IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-50559

JARED MORRISON,

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 Western District of Texas

O R D E R:

In 2004, Jared Morrison, Texas prisoner # 1747148, pleaded guilty to committing sexual assault of a child by penetrating the female sexual organ of a child younger than 17 years of age who was not his spouse, which is a violation of Texas Penal Code Ann. § 22.011(a)(2)(A) (West 2014). The trial court entered a judgment deferring adjudication of guilt and imposing nine years of community supervision. In 2011, the trial court revoked Morrison's term of community supervision, adjudicated him guilty of the charged offense, and sentenced him to 16 years of imprisonment. He now seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application.

APPENDIX 1 (1 OF 2)

To obtain a COA, Morrison must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). The district court held that Morrison's claims arising from the 2004 proceedings were time barred and denied his claims arising from the 2011 proceedings after reviewing their merits. When a district court rejects a claim on procedural grounds, we will issue a COA only if the movant "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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a district court rejects a claim on the merits, we will issue a COA only if the movant demonstrates that jurists of reason could disagree with the district court's resolution of his constitutional claims or could conclude the issues presented "deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336 (internal quotation marks and citation omitted).

In his COA request, Morrison argues that the district court incorrectly determined that eight of his grounds for relief were time barred and that he failed to overcome the deference due to the state habeas corpus court's denial of his remaining grounds for relief. He has failed to make the requisite showing as to all of his claims. Accordingly, Morrison's motion for a COA is DENIED.

W. Eugene Davis

W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

JARED MORRISON,	§	
Petitioner,	§	
	§	
v.	§	**No. MO:15-CV-00069-RAJ-DC**
	§	
WILLIAM STEPHENS,	§	
Director, Texas Department of Criminal	§	
Justice, Correctional Institutions Division,	§	
Respondent.	§	

REPORT AND RECOMMENDATION OF THE U.S. MAGISTRATE JUDGE

BEFORE THE COURT is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by Petitioner, Jared Morrison ("Morrison"), a state prisoner, against William Stephens, director of the Texas Department of Criminal Justice, Correctional Institutions Division ("Respondent"). The petition is before the United States Magistrate Judge for a Report and Recommendation by Order of Referral from the United States District Judge pursuant to 28 U.S.C. § 636 and Appendix C of the Local Rules for the Assignment of Duties of the United States Magistrates. (Doc. 18). After due consideration, the undersigned recommends that Morrison is not entitled to federal habeas corpus relief or a Certificate of Appealability from the Court. For the reasons set forth hereinafter, habeas relief should be **DENIED**.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Petitioner Morrison, proceeding *pro se*, filed this federal habeas corpus action pursuant to Title 28, United States Code, Section 2254, complaining of the legality of his May 6, 2004 deferred adjudication order and subsequent conviction for sexual assault of a child[1]. (Doc. 1).

[1] On June 11, 2003, Morrison and his twin brother, Jason Morrison, hosted their eighteen-year-old cousin, Tyler White and White's fifteen year old friend, "M.M." at their residence. "White came in with a 12-pack of beer and [M.M] carried in a bottle of tequila." Morrison, his brother, White, and M.M. proceeded to take several shots of

APPENDIX 3 (1 OF 35)

Morrison is an inmate confined at the Huntsville Unit of the TDCJ-CID. On February 26, 2004 Morrison was charged by indictment with the second degree felony offense of sexual assault of a child in violation of Section 22.011 of the Texas Penal Code. (CR[2] 3). Attorney Ian Cantacuzene represented Morrison throughout Morrison's trial court proceedings. (II SHCR 310). On May 6, 2004, Morrison signed a written judicial confession and pleaded guilty to the charged offense. (CR 27–48). Pursuant to a plea agreement, the trial court deferred adjudication of Morrison's guilt conditional to Morrison's completion of nine years of community supervision. (CR 25–48).

On March 28, 2005, the State filed a motion to proceed with an adjudication of guilt and to revoke Morrison's community supervision. (CR 55–57). On April 12, 2005, Morrison retained Attorney Novert Morales to represent him throughout the trial court's modification of his community supervision. (II SHCR 311). On May 17, 2005, Morrison entered into a second plea agreement wherein Morrison agreed to plead true to the allegations, extend his community supervision by two years, serve ninety days in jail, and enroll in the Treatment Alternative Incarceration Program ("TAIP") until he successfully finished the program. (CR 64–70). Pursuant to the plea agreement, no adjudication of guilt was entered and Morrison "continued on community supervision." (*Id.*). (CR 95). On April 28, 2009, the trial court granted the State's motion to modify Morrison's community supervision and Morrison was again ordered to enroll in TAIP and remain in the program until he was discharged by a counselor. (CR 98).

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tequila. Morrison, his brother, and White then took several body shots of tequila off of M.M. The three men then had sexual intercourse with M.M. (Doc. 2-2 at 1–2).

[2] "CR" refers to the Clerk's Record of pleadings and documents filed with the trial court in cause number 11-11-00191-CR. "SHCR" refers to the State Habeas Clerk's Record for Morrison's state writ application number 83, 021-01. SHCR is preceded by the volume number and followed by the pertinent page number. Finally, "RR" refers to the reporter's record in Morrison's trial court proceeding, also preceded by the volume number and followed by the page numbers.

On April 7, 2010, the State again moved to proceed with an adjudication of guilt and revoke Morrison's community supervision. (CR 101–113). On January 11, 2011, the trial court appointed Attorney Tom Morgan to represent Morrison in these proceedings. (CR 115). The State alleged seven violations[3] in its motion. (CR 120–133). On March 9, 2011, Morrison filed a letter addressed to Judge Robin Darr. (II SHCR 312). The letter details the facts surrounding his offense and his argument that he is innocent of the offense because of his lack of knowledge of the victim's age. (II SHCR 312–18). In the letter, Morrison requests the discovery in his case, new counsel, a polygraph examination, and a second opportunity to use his argument in a new trial. (II SHCR 317). Judge Darr did not read the letter, but a copy of the letter was faxed to both Morrison's attorney and the State. (II SHCR 312). On March 18, 2011, Tom Morgan withdrew as Morrison's counsel and the trial court appointed Attorney David Rogers to represent Morrison. (II SHCR 318).

On April 28, 2011, Morrison's counsel, David Rogers, filed a motion for the continuance of the hearing on the State's motion to proceed with an adjudication of guilt and revoke Morrison's community supervision ("revocation hearing"), arguing that Morrison's letter was an application for a post-conviction writ challenging his conviction, and therefore, the hearing should be postponed until the application was ruled on. (*Id.*). The trial court denied the motion for continuance, revoked Morrison's community supervision, adjudicated him guilty of sexual assault of a child, and sentenced him to sixteen years imprisonment. (CR 151–67; II SHCR 318).

