APPENDIX - A

OPINION OF THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

CAUSE No. 17-50839

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-50839

WESLEY WAYNE SCHAEFER,

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:

Wesley Wayne Schaefer, Texas prisoner # 1713601, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition, challenging his convictions for continuous sexual abuse of a child and possession of child pornography and his resulting life sentence. To obtain a COA, he must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires him to show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), "or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotation marks and citation omitted).

If his motion is afforded a liberal construction, Schaefer renews his claims that his guilty pleas to the possession of child pornography counts were involuntary, that the constructive amendment of his indictment violated his constitutional rights, that his convictions violated the Double Jeopardy Clause, and that counsel was ineffective in failing to advise him of the consequences of his pleas and in not objecting to the continuous sexual abuse statute as unconstitutional. He does not brief any argument renewing the following claims, also raised in his § 2254 petition: (1) trial counsel was ineffective in failing to object to evidence of extraneous offenses, request a lesser-included-offense instruction, and object to the jury instruction which falsely stated that he had been properly admonished before pleading guilty, (2) the prosecution's closing remarks amounted to misconduct, (3) appellate counsel was ineffective, (4) the evidence was insufficient, and (5) the stacking of his sentences was improper. He has therefore abandoned those claims. *See Hughes v. Johnson,* 191 F.3d 607, 613 (5th Cir. 1999).

Schaefer also appears to raise, for the first time, a claim that his due process and equal protection rights were violated by both the magistrate judge and the district court. However, this newly raised claim will not be considered. *See Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003). Alternatively, the claim is wholly conclusional and thus does not warrant relief. *See Alexander v. McCotter*, 775 F.2d 595, 602-03 (5th Cir. 1985).

As to the remaining, preserved claims, Schaefer has failed to make the required showing to obtain a COA. *See Slack*, 529 U.S. at 484; *see also Miller-El*, 537 U.S. at 336. Accordingly, the motion for a COA is DENIED. Schaefer's motion for leave to proceed in forma pauperis on appeal is also DENIED.

/s/ James E. Graves, Jr.

JAMES E. GRAVES, JR.
UNITED STATES CIRCUIT JUDGE

APPENDIX - B

OPINION OF THE U.S.D.C. WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

CAUSE No. A-16-CA-1273-SS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WESLEY WAYNE SCHAEFER	§	
	§	
V.	§	**A-16-CA-1273-SS**
	§	
LORIE DAVIS	§	

ORDER ON REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Before the Court in the above-styled and numbered cause is Petitioner's Petition For Writ of Habeas Corpus By a Person in State Custody. *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); Fed. R. Civ. P. 72; Loc. R. W. D. Tex. Appx. C. The Magistrate Judge recommended the denial of the petition and the denial of a certificate of appealability. Petitioner objects to the Report and Recommendation.

Specifically, Petitioner objects to the Magistrate Judge's use of the Texas Court of Appeals' factual background, asserting "[t]he Magistrate was duty bound to conduct his own factual background investigation instead of relying upon an unpublished opinion." (DE 18 at 2). This is a mis-statement of the federal law governing habeas relief. *See* 28 U.S.C. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.").

Petitioner objects to the Magistrate's finding that Petitioner's guilty plea was knowing and voluntary, stating "a knowing and voluntary waiver of [rights] is not presumed from a silent record." (DE 18 at 4). The Magistrate Judge did acknowledge that no *formal* admonishment appeared in the record. (DE 13 at 10) ("However, there is no admonishment in the state court record with regard to Petitioner's guilty plea."). The Magistrate Judge found, however, that Petitioner had been fully informed and discussed with his counsel the range of punishment he faced as a result of pleading guilty, and Petitioner had knowledge of the rights he was waiving in pleading guilty. (DE 13 at 10-11).

A guilty plea is not knowing and voluntary if the defendant does not understand the consequences of entering the plea. *James v. Cain*, 56 F.3d 662, 666 (5th Cir. 1995). "Knowing the consequences of a guilty plea means only that the defendant knows "the maximum prison term and fine for the offense charged." *Ables v. Scott*, 73 F.3d 591, 592 n.2 (5th Cir. 1996) (internal quotations omitted). The Magistrate Judge found:

> The record in this matter further shows that, before jury voir dire and before the indictment was read, outside the presence of the voir dire panel, counsel and the court discussed Petitioner's potential guilty pleas to the charges. (DE 8-9 at 53). Then, still outside the presence of the venire panel, Petitioner was sworn for the purpose of averring that he had received and rejected a plea bargain. (DE 8-9 at 57). The plea bargain was for a sentence of 50 years' imprisonment on the charge of continuous sexual abuse and "open" on the other counts. *Id.* Accordingly, the record clearly establishes that Petitioner did discuss entering a guilty plea with his counsel, prior to rejecting a plea offer. And, at the close of the first day of trial, Petitioner was allowed to review the evidence against him with regard to all of the counts in the indictment and again discuss the entry of a guilty plea with his counsel – because this conversation was protected by the attorney-client privilege, it was not recorded.

(DE 13 at 10, *citing* DE 8-9 at 53, 169, 247-51).

The Magistrate Judge's findings were a correct application of federal law because the record in this matter establishes that Petitioner was aware of the consequences of pleading guilty to some of the charges against him, notwithstanding the absence of a formal admonishment in the record. *See Burton v. Terrell*, 576 F.3d 268, 271-72 (5th Cir. 2009); *Burdick v. Quarterman*, 504 F.3d 545, 547-48 (5th Cir. 2007).

Petitioner asserts he has a federal constitutional right to proper indictment by a grand jury. Although Petitioner's quotation of the Fifth Amendment to the United States Constitution is accurate, the federal courts have never found this right applies to a state defendant, as compared to a defendant in federal court answering to a charge of violating federal law.

> This court has held that [t]he sufficiency of a state indictment is not a matter of federal habeas relief unless it can be shown that the state indictment is so defective that it deprives the state court of jurisdiction." *McKay v. Collins*, 12 F.3d 66, 68 (5th Cir. 1994) (citation omitted)... That question is foreclosed to federal habeas review, however, if "the sufficiency of the [indictment] was squarely presented to the highest court of the state on appeal, and that court held that the trial court had jurisdiction over the case." *Millard v. Lynaugh*, 810 F.2d 1403, 1407 (5th Cir. 1987) (*quoting Liner v. Phelps*, 731 F.2d 1201, 1203 (5th Cir. 1984)). Here, the sufficiency of the indictment was squarely presented to the TCCA, which adopted the state habeas court's express findings that the indictment was not fundamentally defective and that even if the indictment failed to allege a necessary element, it was still an indictment under state law. Because the sufficiency of the indictment was squarely presented to the highest state court and that court held that the trial court had jurisdiction over this case, this claim is foreclosed to federal habeas review. *Millard*, 810 F.2d at 1407 (*quoting Liner*, 731 F.2d at 1203).

Wood v. Quarterman, 503 F.3d 408, 412 (5th Cir. 2007) (some internal citations omitted).

Petitioner alleges he was denied his right to due process of law because the State was allowed to constructively amend the indictment in a manner that lessened its burden of proof on the charge of continuous sexual abuse of a child. (DE 1 at 12). Petitioner's claim alleging a variance between

the indictment and the evidence was presented to and denied by the Texas Court of Criminal Appeals in his state habeas action. The Magistrate Judge concluded:

> There was no constructive amendment of the indictment in this matter, because Petitioner was not convicted upon a factual basis that effectively modified any essential element of the charged offense.
>
> > [T]he continuous sexual abuse statute sets forth various alternative means by which a defendant may commit a violation . . . an indictment must give the defendant notice of the means by which he is alleged to have committed the offense, i.e., it must describe the underlying acts of sexual abuse that are being used as predicate acts.
>
> *Holton v. State*, 487 S.W.3d 600, 609 (Tex. App.–El Paso 2015, no pet.).

(DE 13 at 16).

The Magistrate Judge further found:

> The evidence was sufficient for the jury to find, in accordance with the charge, that Petitioner had, on one occasion, induced a child to engage in lewd exhibition of the genitals and on two occasions either lewd exhibition of the genitals or masturbation. The charged offense was continuous sexual abuse of a child by the manner and means of sexual performance of a child. Accordingly, Petitioner was not convicted of a charge not brought by the grand jury.
>
> The charge to the jury was not a constructive amendment of the indictment, and did not lessen the State's burden of proof. Petitioner had adequate notice of the charges against him and his counsel thoroughly argued the issue of "inducement," and whether the videos and photos depicted masturbation or lewd exhibition of the genitals. The jury instructions did not alter any element of the crime of continuous sexual abuse of a child or change the theory of the prosecution.

