IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-10420

A True Copy
Certified order issued May 30, 2018

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

MICHEAL JERRIAL IBENYENWA,

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 Northern District of Texas

O R D E R:

Micheal Jerrial Ibenyenwa, Texas prisoner # 1638105, was convicted by a jury of continuous sexual abuse of a child under the age of 14 (count one); two counts of aggravated sexual assault of a child (counts two and three); and two counts of indecency with a child—sexual contact (counts four and five). He was sentenced to 50 years of imprisonment for the first three counts, to run concurrently, and to 20 years of imprisonment for counts four and five, to run consecutively to the sentences for the first three counts and concurrently with one another. The Texas Court of Appeals affirmed Ibenyenwa's conviction on the first count and vacated his convictions on the remaining four counts on double jeopardy grounds.

APPX. A

Ibenyenwa moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application challenging his remaining conviction of count one. He argues that (1) his challenge to the constitutionality of Texas Penal Code § 21.02 was not procedurally barred because he demonstrated cause and prejudice; (2) his due process right to a fair trial was violated when the State, in violation of the Double Jeopardy Clause, maliciously charged him on counts two through five after he exercised his constitutional right to plead not guilty to count one; and (3) trial counsel was ineffective for (a) failing to object to the constitutionality of § 21.02, (b) failing to argue that his indictment, the jury charge, and the evidence violated the Double Jeopardy Clause, (c) improperly advising him that he could be eligible for probation, which caused him to reject the State's plea offer of 10 years of imprisonment, and (d) failing to inform him that the State had made a plea offer of 15 years of imprisonment, even though he had asked counsel to seek a plea deal. He also challenges the district court's denials of his motions for discovery and for an evidentiary hearing. Additionally, he moves for a standing order on authorities, a preliminary injunction or temporary restraining order (TRO) pending appeal, and leave to file a supplement to the motion for an injunction or TRO pending appeal.

To obtain a COA, Ibenyenwa 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). A movant satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327; *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where the district court's denial of federal habeas relief is based on procedural

grounds, this court will issue a COA "when the prisoner shows, at least, that jurists of reason would find it debatable whether the [motion] 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*, 529 U.S. at 484. Ibenyenwa has not met these standards.

Accordingly, Ibenyenwa's motion for a COA is DENIED. His motions for a standing order on authorities, a preliminary injunction or TRO pending appeal, and leave to file a supplement to the motion for an injunction or TRO pending appeal are DENIED AS MOOT.

GREGG J. COSTA
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MICHAEL JERRIAL IBENYENWA, Petitioner,	§ § §	
v.	§	Civil Action No. 4:15-CV-060-O
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§ § § §	

FINAL JUDGMENT

In accordance with its opinion and order signed this day, the Court **DENIES** the petition of Michael Jerrial Ibenyenwa pursuant to 28 U.S.C. § 2254 in the above-captioned action.

SO ORDERED on this 13th day of March, 2017.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MICHAEL JERRIAL IBENYENWA,	§	
	§	
Petitioner,	§	
	§	
v.	§	Civil Action No. 4:15-CV-060-O
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

OPINION AND ORDER

Before the Court is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by petitioner, Michael Jerrial Ibenyenwa, a state prisoner confined in the Correctional Institutions Division of the Texas Department of Criminal Justice (TDCJ), against Lorie Davis, Director of TDCJ, Respondent. After considering the pleadings and relief sought by Petitioner, the Court has concluded that the petition should be denied.