On May 30, 2013, the Texas Eleventh Court of Appeals affirmed Morrison's conviction. *Morrison v. State*, No. 11-11-00191-CR, 2013 WL 2407088 at *1 (Tex. App.—Eastland 2013) (pet ref'd) (mem. op.). In his first issue on appeal, Morrison challenged the legal and factual

[3] The State alleged that Appellant: (1) failed to pay fees; (2) failed to report a change of address; (3) possessed and used marihuana; (4) failed to pay for drug and alcohol testing; (5) failed to verify registration as a sex offender; (6) was convicted in federal court of failing to register as a sex offender; and (7) failed to report in person.

sufficiency of the evidence supporting his conviction. (*Id.* at *1–2). The Court of Appeals overruled this issue because it found evidence that Morrison violated at least one "condition of his community supervision when he failed to report in person on the 6th, 13th, and 20th of May 2010." (*Id.* at *2). Next, Morrison argued that the trial court abused its discretion in overruling the hearsay objection to the admission of Sex Offender Registration records concerning Morrison. (*Id.*). The appellate court overruled this objection, finding that this issue was not preserved for appellate review and even if it were, there was evidence supporting the trial court's decision to overrule this objection. (*Id.* at *4). Finally, Morrison argued that the trial court's decision to impose almost the maximum sentence and have it run consecutively to his federal sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment. (*Id.* at *4–5). The appellate court overruled this objection and found that the trial court's decision was supported by the record and was not a violation of his Eighth Amendment rights. (*Id.* at *5–6).

On December 19, 2014, Morrison signed a state application for writ of habeas corpus challenging his conviction. (I SHCR 27). On December 30, 2014, the trial court file-stamped Morrison's application. (I SHCR 1). On April 29, 2015, the Texas Court of Criminal Appeals denied Morrison's application without a hearing or written order on the finding of the trial court. (Doc. 12-27). On May 8, 2015, Morrison filed this federal habeas corpus action. (Doc. 2 at 2). On January 20, 2016, Respondent filed a response to Morrison's federal habeas corpus action. (Doc. 11). On March 10, 2016, Morrison filed a reply to Respondent's response. (Doc. 17). Accordingly, this matter is ripe for disposition.

A. The Petition

On May 8, 2015, Morrison filed his Petition for Writ of Habeas Corpus by a Person in State Custody in the instant action. (Doc. 2). Morrison states his grounds for relief as follows:

1. **GROUND ONE**: Morrison's revocation counsel was ineffective for:
   a. failing to properly advise him that a new trial was unlikely, thus causing him to reject a seven-year plea offer (*Id.* at 7);
   b. failing to request a separate punishment hearing to allow character witnesses to testify (*Id.* at 13);
   c. denying him of his right to be heard after the hearing (*Id.* at 13); and
   d. failing to investigate the facts of the case and object to the state court's interpretation of the unconstitutional sexual assault of a child statute. (*Id.* at 14).

2. **GROUND TWO**: Courts are not applying the appropriate culpable mental state in Texas Penal Code § 22.011, in violation of the separation of powers doctrine. (*Id.* at 7).

3. **GROUND THREE**: Texas Penal Code § 22.011 is facially unconstitutional and unconstitutional as applied because it violates the Equal Protection Clause with regard to married and unmarried individuals. (*Id.* at 9).

4. **GROUND FOUR**: Texas Penal Code § 22.011 is unconstitutionally applied because it does not penalize persons within three years of age of the victim. (*Id.*).

5. **GROUND FIVE**: Texas Penal Code § 22.011 is unconstitutional because it requires a culpable mental state, but Courts apply it as a strict liability crime. (*Id.* at 8).

6. **GROUND SIX**: Texas Penal Code § 22.011 is unconstitutional because it is overbroad with regard to strict liability. (*Id.* at 10).

7. **GROUND SEVEN**: Texas Penal Code § 22.011 is unconstitutionally vague and ambiguous regarding its culpable mental state. (*Id.* at 11).

8. **GROUND EIGHT**: The trial court abused its discretion by:
   a. refusing to continue his revocation hearing so that he could file a post-conviction writ of habeas corpus (*Id.* at 11–12); and
   b. failing to appoint counsel to effectively counsel him regarding a writ of habeas corpus. (*Id.*).

9. **GROUND NINE**: His appellate counsel was ineffective for failing to raise the trial court's denial of his motion for continuance on appeal. (*Id.* at 13).

10. **GROUND TEN**: His original guilty plea counsel was ineffective for:
    a. failing to investigate the facts of the case and culpable mental state of Texas Penal Code § 22.011 (*Id.* at 14–15);
    b. failing to object to the appellate court's interpretation of the culpable mental state in Texas Penal Code § 22.011 (*Id.* at 15–16); and
    c. failing to object to Texas Penal Code § 22.011 because it violates the Equal Protection Clause. (*Id.* at 16).

B. The Response

On January 20, 2016, Respondent filed a Response to Morrison's Petition for Writ of Habeas Corpus, including a general denial of Morrison's assertions of fact except those supported by the record. (Doc. 11). Respondent asserts that this "record conclusively establishes that Morrison filed the instant federal petition outside of Antiterrorism and Effective Death Penalty Act of 1996's ("AEDPA") one-year limitation period with respect to seven of his grounds for relief; thus, such claims should be dismissed with prejudice as barred by the federal statute of limitations." (*Id.* at 5). Further, Respondent argues that Morrison has failed to allege "any facts that could support a finding that equitable tolling applies" because "Morrison provides no explanation for the delay." (*Id.* at 8–10). Next, Respondent contends that Morrison is not entitled to relief on his trial court error claims because "Morrison's allegations essentially challenge the state habeas process vis-à-vis the guise of the revocation court's alleged error." (*Id.* at 16). Respondent then asserts that Morrison has failed to establish that the state habeas court's denial of his ineffective assistance of revocation counsel claims was unreasonable. (*Id.* at 20). Finally, Respondent argues that Morrison has failed "to meet his burden to prove that his appellate counsel was ineffective, and his claim should be dismissed with prejudice." (*Id.* at 34).

II. STANDARD OF REVIEW

"[C]ollateral review is different from direct review," and the writ of habeas corpus is an "extraordinary remedy" reserved for those petitioners whom "society has grievously wronged."

Brecht v. Abrahamson, 507 U.S. 619, 633–34 (1993). Federal habeas review "is designed to guard against extreme malfunctions in the state criminal justice system." *Id.* Collateral review provides an important, but limited, examination of an inmate's conviction and sentence. *See Harrington v. Richter*, 562 U.S. 86, 92 (2011) ("[S]tate courts are the principal forum for asserting constitutional challenges to state convictions."). Accordingly, the federal habeas court's role in reviewing state prisoner petitions is exceedingly narrow. *Id.* "Indeed, federal courts do not sit as courts of appeal and error for state court convictions." *Dillard v. Blackburn*, 780 F.2d 509, 513 (5th Cir. 1986). Federal habeas courts must generally defer to state court decisions on the merits and on procedural grounds. *Moore v. Cockrell*, 313 F.3d 880, 881 (5th Cir. 2002). A federal court may not grant relief to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also present. *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991); *West v. Johnson*, 92 F.3d 1385, 1404 (5th Cir. 1996).

A federal court can only grant relief if the state court's adjudication of the merits was "contrary to, or involved an unreasonable application of, clearly established Federal law," 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 proceeding." *Berghuis v. Thompkins*, 560 U.S. 370, 378 (2010) (quoting 28 U.S.C. § 2254(d)(1)); 28 U.S.C. § 2254(d)(2). The focus of this well-developed standard "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

Moreover, the federal court's focus is on the state court's ultimate legal conclusion, not whether the state court considered and discussed every angle of the evidence. *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc); *Catalan v. Cockrell*, 315 F.3d 491, 493 (5th Cir.