Id. The Magistrate Judge applied the correct law after a thorough review of the record, and did not err in concluding that Petitioner's claim of infirmity in his indictment did not warrant federal habeas relief.

Petitioner contends his right to be free of double jeopardy was violated because he was convicted of both continuous sexual abuse of a child and the lesser-included offense of possession of child pornography. The case cited by Petitioner, *Carmichael v. State*, 505 S.W. 3d 95 (Tex.

App.–San Antonio 2016, pet. ref'd), finding the defendant's double jeopardy rights were violated, is not similar to Petitioner's case. In *Carmichael* the defendant was convicted of both continual sexual abuse of a child and aggravated sexual assault of a child; the court found the defendant's double jeopardy rights were violated because both counts involved the same child complainant and the event giving rise to the conviction for aggravated sexual assault occurred during the time period of the continuous sexual abuse charge. *Id.* at 101. Petitioner's convictions for possession of child pornography involved distinct images of children other than the complainant in the continuous sexual assault charge, and the continuous sexual assault charge involved acts other than the acts alleged in the counts of possession of child pornography. Accordingly, the Magistrate Judge's determination was not in error.

Petitioner asserts his ineffective assistance of counsel claims were improperly decided by the Magistrate Judge. Petitioner reiterates his counsel failed to adequately admonish him regarding his guilty pleas to the 127 counts of possession of child pornography. Having thoroughly reviewed the record in this matter and as noted previously, the Court concludes Petitioner was advised, both by counsel and the trial court, of the potential punishment he faced if he pleaded guilty to these charges. Additionally, the record in this matter indicates the State was prepared to introduce solid evidence in support of these charges and, accordingly, Petitioner did not suffer any prejudice by pleading guilty on these counts rather than proceeding to trial and being found guilty on these charges.

Petitioner also argues the Magistrate Judge improperly assumed counsel's failure to seek a lesser-included offense instruction was a strategic decision. This Court does not undertake de novo review of the state court's denial of a claim on the merits. The Magistrate Judge afforded the state court's denial of this claim proper deference, as the state court's finding that counsel made a strategic

decision in this particular context was not unreasonable. *See Woods v. Allen*, 558 U.S. 290, 302 (2010).

Petitioner contends the Magistrate Judge erred in recommending denial of his claim that his federal constitutional rights were violated because the state statute governing continuous sexual abuse of a child allows a conviction on less than a unanimous verdict. Petitioner correctly criticizes the Magistrate Judge for stating the United States Supreme Court's denial of a writ of certiorari can be viewed as an affirmation of the merits of an underlying decision. However, the Magistrate Judge's conclusion is otherwise not erroneous. Petitioner's argument that his right to due process requires jury unanimity was rejected by the United States Supreme Court in *Johnson v. Louisiana*, 406 U.S. 356, 359 (1972) ("We note at the outset that this Court has never held jury unanimity to be a requisite of due process of law.").

In his habeas petition Petitioner claims he was denied his right to the effective assistance of counsel because counsel failed to object to the jury charge that incorrectly stated Petitioner had been formally admonished before pleading guilty. The Magistrate Judge recommended denial of this claim, finding any alleged deficient performance was not prejudicial because, even absent a formal admonishment, Petitioner was properly advised of the consequences of pleading guilty to the 127 charges of possession of child pornography. Petitioner objects to the Magistrate Judge's conclusion and seeks an evidentiary hearing "to discover the nature of the conversations between counsel and the Petitioner." (DE 18 at 15).

The Court finds Petitioner is not entitled to relief on this claim. Even if the trial court did not properly admonish Petitioner on the record, and even if the privileged conversation between Petitioner and counsel about a potential guilty plea is not taken into consideration, Petitioner was not prejudiced by counsel's failure to object. Counsel's failure to object to the court's statement violated Petitioner's right to the effective assistance of counsel only if the failure was prejudicial to the outcome in this matter. There is no reasonable probability that, but for the court's statement to the jury that Petitioner had been admonished regarding the counts of child pornography, the jury would not have found Petitioner guilty on the charge of continuous sexual assault of a child.

Petitioner asserts the Magistrate Judge concluded the prosecution's comments in closing argument were undesirable or worthy of rebuke and, therefore, that the Magistrate Judge's conclusion that the comments did not violate his right to due process was "inconsistent." Petitioner misconstrues the Magistrate Judge's finding on this claim. The Magistrate Judge determined:

> Having reviewed the entire record in this matter, the undersigned concludes that the prosecutor's remarks were not persistent and pronounced, nor was the evidence of guilt so insubstantial that the conviction would not have occurred but for the challenged statements. It cannot be said that these remarks were "a crucial, critical, highly significant factor upon which the jury based its verdict of guilty." [*Harris v. Cockrell*, 313 F.3d 238, 245 (5th Cir. 2002)] (internal quotations omitted). Nor were the prosecutor's challenged remarks "egregious," even though they *may* have been undesirable or worthy of rebuke. Accordingly, the state court's decision denying relief on this claim was not clearly contrary to or an unreasonable application of federal law.

(DE 13 at 26) (emphasis added). The Magistrate Judge applied the correct law, requiring the comments to be *beyond* undesirable or worthy of rebuke, i.e., egregious and a crucial, critical, highly significant fact upon which the jury based its verdict of guilty, to warrant relief. Therefore, this claim of error fails.

Petitioner contends the Magistrate Judge erred by making only a "bald conclusion" that he was not denied his right to the effective assistance of appellate counsel. (DE 18 at 16). Petitioner argues: "The grounds on appeal were substantially weaker than the issues before the Court today, and though appellate counsel may have presented issues of merit, he failed to adequately master the trial record and thoroughly research the law in the instant case prior to advancing the appeal in the instant case." (DE 18 at 17).

To establish ineffective assistance of appellate counsel, a petitioner must show "a particular nonfrivolous issue was clearly stronger than issues counsel did present." *Smith v. Robbins*, 528 U.S. 259, 288 (2000). To establish prejudice from appellate counsel's alleged deficient performance, a petitioner must show a reasonable probability that, but for his counsel's unreasonable failure to assert a particular claim on appeal, he would have prevailed in the appeal. *Id.* at 286. On appeal, counsel asserted the evidence was insufficient to support Petitioner's conviction for continuous sexual abuse of a child and the trial court's cumulation order was insufficient to allow for consecutive sentences. (DE 8-17). Petitioner asserts appellate counsel's performance was deficient because counsel did not challenge: (1) the constructive amendment of the indictment; (2) whether his guilty pleas were unknowing and involuntary; and (3) whether his convictions violated his right to be free of double jeopardy. (DE 1 at 22). The Court's review of appellate counsel's brief and the record in this matter indicate counsel possessed sufficient knowledge of the trial record and the relevant law. Additionally, none of the issues presented by Petitioner were more likely to prevail on appeal than the issues raised by appellate counsel and, therefore, counsel's failure to assert these claims was not prejudicial. Accordingly, the state court's determination that appellate counsel was not ineffective

was not an unreasonable application of *Strickland* and the Magistrate Judge did not err in recommending denial of this claim.

Petitioner asserts there was insufficient evidence to sustain his conviction. Petitioner contends:

> Arguendo, there is an element of inducement in the instant case, [but] the State failed to demonstrate that the events were 30 days or more in duration in the instant case, in relation to the Continuous Sexual Abuse charge. The Petitioner thus objects to the Magistrate Report and Recommendation in the instant case.

(DE 18 at 17).

Petitioner asserted in his appeal that there was insufficient evidence to sustain his conviction because there was insufficient evidence of inducement, and the Texas Court of Appeals concluded the evidence was sufficient to find Petitioner guilty as charged. The Magistrate Judge concluded: "The Texas Court of Appeals thoroughly examined the evidence presented at Petitioner's trial and concluded a rational trier of fact could have found Petitioner guilty of continuous sexual abuse of a child." The Magistrate Judge found the state court's decision was not clearly contrary to or an unreasonable application of *Jackson v. Virginia*, 443 U.S. 307 (1979). The trial court record in this matter shows testimony that the sexual abuse occurred from late 2008 through late 2009, a period of more than one month. (DE 8-10 at 67). The mother of one of the victims testified Petitioner admitted "[h]e knew he needed help." (DE 8-10 at 54-55). The Court finds there was sufficient evidence to find Petitioner guilty as charged and the Magistrate Judge's recommendation in this regard was not in error.