I. BACKGROUND

In July 2009 Petitioner was indicted in Tarrant County, Texas, Case No. 1149004D, on one count of continuous sexual abuse of a child younger than 14 years of age (Count One), two counts of aggravated sexual assault of a child younger than 14 years of age (Counts Two and Three), two counts of indecency with a child (Counts Four and Five), and one count of indecent exposure (Count Six). Adm. R., Clerk's R. 2-3, ECF No. 15-16. On April 6, 2010, the state waived Count Six and, on April 8, 2010, Petitioner's jury trial commenced on Counts One through Five. *Id.*, Reporter's R., vol. 2, 9, ECF No. 15-9. The jury found Petitioner guilty of all five offenses and assessed his punishment at 50 years' confinement on Counts One, Two, and Three and 20 years' confinement on

APPX. B

Counts Four and Five. Adm. R., Clerk's R. 150-64, ECF No. 15-16. On direct appeal, the Second District Court of Appeals of Texas affirmed Petitioner's conviction under Count One for continuous sexual abuse but vacated his convictions under Counts Two through Five as violative of double jeopardy, and the Texas Court of Criminal Appeals refused Petitioner's petition for discretionary review. *Id.*, Op. on State's Mot. for Reh'g 11-12, ECF No. 15-6 & Docket Sheet, ECF No. 15-4. Petitioner also filed two state habeas-corpus applications challenging his conviction, which were consolidated and denied by the Texas Court of Criminal Appeals without written order or a hearing on the findings of the trial court. *Id.*, Action Taken, ECF Nos. 16-6 & 16.9. This federal petition followed.

The testimony at trial was that the child victim Z.M., who was six years old at the time of the offense, her mother, and Petitioner, her mother's boyfriend and a father figure to Z.M., lived together in Arlington, Texas. After losing his job in December 2008, Petitioner began taking Z.M. to school and picking her up in the afternoons while her mother was working. In January 2009, when Z.M. was in first grade, the child told her mother that Petitioner had touched her on her private area with his private area and puts his private in her private. *Id.*, Reporter's R., vol. 3, at 38, 42, 47-51, ECF No. 15-10. A sexual assault exam was done on the same day of Z.M.'s outcry to her mother. Z.M. told or acknowledged to the sexual assault examiner, among other things, that Petitioner touched her private that day; that she lost count of how many times he touched her private; that Petitioner's private touched the "inside" of her private and it hurt sometimes; that Petitioner put his fingers inside her private; that she had to put her mouth on Petitioner's private; and that sometimes stuff came out of his private that looked like "clear pee." *Id.*, vol. 4, at 18, ECF No. 15-11. Z.M. made similar statements to a CPS child forensic interviewer during a recorded interview, including statements

regarding a "penis being hard or soft" and describing the taste of the "clear stuff" that came out of Petitioner's penis as "salty." Z.M. was also able to demonstrate various sexual acts with anatomical dolls and denied that anyone else abused her. *Id.* at 167-71. Z.M.'s testimony at trial was largely consistent with her earlier statements regarding the specifics of the abuse; she demonstrated for the jury various acts Petitioner performed on her or had her perform on Petitioner with the anatomically-correct dolls; and she testified that the abuse started during the school year in kindergarten and happened "a few days in the week" until she told her mother about it. *Id.* at 94-103. Notwithstanding the absence of any forensic or physical findings of abuse, the CPS investigator found reason to believe sexual abuse had occurred.[1] *Id.* vol. 3, at 115 & vol. 4, at 18. Petitioner testified on his own behalf at trial and denied all the allegations.

II. ISSUES

In six grounds, Petitioner raises the following claims:

- His trial was rendered fundamentally unfair "from indictment thru guilt/innocence to the court's charge instructions to the jury as a result of being permeated with a prejudicial prosecutorial strategy that embraced and persuaded from offenses that were violations of double jeopardy";
- Defense counsel was ineffective "for failing to lodge objections(s), request(s), motion(s), or some other behavior(s) the constitutionality of the continuous sexual abuse statute" under § 21.02 of the Texas Penal Code;
- Defense counsel was ineffective for failing to "lodge objection, request and/or motion regarding the constitutionality of the indictment and/or jury charge at guilt/innocence due to double jeopardy violations";
- The continuous sexual abuse statute is unconstitutional on its face and/or as applied to him;

[1]There was DNA evidence of seminal fluid on a comforter from Petitioner's bedroom, which was considered insignificant. *Id.*, vol. 4, at 43.