2002) ("we review only the state court's decision, not its reasoning or written opinion"). Indeed, state courts are presumed to know and follow the law. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). Factual findings, including credibility choices, are entitled to the statutory presumption, so long as they are not unreasonable "in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Further, factual determinations made by a state court enjoy a presumption of correctness which the petitioner can rebut only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Clark v. Quarterman*, 457 F.3d 441, 444 (5th Cir. 2006) (noting that a state court's determination under Section 2254(d)(2) is a question of fact). The presumption of correctness applies not only to express findings of fact, but also to "unarticulated findings which are necessary to the state court's conclusions of mixed law and fact." *Valdez v. Cockerel*, 274 F.3d 941, 948 n. 11 (5th Cir. 2001). In sum, the federal writ serves as a "guard against extreme malfunctions in the state criminal justice systems," not as a vehicle for error correction. *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

III. DISCUSSION

A. Morrison's Claims Barred by Statute of Limitations

Morrison's claims in grounds two, three, four, five, six, seven, and ten, respectively, are barred by the statute of limitations under 28 U.S.C. § 2244(d). In these claims, Morrison contends that Texas Penal Code § 22.011, to which he pleaded guilty, is unconstitutional for multiple reasons and that his original trial counsel was ineffective for failing to investigate or object to this statutory provision on those grounds. (Doc. 2 at 7–16). Each of these claims attempt to undermine Morrison's original guilty plea that led to the trial court's order of deferred adjudication.

Because Morrison filed his federal habeas corpus action after AEDPA's effective date, the Court's review of petitioner's claims for federal habeas corpus relief is governed by AEDPA. 28 U.S.C. § 2254. Title 28, United States Code, Section 2254, authorizes the District Court to entertain a petition for writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment if the prisoner is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). AEDPA provides that a one-year limitation period for inmates seeking federal habeas corpus relief. *Id.* at § 2244(d)(1). Specifically, Section 2244(d)(1) provides:

> A 1–year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id. The one-year limitation period may be tolled if the petitioner properly files a state application for habeas corpus relief. *Id.* at § 2244(d)(2).

In *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1928 (2013), the Supreme Court of the United States determined "actual innocence, if proved, serves as a gateway through which a petitioner may pass [the] . . . expiration of the statute of limitations." The Supreme Court added, "[i]n other words, a credible showing of actual innocence may allow a prisoner to pursue his

constitutional claims. . . on the merits notwithstanding the existence of a procedural bar to relief." *Id.* at 1931. However, "[a] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.* at 1928. Moreover, "in making an assessment the timing of the [petition] is a factor bearing on the reliability of [the] evidence purporting to show actual innocence." *Id.* (internal quotation marks and citations omitted).

According to the Supreme Court, "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins*, 506 U.S. 390, 399 (1993). A petitioner's claim of innocence does not by itself provide a basis for relief. *Schlup v. Delo*, 513 U.S. 298, 315 (1995). The United States Court of Appeals for the Fifth Circuit has repeatedly and unequivocally held that the Constitution does not endorse an independent actual-innocence ground for relief. *Kinsel v. Cain*, 647 F.3d 265, 270 n. 20 (5th Cir. 2011).

Morrison's second, third, fourth, fifth, sixth, seventh, and tenth claims do not concern a constitutional right recognized by the Supreme Court within the last year and made retroactive to cases on collateral review, nor does the record reflect that any unconstitutional State action impeded Morrison from filing for federal habeas relief prior to the end of the limitations period. (Doc. 2). In addition, the record does not demonstrate that Morrison lacked knowledge of the factual predicate of his claims until a certain date. Thus, the federal limitations period expired one year after "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

"Under Texas law, 'a judge may defer the adjudication of guilt of particular defendants and place them on 'community supervision' if they plead guilty or nolo contendere.'" *Frey v. Stephens*, 616 F. App'x 704, 707 (5th Cir. 2015) (quoting *Tharpe v. Thaler,* 628 F.3d 719, 722 (5th Cir.2010)). If the defendant violates a condition of his community supervision, the trial court must determine whether it should impose a judgment of guilt. *Id.* "If the court convicts the defendant, it also sentences him." *Id.* The Fifth Circuit held in *Frey* that two distinct limitations periods then apply for the filing of habeas petitions: (1) one limitations period applies to claims relating to the deferred adjudication order; and (2) another limitations period applies to claims relating to the adjudication of guilt. *Id.* (citing *Tharpe,* 628 F.3d at 724).

The trial court's order of deferred adjudication became final on June 5, 2005, upon the expiration of Morrison's thirty-day period for taking a direct appeal. *See Frey*, 616 F. App'x at 707–08; Tex. R. App. P. 26.2(a) (where the defendant does not file a motion for a new trial, "[t]he notice of appeal must be filed ... within 30 days after the day sentence is imposed or suspended in open court, or after the day the trial court enters an appealable order"). As such, the limitations period for federal habeas relief concerning Morrison's claims relating to the deferred adjudication order expired one year later, on June 5, 2005, absent statutory tolling. *See* 28 U.S.C. § 2244(d)(1)(A).

In order to toll the federal one-year statute of limitations for these claims, Morrison was required to submit a properly filed state application for post-conviction relief as contemplated by 28 U.S.C. § 2244(d)(1) on or before June 5, 2005. However, Morrison's state habeas application challenging the deferred adjudication order did not toll the limitations period because it was filed after June 5, 2005. *See Frey*, 616 F. App'x at 707. Under the "mailbox rule," the instant *pro se* federal petition for a writ of habeas corpus is deemed filed on the date the petitioner delivered it

to prison officials for mailing to the district court. *Spotville v. Cain*, 149 F.3d 374, 376–78 (5th Cir. 1998). Morrison filed the instant federal habeas action on May 8, 2015. (Doc. 2 at 20). Because this petition was not filed by June 5, 2005, the claims relating to the deferred adjudication order are time-barred. 28 U.S.C. § 2244(d).

1. Actual Innocence

Morrison's claims of alleged actual innocence do not excuse his late filing. (Doc. 17 at 4–9). As the Supreme Court in *McQuiggin* explained, "tenable actual-innocence gateway pleas are rare: 'A petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" 133 S.Ct. at 1935 (quoting *Schlup*, 513 U.S. at 329). "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." *Schlup*, 513 U.S. at 324. In this context, newly-discovered evidence of a petitioner's actual innocence refers to factual innocence, not legal insufficiency. *Bousely v. United States*, 523 U.S. 614, 623–24 (1998) (citing *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)).

Morrison does not present any newly discovered evidence demonstrating his actual innocence. (Docs. 2, 17). Morrison claims in regard to the time-barred claims:

> [a] look to those grounds are sufficient proof that because of the new evidence and violation of his constitutional rights, he is actually innocent of 22.011 as the plain language of that statute mandates, and no reasonable juror, following the plain language of 22.011 and the other laws like 2.01, 6.02, and 8.02, would have voted to find Morrison guilty beyond a reasonable doubt.

(Doc. 17 at 5).

Although Morrison claims he has discovered "new evidence," he has failed to present any exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence. Morrison did not produce any evidence of innocence to the state habeas court and he has not produced such evidence to this Court. Therefore, Morrison has not presented an actual innocence claim under the standard in *McQuiggin*. 133 S.Ct. at 1935. Because this is not a case in which the petitioner has presented new evidence whatsoever, much less evidence sufficient to show it is probable that no reasonable juror could have convicted him of the offense to which he pleaded guilty[4], Morrison's time-barred claims should not be considered by this Court. *Id.*; *Schlup*, 513 U.S. at 316.