Finally, Petitioner alleges the state court improperly stacked his sentences, but he does not assign any error to the Magistrate Judge's Report and Recommendation regarding this claim. Petitioner raised this issue in his appeal, and the Texas Court of Appeals denied relief, finding the imposition of sentence complied with state law. *Schaefer v. State*, No. 03-11-00345-CR, 2014 WL 3410589, at *6 (Tex. App.–Austin 2014, pet. ref'd).

The Magistrate Judge determined:

> It is axiomatic that federal habeas corpus relief does not lie for errors of state law, including state law governing the imposition of a criminal sentence. *Wilson v. Corcoran*, 562 U.S. 1, 4-5 (2010); *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Claims arising from a state sentencing decision are not cognizable under § 2254 unless the sentence imposed exceeds the statutory limits or is "wholly unauthorized by law." *Haynes v. Butler*, 825 F.2d 921, 924 (5th Cir. 1987). Because federal courts do not review a state's failure to adhere to its own sentencing procedures, Petitioner's claim with regard to the stacking of his sentences does not present a possible basis for habeas corpus relief. *Jones v. Estelle*, 622 F.2d 124, 126 (5th Cir. 1980); *Nichols v. Estelle*, 556 F.2d 1330, 1331 (5th Cir. 1977).

(DE 13 at 29).

The Magistrate Judge properly applied the controlling federal law to this claim.

In light of Petitioner's objections to the Report and Recommendation, the Court has undertaken a *de novo* review of the entire case file in this action and finds and concludes that the Report and Recommendation of the United States Magistrate Judge is correct and should be accepted and adopted by the Court for substantially the reasons stated therein.

IT IS ORDERED that the Petitioner's Objections are **OVERRULED.**

IT IS FURTHER ORDERED that the Report and Recommendation of the United States Magistrate Judge filed in this action is hereby **ACCEPTED AND ADOPTED.**

IT IS FURTHER ORDERED that Petitioner's Petition For Writ of Habeas Corpus By a Person in State Custody is **DENIED.**

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

SIGNED this 25th day of August 2017.

Sam Sparks

SAM SPARKS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WESLEY WAYNE SCHAEFER	§	
	§	
V.	§	**A-16-CA-1273-SS**
	§	
LORIE DAVIS	§	

JUDGMENT

BE IT REMEMBERED on this day the Court issued its order denying Petitioner's Petition For Writ of Habeas Corpus By a Person in State Custody and thereafter renders the following judgment:

IT IS ORDERED, ADJUDGED, and DECREED that Petitioner's Petition For Writ of Habeas Corpus By a Person in State Custody against Respondent is DENIED.

SIGNED this 25th day of August 2017.

SAM SPARKS
UNITED STATES DISTRICT JUDGE

APPENDIX - C

ORDER ON REHEARING

OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CAUSE No. 17-50839

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

August 07, 2018

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 17-50839 Wesley Schaefer v. Lorie Davis, Director
USDC No. 1:16-CV-1273

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk
LaToya C. Allen
By: _____
LaToya C. Allen, Deputy Clerk
504-310-7623

Ms. Jeannette Clack
Ms. Sarah Miranda Harp
Mr. Edward Larry Marshall
Mr. Wesley Wayne Schaefer

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50839

WESLEY WAYNE SCHAEFER,

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

Before DENNIS, GRAVES, and COSTA, Circuit Judges.

PER CURIAM:

A member of this panel previously denied Certificate of Appealability. The panel has considered Appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.

APPENDIX - R

MAGISTRATE REPORT AND RECOMMENDATION

CAUSE No. A-16-1273-SS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WESLEY WAYNE SCHAEFER	§	
	§	
V.	§	**A-16-CA-1273-SS**
	§	
LORIE DAVIS	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE SAM SPARKS
UNITED STATES DISTRICT JUDGE

The Magistrate Judge submits this Report and Recommendation to the District Court pursuant to 28 U.S.C. § 636(b) and Rule 1(e) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrates.

Petitioner is pro se and has paid the full filing fee in this matter. Before the Court are Petitioner's Application for Writ of Habeas Corpus under 28 U.S.C. § 2254 (Docket Entry "DE" 1), his Memorandum in Support of Petition for Writ of Habeas Corpus (DE 7), Respondent's Answer (DE 10), and Petitioner's Reply (DE 12). For the reasons set forth below, the undersigned recommends that Petitioner's Application for Writ of Habeas Corpus be **denied**.

BACKGROUND

Respondent has custody of Petitioner pursuant to judgments and sentences imposed by the 22nd District Court of Hays County, Texas. A jury found Petitioner guilty on one count of continuous sexual abuse of a child and Petitioner pleaded guilty to 127 counts of possession of child pornography. The trial court imposed an aggregate sentence of life plus 100 years' imprisonment. Petitioner alleges he is entitled to federal habeas relief because his guilty pleas were not knowing and

voluntary, because he was denied his right to the effective assistance of counsel, and because he was denied his rights to due process of law and a fair trial.

STATEMENT OF THE CASE

A. Factual Background

The following facts are taken from the Texas Court of Appeals' decision in Petitioner's appeal:

> The evidence at trial consisted of multiple photographs and videos of nude children taken on Schaefer's cell phone and downloaded to his personal computer. The photos and videos were taken over the course of several months. Schaefer's girlfriend identified three of the children in the photographs and videos as her youngest daughter—age six years old, her niece—age seven years old, and her nephew—age seven years old. In some photographs, witnesses were not able to identify the children because the images were only of the children's genitalia. Witnesses, including the State's forensic investigator, testified that all of the children appeared to be younger than fourteen. The forensic computer investigator further testified that the images were almost "identical in content and character" to other pornographic images of children that Schaefer had downloaded to his computer from the Internet. The majority of the photographs depicted the children in the bathtub, including a photo of a nude girl in the bathtub with her legs spread and pushing her genitals against the stream of water falling from the tub faucet. . . . The State also introduced similar photos that Schaefer had hidden in his sock drawer depicting his own daughter nude, at the age of six, smiling at the camera while standing in the tub with one foot on the sill of the tub exhibiting her genitals. Several witnesses, including family members and police investigators, testified that the images appeared posed.
>
> In addition to the photos, the State introduced two videos that had been taken on Schaefer's cell phone and downloaded to his computer. The first video depicts the girlfriend's youngest daughter lying naked on Schaefer's bed. The child is lying on her back looking into the camera and has her legs pulled back behind her elbows and is clutching her feet, fully exhibiting her vaginal opening and anus. While she is lying there, the child is doing different repetitive butterfly movements with her legs and is counting each movement. She is also looking at and asking the person off camera questions. At one point, the child asks whether the person off camera is filming her. A man responds, "No, I'm texting." The child answers, "You're lying to me." A witness identified Schaefer's voice on the tape. A police investigator testified that the child was "obviously responding to something somebody was saying or had told her"

> based on the unnatural position that she is lying in, her repetition, and her seeking approval from the person off camera. The child's mother testified that the contents of the video were "unusual for her household." In the second video, the same child is lying on her stomach naked on Schaefer's bed again and her genitals are exhibited from behind. An arm can be seen attempting to reposition the child's legs. A witness also identified Schaefer's voice in this video.
>
> None of the complainants identified in the photos or videos testified at trial. The girlfriend's two older daughters did testify as to their experiences and observations living with Schaefer. The girls testified that their mother had three young daughters when she moved in with Schaefer, including them and their youngest sister who is depicted in the videos and many photos. Schaefer also had three young daughters living with him. In addition to the six young girls living in the house, many young cousins frequently visited—two of whom were identified in the photographs. . . .

Schaefer v. State, No. 03-11-00345-CR, 2014 WL 3410589, at *2-3 (Tex. App.–Austin 2014, pet. ref'd) (footnotes omitted).

B. Petitioner's State Court Proceedings

A grand jury indictment returned June 10, 2010, charged Petitioner with one count of continuous sexual abuse of a child, specifying the "manner and means" of committing this crime as four instances of inducing a sexual performance by a child, and 127 counts of possession of child pornography. (DE 8-29 at 4-26).[1] Petitioner pleaded not guilty to the charge of continuous sexual abuse of a child and, on the first full day of his trial, pleaded guilty to all 127 counts of possession of child pornography. (DE 8-10 at 12).

