(d)(1)(A) specifies that the limitations period shall run from the date a judgment becomes final by the conclusion of direct review or the expiration of the time for seeking such review. Section 2244(d)(1)(B) specifies that the limitations period shall run from the date an impediment to filing created by the State is removed. Section 2244(d)(1)(C) specifies that the limitations period shall run from the date in which a constitutional right has been initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review. Section 2244(d)(1)(D) states that the limitation period shall run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Section 2244(d)(2) also provides that the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation.

In the present case, Carmell is challenging his convictions. The appropriate limitations provision is § 2244(d)(1)(A), which states that the statute of limitations starts to run from the date a judgment becomes final. In interpreting § 2244(d)(1)(A) in light of Supreme Court rules, the Fifth Circuit concluded that a state conviction "becomes final upon direct review, which occurs upon denial of certiorari by the Supreme Court or expiration of the period for seeking certiorari." *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999).

In the present case, Carmell was granted an out-of-time appeal. The Second Court of Appeals affirmed his convictions on September 30, 2010. The Texas Court of Criminal Appeals refused his petition for discretionary review on April 6, 2011. The Supreme Court denied his petition for a writ of certiorari on October 11, 2011. Carmell's convictions became final on October 11, 2011. The present petition was due no later than October 11, 2012, absent tolling provisions.

Carmell states that he placed the present petition in the prison mailing system on November 4, 2013. The petition is deemed filed on November 4, 2013, pursuant to the federal "mailbox rule." *Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998). The present petition was filed more than a year too late, absent tolling provisions.

The provisions of 28 U.S.C. § 2244(d)(2) provide that the time during which a properly filed application for state post-conviction or other collateral review is pending shall not be counted toward any period of limitation. The Director asserts that Carmell filed his state application for a writ of habeas corpus on September 21, 2012, which was decided on September 25, 2013. He asserts that the state application was tolled by 369 days, which extended the deadline to October 13, 2013. He argues that the petition was filed too late since it was filed on November 4, 2013.

In response, Carmell asserts that his state application was filed on August 16, 2012, as opposed to September 21, 2012. He further asserts that the state application was pending 406 days, which extended the deadline to November 21, 2013. He argues that the present petition is timely.

The state court records reveal that Carmell's application was filed in the Denton County District Clerk's office on August 27, 2012. The application was signed on August 16, 2012. He presumably mailed the application on August 16, 2012. The application is deemed filed on August 16, 2012, pursuant to the state mailbox rule. *Richards v. Thaler*, 710 F.3d 573, 578-79 (5th Cir. 2013). The Texas Court of Criminal Appeals issued its order on September 25, 2013. Carmell correctly argued that the application was pending for 406 days. The deadline of October 11, 2012 was tolled by 406 days to November 21, 2013. The present petition was timely filed. The Director's arguments to the contrary lack merit.

Standard of Review

The role of federal courts in reviewing habeas corpus petitions by prisoners in state custody is exceedingly narrow. A person seeking federal habeas corpus review must assert a violation of a federal constitutional right. *Lowery v. Collins*, 988 F.2d 1364, 1367 (5th Cir. 1993). Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law,

unless a federal issue is also present. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *West v. Johnson*, 92 F.3d 1385, 1404 (5th Cir. 1996), *cert. denied*, 520 U.S. 1242 (1997). Federal courts do "not sit as a super state supreme court on a habeas corpus proceeding to review error under state law." *Wood v. Quarterman*, 503 F.3d 408, 414 (5th Cir. 2007) (citations omitted), *cert. denied*, 552 U.S. 1314 (2008); *Skillern v. Estelle*, 720 F.2d 839, 852 (5th Cir. 1983), *cert. denied*, 469 U.S. 873 (1984).

The petition was filed in 2013, thus review is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997). Under AEDPA, a petitioner who is in custody "pursuant to the judgment of a State court" is not entitled to federal habeas corpus relief with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). "By its terms § 2254 bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*, 562 U.S. 86, 98 (2011). AEDPA imposes a "highly deferential standard for evaluating state-court rulings, and demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citations and internal quotation marks omitted). With respect to the first provision, a "state court decision is 'contrary to' clearly established federal law if (1) the state court 'applies a rule that contradicts the governing law' announced in Supreme Court cases, or (2) the state court decides a case differently than the Supreme Court did on a set of materially indistinguishable facts." *Nelson v. Quarterman*, 472 F.3d 287, 292 (5th Cir. 2006) (en banc) (quoting *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003)), *cert. denied*, 551 U.S. 1141 (2007). "[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, ___, 131 S. Ct. 1388, 1398 (2011). As such, "evidence

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later introduced in federal court is irrelevant to § 2254(d)(1) review." *Id.* at 1400. "The same rule necessarily applies to a federal court's review of purely factual determinations under § 2254(d)(2), as all nine Justices acknowledged." *Blue v. Thaler*, 665 F.3d 647, 656 (5th Cir. 2011), *cert. denied*, 133 S. Ct. 105 (2012). The Supreme Court has specified that a Texas court's factual findings are presumed to be sound unless a petitioner rebuts the "presumption of correctness by clear and convincing evidence." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (citing 28 U.S.C. § 2254(e)(1)). The "standard is demanding but not insatiable; . . . [d]eference does not by definition preclude relief." *Id.* (citation and internal quotation marks omitted). More recently, the Supreme Court held that a "state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (citation omitted). *See also Clark v. Thaler*, 673 F.3d 410, 421-22 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 179 (2012). The Supreme Court has explained that the provisions of AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). Federal habeas corpus relief is not available just because a state court decision may have been incorrect; instead, a petitioner must show that a state court decision was unreasonable. *Id.* at 694. Furthermore, when a state court provides alternative reasons for denying relief, a federal court may not grant relief "unless *each* ground supporting the state court decision is examined and found to be unreasonable under AEDPA." *Wetzel v. Lambert*, 565 U.S. ___, ___, 132 S. Ct. 1195, 1199 (2012) (emphasis in original).