2. Equitable Tolling

Additionally, Morrison is not entitled to the benefit of equitable tolling. A petitioner's AEDPA limitations period may be equitably tolled only when he can demonstrate: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010); *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002) (holding that the petitioner bears the burden of proving he is entitled to equitable tolling). Morrison does not allege any rare and exceptional circumstance to warrant equitable tolling. Importantly, Morrison admits in his reply that he was not diligent in pursuing his rights. (Doc. 17 at 7). Morrison also claims that "Morrison did not specifically allege any facts that could support a finding that 'equitable tolling' should apply....at the time Morrison filed his 2254, he was not even contemplating the notion that he could be time-barred...." (*Id.* at 9).

[4] Some courts have held that a guilty plea precludes a petitioner from arguing actual innocence to extend a time period under *McQuiggin*. *See United States v. Cunningham*, Cause No. H-12-3147, 2013 WL 3899335, at *4 n. 3 (S.D. Tex. July 27, 2013) (unpublished).

Morrison was neither actively misled, nor prevented in some extraordinary way from asserting his rights. Morrison argues that he was actively misled by his counsel regarding the plain language of Texas Penal Code § 22.011. Morrison insists that the plain language means that "to commit the 22.011 offense[,] he had to **know** he was penetrating the sexual organ **of a child**, or that he had intent to penetrate a **child's sexual organ**, which is the only element that makes 22.011 a crime." (Doc. 2-2 at 4) (emphasis in original). His counsel advised him that "it is not a legal defense at the guilt or innocence phase of a trial that the victim may have lied about her age or that [Morrison] reasonably believed that the victim was of legal age to consent to the sexual contact." (II SHCR 30); *Johnson v. State*, 967 S.W.2d 848, 849 (Tex. Crim. App. 1998) (Indecency with a child statute does not require the State to prove that a defendant knew the victim was under the age 17).

Morrison's lack of knowledge about the law is not a basis upon which to toll the limitations period. *See Felder v. Johnson,* 204 F.3d 168, 172 (5th Cir. 2000) (explaining that neither a prisoner's ignorance of the law nor the lack of knowledge of a filing deadline justifies equitable tolling). In sum, Morrison has failed to show that his circumstances were rare and exceptional to warrant equitable tolling or that he was diligent in pursuing relief. Therefore, these claims should be **DENIED** as untimely. (Doc. 2).

B. Morrison's Claims of Trial Court Error

Morrison claims that the trial court abused its discretion by: (1) refusing to continue his revocation hearing so that he could file an application for a pre-conviction[5] writ of habeas corpus; and (2) failing to appoint effective counsel regarding his application for a writ of habeas corpus. (*Id.* at 11–12). Specifically, Morrison asserts that "[t]he Motion for Continuance- if

[5] Morrison sent a *pro se* letter to the trial court prior to his revocation hearing while he was represented by counsel that he contends was an application for a pre-conviction writ of habeas corpus. (II SHCR 312).

granted, would have allowed Morrison to assert his rationale- was overruled by the trial court because the *pro se* letter he sent to the court was not considered a Writ of Habeas Corpus." (*Id.* at 12). Respondent counters that "Morrison's allegations essentially challenge the state habeas process vis-à-vis the guise of the revocation court's alleged error," and therefore "Morrison fails to state a viable claim for federal habeas relief." (Doc. 11 at 16). Alternatively, Respondent argues that "to the extent Morrison's claims are liberally construed as alleging the violation of his federal due process rights, they fare no better." (*Id.*). Respondent asserts that there is no Supreme Court precedent that establishes due process safeguards in deferred adjudication proceedings. (*Id.* at 17).

In regard to Morrison's claim that the trial court erred in denying his motion for continuance to pursue a pre-conviction writ of habeas corpus, the state habeas court found that "[Morrison's] *pro se* letter to the court...did not constitute an application for postconviction writ of habeas corpus under Article 11.3072 [Texas Code of Criminal Procedure] to attack the underlying community supervision." (II SHCR 376). Further, the state habeas court found "[o]verruling [Morrison's] motion for continuance did not prevent [Morrison] 'from exercising his constitutional right for Writ of Habeas Corpus in the trial court" and did not prevent [Morrison] "from objecting and preserving on record his issues raised in this instant Writ of Habeas Corpus for further review.'" (II SCHR 376–77).

Only errors of a constitutional magnitude are cognizable by a federal habeas court. *Thompson v. Johnson*, 7 F. Supp. 2d 848, 856 (S.D. Tex. 1998) (citing *Mabry v. Johnson,* 467 U.S. 504, 507, (1984)). "To be actionable on federal habeas review, the trial court's errors must not have been merely an abuse of discretion, but so grave that they amounted to a denial of the constitutional right to substantive due process, *i.e.,* that the errors made the trial fundamentally

unfair." *Id.* (citing *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 24 (1981)). "A motion for a continuance in addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of that discretion." *United States v. Uptain*, 531 F.2d 1281, 1285 (5th Cir. 1976). Furthermore, "[t]his issue must be decided on a case by case basis in light of the circumstances presented, particularly the reasons for continuance presented to the trial court at the time the request is denied." *Id.* at 1285–86 (citing *Ungar v. Sarafite*, 376 U.S. 575 (1964)). "When a denial of a continuance forms a basis of a petition for a writ of habeas corpus, not only must there have been an abuse of discretion but it must have been so arbitrary and fundamentally unfair that it violates constitutional principles of due process." *Hicks v. Wainwright*, 633 F.2d 1146, 1148 (5th Cir. 1981). The Supreme Court stated:

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

Hicks v. Wainwright, 633 F.2d 1146, 1148 (5th Cir. 1981) (quoting *Ungar*, 376 U.S. at 589).

To sustain error for the trial court's denial of his motion to continue his revocation hearing, Morrison must show not only that the trial court abused its discretion in denying his motion for continuance, but also that the decision was "so arbitrarily and fundamentally unfair that it violates constitutional principles of due process." *See Johnson v. Puckett,* 176 F.3d 809, 822 (5th Cir. 1999) (internal citations omitted). There is no evidence here that the district court applied its discretion unwisely.

Morrison and Respondent dispute whether Morrison's *pro se* letter to the trial court was a pre-conviction application or a post-conviction application. This distinction is not meaningful to this discussion. Morrison incorrectly filed his letter as an application for a pre-conviction writ of habeas corpus by filing it *pro se*, instead of through his counsel. A defendant has no right to file documents with the court while represented by counsel, as no right of hybrid representation exists in Texas. *Robinson v. State,* 240 S.W.3d 919, 922 (Tex. Crim. App. 2007) ("Hybrid representation" is a court's consideration of filings by a party who is represented by counsel.); *United States v. Steinbrecher*, 112 F. App'x 987, 988 (5th Cir. 2004). Accordingly, courts should disregard *pro se* motions presented by a defendant who is represented by counsel. *Id.* The trial court appropriately disregarded Morrison's letter and did not abuse its discretion in denying Morrison's motion for continuance. The trial court acted properly in denying the motion because there was no application for writ of habeas corpus necessitating postponement of the revocation hearing.

