APPENDIX A

United States Court of Appeals Reconsideration Denial

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40472

PETER CAIN BRUTON,

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

Before DAVIS, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motions for certificate of appealability and for leave to proceed in forma pauperis. The panel has considered appellant's motion for reconsideration of a certificate of appealability only. IT IS ORDERED that the motion is DENIED.

APPENDIX B

United States Court of Appeals COA Denial

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40472

A True Copy
Certified order issued Feb 28, 2018

Clerk, U.S. Court of Appeals, Fifth Circuit

PETER CAIN BRUTON,

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

O R D E R:

Peter Cain Bruton, Texas prisoner # 01730014, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application challenging his convictions for aggravated sexual assault of a child and indecency with a child. He contends that his trial counsel was ineffective because he failed to object to some of the prosecutor's statements during closing argument on the ground that the statements violated the trial court's ruling on his motion in limine. In addition, he argues that the district court erred in denying his § 2254 application without conducting an evidentiary hearing.

To obtain a COA, Bruton must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To satisfy this standard, he must show that reasonable jurists

would find the district court's decision to deny relief debatable or wrong, *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or "that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further," *Miller-El*, 537 U.S. at 327. Bruton has not made the required showing for a COA. Accordingly, his COA motion is DENIED. Bruton's motion for leave to proceed in forma pauperis on appeal is also DENIED.

/s/ *Priscilla R. Owen*
PRISCILLA R. OWEN
UNITED STATES CIRCUIT JUDGE

APPENDIX C

United States District Court COA Denial

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

PETER CAIN BRUTON, #1730014	§	
	§	
V.	§	CIVIL ACTION NO. 4:15cv473
	§	
DIRECTOR TDCJ-CID	§	

POSTJUDGMENT ORDER

Petitioner filed a notice of appeal, which is also construed as a motion for certificate of appealability. A petitioner must obtain a certificate of appealability before he can appeal a district court's decision. 28 U.S.C. § 2253(c)(1). A certificate of appealability may issue only if the petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

The Supreme Court of the United States 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 rejects 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.* The Supreme Court has held that a certificate of

appealability is a "jurisdictional prerequisite" and a court of appeals lacks jurisdiction to rule on the merits until a certificate of appealability has been issued. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Petitioner's petition was dismissed because he failed to raise issues with merit, and he has not shown that the decision dismissing his writ was wrong. He simply has not made a substantial showing of the denial of a constitutional right; thus, Petitioner is not entitled to a certificate of appealability.

Petitioner also filed a motion for leave to appeal *in forma pauperis* (Dkt. #19). Because Petitioner has not shown entitlement to a certificate of appealability, he also has not shown that he is entitled to proceed *in forma pauperis* on appeal. *United States v. Delario*, 120 F.3d 580, 582-83 (5th Cir. 1997). Furthermore, Petitioner's *in forma pauperis* data sheet shows that his average balance each month is $250.27. For this additional reason, he is not entitled to proceed *in forma pauperis*. It is accordingly

ORDERED that a construed motion for a certificate of appealability is **DENIED**. It is further

ORDERED the motion to proceed *in forma pauperis* on appeal (Dkt. #19) is **DENIED**. All motions not previously ruled upon are **DENIED**. Petitioner should submit all future motions to the Fifth Circuit as opposed to this Court.

SIGNED this 27th day of July, 2017.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

APPENDIX D

United States District Court Petition Dismissal

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

PETER CAIN BRUTON #01730014	§ §	
v.	§	CIVIL ACTION NO. 4:15CV473
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

The above-entitled and numbered civil action was referred to United States Magistrate Judge Christine A. Nowak. The Report and Recommendation of the Magistrate Judge ("the Report") (Dkt. 13), which contains proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. The Report recommends that the Court deny Bruton's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Dkt. 1), dismiss the case with prejudice, and deny a certificate of appealability. Bruton has filed written Objections (Dkt. 14). Having made a *de novo* review of the Objections, the Court concludes that the findings and conclusions of the Magistrate Judge are correct and adopts the same as the findings and conclusions of the Court.