Merits of Carmell's Claims

The one claim that was decided by the Texas Court of Criminal Appeals on the merits was Carmell's supplemental claims of ineffective assistance of appellate counsel. Carmell states that his appellate attorney was ineffective for failing to bring the following grounds for relief: (1) lack of trial court jurisdiction, (2) ineffective assistance of trial counsel, (3) prosecutor withheld impeachment

evidence and violated his right of confrontation, (4) the life sentences in Counts 3 and 4 violated the Cruel and Unusual Punishment Clause, (5) the prosecutor engaged in prosecutorial misconduct by using perjured testimony, and (6) trial taint. The Court notes that these six claims correspond to six of his grounds for relief; thus, these six grounds for relief must be discussed regardless of the procedural bar. Consequently, the Court will discuss Carmell's various grounds for relief and then discuss them in the context of an ineffective assistance of appellate counsel claim.

1. Trial Court Lacked Jurisdiction

In the first two grounds for relief, Carmell argues that the trial court did not have jurisdiction to hear the case. He asserts that the trial court was not conferred jurisdiction by the issuance of an indictment by a quorum of the grand jury. Furthermore, the trial court did not have jurisdiction over Counts 3 and 4 because the indictment did not specify whether they were felonies of the first or second degree. Carmell focuses on Texas law in arguing that the trial court lacked jurisdiction.

The Director appropriately observed that federal habeas relief is available only for the vindication of rights under federal law; not rights existing solely under the rules of state procedure. *Manning v. Blackburn*, 786 F.2d 710, 711 (5th Cir. 1986). As was previously noted, federal courts do "not sit as a super supreme court on a habeas corpus proceeding to review error under state law." *Wood*, 503 F.3d at 414. "[T]he Supreme Court has concluded that neither the Grand Jury Clause of the Fifth Amendment nor the Due Process Clause of the Fourteenth Amendment requires the state to afford the accused the right to grand jury review before trial." *Wilkerson v. Whitley*, 28 F.3d 498, 503 (5th Cir. 1994) (citing *Hurtado v. California*, 110 U.S. 516, 534-35 (1884)), *cert. denied*, 513 U.S. 1085 (1995). Due to the absence of a right to grand jury review, Carmell's first ground for relief lacks merit.

The first ground for relief should be rejected for the additional reason that Carmell failed to show that the grand jury lacked a quorum. In support of his claim, he cited the statement of facts from a pretrial hearing conducted on December 19, 1996 (docket entry #24, Appendix A). He noted that the only people present during the hearing were his attorney, the prosecutor and himself, as

opposed to a quorum of the grand jury. However, the record clearly shows that he attended a pretrial hearing. It was not an assembly of the grand jury. The prosecutor clearly stated that the grand jury had reindicted Carmell earlier that morning. *Id.* at 2. There is nothing in this attachment that supports an inference that the reindictment was not the product of a quorum of the grand jury. Carmell has offered nothing other than conclusory allegations and bald assertions, which are insufficient to support a petition for a writ of habeas corpus. *See Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000); *Koch v. Puckett*, 907 F.2d 524, 530 (5th Cir. 1990); *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983).

Carmell further argues that the trial court did not have jurisdiction over Counts 3 and 4 because the indictment did not specify whether they were felonies of the first or second degree. The counts in question read as follows:

> COUNT III.
>
> And the Grand Jurors aforesaid, duly elected, impaneled, sworn and charged at said term of said court as aforesaid, upon their oaths further present in and to said court that SCOTT LESLIE CARMELL, on or about the 1st day of June, 1991, and anterior to the presentment of this indictment, in the County of Denton and State of Texas, did then and there intentionally and knowingly cause the sexual organ of [K.M.], a child younger than 14 years of age and not the spouse of the defendant, to contact the sexual organ of the defendant;
>
> COUNT IV.
>
> And the Grand Jurors aforesaid, duly selected, impaneled, sworn and charged at said term of said court as aforesaid, upon their oaths further present in and to said court that SCOTT LESLIE CARMELL, on or about the 1st day of July, 1991, and anterior to the presentment of this indictment, in the County of Denton and State of Texas, did then and there intentionally and knowingly cause the sexual organ of [K.M.], a child younger than 14 years of age who was not the spouse of the defendant, to contact the sexual organ of the defendant;

The jury subsequently found Carmell "guilty of the offense of aggravated sexual assault as alleged in count three of the indictment" and "guilty of the offense of aggravated sexual assault as alleged in count four of the indictment." 11 RR 412-13.

The Texas Court of Criminal Appeals has observed that "[b]oth the Sixth Amendment and Article I, § 10, require that a defendant be given notice before trial of the 'nature and cause' of the accusation against him, and require further that the notice be given with sufficient clarity and detail

to enable the defendant to anticipate the State's evidence and prepare a proper defense to it." *Garcia v. State*, 981 S.W.2d 683, 685 (Tex. Crim. App. 1998) (en banc) (citation omitted). "Thus, an indictment must allege, in plain and intelligible language, all the facts and circumstances necessary to establish all the material elements of the offense charged." *Id.* (citations omitted). The charges contained in Counts 3 and 4 gave him fair notice of all of the material elements of the aggravated sexual assault charges. The charges were not vague. Furthermore, the requirements of indictments are set forth in Article 21.02 of the Texas Code of Criminal Procedure. Nothing in Article 21.02 requires that an indictment specify the degree of the offense. Moreover, Carmell has not cited any authority showing that he is entitled to relief because Counts 3 and 4 did not inform him whether the offenses were first or second degree felonies.