Petitioner was represented by appointed counsel (DE 8-9 at 118) and did not testify at his trial. Petitioner's counsel argued that the State had not produced sufficient evidence to establish that Petitioner had "induced" the children to engage in lewd behavior, an element of the crime of sexual

[1] The State Court Record in this matter is lodged at Docket Entry 8.

performance by a child.[2] (DE 8-11 at 162, 168; DE 8-12 at 30-40). After deliberating for several hours, (DE 8-29 at 238), the jury found Petitioner guilty of continuous sexual abuse of a child. (DE 8-29 at 37).

The jury was instructed to assess punishment at a term of not less than 25 years and not more than 99 years or life imprisonment on the count of continuous sexual abuse of a child, and not less than two years and not more than ten years on each charge of possession of child pornography. (DE 8-29 at 39 & 42). The jury assessed punishment at a term of life imprisonment and a fine of $10,000.00 on the charge of continuous sexual abuse of a child, (DE 8-29 at 44), and at a term of ten years' imprisonment and a fine of $1,000.00 on each count of possession of child pornography. (DE 8-29 at 45-172). The trial court ordered that ten of the ten-year sentences for possession of child pornography be served consecutively to the life sentence, and that the other 117 ten-year sentences be served concurrently to each other and to the life sentence. (DE 8-29 at 174-77).

Petitioner filed a motion for a new trial, alleging that the verdicts were against the weight of the evidence and contrary to law, and arguing that the trial court had improperly denied objections to the admission of evidence. (DE 8-29 at 179-80). Petitioner appealed his convictions and sentences,

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[2] The statute provides that a person commits the offense of continuous sexual abuse of a child if:

> (b)(1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims . . .
>
> (c) For purposes of this section, "act of sexual abuse" means any act that is a violation of one or more of the following penal laws:
>
> ***
>
> (6) sexual performance by a child under Section 43.25 . . .

Tex. Penal Code Ann. § 21.02.

Section 43.25(b) provides:

> A person commits an offense if, knowing the character and content thereof, he employs, authorizes, or induces a child younger than 18 years of age to engage in sexual conduct or a sexual performance. . . .

asserting that the evidence was insufficient to support his conviction for continuous sexual abuse of a child, and that the trial court's cumulation order was insufficient to allow for consecutive sentences. (DE 8-17). The Texas Court of Appeals affirmed the convictions. *Schaefer v. State*, No. 03-11-00345-CR, 2014 WL3410589, at *6 (Tex. App.–Austin 2015, pet. ref'd). The Texas Court of Criminal Appeals denied an application for discretionary review. *Id.*

Petitioner filed an application for a state writ of habeas corpus, raising the same claims stated in his federal habeas action. (DE 8-28 at 1-13; DE 8-29 at 195-218). The trial court denied the application. (DE 8-29 at 237). The Texas Court of Criminal Appeals denied the application for a state writ of habeas corpus without written order. (DE 8-27 WR-85,946-01).

C. Petitioner's Federal Habeas Claims

Petitioner asserts he is entitled to federal habeas relief because

1. His guilty pleas were involuntary and unknowing;

2. The indictment was defective with regard to the charge of continuous sexual abuse of a child;

3. His trial on the charge of continuous sexual abuse of a child violated his right to be free of double jeopardy;

4. He was denied the effective assistance of trial counsel, alleging four specific errors by trial counsel;

5. The State's closing argument was improper;

6. He was denied effective assistance of appellate counsel, alleging three specific errors by appellate counsel;

7. The evidence was insufficient to support his conviction for continuous sexual abuse of a child; and

8. The accumulated "stacking" order was insufficient.

Respondent allows that the petition is timely. Respondent allows that all but one of Petitioner's claims were properly exhausted in the state courts. (DE 10 at 7-8). Respondent asserts that the claim that Petitioner's trial counsel failed to object to the jury charge regarding his admonishment before pleading guilty was not presented to the state courts. *Id.* However, the record indicates Petitioner raised this claim in an amendment to his application for a state writ of habeas corpus. (DE 8-28 at 12). Accordingly, the undersigned concludes that Petitioner properly presented all of his federal habeas claims to the state courts.

ANALYSIS

A. The Antiterrorism and Effective Death Penalty Act

The Supreme Court summarized the basic principles established by the Court's many cases interpreting the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA") in *Harrington v. Richter*, 562 U.S. 86, 97-100 (2011). Section § 2254 provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Section 2254(d) permits the granting of federal habeas relief in only three circumstances: (1) when the state court's decision "was contrary to" federal law as clearly established by the holdings of the Supreme Court; (2) when the state court's decision involved an "unreasonable application" of

such law; or (3) when the decision "was based on an unreasonable determination of the facts" in light of the record before the state court. *Richter*, 562 U.S. at 100, *citing Williams v. Taylor*, 529 U.S. 362, 412 (2000). Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Thaler v. Haynes*, 559 U.S. 43, 47 (2010); *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003). Under the unreasonable application clause of § 2254(d), a federal court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions, "but unreasonably applies that principle to the facts of the prisoner's case." *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000) (quotation marks and citation omitted). 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. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

Section 2254(e)(1) requires a federal court to presume state court factual determinations to be correct, although a petitioner can rebut the presumption by clear and convincing evidence. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005). This presumption extends not only to express findings of fact, but also to implicit findings of fact by the state court. *Register v. Thaler*, 681 F.3d 623, 629 (5th Cir. 2012). The Supreme Court has "explicitly left open the question whether § 2254(e)(1) applies in every case presenting a challenge under § 2254(d)(2)." *Wood v. Allen*, 558 U.S. 290, 300 (2010). However, the Fifth Circuit Court of Appeals has held that, while section 2254(e)(1)'s clear and convincing standard governs a state court's resolution of "particular factual issues," section 2254(d)(2)'s unreasonable determination standard governs "the state court's decision as a whole." *Blue v. Thaler*,

665 F.3d 647, 654 (5th Cir. 2011). *See also Hoffman v. Cain*, 752 F.3d 430, 441-42 (5th Cir. 2014) (reaffirming the standard stated in *Miller-El* and *Blue.)*.

One of the issues *Richter* resolved was "whether § 2254(d) applies when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied." 562 U.S. at 98. When a state court decision denying relief is unexplained, the habeas petitioner's burden is to show there was "no reasonable basis for the state court to deny relief." *Id.* If state habeas relief is denied without an opinion examining the claims, this Court must assume that the state court applied the proper "clearly established Federal law," and then determine whether the state court decision was "contrary to" or "an objectively unreasonable application of" that law. *Schaetzle v. Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003).

B. Merits

1. Involuntary and unknowing guilty plea

Petitioner asserts that he was not properly admonished with regard to his guilty pleas on the counts of possession of child pornography, rendering his guilty pleas to those counts unknowing and unintelligent. (DE 7 at 2). Petitioner contends that he was not informed of the rights he was waiving as a result of his guilty pleas, including his right to a jury trial, his right to confrontation, or his right to be free of self-incrimination. (DE 1 at 11). Petitioner further asserts that he was not admonished as to the range of punishment with regard to the counts of possession of child pornography. *Id.* Petitioner alleges that the failure to admonish him violated state rules of criminal procedure[3] and his

[3] To the extent Petitioner claims the failure to admonish him violated state law, the undersigned notes the claim is without merit, even if a violation of state law could be cognizable as a basis for federal habeas relief. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (holding federal habeas relief may not be premised on errors of state law); *Valdez v. State*, 326 S.W.3d 348, 351 (Tex. App.–Ft. Worth 2010, no pet.) ("A defendant is deemed to have notice of the punishment range, and the trial court's failure to admonish on the punishment

federal right to due process of law. (DE 7 at 3-4). Petitioner raised this claim in his application for a state writ of habeas corpus, and the Texas Court of Criminal Appeals denied relief.

The well-established federal law with regard to validity of a guilty plea is that set forth in *North Carolina v. Alford*, 400 U.S. 25, 31 (1970): "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." In *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), the Supreme Court held that a trial judge may not accept a guilty plea "without an affirmative showing" that the plea is "intelligent and voluntary." A guilty plea may be challenged only on the grounds that it was made on the defective advice of counsel or that the defendant could not have understood the terms of his plea bargain. *Brady v. United States*, 397 U.S. 742, 755-56 (1970). "The advice of competent counsel exists as a safeguard to ensure that pleas are voluntarily and intelligently made." *Matthew v. Johnson*, 201 F.3d 353, 365 (5th Cir. 2000), *citing Henderson v. Morgan*, 426 U.S. 637, 647 (1976). Courts assessing whether a defendant's plea is valid look to "all of the relevant circumstances surrounding it," *Brady*, 397 U.S. at 749, and may consider such factors as whether there was evidence of factual guilt. *Matthew*, 201 F.3d at 365. A guilty plea is invalid if the defendant does not know and understand the consequences of entering the plea. *James v. Cain*, 56 F.3d 662, 666 (5th Cir. 1995). Knowing the consequences of a guilty plea means only that the defendant knows "the maximum prison term and fine for the offense charged." *Ables v. Scott*, 73 F.3d 591, 592 n.2 (5th Cir. 1996) (internal quotations omitted).