Even if the trial court had allowed Morrison to proceed with "hybrid representation," Morrison's letter is not a proper application for a writ of habeas corpus. An application for a writ of habeas corpus, whether filed under statute relating to non-death-penalty cases or under statute governing habeas petitions in capital cases, must contain sufficient specific facts that, if proven to be true, might entitle the applicant to relief. *Ex parte Medina*, 361 S.W.3d 633 (Tex. Crim. App. 2011). Morrison's letter details specific facts that establish that Morrison is not entitled to relief. In his letter, he asserts facts that show that he engaged in sexual conduct with a minor and a legal argument unfounded in Texas law. (II SHCR 312–18). Morrison's contention that he is innocent of this offense because of his lack of knowledge concerning the victim's minority is not the law in Texas. The State is not required to show that a defendant knew the victim's age, and it

is not a defense to criminal prosecution that Morrison was unaware the victim was a minor. *See Johnson*, 967 S.W.2d at 849–50. Accordingly, Morrison's letter, if viewed by the trial court, still would not constitute a proper application for a writ of habeas corpus.

Moreover, even if Morrison had filed a proper application, such a decision would not amount to a decision "so arbitrarily and fundamentally unfair that it violates constitutional principles of due process." *See Johnson,* 176 F.3d at 822. Morrison claims that he lost the opportunity to "assert his rationale" when the trial court denied his motion for continuance. (Doc. 2 at 2). In Texas, an application for writ of habeas corpus is classified based on when it was filed, not when it was considered. *Kniatt v. State*, 206 S.W.3d 657, 666 (Tex. Crim. App. 2006). Texas trial courts have the authority to consider an application for writ of habeas corpus and an adjudication of guilt simultaneously. *Id.* at 666 n. 2 ("A trial court may properly consider, in a single hearing, both a motion to proceed with an adjudication of guilt and an application for writ of habeas corpus."). Morrison has failed to demonstrate any reason why the trial court needed to continue the revocation hearing so as to properly consider Morrison's alleged application for writ of habeas corpus.

Further, to the extent Morrison claims he was denied the chance to file an application for pre-conviction writ of habeas corpus, this argument fails. Under Texas law, an application for a writ of habeas corpus filed before the trial court revokes a defendant's community supervision and proceeds with an adjudication of guilt is a pre-conviction writ of habeas corpus. *See Kniatt*, 206 S.W.3d at 660. Had Morrison's letter been an appropriate application for habeas corpus relief, it would be considered a pre-conviction application under Texas law. The trial court's decision to proceed with the revocation hearing instead of granting Morrison's motion for continuance would not have affected the pre- or post-conviction classification of his letter.

Accordingly, Morrison has failed to demonstrate that the trial court abused its discretion in denying the motion for continuance. Moreover, Morrison has failed to show that the trial court's denial of the motion for continuance was "so arbitrarily and fundamentally unfair that it violates constitutional principles of due process." *See Johnson,* 176 F.3d at 822. The undersigned finds that this claim is without merit and should be **DENIED**.

Secondly, Morrison claims that the trial court abused its discretion by failing to appoint effective counsel regarding his application for a writ of habeas corpus. (Doc. 2 at 11–12). In regard to Morrison's claim that the trial court erred by failing to appoint effective counsel for his writ of habeas corpus, the state habeas court found that Morrison "had every right under Article 11.072 [Texas Code of Criminal Procedure] to file an application for postconviction writ of habeas corpus to attempt to set aside his deferred adjudication and community supervision for the offense of sexual assault of a child entered on May 6, 2004." (II SHCR 375). The state habeas court further found that "[a] defendant, indigent or not, does not have a right to the appointment of counsel for the purposes of filing a postconviction writ of habeas corpus under Article 11.072 [Texas Code of Criminal Procedure]." (II SHCR 376). Additionally, the state habeas court ruled that "counsel for [Morrison] on the State's motion to revoke community supervision, did in fact 'effectively counsel him about the decisions relating to his habeas corpus issues.'" (II SHCR 377).

The Supreme Court of the United States and the Supreme Court of Texas have repeatedly held that neither the federal nor the Texas constitutions require the appointment of counsel to pursue the available remedy of a writ of habeas corpus. *Ex parte Graves*, 70 S.W.3d 103, 128 n. 29 (Tex. Crim. App. 2002) (Texas and federal courts "reject claims of a constitutional right to counsel in habeas corpus proceedings made under the Due Process Clause, the Equal Protection

Clause, and the Sixth Amendment Right to Counsel."). Neither the Eighth Amendment, nor the due process clause, requires states to appoint counsel for indigent death row inmates seeking state habeas corpus relief. *Pennsylvania v. Finley*, 481 U.S. 551, 555 n. 23 (1987). Moreover, the Texas Constitution does not grant more rights on habeas review than the U.S. Constitution; in fact, the Texas Constitution provides no right to counsel in habeas corpus proceedings. *Ex parte Mines*, 26 S.W.3d 910, 914 (Tex. Crim. App. 2000).

Additionally, a person convicted of a felony is entitled to court-appointed counsel with respect to his application for a writ of habeas corpus *only if* the State represents to the convicting court that the applicant is not guilty, guilty only of a lesser offense, or was convicted or sentenced under a law that has been found to be unconstitutional. Tex. Code Crim. Proc. Ann. art. 11.074 (West 2015). There is nothing in this record to show that the State has made any such representations in Morrison's case.

Accordingly, Morrison has failed to support his claim that the trial court abused its discretion by failing to appoint effective counsel regarding his application for writ of habeas corpus. Morrison has also failed to show that the trial court's failure to appoint effective counsel regarding his application for a writ of habeas corpus was "so arbitrarily and fundamentally unfair that it violates constitutional principles of due process." The undersigned finds that this claim is without merit and should be **DENIED**.

C. Morrison's Claims of Ineffective Assistance of Counsel

The Court reviews ineffective assistance of counsel claims under a "doubly deferential" standard, taking "a highly deferential look at counsel's performance," under *Strickland v. Washington*, 466 U.S. 668 (1984), "through the deferential lens of § 2254(d)." *Cullen v. Pinholster*, 563 U.S. 170, 172 (2011) (internal quotation marks and citations omitted). In light of

the deference accorded by section 2254(d)(1), "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

In order to show that counsel was ineffective, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced the defense:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687. The Court need not address both components if the petitioner makes an insufficient showing on either one. *Id.* at 697. To establish deficient performance, a petitioner must show that his attorney's actions "fell below an objective standard of reasonableness." *Id.* at 689. In evaluating an attorney's performance, there is a "strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance," or that under the circumstances the challenged action might be considered sound trial strategy. *Id.* The Court "must be highly deferential" to counsel's conduct. *Id.* at 687.

In order to prove the prejudice prong, a 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." *Day v. Quarterman* 566 F.3d 527, 536 (5th Cir. 2009) (citing *Strickland*, 466 U.S. at 695). Having independently reviewed the entirety of the evidence from Morrison's trial, direct appeal, and state habeas corpus proceedings, the undersigned recommends that none of

Morrison's claims regarding the performance of his attorneys satisfy either prong of the *Strickland* test.

Under the well-settled *Strickland* standard, the Supreme Court recognizes a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. 466 U.S. at 690. Furthermore, under AEDPA review, in order to obtain federal habeas relief on an ineffective assistance claim rejected on the merits by a state court, the petitioner must do more than convince the federal court the state court applied *Strickland* incorrectly—the petitioner must show the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. *Bell v. Cone*, 535 U.S. 685, 699 (2002).