In addition to the foregoing, the claim lacks merit under federal law. For purposes of the present proceeding, the sufficiency of a state indictment is appropriate for federal habeas corpus relief only when it can be shown that the indictment is so defective that it deprives the convicting court of jurisdiction. *McKay v. Collins*, 12 F.3d 66, 68 (5th Cir.), *cert. denied*, 513 U.S. 854 (1994). The indictment in this case gave Carmell fair notice of all of the material elements of the charges against him. Carmell has not shown that the indictment was so defective that it deprived the convicting court of jurisdiction. Carmell's first two grounds for relief lack merit.

2. Complaints About Two Life Sentences For Two Aggravated Sexual Assault Convictions

Carmell next alleges that his two life sentences for Counts 3 and 4 violate the Cruel and Unusual Punishment Clause of the Eighth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In support of the claim, he focuses on the distinction between the definition of sexual assault and aggravated sexual assault as contained in Sections 22.011 and 22.021 of the Texas Penal Code. He correctly observed that the definitions of the two offenses as they apply to him are identical except for the aggravating element associated with the age of the victim. Apparently he does not agree with the distinction provided by the statute associated with the age of the victim; nonetheless, the Texas Legislature thought that sexually assaulting

someone under fourteen warranted an enhancement to an aggravated offense. Carmell has not shown that the aggravating element associated with the victim's age offends either the Eighth or Fourteenth Amendments.

In addition to the foregoing, it is noted that the Eighth Amendment incorporates the principle that "a punishment should be proportionate to the crime." *Solem v. Helm*, 463 U.S. 277, 285-88 (1983). The Supreme Court identified three criteria for use in evaluating the proportionality of a particular sentence: (1) the gravity of the offense and the harshness of the punishment; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for the same offense in other jurisdiction. *Id.* at 290-91. In applying *Solem*, the Fifth Circuit has specified that a court should initially make a threshold comparison between the gravity of the charged offense and the severity of the sentence. *McGruder v. Puckett*, 954 F.2d 313, 315-16 (5th Cir. 1992). Only upon a determination that the sentence is grossly disproportionate to the offense should the court consider the remaining two *Solem* factors. *Id.* In non-capital cases, successful challenges to the proportionality of particular sentences are "exceedingly rare." *Rummel v. Estelle*, 445 U.S. 263, 272 (1980).

It is without question that the Texas Legislature was of the opinion that a conviction for aggravated sexual assault was sufficiently serious to warrant being a first degree felony and a possible life sentence. *See* Tex. Penal Code § 22.021. Texas courts, in turn, have found that life sentences for the commission of aggravated sexual assault of a child less than fourteen years of age was not grossly disproportionate to the crime. *Holder v. State*, 643 S.W.2d 718, 721 (Tex. Crim. App. 1982) (three life sentences for three separate convictions for aggravated sexual assault of a child were not unconstitutionally excessive); *Arriaga v. State*, 335 S.W.3d 331, 336 (Tex. App. - Houston [14th Dist.] 2010, pet. ref'd) (life sentence for aggravated sexual assault of a child less than fourteen was not excessive). Texas courts have further found that multiple counts of aggravated sexual assault of a child were far more serious than the combination of offenses that resulted in the life sentence that was upheld by the Supreme Court in *Rummel*. *See Frels v. State*, No. 12-13-00241-

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CR, 2015 WL 1825366 (Tex. App. -Tyler Apr. 22, 2015, pet. filed); *Thomas v. State*, No. 13-11-00680-CR, 2012 WL 6061774, at *6 (Tex. App. - Edinburg Dec. 6, 2012, pet. ref'd). Federal courts in Texas have applied the *Solem* factors in numerous cases in finding that a life sentence for the offense of aggravated sexual assault of a child does not violate the Constitution. *See, e.g., Zelaya v. Stephens*, No. H-12-3522, 2013 WL 6889696, at *16-18 (S.D. Tex. Dec. 31, 2013), *appeal dismissed*, No. 14-20437 (5th Cir. Sept. 9, 2014); *Servis v. Quarterman*, No. 4:07-CV-462-A, 2008 WL 4787637, at *3-4 (N.D. Tex. Oct. 24, 2008). In light of the case law, the Court is of the opinion that Carmell's two life sentences for two separate counts of aggravated sexual assault of his stepdaughter, who was under fourteen years of age, was not grossly disproportionate. His two life sentences did not violate the Constitution.

3. Void-for-Vagueness Claim

Carmell next claims that Section 22.021 of the Texas Penal Code is void-for-vagueness as applied to him, thereby violating his right to due process and equal protection. He argues that the appellate court erred when it failed to address the merits of the claim.

The state court of appeals addressed the claim on direct appeal as follows:

> In his fourth issue, [Carmell] contends that section 22.021 of the penal code is void for vagueness as applied to him in violation of his rights to due process and equal protection under the United States and Texas Constitutions. [Carmell] did not raise this issue at trial; thus, he has not preserved it for our review. *See Mays v. State*, 318 S.W.3d 368, 398-88 (Tex. Crim. App. 2010); *Sony v. State*, 307 S.W.3d 348, 352 (Tex. App. - San Antonio 2009, no pet.); *see also Karenev v. State*, 281 S.W.2d 428, 434 (Tex. Crim. App. 2009) (holding that appellant may not raise facial challenge to constitutionality of statute for the first time on appeal). We overrule [Carmell's] fourth issue.

Carmell, 331 S.W.3d at 460.