The governing standard as to whether a plea of guilty is voluntary for purposes of the Federal Constitution is a question of federal law, but "questions of historical fact, including inferences

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range does not affect the defendant's substantial rights where the attorneys, with the defendant present, explain the specific range of punishment to the venire during voir dire.") (collecting cases so holding).

properly drawn from such facts, are in this context entitled to the presumption of correctness accorded state court factual findings." *Parke v. Raley*, 506 U.S. 20, 35 (1992), *citing Marshall v. Lonberger*, 459 U.S. 422, 431-32 (1983). The presumption applies to findings of fact by the trial and appellate courts of the state, both explicit and implicit. *Id.* at 36.

The record in this matter reveals that, when instructing the jury, the trial court did state: "After being admonished of his rights as required by law, the defendant persists in his plea. . . . The Court finds that the defendant is mentally competent and that the plea is free and voluntary." (DE 8-12 at 11, 12). However, there is no admonishment in the state court record with regard to Petitioner's guilty plea. The trial court asked Petitioner: "Count 2, possession of child pornography, through Count 128 – all possession of child pornography, how do you plead?" and Petitioner replied "Guilty." (DE 8-10 at 12).

The record in this matter further shows that, before jury voir dire and before the indictment was read, outside the presence of the voir dire panel, counsel and the court discussed Petitioner's potential guilty pleas to the charges. (DE 8-9 at 53). Then, still outside the presence of the venire panel, Petitioner was sworn for the purpose of averring that he had received and rejected a plea bargain. (DE 8-9 at 57). The plea bargain was for a sentence of 50 years' imprisonment on the charge of continuous sexual abuse and "open" on the other counts. *Id.* Accordingly, the record clearly establishes that Petitioner did discuss entering a guilty plea with his counsel, prior to rejecting a plea offer. And, at the close of the first day of trial, Petitioner was allowed to review the evidence against him with regard to all of the counts in the indictment and again discuss the entry of a guilty plea with his counsel–because this conversation was protected by the attorney-client privilege, it was not recorded. (DE 8-9 at 53, 169, 247-51). The next morning, outside the presence of the jury, Petitioner

elected to plead guilty to the charges of possession of child pornography and not guilty to the charge of continuous sexual abuse of a child. (DE 8-10 at 6).

The record also establishes that, in addition to discussions with his counsel, Petitioner did know the range of punishment on the crimes of possession of child pornography. The range of punishment was mentioned during voir dire. (DE 8-9 at 96-97, 100, 147). Additionally, Petitioner did know he was waiving his right to a jury trial and did know he was waiving his right to be free of self-incrimination, as these specific rights were discussed during jury voir dire and prior to the entry of the guilty pleas. (DE 8-9 at 70-73, 76-77, 169).

In *McCarthy v. United States*, 394 U.S. 459, 464-67 (1969), the Supreme Court held that the most efficient method of insuring the intelligent, voluntary nature of a guilty plea is through a colloquy between the trial judge, the defendant, and the defendant's attorney. However, the Supreme Court has

> never held that the judge must himself explain the elements of each charge to the defendant on the record. Rather, the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel.

Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005). *See also Henderson*, 426 U.S. at 647 ("even absent a clear showing on the record, we presume that counsel did in fact explain the nature of the offense to the defendant.").

Although it is certainly preferable for a trial court to clearly admonish a defendant, on the record, as to the rights he is waiving by entering a guilty plea and as to the potential sentence he faces as a result of pleading guilty, the Fifth Circuit Court of Appeals has repeatedly found that a defendant's federal constitutional rights were not violated when a guilty plea was entered in the

absence of a full admonishment by the trial court, when the defendant otherwise had knowledge of the rights he was waiving and his potential punishment.

In *Burdick v. Quarterman*, 504 F.3d 545, 547-48 (5th Cir. 2007), the Fifth Circuit Court of Appeals upheld a guilty plea where "someone" advised the defendant as to the range of punishment prior to the entry of a guilty plea.

> Texas does not dispute that its trial court failed to discharge this duty. In accepting the defendant's guilty plea, the trial court said nothing of the maximum penalties she faced. Yet Texas argues that there was no constitutional error because Burdick knew, in fact, the maximum penalties she faced. Thus, Texas argues, the trial court need not advise the defendant of consequences of her guilty plea, as long as somebody does.We agree. Long ago in *Cheely v. United States* we held that "[t]he question . . . is not whether [the defendant] learned of such penalty from the judge, in a formal proceeding, but whether he had knowledge as to such matter, whether from the judge, his lawyer, his bondsman, or from some other source. We acknowledge that this holding is a somewhat stingy implementation of the Court's language in *Boykin*, yet it is a plausible implementation, and it has survived for thirty years as such.

Id.

In *Burton v. Terrell*, 576 F.3d 268, 271-72 (5th Cir. 2009), the Fifth Circuit held:

> . . . [A] trial court's failure to discharge this duty by informing the defendant of the maximum possible sentence does not invariably lead to constitutional error. This court has consistently held that the critical question is not whether the court informed the defendant of the maximum sentence, but whether the defendant knew, in fact, the maximum he faced. While we acknowledge that this is a "somewhat stingy implementation of . . . *Boykin*," this court's precedent is clear that the source of the defendant's actual knowledge is of no moment to the plea's constitutionality.

Id.

The undersigned further notes that the United States Supreme Court denied certiorari from a Texas Court of Appeals' decision in *Rhea v. State*, presenting a very similar fact pattern to this matter. *See* 181 S.W.3d 478, 486 (Tex. App.–Texarkana 2005, pet. ref'd), *cert. denied,* 547 U.S. 1181 (2006). In denying federal habeas relief to the defendant in *Rhea,* the Eastern District of Texas

concluded that, although the defendant was not admonished in accordance with Article 26.13 of the Texas Code of Criminal Procedure, his federal rights were not violated because

> [t]he indictments notified petitioner of the charges against him, and the factual basis of the charges. The record shows that counsel advised petitioner of the rights he was waiving by pleading guilty, and advised him of the punishment range. Thus, the plea met the Constitutional standards for a knowing and voluntary guilty plea.

Rhea v. Director, TDCJ-CID, 2009 WL 3761743, at *8 (E.D. Tex. 2009).

Petitioner does not assert that his guilty pleas were coerced or induced by misrepresentation. Petitioner does not assert that his counsel misled or misinformed him as to the consequences of entering the guilty pleas. Because "clearly established federal law" does not require a record showing that the trial court admonished the defendant about the specific rights he was waiving or the potential punishment prior to accepting his guilty plea, the Texas Court of Criminal Appeals' rejection of this claim was neither contrary to nor an unreasonable application of federal law. Moreover, to the extent Petitioner asserts that *Boykin* should be construed to cover guilty plea situations such as his, the Supreme Court has concluded that a state court's failure to extend Supreme Court precedent cannot provide the basis for relief under § 2254(d)(1). *White v. Woodall*, 134 S. Ct. 1697, 1706 (2014).

Accordingly, because the record in this matter indicates that Petitioner's guilty pleas were counseled, knowing and voluntary, and not coerced or induced by threats, promises, or misrepresentations, the state court's denial of this claim was not clearly contrary to or an unreasonable application of federal law.

2. Indictment

Petitioner alleges that he was denied his right to due process of law because the State was allowed to constructively amend the indictment in a manner that lessened its burden of proof on the

charge of continuous sexual abuse of a child. (DE 1 at 12). Petitioner alleges that the amended indictment limited the allegation of lewd performance of a child to inducing masturbation on one occasion, and to inducing lewd exhibition of the genitals on two occasions, but then, at trial, the State was only required to show that the child had been induced to perform masturbation *or* lewd exhibition of the genitals, lessening the State's burden of proof. (DE 1 at 12-13).