Importantly, the state habeas court already considered and rejected these claims on the merits, finding that both revocation and appellate counsel rendered effective assistance. (II SHCR 353–54, 382, 385, 391–92). In the instant case, the state court's decision is not an unreasonable application of the *Strickland* standard or an unreasonable application of the facts in light of the evidence presented. Accordingly, the undersigned recommends that Morrison is not entitled to relief on his ineffective assistance of counsel claims.

1. Morrison's Revocation Counsel

Morrison argues that his revocation counsel was ineffective for: (1) failing to properly advise him that a new trial was unlikely, thus causing him to reject a seven-year plea offer (Doc. 2 at 7); (2) failing to request a separate punishment hearing to allow character witnesses to testify (*Id.* at 13); (3) denying him of his right to be heard after the hearing (*Id.*); and (4) failing to investigate the facts of the case and object to the state court's interpretation of the unconstitutional sexual assault of a child statute. (*Id.* at 14). Morrison contends that he:

> thought he would receive a new jury trial or an evidentiary hearing, then ultimately receive an acquittal based off of his interpretation of the plan language

> of Texas Penal Code 22.011, 6.02, 8.02, and 2.01. He filed a *pro se* motion requesting a new jury trial among other things. Counsel did not properly counsel Morrison that his rationale was an incorrect legal rule, or that his improperly filed pleadings would be futile. Morrison went into the revocation hearing expecting relief, but was sentenced to 16 years. If [revocation counsel] would have properly counseled Morrison, Morrison would have accepted the seven plea offer.

(*Id.* at 7).

Respondent counters that "Morrison's claims should be dismissed with prejudice as *Teague* barred and alternatively because they lack merit." (Doc. 11 at 20). Respondent argues Morrison's claims are barred by *Teague v. Lane,* 489 U.S. 288 (1989), as no existing Supreme Court precedent establishes that a criminal defendant has the right to effective assistance during a deferred-adjudication revocation proceeding. (*Id.*) Specifically, Respondent argues that "until Morrison produces Supreme Court authority as to the standard of review that is applied to an ineffectiveness claim in deferred adjudication context, these allegations are *Teague*/AEDPA barred." (*Id.* at 21). Respondent alternatively argues that "even if Morrison had a right to counsel, he fails to meet his burden to prove that his counsel was deficient and that he was prejudiced." (*Id.*). Assuming without deciding that Morrison had the right to counsel at that proceeding, his claim nevertheless fails, as he has failed to carry his burden to show the state court's conclusion that he failed to make out an ineffective assistance claim was unreasonable or incorrect. *See Jaimes v. Stephens*, No. A-14-CA-322-SS, 2014 WL 5808339 at *3 (W.D. Tex. Nov. 7, 2014) (unpublished). Morrison cannot show that revocation counsel's performance was deficient and that it prejudiced him.

Morrison first complains that his revocation counsel was ineffective "by not requesting a separate punishment hearing to allow Morrison character witnesses to testify on his behalf before sentencing." (Doc. 2 at 13). The state habeas court found Morrison's complaint that his counsel was ineffective for failing to request a separate punishment hearing to allow character witnesses

to testify on Morrison's behalf without merit because although Morrison and his counsel discussed strategy for the hearing, Morrison never provided his counsel with the names of any potential witnesses. (II SHCR 382). In his reply, Morrison abandons this claim and states, "Morrison surely does not feel he will prevail in this issue in a bout in the Fifth Circuit or Supreme Court, therefore, Morrison humbly bows out of that claim, concedes, and will abandon that issue." (Doc. 17 at 50). Accordingly, this claim should be dismissed.

Second, Morrison asserts his revocation counsel was ineffective because his attorney "denied [Morrison's] right to address the court on his own behalf." (Doc. 2 at 13). Morrison claims:

> Morrison wanted to be heard, but was not allowed and that violated his constitutional rights. Morrison wanted to explain his situation to the court so it would be known that he did not have the opportunity to obtain character witness and to request a separate punishment hearing so as to have witnesses to testify on his behalf. He also wanted to explain his reasoning for rejecting the seven year offer, and make sure his premise behind the letter was explained for the record.

(*Id.*).

Morrison further stated that he wished to speak because "Morrison wanted to tell the court that it was not his intentions to plead not true because he was not guilty of the probation violations, but because he wanted to postpone the revocation hearing so he could get a new jury trial for the 22.011 charge based off of how the plain language of the law was written." (Doc. 2-2 at 8). The state habeas court decided that Morrison's claim that his counsel was ineffective for not allowing Morrison to address the trial court is without merit because Morrison's counsel advised Morrison not to speak during the hearing after discerning that whatever Morrison would say would be unhelpful to the case and Morrison decided to heed such advice. (II SHCR 385).

In his reply, Morrison abandons this claim and states, "[s]ince Morrison is no longer prejudiced by this issue, he abandons this issue so this court can focus its precious time on more pressing issues at hand." (Doc. 17 at 51). Accordingly, this claim should be **DENIED**.

Third, Morrison argues that his revocation counsel was ineffective for failing to properly advise him that a new trial was unlikely, therefore causing him to reject a seven-year plea offer. (Doc. 2 at 7). Morrison asserts that "[b]ecause of the ineffective assistance of counsel, Morrison was sentenced to 16 years instead of seven years prison....If [revocation counsel] would have properly counseled Morrison, Morrison would have accepted the seven year plea offer." (*Id.*). Specifically, Morrison contends that:

> Morrison thought he would receive a new jury trial or an evidentiary hearing, then ultimately receive acquittal based off of his interpretation of the plan language of Texas Penal Code 22.011, 6.02, 8.02, and 2.01....Counsel did not properly counsel Morrison that his rationale was an incorrect legal rule, or that his improperly filed pleadings would be futile.

(*Id.*).

The state habeas court found that this claim was without merit because Morrison was apprised by both his plea counsel and his revocation counsel of Texas law that his knowledge concerning whether the female victim was a minor at the time of the sexual conduct was not relevant to his criminal conviction. (II SHCR 351–353). The court noted:

> The law is clear. Sexual assault of a child under Section 22.011 Penal Code is a strict liability offense and the actor's knowledge that the child was under the age of 17 is not an element of the offense....The defense of mistake of fact under Section 8.02 Penal Code that the actor formed a reasonable but mistaken belief that the child was 17 years of age or older at the time of the offense does not apply to sexual offenses against children.

(II SHCR 353). The court stated that Morrison's plea counsel and Morrison's revocation counsel "both clearly and correctly informed [Morrison] of the law applicable to [Morrison's] offense of sexual assault of a child." (*Id.*).

The Supreme Court has held that "[w]hen a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel during plea bargaining, our cases require that the federal court use a 'doubly deferential' standard of review that gives both the state court and the defense attorney the benefit of the doubt." *Burt v. Titlow*, 134 S. Ct. 10, 13 (2013). "Moreover, we presume the state court's factual findings to be correct unless the applicant rebuts the presumption by clear and convincing evidence." *Miller v. Thaler*, 714 F.3d 897, 901 (5th Cir. 2013). Credibility findings are also entitled to a presumption of correctness. *Id.* at 903.

Morrison fails to establish how "Counsel did not properly counsel Morrison that his rationale was an incorrect legal rule, or that his improperly filed pleadings would be futile" and demonstrate to a reasonable probability that he would have accepted the plea deal of seven years. Morrison has asserted nothing more than speculative arguments that his revocation counsel provided ineffective assistance of counsel by failing to advise Morrison of Morrison's incorrect understanding of the law. Morrison has failed to provide this Court with any evidence refuting the state habeas court's factual findings that Morrison was clearly and effectively counseled on the law regarding his offense by both his trial counsel and his revocation counsel prior to rejecting the plea offer of seven years.