I. BACKGROUND

Bruton was indicted and subsequently convicted of aggravated sexual assault of a child and indecency with a child by sexual contact, pursuant to Texas law. Prior to trial, his lawyer made a motion in limine intended to restrict the discussion of unindicted wrongful conduct in the jury's presence. The defense motion in limine requested, *inter alia*, that the trial court:

> [ ]hold a hearing outside the presence of the jury and instruct the Attorney for the State not to mention or allude to the following without said hearing:
>
> I.
>
> Any extraneous offenses, crimes, wrongs or acts that the Defendant is alleged to have engaged in either as a principal or a party, including but not limited to those identified by the State in any response pursuant to Texas Rule of Evidence 404(b) or Tex. Code of Crim. Proc. Art. 37.07[.]
>
> II.
>
> Any prior convictions, if any, of the Defendant if the State intends to introduce them either at the punishment phase [or for] impeachment purposes.
>
> III.
>
> Any additional unindicted offenses involving the Defendant, if any, in this case.

Dkt. 10-1 at 121-22. As the Magistrate Judge observed in her Report:

> [T]he trial court considered the parties' arguments on the motion [in limine]. The prosecutor indicated that "there [would] be a good number of extraneous offenses involving the victim." Dkt. 10-22 at 8. He further informed the court that "[t]here's *other* victims that we have evidence of, but we would certainly approach before we mentioned that in any way, so I have no objection to a motion in limine as to *other* victims. But we do intend on getting other instances of sexual abuse with *this* victim that is not mentioned in the indictment." *Id.* (emphasis added). Defense counsel argued that the State should be required to obtain an admissibility ruling outside the jury's presence before introducing unindicted instances of sexual abuse with either the victim in the case or with any other alleged victim. *Id.* The trial court denied the defense motion in limine as to unindicted instances of sexual abuse with the victim in the case. *See id.* However, the court granted the motion as to conduct with "any other person other than the victim in this case." *Id.*

Dkt. 13 at 7-8.

The case proceeded to trial and, during the State's closing argument in the guilt phase, the following exchange occurred:

> [The prosecutor]: And it's crucial that you hold him accountable for his actions, because if you don't, you're putting other children at risk. You simply are. I know you don't want to hear that, but you are because of the way this man's mind works. If you let him get away with it, it's going to progress. He has proven that. When he got away with it before, it continued because no one stopped him. And if he's not held accountable, it's going to continue. He's going to feel bullet proof. He's going

> to know no one is going to believe these kids. I can do what I want. I can continue this, and I can continue to get away with it. And this is not a habit that he can just turn on and off. The way his mind is wired is different than yours—
>
> [Defense counsel]: Objection, Your Honor. There's no evidence to support that argument.
>
> [The Court]: Sustained.
>
> [Defense counsel]: Move to strike. Move to instruct the jury to disregard, Your Honor.
>
> [The Court]: Ladies and gentlemen, you will disregard the last comment of counsel.
>
> [Defense counsel]: And, Your Honor, I also move for a mistrial.
>
> [The Court]: Denied.

Dkt. 10-25 at 16. In Bruton's § 2254 Petition, he complains that this portion of the State's closing argument violated the defense motion in limine. *See* Dkt. 1 at 7; 1-1 at 5. Bruton further complains that, though his defense counsel objected to the State's closing argument, moved to strike, and requested a mistrial based on lack of evidence to support the closing argument (*See* Dkt. 1 at 7; 1-1 at 5), counsel's failure to lodge an objection or request a mistrial specifically based on the purported violation of the motion in limine constituted ineffective assistance under *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052 (1984).[1] *See* Dkt. 1 at 7; 1-1 at 5-7.

Bruton asserted an identical claim in a state application for the writ of habeas corpus. *See* Dkt. 10-31 at 9-10, 43-50. During the state habeas proceedings, the trial court entered the following findings of fact and conclusions of law regarding Bruton's ineffective assistance claim:

> 1. Applicant's trial counsel was not deficient in his performance by not objecting to the complained of testimony for a violation of the motion in limine because it was an objection that would not have been granted.

---

[1] *Strickland* announced the well-settled two (2) prong standard for evaluating ineffective assistance of counsel claims. Under this standard, reversal of a conviction is warranted only if a defendant shows: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *See Strickland*, 466 U.S. at 687.