The original indictment, returned June 10, 2010, charged Petitioner with one count of continuous sexual abuse of a child, by the manner and means of committing two acts of sexual performance by a child by inducing the child to "engage in sexual conduct, to wit: masturbation or lewd exhibition of the genitals," and by the manner and means of committing two acts of sexual performance of a child by inducing a child to "engage in sexual conduct, to wit: lewd exhibition of the genitals." (DE 8-29 at 4). The indictment was amended on February 1, 2011, approximately six months prior to trial, because the count charging continuous sexual abuse of a chid contained "error and surplus." (DE 8-29 at 27). The amended indictment charged that, with regard to Count I, continuous sexual abuse of a child, on one occasion Petitioner had induced a child to "engage in sexual conduct, to wit: masturbation," and on two occasions to "engage in sexual conduct, to wit: lewd exhibition of the genitals." (DE 8-29 at 28).[4]

The written jury charge instructed that: "A person commits the offense of Sexual Performance By a Child if, knowing the character and content thereof, he employs, authorizes, or induces a child younger than 18 years to engage in sexual conduct or a sexual performance," and that "sexual conduct" could include ". . . masturbation . . . or lewd exhibition of the genitals . . ." (DE 8-29 at 31).

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[4] As previously noted, to find Petitioner guilty of this charge, the jury was required to find that "during a period that is 30 or more days in duration, the person commit[ed] two or more acts of sexual abuse . . ." Tex. Penal Code Ann. § 21.02(b)(1).

The jury was verbally instructed with the language contained in the original indictment, i.e., that Petitioner had once "induced" a child to engage in lewd exhibition, (DE 8-12 at 10), and twice induced a child to "engage in sexual conduct, to wit: masturbation or lewd exhibition of the genitals." *Id.*[5]

There is no federal constitutional right to indictment by a grand jury; however, the United States Constitution requires that a criminal defendant have notice of the charge against which he must defend himself. *Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972); *Combs v. State*, 530 F.2d 695, 698 (6th Cir. 1976). Allowing the State to amend an indictment at trial, to seek a conviction on a charge not brought by the grand jury, constitutes a denial of due process because the defendant is thereby deprived of fair notice of criminal charges against him. *DeJonge v. Oregon*, 299 U.S. 353, 362 (1937). Constructive amendment typically refers to situations where the trial proof or jury instruction goes beyond the parameters of the indictment in an attempt to cure a defective indictment, resulting in a prosecution for an offense different from, or in addition to, that charged by the grand jury. *Lemons v. O'Sullivan*, 54 F.3d 357, 363-64 (7th Cir. 1995). Not all variations in proof that contradict or supplement verbiage in the indictment rise to the level of a constructive amendment. *Id.* No constructive amendment occurs when the evidence proves facts different from those alleged in the indictment, but does not modify an essential element of the charged offense. *United States v. Munoz*, 150 F.3d 401, 417 (5th Cir. 1998).

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[5] At trial, defense counsel raised the argument that two of the videos introduced into evidence showed lewd exhibition of the genitals but not masturbation. An expert witness testified that the evidence, with regard to one of the videos, showed the victim in lewd exhibition of the genitals, rather than simulated masturbation. (DE 8-11 at 155). During that witness's testimony the indictment was read to the jury as alleging that Petitioner had induced the child to "'Engage in sexual conduct, to wit: masturbation or lewd exhibition of the genitals.'" (DE 8-11 at 156).

There was no constructive amendment of the indictment in this matter, because Petitioner was not convicted upon a factual basis that effectively modified any essential element of the charged offense.

> [T]he continuous sexual abuse statute sets forth various alternative means by which a defendant may commit a violation . . . an indictment must give the defendant notice of the means by which he is alleged to have committed the offense, i.e., it must describe the underlying acts of sexual abuse that are being used as predicate acts.

Holton v. State, 487 S.W.3d 600, 609 (Tex. App.–El Paso 2015, no pet.)

Conviction pursuant to the amended indictment required the State to prove Petitioner had committed at least two of the following three charged predicate acts: on one occasion between specific dates, Petitioner had induced a child to engage in masturbation, and on two occasions between specific dates, Petitioner had induced a child to engage in masturbation or lewd exhibition of the genitals. The State produced evidence from which the jury could find Petitioner committed all three of these acts. The evidence was sufficient for the jury to find, in accordance with the charge, that Petitioner had, on one occasion, induced a child to engage in lewd exhibition of the genitals and on two occasions either lewd exhibition of the genitals or masturbation. The charged offense was continuous sexual abuse of a child by the manner and means of sexual performance of a child. Accordingly, Petitioner was not convicted of a charge not brought by the grand jury.

The charge to the jury was not a constructive amendment of the indictment, and did not lessen the State's burden of proof. Petitioner had adequate notice of the charges against him and his counsel thoroughly argued the issue of "inducement," and whether the videos and photos depicted masturbation or lewd exhibition of the genitals. The jury instructions did not alter any element of the crime of continuous sexual abuse of a child or change the theory of the prosecution. Accordingly, the

state court's denial of this claim was not clearly contrary to or an unreasonable application of federal law.

3. Double jeopardy

Petitioner contends that he was convicted in violation of his right to be free of double jeopardy, because possession of child pornography is a lesser included offense of continuous sexual abuse of a child.

> The longstanding test for determining whether two statutes constitute the "same offense" for double jeopardy purposes was first developed in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). There, the Supreme Court explained that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304, 52 S.Ct. 180. A court applying the *Blockburger* test must "focus[] on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Iannelli v. United States*, 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975); *see also United States v. Agofsky*, 458 F.3d 369, 371 (5th Cir. 2006) ("Under the *Blockburger* test, each offense must contain an element not contained in the other; if not, they are the same offense . . . and double jeopardy bars subsequent punishment or prosecution.") (internal quotation marks omitted).

Austin v. Cain, 660 F.3d 880, 887 (5th Cir. 2011).

Two offenses are "the same" only if one offense is always a necessary element of another offense. *Illinois v. Vitale*, 447 U.S. 410, 416, 419-20 (1980); *Ortega v. Stephens*, 784 F.3d 250, 252 (5th Cir.), *cert. denied*, 136 S. Ct. 176 (2015). In contrast, when an offense constitutes only one of several alternative elements of another offense, the two are not the same offense for double jeopardy purposes. *Austin*, 660 F.3d at 892.

Additionally, the continuous sexual assault statute specifically requires that the statute not be applied in a matter that violates a defendant's right to be free of double jeopardy.

> Based on the language in section 21.02(c), it appears the Legislature did not intend to allow a defendant convicted of continuous sexual abuse to also be convicted for the aggravated sexual assault of the same child if the aggravated sexual assault at issue and the continuous sexual abuse both occurred within the same time periods. *See* Tex. Penal Code Ann. § 21.02(c)(4), (e); *Littrell*, 271 S.W.3d at 276.

Price v. State, 413 S.W.3d 158, 162 (Tex. App.–Beaumont 2013), *aff'd*, 434 S.W. 3d 601 (Tex. Crim. App. 2014) (explaining legislative history and intent of the statute and holding that the defendant could not be convicted of both continuous sexual abuse of a child and a predicate offense). *See also Carmichael v. State*, 505 S.W. 3d 95, 101 (Tex. App.–San Antonio 2016, pet ref'd) (vacating conviction for aggravated sexual assault of a child when the defendant was also convicted of continuous sexual assault of the same child and the crime occurred during the same time period specified in the count of continuous sexual assault of a child).

No double jeopardy violation occurred in Petitioner's case. The lesser offense (possession of child pornography) is not always a necessary element of the greater offense (continuous sexual abuse of a child). Furthermore, Petitioner's conviction on continuous sexual assault of a child was predicated on specific acts with regard to specific children, at least two of which were filmed, and his convictions on the 127 counts of possession of child pornography were based on additional separate and distinct images found on Petitioner's phone and computer. Petitioner was not charged with or convicted of both continuous sexual abuse of a child and the predicate offenses.

Accordingly, the state court's denial of this claim in Petitioner's state habeas action was not clearly contrary to or an unreasonable application of federal law.

4. Ineffective assistance of trial counsel

Ineffective assistance of counsel claims are analyzed under the well-settled standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984):

> 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 can make 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.

Id. at 687.

The prejudice prong of *Strickland* provides for federal habeas relief only if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "'The likelihood of a different result must be substantial, not just conceivable.'" *Trevino v. Davis*, 829 F.3d 328, 351 (5th Cir. 2016), *quoting Brown v. Thaler*, 684 F.3d 482, 491 (5th Cir. 2012). Counsel's performance cannot be considered deficient or prejudicial if counsel fails to raise a non-meritorious argument. *Turner v. Quarterman*, 481 F.3d 292, 298 (5th Cir. 2007); *Parr v. Quarterman*, 472 F.3d 245, 256 (5th Cir. 2006).