Morrison must also show that there is reasonable probability that, but for counsel's errors, he would have pleaded guilty. "The likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 112. Throughout the record, it is abundantly clear that multiple persons, including revocation counsel, advised Morrison that Texas law does not require the State to prove that he knew the victim was a minor. In his numerous filings with the Court, Morrison devotes countless pages of argument to his point that he is innocent because he was unaware that he was engaging in sexual relations with a minor. It is not evident from the

record that had Morrison been advised that his knowledge of the victim's minority was irrelevant to his offense, he would have accepted responsibility and accepted the plea deal of seven years.

The undersigned finds that Morrison has failed to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. *See Bell*, 535 U.S. at 699. The state court's decision is not an unreasonable application of the *Strickland* standard or an unreasonable application of the facts in light of the evidence presented. Accordingly, the undersigned recommends that Morrison is not entitled to relief on this claim. This claim is without merit and should be **DENIED**.

Lastly, Morrison contends that he was denied effective assistance of counsel when his revocation counsel "failed to investigate, and failed to object and preserve for further review Morrison's habeas Corpus [sic] issues...." (Doc. 2 at 15). Morrison claims that he discussed with his revocation counsel:

> that the female in his offense represented herself to be an adult, and he was unaware of the nature of the crime when he engaged in the prohibited conduct. And he felt by how the plain language of the statute was written that he should not be held criminally responsible for 22.011, and he should get a new jury trial....

(*Id.*).

Morrison specifically argues that his counsel "fell below a professional standard of reasonableness because he failed to properly investigate Morrison's case, and to research the law, and recognize that the Court of [A]ppeals' strict liability interpretation was predicated on pre-1983 law." (*Id.*).

"Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. However, courts must apply a high deference to counsel's judgments. *Id.* An attorney's failure to investigate the case against the defendant can support a finding of ineffective assistance. *Bryant v. Scott*, 28

F.3d 1411, 1418 (5th Cir. 1994). In order to establish counsel's ineffectiveness by virtue of his failure to adequately investigate the case or to discover and present evidence, the movant must do more than merely allege a failure to investigate; he must state with specificity what the investigation would have divulged and why it would have been likely to make any difference in the defendant's trial or sentencing. *Nelson v. Hargett*, 989 F.2d 847, 850 (5th Cir. 1993) (citing *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989)); *see also, Anderson v. Collins*, 18 F.3d 1208, 1221 (5th Cir. 1994).

Broadly construing his motion and reply, Morrison has failed to demonstrate that his counsel "failed to investigate, and failed to object and preserve for further review Morrison's habeas Corpus [sic] issues...." (Doc. 2 at 15). Morrison reiterates multiple times that he believes he is innocent because he was unaware of the victim's age when he engaged in sexual conduct with her. This is not relevant to Morrison's criminal conviction or revocation of his community supervision. Morrison urges that he conducted research himself and found that he was "not actually guilty of the 22.011 charge." (Doc. 2-2 at 4). Morrison asserts that Justice Baird's dissenting opinion in *Johnson*, 967 S.W.2d 848, supports his position. (*Id.* at 5). A dissenting opinion is not binding precedent. In *Johnson*, the Texas Court of Criminal Appeals held that Texas's indecency with a child statute did not require the State to prove that the defendant knew that the victim was under age 17. 967 S.W.2d at 849–50. As Morrison's revocation counsel advised Morrison, the State is not required to show that the defendant knew the victim's age, and it is not a defense to criminal prosecution that Morrison was unaware the female victim was a minor. (I SCHR 273–74).

The state habeas court found that Morrison's revocation counsel researched and investigated pertinent facts and case law, and then presented this information to Morrison. (II

SHCR 390–92). Morrison cannot demonstrate ineffective assistance of counsel with baseless accusations that his counsel did not research and pursue an unfounded argument. Morrison's allegation that his counsel's failure to investigate and present relevant facts and law is mere conjecture without any factual support. As such, Morrison does not overcome the considerable deference this Court must give to trial counsel's judgment.

Furthermore, Morrison does not raise factual support as to why he would have taken the plea offer instead of proceeding to trial if his counsel had investigated or objected to Morrison not knowing the age of his victim. (*Id.*). Morrison asserts:

> Morrison was harmed by this ineffectiveness because these issues were not raised at trial, where there is a reasonable probability (because of the strong evidence that existed in support of Morrison's rationale) that Morrison would have received relief had [revocation counsel] raised these issues before the trial court....If [revocation counsel] would have done a proper investigation into Morrison's case and researched the plain language of 22.011 and the unconstitutional effects that the strict liability interpretation has on the statute (which Morrison raises now) and if he properly raised these issues at Morrison's revocation hearing or filed the proper objections or pre-trial motions, then these issues would have been properly preserved for review, and there is a reasonable probability that Morrison would have received relief at the trial court level or on direct appeal.

(Doc. 5 at 155).

Morrison's emphasis that the trial court or appellate court would have agreed with his argument that he is innocent is insufficient to show prejudice. Morrison has offered nothing more than speculation that the trial court or appellate court would have made a different decision concerning the revocation of his community supervision had revocation counsel investigated these issues. The revocation hearing focused on whether Morrison violated the conditions of his community supervision, not the constitutionality of the underlying criminal statute. Morrison admits that he violated the conditions of his community supervision, and states:

> Morrison wishes...to show proof that he was accepting responsibility for his actions by apologizing to the court, society, and the probation office for failing to

> complete his probation....Morrison knew he was guilty of the probation violations that he was going to be revoked on and, therefore, he did not reject the seven year offer to plead not true to the probation violation allegations, he rejected the offer because of his rationale based off of his interpretation of the plain language of 22.011, 6.02, 8.02, and 2.01, and also his *pro se* Writ of Habeas Corpus that he sent to the court.

(Doc. 2-3 at 2).

There is nothing in the record that demonstrates that the outcome of the revocation hearing would have been any different had revocation counsel investigated the law and facts surrounding Morrison's argument that his innocence rested in his ignorance of the victim's minority. Morrison has failed to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. *See Bell*, 535 U.S. at 699. The state habeas court has already considered and rejected this claim on the merits, finding that revocation counsel rendered effective assistance. (II SHCR 387). The state court's decision is not an unreasonable application of the *Strickland* standard or an unreasonable application of the facts in light of the evidence presented. Accordingly, this claim should be **DENIED**.

2. Morrison's Appellate Counsel

Morrison argues that his appellate counsel was ineffective for failing to raise the trial court's denial of his motion for continuance on appeal. (Doc. 2 at 13–14). Morrison asserts that his appellate counsel "did not raise the overruling of the Motion for continuance on appeal, which harmed Morrison by that ground not being in front of the Court of Appeals for review." (*Id.* at 14). Specifically, Morrison contends that he "was harmed because his probation violations were found to be true and he was sentenced to 16 years prison." Morrison concludes, "If [appellate counsel] would have been effective and he would have properly raised that issue on appeal, there is a reasonable probability, by reasonings [sic] stated...about Morrison's right to

writ of habeas corpus being denied, that the Court of Appeals would have held a decision in his favor." (*Id.*).