- Defense counsel was ineffective for failing to inform him of the state's 15-year plea bargain offer which he would have accepted had he known; and
- Defense counsel was ineffective for erroneously advising him that he was eligible for probation which kept him from accepting an earlier 10-year plea bargain offer by the state.

Am. Pet. 6-7, ECF No. 7.

III. RULE 5 STATEMENT

Respondent believes that the petition is neither barred by the statute of limitations or successiveness and that Petitioner has sufficiently exhausted the claims in state court. Resp't's Ans. 8, ECF No. 18.

IV. DISCUSSION

A. Standard of Review

A § 2254 habeas petition is governed by the heightened standard of review provided for in the Anti-Terrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. § 2254. Under the Act, a writ of habeas corpus should be granted only if a state court arrives at a decision that is contrary to or an unreasonable application of clearly established federal law as established by the Supreme Court or that is based on an unreasonable determination of the facts in light of the record before the state court. 28 U.S.C. § 2254(d)(1)–(2); *Harrington v. Richter,* 562 U.S. 86, 100 (2011). This standard is difficult to meet and "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings." *Harrington*, 562 U.S. at 102. Additionally, the statute requires that federal courts give great deference to a state court's factual findings. *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000). Section 2254(e)(1) provides that a determination of a factual issue made by a state court shall be presumed to be correct. A petitioner has the burden of

rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *Williams v. Taylor*, 529 U.S. 362, 399 (2000). Finally, when the Texas Court of Criminal Appeals denies a federal claim in a state habeas-corpus application without written opinion, a federal court may presume "that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary" and applied the correct "clearly established federal law, as determined by the Supreme Court of the United States" unless there is evidence that an incorrect standard was applied, in making its decision. *Johnson v. Williams*, — U.S. —, 133 S. Ct. 1088, 1094 (2013); *Harrington*, 562 U.S. at 99; *Schaetzle v. Cockrell*, 343 F.3d 440, 444 (5th Cir. 2004).

B. Unfair Trial

Under his first ground, Petitioner claims "his trial was fundamentally unfair from indictment thru guilt/innocence to the court's charge instructions to the jury as a result of being permeated with a prejudicial prosecutorial strategy that embraced and persuaded from offenses that were violations of double jeopardy." Am. Pet. 6, ECF No., ECF No. 7. According to Petitioner–

> [o]n appeal, the defense appellate attorney, the State's Appellate Attorney, the District Attorney who prosecuted [him], and the three Appellate Judges all agreed that Counts 2, 3, 4, 5, 6, were violations of the Fifth Amendment's Double Jeopardy Clause. Thus, the Prosecutor's strategic choice to indict, litigate, prosecute and charge to the Jury was either out of incompetence or intentionally. At first the Prosecutor only indicted on Count One (the count that contained the other five) but after non-acceptance of plea offers the prosecutor re-indicted with 6-Counts. The jury was prejudicially pushed to believe that petitioner must be guilty of some sexual offense in light of the numerous sexual offense counts he pled to, was indicted for, prosecuted and instructed to the jury in the Court's jury charge. Along with multiple verdict forms, as well as, no defense objections.

Id. at 6-6a.

This claim appears to raise the question whether it was misconduct for the state to go forward

with the prosecution of Petitioner on the additional counts after he rejected all plea offers. The state habeas court found that, although Petitioner "ultimately improperly received multiple sentences in violation of the protections against double jeopardy" *"at the end* of trial," there was no evidence that that fact caused him prejudice throughout the trial. Adm, R., State Habeas R. - 02, 448, ECF No. 16-15 (emphasis in original). Thus, the court concluded that Petitioner failed to prove that his trial was fundamentally unfair, and the Texas Court of Criminal Appeals in turn denied relief based on the habeas court's findings. *Id.* at 452.