A habeas petitioner has the burden to prove both prongs of the *Strickland* ineffective assistance test. *Rogers v. Quarterman*, 555 F.3d 483, 489 (5th Cir. 2009); *Blanton v. Quarterman*, 543 F.3d 230, 235 (5th Cir. 2008). And the "court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged

deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697.

In considering a state court's application of *Strickland*, AEDPA review must be "doubly deferential" in order to afford "both the state court and the defense attorney the benefit of the doubt." *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015); *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). When evaluating Petitioner's complaints about the performance of his counsel under the AEDPA, the issue before this Court is whether the Texas Court of Criminal Appeals could reasonably have concluded Petitioner's complaints about his counsel's performance failed to satisfy either prong of the *Strickland* analysis. *Schaetzle*, 343 F.3d at 444.

a. Extraneous offenses

Petitioner contends counsel's performance was deficient because he failed to object when the State admitted evidence of extraneous offenses. Petitioner asserts counsel improperly allowed into evidence hundreds of photos depicting child pornography and that counsel failed to object when "numerous extraneous offense allegations were introduced claiming Petitioner had molested unindicted charges against children . . ." (DE 1 at 16).

Defense counsel did object to the State referencing "hundreds of other pictures that they could have brought, but they didn't. . . ." (DE 8-10 at 56). Counsel argued: "I think that violates the extraneous offenses they're not supposed to talk about. And we had agreed we would stipulate so that we wouldn't be subject to hearing about or seeing these other extra pictures." *Id.* The state replied: "But they knew full good and well that everything was coming in. He just agreed to put it all into evidence." (DE 8-11 at 57). The trial court then overruled defense counsel's objection to the

admission into evidence of a CD containing images of child pornography found on Petitioner's computer, which included images not included in the indictment. *Id.*

Petitioner's trial counsel did object to the admission of this evidence, and his objection was overruled. Accordingly, Petitioner's counsel's performance was not deficient nor prejudicial, and the state court's decision denying relief on this claim was not an unreasonably application of *Strickland.*

b. Lesser-included offense instruction

Petitioner asserts that his counsel should have requested a lesser-included offense instruction with regard to the charge of continuous sexual abuse of a child and argued to the jury that the State failed to prove inducement and, therefore, that Petitioner was guilty only of possession of child pornography. (DE 1 at 18). Petitioner argues that, because no lesser-included offense instruction was given, the jury had "no alternative except to convict Petitioner of Sexual Performance, and, thus, Continuous Sexual Abuse, or to acquit Petitioner of any offense relating to Count One." *Id.*

Petitioner's counsel moved for a a directed verdict on the charge of continuous sexual abuse, based on a lack of evidence of inducement, which motion was denied. (DE 8-11 at 162-170). It is possible that counsel made a strategic decision that, if the jury agreed Petitioner had not induced the children into a sexual performance, the jury would have to acquit Petitioner on this charge if the jury could not consider a lesser-included offense. Additionally, to determine whether a jury instruction for a lesser offense should be given, Texas law requires that: (1) "the lesser included offense must be within the proof necessary to establish the offense charged"; and (2) "there must be some evidence in the record that if the defendant is guilty, he is guilty only of the lesser offense." *Richards v. Quarterman*, 566 F.3d 553, 568 (5th Cir. 2009).

In denying this claim in Petitioner's state habeas action, the Texas Court of Criminal Appeals could reasonably conclude that either a lesser-included offense instruction was not warranted or that counsel had a strategic reason for not asking for a lesser-included offense instruction. A federal habeas court must defer to the state court's interpretation of its law on whether a lesser-included offense instruction is warranted, *Creel v. Johnson*, 162 F.3d 385, 390-91 (5th Cir. 1998); *Valles v. Lynaugh*, 835 F.2d 126, 128 (5th Cir. 1988), and counsel's performance cannot be considered deficient or prejudicial if counsel fails to raise a non-meritorious argument. *Turner*, 481 F.3d at 298; *Parr*, 472 F.3d at 256. Additionally, counsel's strategic choices, when made after an investigation of the facts, are "virtually unchallengeable" with regard to the *Strickland* analysis. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Richards*, 566 F.3d at 566; *Geiger v. Cain*, 540 F.3d 303, 309-10 (5th Cir. 2008) (finding counsel had a legitimate, strategic reason for failing to request a jury instruction on accomplice testimony).

Because the state trial court could have reasonably concluded that a motion for a lesser-included offense instruction was not likely to succeed, or that counsel's decision to not request such an instruction was strategic because it then allowed for the possibility of acquittal on the charge of continuous sexual abuse, the state court's decision was not an unreasonable application of or contrary to the Supreme Court's decision in *Strickland*.

c. Unanimity of the verdict

Petitioner argues that his counsel failed to assert that the continuous sexual abuse statute violated his right to a "unanimous verdict under the Texas Constitution, and a majority verdict under the United States Constitution, by not requiring the jury to vote unanimously regarding which two

underlying elements they were relying upon to find the Petitioner guilty of Continuous Sexual Abuse." (DE 1 at 19).

The Texas state courts have consistently held that the subject statute does not violate a defendant's right to jury unanimity, and this conclusion has been impliedly affirmed by the United State Supreme Court when it has rejected petitions for certiorari in these cases. *Fulmer v. Texas*, 401 S.W. 3d 305, 311-12 (Tex. App.–San Antonio 2013, pet. ref'd) , *cert. denied*, 134 S. Ct. 436 (2013); *Render v. State*, 316 S.W. 3d 846, 857-58 (Tex. App–Dallas 2010, pet. ref'd), *cert. denied*, 562 U.S. 1243 (2011). *See also Eannarino v. State*, 2015 WL 6900423 (Tex. App.–San Antonio 2015, pet. ref'd), *cert. denied*, 137 S. Ct. 248 (2016). Accordingly, counsel's failure to raise this claim was not deficient performance or prejudicial as the claim was without merit.

Additionally, because the Texas statute requires a unanimous verdict on the substantive charge of continuous sexual abuse of a child, rather than on the manner and means of committing that crime, Petitioner's conviction did not violate Petitioner's right to a majority verdict pursuant to the holdings of the United States Supreme Court. In *Schad v. Arizona*, 501 U.S. 624 (1991), the Supreme Court recognized the general rule that a single count in an indictment may include allegations that the defendant committed the offense by one or more specified means, and held that there is no constitutional requirement that the jury reach unanimity on the preliminary factual issues which underlie the verdict. *Id.* at 631-32 (plurality opinion) & 649-50 (Justice Scalia's separate concurring opinion in which he specifically agreed with the plurality's determination that the jury need not agree on the mode of commission of a single crime when that offense can be committed in various ways). *See also Reed v. Quarterman*, 504 F.3d 465, 482 (5th Cir. 2007) ("In the instant case, we are faced not with alternate theories of premeditated murder and felony murder but with alternate theories of

murder in the course of a robbery and murder in the course of attempted rape. It is a reasonable application of *Schad*, however, to conclude that the same result obtains").

Counsel's failure to raise a meritless claim cannot be considered either deficient performance or prejudicial. Because raising this claim was not likely to succeed, the state court's decision denying this claim was not contrary to or an unreasonable application of *Strickland*.

d. Jury instruction regarding admonishment

Petitioner claims he was denied his right to the effective assistance of counsel because counsel failed to object to the jury charge that falsely stated Petitioner had been properly admonished before pleading guilty. (DE 1 at 23).

Trial counsel's failure to object does not constitute deficient representation unless a sound basis exists for objection. *Emery v. Johnson*, 139 F.3d 191, 198 (5th Cir. 1997) (holding a futile or meritless objection cannot be grounds for a finding of deficient performance). To succeed on such a claim, a petitioner must show that the trial court would have sustained the objection and that it would have actually changed the result of his trial. *Strickland*, 466 U.S. at 694. Failure to make a frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness. *Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998). As previously noted, if a state appellate court found a claim based on state law without merit, counsel's failure to assert the claim is not prejudicial. *Garza v. Stephens*, 738 F.3d 669, 677 (5th Cir. 2013); *Charles v. Thaler*, 629 F.3d 494, 500-01 (5th Cir. 2011).

The Texas Court of Criminal Appeals denied this claim for relief. The state court could reasonably conclude that, pursuant to state law, Petitioner was sufficiently admonished and, therefore, that any assertion by counsel to the contrary was without merit. Additionally, as explained above,

Petitioner's guilty pleas were knowing and voluntary as those terms are defined by federal common law. Accordingly, the state court's decision denying the claim was not clearly contrary to or an unreasonable application of the *Strickland* standard.