> 2. The objection made by Applicant's trial counsel could have presumably been trial strategy and Applicant's trial counsel was therefore not deficient.
>
> 3. This Court would not have erred if it were to have denied Applicant's motion for mistrial after granting an objection for a violation of the motion in limine if this Court instructed the jury to disregard the objectionable portion of the State's closing argument.
>
> 4. The remedy for a violation of the motion in limine lies with the trial court, and the remedy of a curative instruction would have been sufficient.
>
> 5. The portion of the closing argument at controversy was not extremely prejudicial and was not an incurable error.
>
> 6. Considering the circumstances in this case, there was not any harm that a curative instruction did not cure.
>
> 7. The jury was instructed to disregard the State's objectionable statement and there were no aggravating circumstances, therefore this case did not justify a mistrial.
>
> 8. Applicant has not shown that his counsel's performance prejudiced his defense. The result of this proceeding would not have been different if Applicant's counsel objected on the grounds that the State violated the motion in limine, as this Court would not have been required to grant a mistrial and would have given the same instruction to disregard that was actually given to the jury.

Id. at 143-44 (citations omitted). The Texas Court of Criminal Appeals ("CCA") adopted these findings and conclusions and denied Bruton's state habeas application without written order. *See* Dkt. 10-29.

In her Report, the Magistrate Judge expressly considered the CCA's findings and conclusions regarding defense counsel's purportedly deficient performance and resulting prejudice, concluding, "[t]he CCA's findings are not unreasonable and are, thus, entitled to deference under [the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")]." Dkt. 13 at 10. Bruton objects to the Magistrate Judge's deference to the CCA's findings. *See* Dkt. 14 at 2-3. Bruton also objects to the Magistrate Judge's recommendation that he be denied a certificate of appealability. *See id.* at 3.

II. ANALYSIS

In his Objections, Bruton first takes issue with the Magistrate Judge's determination that "[t]he CCA was justified in concluding that defense counsel made a strategic decision not to advance a meritless objection based on the motion in limine and, accordingly, did not render deficient performance." Dkt. 13 at 9; *see also* Dkt. 14 at 2. It is evident from the Report that, in consideration of the CCA's conclusion, the Magistrate Judge closely examined the State's closing argument, including portions of the argument leading up to and following the offending language. *See* Dkt. 13 at 8-9. Ultimately, the Magistrate Judge independently determined that, "[t]he State's closing argument does not purport to introduce evidence of actual offenses against other victims; thus, it is not in violation of the ruling on the defense motion in limine." *Id.* at 9.

Bruton challenges this reasoning, accusing the Magistrate Judge of "cherry-picking the State's closing argument" in order to "minimize the State's reference to other victims." Dkt. 14 at 2. However, it is Bruton who hangs on insular words and phrases in the State's closing argument, without regard to context or the argument as a whole. In his Objections, Bruton focuses on the State's isolated use of the phrase "these kids" in closing arguments; similarly, in his Petition, he honed in on a mere five (5) lines of the State's nine (9) page closing argument. *See* Dkt. 1-1 at 5; Dkt. 14 at 2.

In contrast, the Magistrate Judge considered the State's closing argument as a whole and reasoned that, "[t]aken in isolation, the State's reference to 'these kids' during its closing argument could be argued (as Petitioner has) to run afoul of the trial court's order requiring an admissibility ruling before introduction of instances of misconduct involving other victims. However, this position unravels when viewed or taken in the context of the entire closing argument." *See* Dkt. 13 at 9. Bruton's bare accusations do not undermine this reasoning. And, on *de novo* review of the record, the Court finds no basis to reject the Magistrate Judge's findings.

Next, Bruton objects to the Magistrate Judge's determination that "fairminded jurists could not dispute the CCA's finding that the trial court would not have granted a mistrial even if counsel had objected based on the motion in limine." Dkt. 13 at 3, 10; *see also* Dkt. 14 at 2. Bruton argues this conclusion is erroneous because: (1) his trial lawyer failed to articulate any legal basis for a mistrial; and (2) the trial court lacked authority to grant a mistrial without "a reason proffered by Petitioner's trial counsel." Dkt. 14 at 2.

However, as Bruton acknowledges in his Brief in Support of Petition for a Writ of Habeas Corpus, his trial counsel did move for a mistrial during the State's closing argument and cited a legal basis for the request: that the State's argument was not supported by evidence in the record. *See* Dkt. 1-1 at 5; 10-25 at 16. Any contention to the contrary is unsupported and unsupportable by the record.