Applying *Coleman*, *supra*, the Fifth Circuit has held that the "procedural-default doctrine precludes federal habeas review when the last reasoned state-court opinion addressing a claim explicitly rejects it on a state procedural ground." *Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004) (citation omitted), *cert. denied*, 543 U.S. 1124 (2005). With this in mind, the Fifth Circuit has consistently held that the Texas contemporaneous objection rule constitutes an adequate and independent ground that procedurally bars federal habeas review of a petitioner's claims. *Turner v.*

Quarterman, 481 F.3d 292, 301 (5th Cir.), *cert. denied*, 551 U.S. 1193 (2007); *Cardenas v. Dretke*, 405 F.3d 244, 249 (5th Cir. 2005), *cert. denied*, 548 U.S. 925 (2006); *Dowthitt v. Johnson*, 230 F.3d 733, 752 (5th Cir. 2000) ("[T]he Texas contemporaneous objection rule is strictly or regularly applied evenhandedly to the vast majority of similar claims, and is therefore an adequate procedural bar."), *cert. denied*, 532 U.S. 915 (2001). The state appellate court explicitly rejected the void-for-vagueness claim because Carmell did not raise the issue at trial. Petitioner has not overcome the procedural default by demonstrating either cause and prejudice or a fundamental miscarriage of justice; thus, the claim in procedurally defaulted.

The Court further notes that Carmell cited Sections 22.021(b) and 22.011(c)(1) on direct appeal and complained that the two statutes provide for vastly different punishments. He observed that while both statutes apply to children under the age of 17 years of age, Texas Penal Code Section 22.021 adds the additional proof element that the child complainant is under the age of 14 at the time of the alleged offense. Despite Carmell's complaints about the statutes, his void-for-vagueness claim lacks merit for the very distinction noted by him. The statute makes a distinction based on whether the victim was less than 14 at the time of the offense. The State appropriately observed in response to this claim on direct appeal that the differences in the statutes were capable of ordinary understanding and gave fair notice of forbidden conduct. *See Earls v. State*, 707 S.W.2d 82, 86 (Tex. Crim. App. 1986) (en banc) (addressing the distinction provided by theft and robbery statutes). Furthermore, the "fact that a person's conduct violates two parts of a statute or even two different statutes does not make the statute vague as long as the proscribed conduct is described so as to give a person fair notice that it violates the statute." *Id.* at 86-87. The statute challenged by Carmell makes a clear distinction based on whether a child was under 14 at the time of the offense. The statute was not vague.

For purposes of federal habeas litigation, the Fifth Circuit has observed that state convictions obtained under vague statutes have been found to be in violation of the Due Process Clause. *Springer v. Coleman*, 998 F.2d 320, 322 (5th Cir. 1993). "The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). "A conviction

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may be unconstitutional if it is obtained under a statute so vague that it does not provide adequate notice of what conduct will be deemed criminal." *Id.* As was previously noted, the provisions contained in Sections 22.021(b) and 22.011(c)(1) are clear and the distinction based on the victim being under 14 at the time was neither vague nor ambiguous. Carmell has not shown that he is entitled to federal habeas corpus relief based on the statutes being void-for-vagueness.

4. Prosecutorial Misconduct By Using Perjured Testimony

Carmell next argues that he was not factually guilty of Counts 1, 3 and 4. He observed that the State's notice of intent to use evidence of other crimes, wrongs or acts discussed acts that did not occur until six months (Count 1) to a year (Counts 3 and 4) after what was testified to at trial by the complainant. He asserts that by changing the dates, the State was able to allege that the complainant was 13 years old, as opposed to 14 years old, at the time of the offenses, which made the offenses first degree felonies instead of a second degree felonies. He stresses that the complainant did not testify in conformity with the true facts that she had previously given to the police and prosecutor in the notice. He alleges that the prosecutor knowingly used the false testimony without correction.

"[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (citations omitted). Moreover, the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 153 (1972) (citations omitted). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* (citations omitted). The Fifth Circuit applied the standards set forth in *Napue* and *Giglio* in *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir.), *cert. denied*, 536 U.S. 978 (2002). A petitioner must prove that the prosecution knowingly presented or failed to correct materially false testimony during trial. *Id.* at 337. Due process is not implicated by the prosecutions's introduction or allowance of false or perjured testimony unless the prosecution actually knows or believes the testimony to be false or perjured; it is not enough that the testimony is challenged by another witness or is inconsistent with prior statements. *Id.* Perjury is not established by mere contradictory testimony from witnesses,

inconsistencies within a witness' testimony and conflicts between reports, written statements and the trial testimony of prosecution witnesses. *Koch*, 907 F.2d at 531. To prove a due process violation, a petitioner must demonstrate: (1) that the testimony in question was actually false, (2) that the prosecutor was aware of the perjury, and (3) that the testimony was material. *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996). Perjured testimony is material only when "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Barrientes*, 221 F.3d 741, 756 (5th Cir. 2000), *cert. denied*, 531 U.S. 1134 (2001).

Rule 404(b) of the Texas Rules of Evidence permits the State to offer evidence of other crimes, wrongs or acts for purposes of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that reasonable notice is given in advance of trial. Such evidence is not admissible to prove the character of the person in order to show action in conformity therewith. The Director appropriately observed that the crimes, wrongs or bad acts indicated in the State's notice were extraneous offenses, as opposed to the crimes for which a defendant is on trial. Carmell fails to show how the dates referring to other sexual offenses he committed against the complainant in the State's notice proves that the State offered testimony that was false. The State was not changing the dates of the offenses for which he was indicted; instead, the State was providing evidence of additional offenses. Carmell has not satisfied any of the three elements required to obtain federal habeas corpus relief. The claim lacks merit.