A prosecutor violates due process when he brings additional charges solely to punish the defendant for exercising a constitutional or statutory right. *Bordenkircher v. Hayes,* 434 U.S. 357, 363 (1978). However, filing additional legitimate charges after a defendant refuses to plead guilty does not raise a presumption of vindictiveness. *Id.* at 380-81. When plea negotiations fail, a prosecutor may modify the charges against a defendant. *See United States v. Goodwin,* 457 U.S. 368, 380 (1982) (holding "[a]n initial indictment–from which the prosecutor embarks on a course of plea negotiation–does not necessarily define the extent of the legitimate interest in prosecution. For just as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded"). *See also United States v. Noushfar,* 78 F.3d 1442, 1446 (9th Cir. 1996) (providing that during plea negotiations "prosecutors may threaten additional charges and carry through on this threat"). Petitioner fails to demonstrate that the state courts' adjudication of this claim is contrary to or an unreasonable application of clearly established federal law as established by the Supreme Court or based on an unreasonable determination of the facts in light of the record before the state courts. Nothing in the record objectively establishes that

the prosecutor's charging decision–*i.e.*, to add charges that Petitioner was legitimately subject to prosecution, was motivated by his desire to punish Petitioner for rejecting the plea offers and pleading not guilty and pursuing a jury trial.

C. Constitutionality of Texas Penal Code § 21.02

Under his fourth ground, Petitioner claims the state's continuous-sexual-abuse statute under § 21.02 of the Texas Penal Code is unconstitutional on its face and as applied to him as follows:

- "it mandates no unanimity on the separate violations alleged therein";
- the "indictment and jury charge at guilt/innocence instructed the same penal law offenses doubled-up resulting in . . . judgments of convictions in violation[] of double jeopardy"; and
- the "indictment and jury charge demonstrated via the wording and instructions that the specific sexual abuse penal code-law offenses were essential elements and not manner and means."

Am. Pet. 7, ECF No. 7.

Section 21.02, in relevant part, states:

> (b) A person commits an offense if:
>
> (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; and
>
> (2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age.
>
> (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:
>
> . . .
>
> (2) indecency with a child under Section 21.11(a)(1), if the actor committed the offense in a manner other than by touching, including touching through clothing, the breast of a child;
>
> . . .
>
> (4) aggravated sexual assault under Section 22.021;
>
> . . .

> (d) If a jury is the trier of fact, members of the jury are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. The jury must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse.
>
> . . .

TEX. PENAL CODE ANN. § 21.02(b)-(d) (West Supp. 2014).

The state appellate and habeas courts found that Petitioner's constitutional challenge to the statute was forfeited because his complaints were not raised in the trial court at the time when such error could have been avoided or corrected and, thus, were not preserved for review. Adm. R., State Habeas R. - 02, 450, 457, ECF No. 16-15. Respondent contends the claims are barred from this Court's review based on the procedural default in state court. Resp't's Answer 13-15, ECF No. 18.

The Fifth Circuit has recognized that the Texas contemporaneous-objection rule, which requires a timely objection to preserve error for appeal, is strictly and regularly applied, and is therefore an adequate state procedural bar to federal review. *Dowthitt v. Johnson,* 230 F.3d 733, 752 (5th Cir. 2000). In other words, when a state law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court. *Ylst v. Nunnemaker,* 501 U.S. 797, 801 (1991); *Wainwright v. Sykes,* 433 U.S. 72, 87-88 (1977); *Murray v. Carrier,* 477 U.S. 478, 485-492 (1986). In such cases, federal habeas review of the claim is barred unless a petitioner can demonstrate "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice" due to actual innocence. *Sawyer v. Whitley,* 505 U.S. 333, 339-40 (1992); *Coleman v. Thompson,* 501 U.S. 722, 750 (1991). "This doctrine ensures that federal courts give proper respect to state procedural rules." *Glover v. Cain,* 128 F.3d 900, 902 (5th Cir.