Furthermore, after ruling out less drastic alternatives, Texas courts have discretion to *sua sponte* order a mistrial on the ground of manifest necessity "when the circumstances render it impossible to arrive at a fair verdict, when it is impossible to continue with trial, or when the verdict would be automatically reversed on appeal because of trial error." *Hill v. State*, 90 S.W.3d 308, 313 (Tex. Crim. App. 2002); *see also Brown v. State*, 907 S.W.2d 835, 839 (Tex. Crim. App. 1995). Trial courts may *sua sponte* order a mistrial *without* a finding of manifest necessity when, as here, the defendant consents to a mistrial. *See, e.g., Ex parte Lewis*, 219 S.W.3d 335, 353 (Tex. Crim. App. 2007). Accordingly, Bruton's argument that the trial court lacked authority to grant a mistrial solely because his counsel failed to advance a proper request lacks merit.

Finally, Bruton objects to the Magistrate Judge's conclusion that "[t]here is no likelihood that reasonable jurists could debate the denial of Petitioner's § 2254 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to

proceed. Accordingly, Petitioner is not entitled to a certificate of appealability as to his claims." Dkt. 13 at 10-11 (citations omitted); *see also* Dkt. 14 at 3.

As the Magistrate Judge correctly noted, a certificate of appealability may issue only if a movant has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595 (2000). "In order to make a substantial showing, a petitioner must demonstrate that 'reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003) (quoting *Slack*, 529 U.S. at 484).

Bruton argues he has made a showing sufficient to warrant issuance of a certificate of appealability. Specifically, Bruton contends, "the trial court obviously felt that the State had crossed the line when it made the offending statement [during closing arguments] because the trial court sustained [Bruton's] objection." Dkt. 14 at 3. While this assertion may have merit, it is of no consequence to the only determination relevant to issuance of a certificate of appealability: whether this Court's resolution of Bruton's constitutional claims is incorrect or debatable.

Bruton further contends reasonable jurists could debate the merits of his claim that he was entitled to a mistrial based on the State's purported violation of the motion in limine. He argues:

> [T]he Court of Appeals for the [Eighth] District of Texas pointed this exact issue out in its memorandum opinion. However, the court stated that they would not address the issue because counsel did not state in his request for mistrial that the statements violated the motion in limine. Simply put, trial counsel did not preserve error.
>
> In sum, reasonable jurists—a three judge panel from the [Eighth] Court of Appeals—could debate the denial of Petitioner's § 2254 motion. Therefore, a certificate of appealability should be issued.

Id. Bruton seemingly avers the Eighth Court of Appeals recognized some possibility of reasonable debate regarding the merits of his claim that he was entitled to a mistrial. However, the Eighth

Court of Appeals expressly declined to consider this claim, finding that Bruton had "waived this argument because he failed to make it in the trial court." Dkt. 10-10 at 11. Thus, the opinion of the Eighth Court of Appeals has no bearing on this Court's resolution of Bruton's claim.

On *de novo* review of the record, the Court is of the opinion that Bruton fails to carry his burden of proof under *Strickland v. Washington*, and therefore, fails to make out a violation of a constitutional right. Accordingly, he is not entitled to relief under § 2254 or a certificate of appealability. It is therefore

ORDERED that Bruton's Objections (Dkt. 14) are **OVERRULED**. It is further **ORDERED** that the Petition for a Writ of Habeas Relief pursuant to 28 U.S.C. § 2254 (Dkt. 1) is **DISMISSED** with prejudice. A certificate of appealability is **DENIED**. All motions by either party not previously ruled on are hereby **DENIED**.

SIGNED this 13th day of April, 2017.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

PETER CAIN BRUTON #01730014	§ §	
v.	§ §	CIVIL ACTION NO. 4:15CV473
DIRECTOR, TDCJ-CID	§ §	

FINAL JUDGMENT

The Court having considered Petitioner's case and rendered its decision by opinion issued this same date, hereby **ORDERS** that the above-entitled and numbered cause of action is **DISMISSED** with prejudice.

All motions by either party not previously ruled on are hereby **DENIED**.

SIGNED this 13th day of April, 2017.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

APPENDIX E

Report and Recommendation of Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

PETER CAIN BRUTON #01730014	§ §	
v.	§ §	CIVIL ACTION NO. 4:15CV473
DIRECTOR, TDCJ-CID	§ §	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pro se Petitioner Peter Cain Bruton filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. *See* Dkt. 1. The petition was referred to the undersigned United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

BACKGROUND

On March 29, 2007, Petitioner was charged with aggravated sexual assault of a child (Count I) and indecency with a child by sexual contact (Count II). *See* Dkt. 10-1 at 8, 10-10 at 1. He entered pleas of not guilty to both counts. *See* Dkt. 10-1 at 138. A jury found Petitioner guilty on both counts and assessed punishment at life imprisonment for the aggravated sexual assault count and twenty (20) years' imprisonment for the indecency with a child count. *See id.* at 134-35. The 211th District Court of Denton County, Texas entered a judgment and sentence on June 10, 2011. *See id.* at 138-39.