5. Ineffective Assistance of Trial Counsel

Carmell presents numerous claims of ineffective assistance of trial counsel. Ineffective assistance of counsel claims are governed by the Supreme Court's standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* provides a two-pronged standard, and the petitioner bears the burden of proving both prongs. *Id.* at 687. Under the first prong, he must show that counsel's performance was deficient. *Id.* To establish deficient performance, he must show that "counsel's representation fell below an objective standard of reasonableness," with reasonableness judged under professional norms prevailing at the time counsel rendered assistance. *Id.* at 688. The standard requires the reviewing court to give great deference to counsel's performance, strongly

presuming counsel exercised reasonable professional judgment. *Id.* at 690. Under the second prong, the petitioner must show that his attorney's deficient performance resulted in prejudice. *Id.* at 687. To satisfy the prejudice prong, the habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. An ineffective assistance of counsel claim fails if a petitioner cannot satisfy either the deficient performance or prejudice prong; a court need not evaluate both if he makes an insufficient showing as to either. *Id.* at 697.

Carmell initially claims that his trial attorney was ineffective for failing to investigate. In support of the claim, he complained that counsel did not conduct an investigation in order to confirm when the complainant was in another state. He further complained that counsel failed to confirm dates that were in conflict with the alleged offenses. "An attorney has a duty to independently investigate the charges against his client." *Bower v. Quarterman*, 497 F.3d 459, 467 (5th Cir. 2007) (citation omitted), *cert. denied*, 553 U.S. 1006 (2008). "To establish that an attorney was ineffective for failure to investigate, a petitioner must allege with specificity what the investigation would have revealed and how it would have changed the outcome of the trial." *Miller v. Dretke*, 420 F.3d 356, 361 (5th Cir. 2005). Carmell did nothing more than to provide a discourse about the duty to investigate. He did not supply any of the information outlined in *Miller*. Once again, he has presented nothing other than conclusory allegations and bald assertions, which are insufficient to support a petition for a writ of habeas corpus. *See Miller*, 200 F.3d at 282; *Koch*, 907 F.2d at 530; *Ross*, 694 F.2d at 1011.

Carmell further alleges that his attorney was ineffective for failing to call witnesses. The Fifth Circuit "has repeatedly held that complaints of uncalled witnesses are not favored in federal habeas review because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have stated are largely speculative." *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009). To succeed on the claim, a petitioner must show that had counsel investigated the claim he would have found witnesses to support the defense, that such witnesses were available, and had counsel located and called these witnesses, their testimony would have been

favorable and they would have been willing to testify on his behalf. *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985); *Gomez v. McKaskle*, 734 F.2d 1107, 1109-10 (5th Cir.), *cert. den.*, 469 U.S. 1041 (1984). Failure to produce an affidavit (or similar evidentiary support) from the uncalled witness severely undermines a claim of ineffective assistance. *Sayre v. Anderson*, 238 F.3d 631, 636 (5th Cir. 2001). Conclusory claims are insufficient to entitle a habeas corpus petitioner to relief. *United States v. Woods*, 870 F.2d 285, 288 (5th Cir. 1989); *Schlang v. Heard*, 691 F.2d 796, 799 (5th Cir. 1982). Carmell has once again presented a conclusory claim. He presented nothing more than a one sentence claim that counsel was ineffective for not seeking out potential defense witnesses. The claim lacks merit.

Carmell next alleges that counsel was ineffective for failing to argue that Section 22.021 of the Texas Penal Code was unconstitutional. He once again focused on allegations that the statute was void-for-vagueness. As was previously discussed in conjunction with claim number three, Carmell's void-for-vagueness claim lacks merit. Carmell has not shown that Section 22.021 is unconstitutional. He has not shown that counsel had any meritorious basis for arguing that the statute is unconstitutional. Counsel was not required to make frivolous or futile motions or objections. *Johnson v. Cockrell*, 306 F.3d 249, 255 (5th Cir. 2002); *Koch*, 907 F.2d at 527. The ineffective assistance of counsel claim based on counsel's failure to argue that Section 22.021 is unconstitutional lacks merit.

Carmell next alleges that counsel was ineffective for failing to inform the judge and jury that he was eligible for a lesser included offense under Section 22.021 of the Texas Penal Code. In Texas, a "defendant is entitled to an instruction on a lesser-included offense where the proof for the offense charged includes the proof necessary to establish the lesser-included offense and there is some evidence in the record that would permit a jury rationally to find that if a defendant is guilty, he is guilty *only* of the lesser included offense." *Hall v. State*, 225 S.W.3d 524, 536 (Tex. Crim. App. 2007) (emphasis added). Anything more than a scintilla of evidence may be sufficient to entitle a defendant to a lesser charge, but the evidence must establish the lesser included offense as a valid, rational alternative to the charged offense. *Id.* "[A] lesser-included offense instruction will be merited when 'the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of

the greater.'" *Campbell v. Dretke*, 117 F. App'x 946, 952 (5th Cir. 2004) (quoting *Jones v. Johnson*, 171 F.3d 270, 274 (5th Cir. 1999), *cert. denied*, 546 U.S. 1015 (2015). In the present case, the evidence was such that Carmell could not have been guilty only of a lesser included offense. For example, if the complainant was thirteen, then Carmell would be guilty of aggravated sexual assault. If the complainant was fourteen, then Carmell would only be guilty of sexual assault. The evidence supported the conclusion that the complainant was under thirteen. The lesser included offense argument lacks merit because Carmell could not have been guilty of only sexual assault when she was under fourteen. Once again, counsel was not ineffective for failing to make frivolous or futile motions.