5. Improper closing argument by the State

Petitioner alleges that the prosecutor "inflamed the passions of the jury" by "interjecting" the prosecutor's opinions about the alleged crimes into closing argument. (DE 1 at 20). Specifically, Petitioner challenges the prosecutor's statements that the alleged crimes were "worse than a murder case," and that the prosecutors had "cried over this case," because "[e]very picture that you saw – what you saw was a soul murdered and left behind." (DE 8-12 at 44) (internal quotations omitted).

Prosecutorial misconduct may constitute a denial of a defendant's federal constitutional right to due process of law if the trial was rendered fundamentally unfair as a result. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). A trial is fundamentally unfair if there is a reasonable probability the verdict might have been different had the trial been properly conducted. *Rogers v. Lynaugh*, 848 F.2d 606, 608-09 (5th Cir. 1988). To violate the defendant's right to due process, the prosecutor's misconduct must be persistent and pronounced, or the evidence of guilt so insubstantial that the conviction would not have occurred but for the improper remarks. *Geiger*, 540 F.3d at 308. With regard to a prosecutor's statements in closing argument, the Fifth Circuit Court of Appeals has stated: "Our question on habeas review is not whether the argument warrants our strong rebuke, but whether the statement, in light of the entire trial, demonstrates a due process violation." *Foy v. Donnelly*, 959 F.2d 1307, 1319 (5th Cir. 1992) (denying habeas relief even when prosecutor's statements in closing argument were "clearly improper"). "A prosecutor's improper argument will, in itself, exceed

constitutional limitations in only the most egregious cases." *Harris v. Cockrell*, 313 F.3d 238, 245 n.12 (5th Cir. 2002) (internal quotations omitted).

Having reviewed the entire record in this matter, the undersigned concludes that the prosecutor's remarks were not persistent and pronounced, nor was the evidence of guilt so insubstantial that the conviction would not have occurred but for the challenged statements. It cannot be said that these remarks were "a crucial, critical, highly significant factor upon which the jury based its verdict of guilty." *Id.*, 313 F.3d at 245 (internal quotations omitted). Nor were the prosecutor's challenged remarks "egregious," even though they may have been undesirable or worthy of rebuke. Accordingly, the state court's decision denying relief on this claim was not clearly contrary to or an unreasonable application of federal law.

6. Ineffective assistance of appellate counsel

Petitioner asserts his appellate counsel's performance was deficient because he did not challenge: (1) the constructive amendment of the indictment; (2) that his guilty pleas were unknowing and involuntary; and (3) that his convictions violated his right to be free of double jeopardy. (DE 1 at 22).

To succeed on an ineffective assistance of appellate counsel claim, a petitioner must first show that his counsel's performance was objectively unreasonable in failing to find arguable issues to raise in the appeal, i.e., that counsel unreasonably failed to discover non-frivolous issues and to file a merits brief raising those issues. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Dorsey v. Stephens*, 720 F.3d 309, 319-20 (5th Cir. 2013). To establish ineffective assistance when appellate counsel filed a merits brief, a petitioner must show that "a particular nonfrivolous issue was clearly stronger than issues counsel did present." *Robbins*, 528 U.S. at 288. The process of "winnowing out weaker arguments

on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (internal quotations omitted). If the petitioner is able to establish that appellate counsel's performance was deficient, he then must demonstrate prejudice arising from the deficient performance of appellate counsel. To establish prejudice, the petitioner must show a reasonable probability that, but for his counsel's unreasonable failure to assert a particular claim on appeal, he would have prevailed in the appeal. *Robbins*, 528 U.S. at 286; *Moreno v. Dretke*, 450 F.3d 158, 168 (5th Cir. 2006).

Because none of these issues were more meritorious than the issues presented by appellate counsel, as explained more thoroughly above with regard to those specific issues, the state court's denial of relief on this claim was not clearly contrary to *Strickland.*

7. Insufficient evidence

Petitioner alleges there was insufficient evidence to sustain his conviction on the count of continuous sexual abuse of a child. Petitioner presented this same claim in his appeal. The Texas Court of Appeals reviewed the trial record and denied the claim, stating:

> Viewing the foregoing evidence in the light most favorable to the jury's verdict, we conclude that any rational trier of fact could have found that Schaefer induced "through his persuasion or influence" young children living and visiting in his home to engage in sexual conduct by a lewd exhibition of their genitals. While the term "induce" is not defined by the Penal Code, courts have interpreted the term using its commonly understood meaning of "to move and lead by persuasion or influence" or "to persuade, prevail upon, or bring about." *See Bell v. State*, 326 S.W.3d 716, 720 (Tex. App.–Dallas 2010, pet. ref'd, untimely filed); *see also Dornbusch v. State*, 156 S.W.3d 859, 867 (Tex. App.–Corpus Christi 2005, pet. ref'd) (adopting common definition of "induce," which is "to move by persuasion or influence" or "to bring about by influence") . . . There is no requirement "either in the statute or the common understanding of the word" that inducement be verbal and explicit or that the defendant use force. *Dornbusch*, 156 S.W.3d at 867. Rather, there is sufficient evidence of inducement where a defendant uses his position of authority to create a situation in which a child is unable or afraid to refuse his sexual advances. *See id.*

Schaefer, 2014 WL 3410589, at *4.

The Texas Court of Appeals then determined:

> This evidence at trial directly refutes Schaefer's argument that he did not induce the children's behavior and was merely taking "advantage of a situation which he did not curtail." Based on the foregoing, we conclude that a rational trier of fact could have found that Schaefer induced these lewd exhibitions. We hold the evidence is sufficient to support the conviction and overrule Schaefer's first point of error.

Id. at *5.

A claim that there was insufficient evidence to sustain a habeas petitioner's conviction is evaluated by the standard stated in *Jackson v. Virginia*, 443 U.S. 307 (1979). Pursuant to this standard, a state prisoner is entitled to habeas corpus relief if a federal judge finds that "upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324, *quoted in McDaniel v. Brown*, 558 U.S. 120, 121 (2010).

The Texas Court of Appeals thoroughly examined the evidence presented at Petitioner's trial and concluded a rational trier of fact could have found Petitioner guilty of continuous sexual abuse of a child. The state court's decision was not clearly contrary to or an unreasonable application of federal law as stated by the United States Supreme Court in *Jackson* and, accordingly, Petitioner is not entitled to habeas relief on this claim.

8. Sentencing error

Petitioner argues that "The court stacked eleven total sentences instead of 10, as reflected in the judgement of the Court. However, the trial Court announced a total of Ten counts. Therefore, the sentence should be reformed to match the oral announcement at trial." (DE 1 at 25). Petitioner raised this issue in his appeal, and the Texas Court of Appeals denied relief, finding the imposition of sentence complied with state law. *Schaefer*, 2014 WL 3410589, at *6.

It is axiomatic that federal habeas corpus relief does not lie for errors of state law, including state law governing the imposition of a criminal sentence. *Wilson v. Corcoran*, 562 U.S. 1, 4-5 (2010); *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Claims arising from a state sentencing decision are not cognizable under § 2254 unless the sentence imposed exceeds the statutory limits or is "wholly unauthorized by law." *Haynes v. Butler*, 825 F.2d 921, 924 (5th Cir. 1987). Because federal courts do not review a state's failure to adhere to its own sentencing procedures, Petitioner's claim with regard to the stacking of his sentences does not present a possible basis for habeas corpus relief. *Jones v. Estelle*, 622 F.2d 124, 126 (5th Cir. 1980); *Nichols v. Estelle*, 556 F.2d 1330, 1331 (5th Cir. 1977).

CONCLUSION

None of Petitioner's claims for federal habeas relief are meritorious. There was sufficient evidence of Petitioner's guilt to sustain his conviction on the charge of continuous sexual abuse of a child and Petitioner's right to be free of double jeopardy was not violated by this conviction. Petitioner was not denied his right to due process or a fair trial, and Petitioner was not denied his right to the effective assistance of trial or appellate counsel. Accordingly, the state courts' denials of relief on these claims were not clearly contrary to or an unreasonable application of federal law.

RECOMMENDATION

It is, therefore, recommended that Petitioner's Application for Writ of Habeas Corpus be **DENIED**.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). 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 (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 dismissal or denial of the Petitioner's section 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, it is respectfully recommended that the Court shall not issue a certificate of appealability.

OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *Battles v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the district court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the district court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-153 (1985); *Douglass v. United Servs. Auto. Assoc.*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

SIGNED on June 21, 2017.

MARK LANE
UNITED STATES MAGISTRATE JUDGE