The Eighth Court of Appeals of Texas affirmed the judgment of conviction, but reversed the sentences and remanded for a new punishment hearing. *See* Dkt. 10-10. The Texas Court of

Criminal Appeals ("CCA") granted the State's petition for discretionary review and affirmed the judgment of the Eight Court of Appeals. *See* Dkt. 10-3. At Petitioner's second punishment hearing, the jury again assessed his punishment at life imprisonment for the aggravated sexual assault count and twenty (20) years' imprisonment for the indecency with a child count. *See* Dkt. 10-31 at 139.

Petitioner then filed a state habeas corpus application challenging his convictions based on alleged ineffective assistance of counsel. *See* Dkt. 10-31 at 4, 9, 43. In conjunction with the state habeas proceedings, the State submitted Proposed Findings of Fact and Conclusions of Law, which the trial court adopted on April 7, 2015. *See id.* at 141-46. The trial court found, in relevant part:

> 3. Applicant alleges that his trial counsel was ineffective for not objecting to an alleged violation of the motion in limine during the State's closing argument (Application at 6).
>
> 4. Applicant's motion in limine was granted as to other victims of offenses other than the offense before this Court, and other unindicted offenses with victims different from the victim in the current case *(see* Applicant's Exhibit C).
>
> 5. Applicant complains of a specific part of the State's closing argument:
> [I]t's crucial that you hold him accountable for his actions, because if you don't, you're putting other children at risk. You simply are. I know you don't want to hear that, but you are because of the way this man's mind works. If you let him get away with it, it's going to progress. He has proven that. When he got away with it before, it continued because no one stopped him. And if he's not held accountable, it's going to continue. He's going to feel bullet proof. He's going to know no one is going to believe these kids. I can do what I want. I can continue this and I can continue to get away with it.
> (*see* Applicant's Exhibit D).

See id. at 142. And the court concluded:

> 1. Applicant's trial counsel was not deficient in his performance by not objecting to the complained of testimony for a violation of the motion in limine because it was an objection that would not have been granted. *See Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Ex Parte Chandler,* 182 S.W.3d 350, 354 (Tex. Crim. App. 2005); *Gallo v. State,* 239 S.W.3d 757, 767 (Tex. Crim. App. 2007).
>
> 2. The objection made by Applicant's trial counsel could have presumably been trial strategy and Applicant's trial counsel was therefore not deficient. *See Strickland,*

466 U.S. at 687; *Chandler,* 182 S.W.3d at 354; *Starz v. State,* 309 S.W.3d 110, 118 (Tex. App.-Houston [1st Dist.] 2009, pet. ref'd).

3. This Court would not have erred if it were to have denied Applicant's motion for mistrial after granting an objection for a violation of the motion in limine if this Court instructed the jury to disregard the objectionable portion of the State's closing argument. *See Coble v. State,* 330 S.W.3d 253, 292 (Tex. Crim. App. 2010).

4. The remedy for a violation of the motion in limine lies with the trial court, and the remedy of a curative instruction would have been sufficient. *See Thierry v. State,* 288 S.W.3d 80, 87 (Tex. App.-Houston [1st Dist.] 2009, pet. ref' d); *see also Brazzell v. State,* 481 S.W.2d 130, 131 (Tex. Crim. App. 1972).

5. The portion of the closing argument at controversy was not extremely prejudicial and was not an incurable error. *See Simpson v. State,* 119 S. W.3d 262, 272 (Tex. Crim. App. 2003); *Wood v. State,* 18 S.W.3d 642, 648 (Tex. Crim. App. 2000); *Ladd,* 3 S.W.3d at 567; *Francis v. State,* 445 S.W.3d 307, 319-320 (Tex. App.-Houston [1st Dist.] 2013, pet. granted) *affirmed by* 428 S.W.3d 850 (Tex. Crim. App. 2013); *Dekneef v. State,* 379 S.W.3d 423, 429-430 (Tex. App.-Amarillo 2012, pet. ref' d).

6. Considering the circumstances in this case, there was not any harm that a curative instruction did not cure. *See Francis,* 445 S.W.3d at 320; *Dekneef,* 379 S.W.3d at 430.