Carmell presents several ineffective assistance of counsel claims involving instances where he believes that counsel should have voiced an objection. He argues that counsel was ineffective for not objecting to the State's use of a prejudicial extraneous offense of polygamy. The evidence, however, was that he was married to the complainant's mother and then pretended to be married to the complainant. Carmell argues counsel was ineffective for failing to object to the State's character-conforming evidence that was inflammatory. More specifically, he failed to object to evidence showing that Carmell was manipulative and controlling towards his wife and the complainant. Carmell also complains that counsel did not object when the prosecutor provided evidence of a prior misdemeanor during sentencing. Carmell, however, did not show that counsel had a basis for objecting in any of these instances. Counsel was not required to make frivolous or futile motions or objections. *Johnson*, 306 F.3d at 255; *Koch*, 907 F.2d at 527. The failure to object claims lack merit.

Carmell next alleges that his attorney was ineffective for failing to present evidence of his actual innocence of Counts 1, 3, 4, 7, 10 and 11. Carmell, however, has failed to present any evidence of his actual evidence. He once again focused on the dates of offenses presented in the Rule 404(b) offer of proof of other crimes. The proof of other crimes, however, did not show that he was innocent of the crimes for which he was actually indicted. The Director also correctly noted that Carmell failed to satisfy the requirements associated with a showing of actual innocence. The Supreme Court made the following statement concerning the requirements associated with a claim of actual innocence:

> [A] substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. . . . To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence -- that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.

Schlup v. Delo, 513 U.S, 298, 324 (1995). "To establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quoting *Schlup*, 513 U.S. at 328) (internal quotation marks omitted). Carmell has failed to satisfy the requirements of *Schlup*. Moreover, he failed to show that his attorney's representation for failing to argue his innocence was deficient or that he was prejudiced by his attorney's failure to argue that he was innocent of crimes contained in Counts 1, 3, 4, 7, 10 and 11. The claim lacks merit.

Carmell next alleges that his attorney was ineffective for failing to argue the unconstitutionality of § 22.021 of the Texas Penal Code. The statute was not unconstitutional for reasons previously explained. Counsel was not required to make frivolous or futile motions or objections. *Johnson*, 306 F.3d at 255; *Koch*, 907 F.2d at 527. The ineffective assistance of counsel claim premised on counsel's failure to challenge the statute under which he was convicted lacks merit.

Carmell also alleges that his attorney was ineffective for failing to challenge the trial court's jurisdiction. His claim is an ineffective assistance of counsel claim bootstrapped to his first ground for relief. As was previously explained, the claim that the trial court lacked jurisdiction lacks merit; thus, the corresponding claim that counsel was ineffective for failing to challenge the jurisdiction of the trial court lacks merit. Once again, counsel was not required to make frivolous or futile motions or objections. *Johnson*, 306 F.3d at 255; *Koch*, 907 F.2d at 527.

Carmell next argues that counsel was ineffective for failing to argue the ambiguity, insufficient notice and fundamental defectiveness of Counts 3 and 4. The claim is a rehash of claim number three. The underlying claim lacks merit. Thus counsel was not required to make frivolous or futile motions or objections. *Johnson*, 306 F.3d at 255; *Koch*, 907 F.2d at 527.

Overall, none of Carmell's ineffective assistance of trial counsel claims have any merit. With respect to each and every ineffective assistance of trial counsel claim, he failed to show that his attorney's representation was deficient and that he was prejudiced by such deficient representation. Claim number five lacks merit.

6. The Second Court of Appeals Erred in Affirming Counts Seven Through Ten

Carmell argues that the Second Court of Appeals failed to comply with the Supreme Court's mandate when it affirmed Counts 7 through 10 on remand. Carmell had argued to the Supreme Court that the retrospective application of an amendment to Tex. Code Crim. Proc. Ann. art. 38.07 authorizing convictions of certain sexual offenses on the victim's testimony alone was a violation of the Ex Post Facto Clause. The Supreme Court agreed and held that Carmell's convictions in Counts 7 through 10 could not be sustained *if* they were not corroborated by other evidence; thus, the judgment of the Second Court of Appeals was reversed and the case was "remanded for further proceedings not inconsistent with this opinion." *Carmell v. Texas*, 529 U.S. at 552-53.

On remand, the Second Court of Appeals adhered to the instructions issued by the Supreme Court and found that the victim's testimony was, in fact, corroborated by other evidence as follows:

> In determining if corroborating evidence exists, courts look to whether there is any evidence tending to connect the defendant with the commission of the offense. *See Scoggan v. State,* 799 S.W.2d 679, 681 n. 5 (Tex.Crim.App.1990). After carefully reviewing the entire record, we conclude the record is replete with evidence corroborating K.M.'s testimony.
>
> The State presented evidence that an unnatural relationship existed between [Carmell] and K.M. [Carmell] began having "date nights," as he called them, with K.M. where they would go out to dinner, watch a movie, and sleep together in K.M.'s bed. [Carmell's] wife, Eleanor, actually caught [Carmell] and K.M. sleeping together in the nude after one of the "dates." [Carmell] also was obsessed with nudity and tried to convince his family that it was proper. Eleanor told the jury [Carmell] believed family nudity was a way to achieve unity among them. She claimed [Carmell] tried to have sex with her while K.M. was in bed with them and that she had witnessed [Carmell] kissing K.M. on the lips in a romantic manner.
>
> Eleanor testified her relationship with [Carmell] began to change. She noted that the change coincided with a change in [Carmell] and K.M.'s relationship. For instance, [Carmell] started spending more time with K.M. to the point where Eleanor became jealous. [Carmell] seemed overly concerned with K.M.'s menstrual cycle and remarked several times that K.M. was "late." [Carmell] gave K.M. herbal teas to strengthen her female system and started taking baths with K.M. Eleanor also claimed that after he was arrested, [Carmell] admitted to her that he had committed adultery with K.M.