Respondent counters that Morrison received effective assistance of appellate counsel, and that Morrison has failed "to meet his burden to prove that his appellate counsel was ineffective, and his claim should be dismissed with prejudice." (Doc. 11 at 34). Moreover, Respondent argues that "the state court has already found this claim to be without merit....And, the state habeas court's rejection of Morrison's separate and substantive claim similarly compels rejection of this claim of attorney error." (*Id.* at 36).

In determining that this claim was without merit, the state habeas court found the affidavit of Morrison's appellate counsel more compelling than Morrison's arguments of ineffective appellate counsel. (II SHCR 386). Appellate counsel stated that he did not raise the denial of the motion for continuance because he "did not believe it was a valid point of error. [He] could not show harm." (*Id.*). Further, appellate counsel stated:

> Mr. Morrison did not have a proper writ before the Court, and even if he did have a proper writ before the Court, Mr. Morrison's legal basis was incorrect. I reviewed the file and transcript from an appellate standpoint and determined that my initial analysis was correct and that the denial of the motion was not an abuse of discretion. Thus, I did not include the denial of the motion for continuance as an issue on appeal.

(II SHCR 386–87).

"Appellate counsel who files a merits brief need not and should not raise every non-frivolous claim but, rather, may select from among them in order to maximize the likelihood of success on appeal." *Hernandez v. Thaler*, 787 F. Supp. 2d 504, 569 (W.D. Tex. 2011) (citing *Smith v. Robbins*, 528 U.S. 259, 288 (2000)). Furthermore, "[t]he process of winnowing out weaker argument on appeal and focusing on those more likely to prevail is the hallmark of effective appellate advocacy." *Id.* (citing *Smith v. Murray*, 477 U.S. 527, 536 (1986)). To be

effective representation, appellate counsel must research relevant facts and law "to make an *informed* decision that certain avenues will not prove fruitful." *Id.* (emphasis in original). "[S]olid, meritorious arguments based on directly controlling precedent should be discovered and brought to the appellate court's attention." *Id.* (citing *United States v. Reinhart*, 357 F.3d 521, 525 (5th Cir. 2004)).

In the instant case, Morrison's appellate counsel "reviewed the file and transcript from an appellate standpoint and determined that [his] initial analysis was correct and that the denial of the motion was not an abuse of discretion." (II SHCR 386–87). Moreover, after conducting considerable research in Texas law, appellate counsel determined that "Mr. Morrison did not have a proper writ before the Court, and even if he did have a proper writ before the Court, Mr. Morrison's legal basis was incorrect." (II SHCR 342, 346). Credibility findings by the state habeas court are entitled to a presumption of correctness. *Miller*, 714 F.3d at 903. Morrison has failed to demonstrate that the state habeas court's credibility finding with regard to Morrison's appellate counsel's statements is incorrect. Accordingly, the undersigned finds that appellate counsel researched relevant facts and law to reach his informed decision that the trial court's denial of Morrison's motion for continuance would not prove successful on appeal. *See Hernandez*, 787 F. Supp. 2d at 569. Additionally, Morrison has offered nothing more than speculation that the appellate court would have made a different decision concerning his appeal had Morrison's appellate counsel researched and raised the argument that Morrison was innocent given his unawareness of the victim's minority.

Ultimately, Morrison has failed to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. *See Bell*, 535 U.S. at 699. The state habeas court has already considered and rejected this claim on the merits, finding that appellate counsel

rendered effective assistance. (II SHCR 387). The state court's decision is not an unreasonable application of the *Strickland* standard or an unreasonable application of the facts in light of the evidence presented. Accordingly, this claim should be **DENIED**.

IV. 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 Morrison 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 ("COA"). *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, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *see also, Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). According to the Supreme Court in *Slack*:

> when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner 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.

529 U.S. at 478.

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

V. RECOMMENDATION

The undersigned recommends that the above-styled petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 be **DENIED**. It is further recommended that a certificate of appealability be **DENIED**.

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

In the event that a party ***has not been served*** by the Clerk with this Report and Recommendation electronically, pursuant to the CM/ECF procedures of this District, the Clerk is **ORDERED** to mail such party a copy of this Report and Recommendation by certified mail, return receipt requested. Pursuant to 28 U.S.C. § 636(b)(1), any party who desires to object to this report must serve and file written objections within fourteen (14) days after being served with a copy. A party filing objections must specifically identify those findings, conclusions, or recommendations to which objections are being made; the District Court need not consider frivolous, conclusive, or general objections. Such party shall file the objections with the Clerk of the Court and serve the objections on all other parties. A party's failure to file such objections to the proposed findings, conclusions, and recommendations contained in this report shall bar the party from a *de novo* determination by the District Court. Additionally, a party's failure to file

written objections to the proposed findings, conclusions, and recommendations contained in this report within fourteen (14) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

SIGNED this 13th day of March, 2017.

DAVID COUNTS
U.S. MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

JARED MORRISON	§	
	§	
vs.	§	NO: MO:15-CV-00069-RAJ
	§	
WILLIAM STEPHENS	§	

ORDER ADOPTING THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AFTER *DE NOVO* REVIEW

Before the Court in the above styled and numbered cause is Petitioner Jared Morrison's Petition for Writ of Habeas Corpus by a Person in State Custody and Memorandum in Support. [docket numbers 2 & 5]. *See* 28 U.S.C. §2254. Petitioner's petition was referred to the United States Magistrate Judge for findings and recommendations. *See* 28 U.S.C. §636(b). The Magistrate Judge signed the Report and Recommendation on March 13, 2017, in which he finds and recommends that Petitioner's application for writ of habeas corpus should be denied. [docket number 19]. All parties received the report and recommendation by March 21, 2017. [docket number 21]. On March 27, 2017, Petitioner filed a Motion for Extension of Time to File his Objections to the Report and Recommendation of the United States Magistrate Judge. [docket number 22]. On April 3, 2017, this Court granted his Extension of Time through April 21, 2017. [docket number 23]. On April 10, 2017, Petitioner filed his first, hand-written, sixty-nine page set of Objections. [docket number 26]. On April 19, 2017, Petitioner filed an nearly identical forty-nine page second set of Objections, although these were type-written. [docket number 27].

The Court has considered both sets of Petitioner's extensive objections and in light of those objections, the court has undertaken a *de novo* review of the entire case file. The court will overrule the objections.

[redacted]

APPENDIX 2 (1 OF 4)

The court finds and concludes that the Magistrate Judge's Report and Recommendation is correct and should be accepted and adopted for the reasons stated therein. *See* Fed. R. Civ. P. 72.

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). Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, effective December 1, 2009, the District Court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.

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, 120 S. Ct. 1595 (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.* "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, reasonable jurists could not debate the denial of Petitioner's §2254 application 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, 123 S. Ct. 1029 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, a certificate of appealability shall not be issued.

IT IS ORDERED that Petitioner's Objections to the Report and Recommendation are **OVERRULED.**

IT IS FURTHER ORDERED that the Report and Recommendation of the United States Magistrate Judge filed March 13, 2017 is **ACCEPTED AND ADOPTED.**

IT IS FURTHER ORDERED that Petitioner's Application for Writ of Habeas Corpus is **DENIED.**

IT IS FINALLY ORDERED that a Certificate of Appealability is **DENIED.**

SIGNED on this 14 day of June, 2017.

Robert Junell
Senior United States District Judge