7. The jury was instructed to disregard the State's objectionable statement and there were no aggravating circumstances, therefore this case did not justify a mistrial. *See Francis,* 445 S.W.3d at 320.

8. Applicant has not shown that his counsel's performance prejudiced his defense. *See Bone v. State,* 77 S.W.3d 828, 833 (Tex. Crim. App. 2002); *see also Strickland,* 466 U.S. at 687. The result of this proceeding would not have been different if Applicant's counsel objected on the grounds that the State violated the motion in limine, as this Court would not have been required to grant a mistrial and would have given the same instruction to disregard that was actually given to the jury. *See Mitchell v. State,* 68 S.W.3d 640, 642 (Tex. Crim. App. 2002).

Id. at 143-44. The CCA denied Petitioner's state habeas application without written order on the findings of the trial court without a hearing. *See* Dkt. 10-29.

Petitioner commenced the instant action July 10, 2015. *See* Dkt. 1. The Director responded on December 3, 2015. *See* Dkt. 11. Petitioner filed a reply on January 5, 2016. *See* Dkt. 12.

LEGAL STANDARD

The petition before the Court is governed by the standard of review provided by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* 28 U.S.C. § 2254; *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (holding AEDPA only applies to those noncapital habeas corpus cases filed after its effective date of April 24, 1996). The statute provides that a federal court may issue a writ of habeas corpus for a defendant convicted under a state judgment only if the adjudication of the relevant constitutional claim by the state court: (1) was contrary to clearly established federal law as determined by the Supreme Court; (2) involved an unreasonable application of clearly established federal law as determined by the Supreme Court; or (3) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d); *Harrington v. Richter*, 562 U.S. 86, 100 (2011).

A "run-of-the-mill" state court decision applying the correct Supreme Court rule to the facts of a particular case is to be reviewed under the "unreasonable application" clause. *Williams v. Taylor*, 529 U.S. 362, at 406-07 (2000). To this end, a state court unreasonably applies Supreme Court precedent only if it correctly identifies the governing precedent but unreasonably applies it to the facts of a particular case. *Id.* at 407–09. Thus, "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. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Moreover, "evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching

outcomes in case-by-case determinations." *Alvarado*, 541 U.S. at 664. This is particularly true when reviewing a state court's consideration of claimed ineffective assistance of counsel under *Strickland v. Washington, supra.* The standards created by *Strickland* and AEDPA are both highly deferential and when the two apply in tandem, review is "doubly" so. *Richter*, 562 U.S. at 105. "It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 562 U.S. at 102.

> If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal.

Id. (internal citations omitted).

AEDPA also provides that the state court's factual findings "shall be presumed to be correct" unless the petitioner meets "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "The presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact." *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001). Review of the state court's decision "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, 181 (2011). Except for the narrow exceptions contained in § 2254(e)(2), the evidence upon which a petitioner would challenge a state court fact-finding must have been presented to the state court. *See id.* at 181.

ANALYSIS

Petitioner contends he was denied the effective assistance of counsel when his trial lawyer failed to properly object to an alleged violation of the trial court's ruling on his motion in limine. He further contends the CCA's adjudication of his ineffective assistance claim resulted in a decision that involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.[1] Accordingly, he petitions the Court to vacate his convictions or, in the alternative, remand the case for a new trial. He also requests that the Court appoint counsel and convene an evidentiary hearing on his federal habeas claim.

I. Ineffective Assistance Claim

Petitioner's ineffective assistance claim is governed by the familiar two-prong standard announced in *Strickland v. Washington, supra.* Under *Strickland*, a convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires the defendant to show the performance was deficient and the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *See Strickland*, 466 U.S. at 687. The proper standard for judging an attorney's performance is that of reasonably effective assistance considering all of the circumstances. *See id.* at 688. A reviewing court must employ a strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance. *See id.* at 690. Thus, in order to show the requisite prejudice, a defendant must show there is a reasonable probability that, but for counsel's unprofessional performance, the result of

[1] Petitioner briefly cites the "contrary to federal law" clause of AEDPA, but he acknowledges that his ineffective assistance claim is properly governed by *Strickland v. Washington. See* Dkt. 1 at 3-7. Since the trial court found that Petitioner was not entitled to relief because he failed to establish deficient performance or prejudice under *Strickland*, and the CCA denied state habeas relief based on these findings, this Report does not analyze Petitioner's claim under the "contrary to" clause.

the proceedings would have been different. *See id.* at 694. Accordingly, counsel cannot be held to be ineffective for failing to press a frivolous point. *See Sones v. Hatchett*, 61 F.3d 410, 415 (5th Cir. 1995).