> While the foregoing evidence tends to connect [Carmell] to the crimes he was charged with, the State introduced even more evidence from other people who also noticed an unnatural relationship between [Carmell] and K.M. [Carmell's] son explained [Carmell] and K.M. would cuddle on the couch and that [Carmell] would sit unnaturally close to her. Deborah DelCambre, one of [Carmell's] business associates, believed [Carmell] was overly affectionate with K.M. D'Vorah Hasheeve, one of [Carmell's] students, thought [Carmell] treated K.M. like a lover rather than a daughter after seeing him kiss K.M. on the lips. Petra Lackey, another student, also witnessed [Carmell] kiss K.M. on the lips and touch her like they were romantically involved. Lori Weaks, a patient of [Carmell], claimed [Carmell] admitted to her that some of the allegations were true. She told the jury [Carmell] had called K.M. a tramp and said that K.M. "deserved what she got, that she was asking for it," and "had been teasing him for a long time." Rebecca Robinson, an employee of Cagle Bail Bonds, claimed [Carmell] told her that "it wasn" as if [K.M.] was an unwilling participant." And last, the State introduced numerous cards and letters expressing [Carmell's] deep and sincere affection towards K.M.
>
> After carefully reviewing the record, we find sufficient corroborating evidence to connect [Carmell] with the crimes alleged in counts 7 through 10. We affirm the trial court's judgment.

Carmell v. State, 26 S.W.3d at 728. The conviction was affirmed because there was sufficient corroborating evidence. The Texas Court of Criminal Appeals subsequently refused his petition for discretionary review, and the Supreme Court denied his petition for a writ of certiorari. Carmell simply disagrees with the Second Court of Appeals' conclusion; nonetheless, the Court followed the Supreme Court's instructions in affirming the conviction.

The claim should be denied for the additional reason that Carmell has not shown, as required by 28 U.S.C. § 2254(d), that the State court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

7. The Prosecutor Withheld Favorable Impeachment Evidence

In claim number seven, Carmell argues that the prosecutor withheld favorable impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). More specifically, the State withheld evidence that his wife, the complainant's mother, recently had an adulterous affair and an illegitimate baby while he was incarcerated. He believes this information would have undermined her credibility.

Appendix E. 23

The Supreme Court has held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. The duty to provide favorable evidence includes impeachment evidence as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). In order to prevail on a *Brady* claim, the Fifth Circuit requires a petitioner to show that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defense, and (3) the evidence was material to his guilt or innocence. *Mahler v. Kaylo*, 537 F.3d 494, 500 (5th Cir. 2008) (citations omitted). "Evidence is 'material' only when there exists 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* (citing *Bagley*, 473 U.S. at 682). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-10 (1976).

Carmell filed a motion for new trial on the claim that the trial court denied him the right to cross-examine Eleanor Carmell regarding her new baby born after he was incarcerated. The trial court denied the motion, and Carmell raised the issue on appeal. The Second Court of Appeals rejected the claim as follows:

> In his first point, [Carmell] argues that the trial court should have granted him a new trial because the State failed to disclose that Eleanor had another man's child while [Carmell] was in prison. The State does not dispute that it did not disclose this evidence to [Carmell].
>
> We review the denial of a motion for new trial based on newly-discovered evidence under an abuse of discretion standard. *See Driggers v. State,* 940 S.W.2d 699, 709 (Tex.App.—Texarkana 1996, pet. ref'd) (op. on reh'g). The State must produce exculpatory as well as impeachment evidence to a defendant. *See Kyles v. Whitley,* 514 U.S. 419, 432–34, 115 S.Ct. 1555, 1565, 131 L.Ed.2d 490, 505 (1995). *See generally Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). However, the record must reflect that (1) the newly-discovered evidence was unknown to the movant at the time of trial; (2) the movant's failure to discover the evidence was not due to his want of diligence; (3) the evidence was admissible and not merely cumulative, corroborative, collateral, or impeaching; and (4) the evidence was probably true and would probably bring about a different result in another trial. *See Moore v. State,* 882 S.W.2d 844, 849 (Tex.Crim.App.1994), *cert. denied,* 513 U.S. 1114, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995); *see also Gowan v. State,* 927 S.W.2d 246, 249 (Tex.App.—Fort Worth 1996, pet. ref'd).

> Any evidence showing Eleanor's sexual relationship with another man and proving that she had his baby would be inadmissible as impeachment evidence. *See* TEX.R.CRIM. EVID. 608(b); *Ramos v. State,* 819 S.W.2d 939, 942 (Tex.App.—Corpus Christi 1991, pet. ref'd). Because the evidence was inadmissible, the State did not have to produce it, and the trial court did not abuse its discretion in not allowing its admission. We overrule point one.

Carmell, 963 S.W.2d at 837-38 (reversed on other grounds).

Carmell has not shown that the decision issued by the Second Court of Appeals was contrary to or an unreasonable application of federal law as determined by the Supreme Court. Other than mentioning *Brady*, his discussion of the law is based on Texas law, as opposed to federal law. He has not shown that he is entitled to federal habeas corpus relief on this claim.