A defendant has the burden of establishing that he was deprived of effective assistance of counsel by a preponderance of the evidence. *See Clark v. Johnson*, 227 F.3d 273, 284 (5th Cir. 2000). If a defendant fails to establish one prong of the *Strickland* test, the court need not examine the other prong. *Strickland*, 466 U.S. at 697.

At trial, defense counsel filed a motion in limine, which asked, among other things, that the court:

> ...hold a hearing outside the presence of the jury and instruct the Attorney for the State not to mention or allude to the following without said hearing:
>
> I.
>
> Any extraneous offenses, crimes, wrongs or acts that the Defendant is alleged to have engaged in either as a principal or a party, including but not limited to those identified by the State in any response pursuant to Texas Rule of Evidence 404(b) or Tex. Code of Crim. Proc. Art. 37.07
>
> II.
>
> Any prior convictions, if any, of the Defendant if the State intends to introduce them either at the punishment phase of or [sic.] impeachment purposes.
>
> III.
>
> Any additional unindicted offenses involving the Defendant, if any, in this case.

Dkt. 10-1 at 121-22. On June 7, 2011, the trial court considered the parties' arguments on the motion. The prosecutor indicated that "there [would] be a good number of extraneous offenses involving the victim." Dkt. 10-22 at 8. He further informed the court that "[t]here's *other* victims that we have evidence of, but we would certainly approach before we mentioned that in any way, so I have no objection to a motion in limine as to *other* victims. But we do intend on getting other instances of sexual abuse with *this* victim that is not mentioned in the indictment." *Id.* (emphasis added). Defense counsel argued that the State should be required to obtain an admissibility ruling outside the jury's presence before introducing unindicted instances of sexual abuse with either the

victim in the case or with any other alleged victim. *Id.* The trial court denied the defense motion in limine as to unindicted instances of sexual abuse with the victim in the case. *See id.* However, the court granted the motion as to conduct with "any other person other than the victim in this case." *Id.*

Petitioner complains that the prosecutor's closing argument ran afoul of this ruling. *See* Dkt. 1-1. He takes issue with the following passage of the State's argument:

> And if he's not held accountable, it's going to continue. He's going to feel bullet proof. He's going to know no one is going to believe these kids. I can do what I want. I can continue this, and I can continue to get away with it.
>
> And this is not a habit that he can just turn on and off. The way his mind is wired is different than yours--

See id. (quoting Dkt. 10-25 at 16). Petitioner concedes that defense counsel raised a successful objection to this argument on the grounds that it was unsupported by the evidence.[2] He also concedes that the trial court gave a curative instruction to the jury after sustaining counsel's objection. But Petitioner contends defense counsel should have also objected on an additional basis: that the argument constituted a violation of the ruling on the defense motion in limine. Petitioner contends he would have been entitled to a mistrial had counsel made such an objection; and further that counsel rendered prejudicially deficient performance under *Strickland* when he failed to do so.

Taken in isolation, the State's reference to "these kids" during its closing argument could be argued (as Petitioner has) to run afoul of the trial court's order requiring an admissibility ruling before introduction of instances of misconduct involving other victims. However, this position unravels when viewed or taken in the context of the entire closing argument. Before making the

[2] Counsel also moved to strike the offending statements and expressly requested a mistrial. *See* Dkt. 10-25 at 16. The trial court granted the motion to strike but denied the mistrial. *See id.*

offending statements regarding "these kids," the prosecutor specifically recalled the *victim's* testimony that, while Petitioner began with touching her fairly innocently, the contact became progressively more frequent and more sexual in nature over time when she did not report it. *See* Dkt. 10-25 at 13. The prosecutor then opined that Petitioner's past experiences with this victim had taught him that he could get away with sexual abuse of children in the future. Dkt. 10-25 at 16. The prosecutor charged the jury with "hold[ing] him accountable for his actions, because if you don't, you're putting other children at risk...If you let him get away with it, it's going to progress. He has proven that. When he got away with it before, it continued because no one stopped him. And if he's not held accountable, it's going to continue. He's going to feel bullet proof. He's going to know no one is going to believe these kids." *Id.*

The State's closing argument does not purport to introduce evidence of actual offenses against other victims; thus, it is not in violation of the ruling on the defense motion in limine. The CCA was justified in concluding that defense counsel made a strategic decision not to advance a meritless objection based on the motion in limine and, accordingly, did not render deficient performance.

Moreover, even assuming the State's argument did violate the ruling on the defense motion in limine, Petitioner still fails to demonstrate that he was prejudiced by his attorney's failure to object on that ground. Petitioner claims that the trial court would have granted a mistrial had counsel objected based on the motion in limine. However, a mistrial was not mandatory under the circumstances; Texas law gives trial courts discretion to choose an appropriate remedy for the violation of its pretrial order. *See Koslow's v. Mackie*, 796 S.W.2d 700, 704 (Tex. 1990) ("Imposing an available sanction [for violation of a pretrial order] is left to the sound discretion of the trial court."); *Brazzell v. State*, 481 S.W.2d 130, 131 (Tex. Crim. App. 1972) ("The violation

of a motion in limine may entitle a party to relief, but any remedies available with regard to such a violation are with the trial court. If its order has been violated, the trial court may apply sanctions of contempt or take other appropriate action."). In this case, the trial judge considered and denied a defense motion for mistrial following the State's offensive argument. The court opted, instead, to strike the improper argument from the record and give a curative instruction to the jury. *See* Dkt. 10-25 at 16. Given the trial court's unequivocal exercise of discretion on the issue, fairminded jurists could not dispute the CCA's finding that the trial court would not have granted a mistrial even if counsel had objected based on the motion in limine. The CCA's findings are not unreasonable and are, thus, entitled to deference under AEDPA.

Petitioner has not shown that his counsel rendered prejudicially deficient performance or that the CCA's decision denying him relief was based on an unreasonable application of federal law or determination of facts in light of the record. Accordingly, he is not entitled to relief under AEDPA.

II. Requests for Appointment of Counsel and Evidentiary Hearing

Petitioner requests that the Court appoint counsel and conduct an evidentiary hearing in his case. Under Rule 8(c) of the Rules Governing Section 2254 Cases in the United States District Courts, the presiding judge shall appoint counsel for a petitioner if an evidentiary hearing is required and the petitioner qualifies for appointment of counsel under 18 U.S.C. § 3006A(g). However, an evidentiary hearing is precluded under AEDPA unless: (1) the petitioner's claims rely on a new rule of constitutional law or a factual predicate previously undiscoverable through the exercise of due diligence; and (2) the petitioner establishes by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty. *See* 28 U.S.C. § 2254(e)(2). A failure to meet this standard of diligence will bar a federal evidentiary

hearing in the absence of a convincing claim of actual innocence that can only be established by newly discovered evidence. *See Taylor*, 529 U.S. at 436 (2000).

Petitioner has made no showing warranting an evidentiary hearing in this case. Thus, his requests for a hearing and for appointment of counsel should be denied.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(B). Although Movant has not yet filed a notice of appeal, it is respectfully recommended that the 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 [movant] relief is in the best position to determine whether the [movant] 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 movant has made a "substantial showing of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); 28 U.S.C. § 2253(c)(2). "In order to make a substantial showing, a petitioner must demonstrate that 'reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003) (quoting *Slack*, 529 U.S. at 484). "When the district court has denied a claim on procedural grounds, however, the petitioner must also demonstrate that 'jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Id.* (quoting *Slack*, 529 U.S. at 484).

There is no likelihood that reasonable jurists could debate the denial of Petitioner's

§ 2254 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, Petitioner is not entitled to a certificate of appealability as to his claims.

RECOMMENDATION

The Court recommends Petitioner Peter Cain Bruton's Petition for a Writ of Habeas Relief pursuant to 28 U.S.C. § 2254 (Dkt. 1) should be **DENIED** and that the case be **DISMISSED WITH PREJUDICE**. It is further recommended that a certificate of appealability 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 Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten (10) to fourteen (14) days).

SIGNED this 8th day of February, 2017.

Christine A. Nowak
UNITED STATES MAGISTRATE JUDGE

APPENDIX F

Court of Criminal Appeals of Texas Habeas Corpus Denial

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

5/13/2015
BRUTON, PETER CAIN
Tr. Ct. No. F-2007-0697-C(WHC1) WR-83,146-01
This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing.

Abel Acosta, Clerk

PETER CAIN BRUTON
TDCJ No. 1730014
Michael Unit
2664 FM 2054
Tennessee Colony, Texas 75886