Despite Carmell's failure to show that he has a basis for relief under federal law, the Court notes that the Fifth Circuit has observed that it "has not clearly specified how to deal with *Brady* claims about inadmissible evidence - a matter of some confusion in federal courts - except to reaffirm that 'inadmissible evidence may be material under *Brady*.'... Thus, we ask only the general question whether the disclosure of the evidence would have created a reasonable probability that the result of the proceeding would have been different." *Felder v. Johnson*, 180 F.3d 206, 212 (5th Cir. 1999), *cert. denied*, 528 U.S. 1067 (1999). The Supreme Court, on the other hand, has held that evidence was not evidence at all under *Brady* when it is inadmissible under state law. *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995). Assuming *arguendo* that the State had an obligation to disclose this information, Carmell cannot prevail because he has not shown that the result of the proceeding would have been different. In particular, he has not shown that the information could actually have been used for purposes of impeachment.

A sub-issue raised by Carmell is the claim that he was denied the right to confront Eleanor Carmell. He correctly observed that he had a right under the Sixth Amendment to confront the witnesses against him. *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986). The record reveals, however, that he extensively cross-examined his wife. 10 RR 288-310. Carmell asserts, however, that he would have confronted her with this undisclosed information if it had been known to him. Still, the information could not have been used by him since it was inadmissible under state law. He

is not entitled to relief because the information was inadmissible. *See Gumm v. Mitchell*, 775 F.3d 345, 363 (6th Cir. 2014) (holding the same). Overall, Carmell has not shown that he is entitled to relief with respect to claim number seven.

8. Constitutional Violations Throughout the Trial

In claim number eight, Carmell argues that constitutional violations throughout the trial so tainted the trial that it results were unreliable. The Fifth Circuit has regularly rejected cumulative error claims while noting that federal habeas relief is available only for cumulative errors that are of constitutional dimension. *Coble v. Quarterman*, 496 F.3d 430, 440 (5th Cir. 2007); *Livingston v. Johnson*, 107 F.3d 297, 309 (5th Cir.), *cert. denied*, 522 U.S. 880 (1997); *Yohey v. Collins*, 985 F.2d 222, 229 (5th Cir. 1993). The Fifth Circuit has emphasized that "[m]eritless claims or claims that are not prejudicial cannot be cumulated, regardless of the total number raised." *Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir. 1996) (citing *Derden v. McNeel*, 978 F.2d 1453, 1461 (5th Cir. 1992)), *cert. denied*, 519 U.S. 1094 (1997). The claim lacks merit.

9. Ineffective Assistance of Appellate Counsel

Carmell next alleges that he is entitled to federal habeas corpus relief because his appellate attorney was ineffective. The two-prong *Strickland* test applies to claims of ineffective assistance of counsel by both trial and appellate counsel. *Styron v. Johnson*, 262 F.3d 438, 450 (5th Cir. 2001). An indigent defendant does not have a constitutional right to compel appointed counsel to include every nonfrivolous point requested by him; instead, an appellate attorney's duty is to choose among potential issues, using professional judgment as to their merits. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). "Counsel need not raise every nonfrivolous ground of appeal, but should instead present solid, meritorious arguments based on directly controlling precedent." *Ries v. Quarterman*, 522 F.3d 517, 531-32 (5th Cir. 2008) (citation and internal quotation marks omitted); *Adams v. Thaler*, 421 F. App'x 322 (5th Cir. 2011). To demonstrate prejudice, a petitioner must "show a reasonable probability that, but for his counsel's unreasonable failure . . ., he would have prevailed on his appeal." *Briseno v. Cockrell*, 274 F.3d 204, 207 (5th Cir. 2001) (citations omitted).

Carmell alleges that his appellate attorney was ineffective for failing to bring the following grounds for relief: (1) lack of trial court jurisdiction, (2) ineffective assistance of trial counsel, (3) prosecutor withheld impeachment evidence and violated his right of confrontation, (4) the life sentences in Counts 3 and 4 violated the Cruel and Unusual Punishment Clause, (5) the prosecutor engaged in prosecutorial misconduct by using perjured testimony, and (6) trial taint. Each of these claims were previously discussed and found to be without merit. As such, Carmell has not shown with a reasonable probability that, but for counsel's unreasonable failure to raise these claim, he would have prevailed on his appeal. The claim lacks merit.

10. Texas Court of Criminal Appeals Erred

Carmell finally alleges that he is entitled to federal habeas corpus relief because the Texas Court of Criminal Appeals erred in denying, in part, and dismissing, in part, his state application. The Fifth Circuit has repeatedly held "that infirmities in state habeas proceedings do not constitute grounds for federal habeas relief." *Henderson v. Stephens*, 791 F.3d 567, 578 (5th Cir. 2015); *Ladd v. Stephens*, 748 F.3d 637, 644 (5th Cir. 2014); *Moore v. Dretke*, 369 F.3d 844, 846 (5th Cir. 2004). This is because "an attack on the state habeas proceeding is an attack on a proceeding collateral to the detention and not the detention itself." *Rudd v. Johnson*, 256 F.3d 317, 320 (5th Cir. 2001). Carmell does not have a basis for federal habeas corpus relief merely because he is dissatisfied with the decision by the Texas Court of Criminal Appeals. The claim lacks merit.

In conclusion, Carmell has not shown that he is entitled to federal habeas corpus relief; thus, the petition should be denied.

Certificate of Appealability

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Although Carmell has not yet filed a notice of appeal, it is respectfully recommended that this Court, nonetheless, address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule

on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In this case, it is respectfully recommended that reasonable jurists could not debate the denial of Carmell's § 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, it is respectfully recommended that the Court find that Carmell is not entitled to a certificate of appealability as to his claims.

Recommendation

It is accordingly recommended that the above-styled petition for writ of habeas corpus be denied and the case be dismissed with prejudice. A certificate of appealability should be denied.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or

recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superceded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this 5th day of November, 2015.

Christine A. Nowak
UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.