1997). Accordingly, Petitioner's claims are barred under the doctrine of procedural default unless he can show that he fits within an exception to that rule. *Id.*

Toward that end, Petitioner asserts as cause his defense counsel's failure to raise his constitutional challenge to § 21.02 at trial. Pet'r's Reply 3, ECF No. However, as discussed *infra,* counsel was not ineffective by failing to raise the legal proposition because it was not settled at the time of Petitioner's trial. Adm. R., State Habeas R., vol. 3, 448, 453-54, ECF No. 16-15. Nor does he allege that he is actually innocent of the offense upon which he stands convicted. Accordingly, Petitioner's procedural default in state court bars federal review of his constitutional claims in this Court.

D. Ineffective Assistance of Counsel

Under grounds two, three, five, and six, Petitioner claims defense counsel was ineffective by–

- failing to "lodge objection(s), request(s), motion(s), or some other behavior(s) to the constitutionality of the continuous sexual abuse statute";
- failing to "lodge objection, request and/or motion regarding the constitutionality of the indictment and/or jury charge at guilt/innocence due to double jeopardy violations";
- failing to inform Petitioner of the state's 15-year plea bargain offer; and
- erroneously advising Petitioner that he was eligible for probation.

Am. Pet. 6-7, ECF No. 7 .

A criminal defendant has a constitutional right to the effective assistance of counsel at trial and on a first appeal as of right. U.S. CONST. amend. VI, XIV; *Evitts v. Lucey*, 469 U.S. 387, 393-95 (1985); *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Anders v. California*, 386 U.S. 738,

744 (1967). An ineffective assistance claim is governed by the familiar standard set forth in *Strickland v. Washington*. 466 U.S. at 668. To establish ineffective assistance of counsel a petitioner must show (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that but for counsel's deficient performance the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688. Both prongs of the *Strickland* test must be met to demonstrate ineffective assistance. *Id.* at 687, 697. In applying this standard, a court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance or sound trial strategy. *Id.* at 668, 688-89. Judicial scrutiny of counsel's performance must be highly deferential and every effort must be made to eliminate the distorting effects of hindsight. *Id.* at 689. The Supreme Court recently emphasized in *Harrington v. Richter* that—

> [t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.

562 U.S. at 101 (quoting *Williams v. Taylor,* 529 U.S. 362, 410 (2000) (emphasis in original)). Accordingly, it is necessary only to determine whether the state courts' adjudication of Petitioner's ineffective assistance claims was contrary to or an objectively unreasonable application of *Strickland. Bell v. Cone,* 535 U.S. 685, 698-99 (2002); *Kittelson v. Dretke,* 426 F.3d 306, 315-17 (5th Cir. 2005); *Schaetzle v. Cockrell,* 343 F.3d 440, 443 (5th Cir. 2003).

Petitioner's lead defense counsel, Mamie Johnson, filed an affidavit, supported by

documentary exhibits, in the state habeas proceedings responding to Petitioner's allegations as follows:

> From indictment thru guilt/innocence to the Jury, the Jury heard the testimony of witnesses as to the alleged offenses relating to the dates (on or about) that they occurred. The testimony of each witness dealt with the alleged conduct of defendant. Although the additional counts in the indictment were found to be double-jeopardy by the Higher Court, the testimony of alleged conduct remained the same.
>
> . . .
>
> The Continuous Sexual Abuse Statute was somewhat new at the time of Trial. Up until that time, based upon my understanding of the law, legal articles and Advance Criminal Law Seminars, I had no reason to believe said statue [sic] had constitution issues.
>
> . . .
>
> As stated in the response provided above, the Continuous Sexual Abuse Statute was somewhat new at the time of Trial. Up until that time, based upon my understanding of the law, legal articles and Advance Criminal Law Seminars, I had no reason to believe there was an issue of Double-Jeopardy in the Indictment and/or the Jury Charge. Moreover, the same evidence that was used for four counts, was the same evidence that would have been used if it had been one count. No additional evidence came in as a result of the four counts.
>
> . . .
>
> Although I did not like the Continuous Sexual Abuse Statute from it's [sic] inception, there was no indication via legal articles or advance continual educational seminars to give me reason to question it.
>
> . . .
>
> Mr. Ibenyenwa was most definitely made aware of the last offer made of 15 years TDC by Mr. Vasser. . . . From date of hire, up until a few months prior to Trial, Mr. Ibenyenwa was adamant he did not want to accept any plea bargain. As a result of his stance, I suggested he watch a Jury Trial in which the same or similar offense as his was being tried. Consequently, the watching of the Trial got his attention and had an affect on him. Mr. Ibenyenwa called me in tears. That's why I attempted to get 5 years if I could get it. But Mr. Vasser rejected the 5 years offer and offered 15 years TDC. That offer was only available for 5 days . . . . I spoke with Mr.

> Ibenyenwa, who immediately said "No" to 15 years, as it was already a chore for him to accept 5 TDC. We met in my office to prepare for Trial on the day the 15 years offer was to expire at noon. After Mr. Ibenyenwa again said "NO" to 15 years, we continued preparing for Trial . . . .

Adm. R., State Habeas R. - 02, vol. 3, 412-13, ECF No. 16-15 (reference to exs. omitted)).

Counsel Mary Moore, who assisted Johnson, also filed an affidavit stating that during the one meeting she had with Johnson and Petitioner, Petitioner "made it clear that he was not interested in a plea." *Id.* at 417-18.

The state habeas court found Johnson's affidavit credible and supported by the record and adopted the state's proposed factual findings refuting Petitioner's claims. *Id.* at 448-51. Applying *Strickland* to the totality of counsel's representation, the state court concluded that Petitioner failed to prove that counsel was ineffective, that counsel's representation fell below objective standards of reasonableness, or that there existed a reasonable probability that, but for counsel's alleged acts or omissions, the result of the proceedings would have been different, and the Texas Court of Criminal Appeals in turn denied habeas relief based on the habeas court's findings. *Id.* at 452-58. Deferring to those findings, absent clear and convincing evidence in rebuttal, and assuming the Texas Court of Criminal Appeals applied *Strickland* to Petitioner's ineffective assistance claims, the state courts' application of *Strickland* was not unreasonable.

Petitioner claims counsel was ineffective by failing to "lodge objection(s), request(s), motion(s), or some other behavior(s) to the constitutionality of the continuous sexual abuse statute." The state habeas court found that counsel did not have reason to believe the statute was unconstitutional, facially or as applied, because the law was not settled–*i.e.*, not "well considered and clearly defined," at the time of Petitioner's trial in 2010. Thus, the court concluded that,

although "ignorance of well-defined general law, statutes and legal propositions is not excusable," counsel's representation did not fall below an objective standard of reasonableness as no court had found § 21.02 unconstitutional facially or as applied to any defendants at that time. *Id.*, State Habeas R., vol. 3, 453-54, ECF No. 16-15. There is no general duty on the part of counsel to anticipate changes in the law. *United States v. Fields,* 565 F.3d 290, 294-95 (5th Cir. 2009). And, a cursory review of state court cases indicates that the Texas Court of Criminal Appeals did not weigh in on the issue until 2014 when it decided *Price v. State,* 434 S.W.3d 601 (Tex. Crim. App. 2014).

Petitioner claims counsel was ineffective by failing to "lodge objection, request and/or motion regarding the constitutionality of the indictment and/or jury charge at guilt/innocence due to double jeopardy violations." The state habeas court found that counsel's decision not to object to the indictment on double-jeopardy grounds was reasonable given that, as a matter of state law, "[a] defendant may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode." *Id.* at 455. The court also found that counsel had no reason to believe at the time there was an issue of double jeopardy in the jury charge. *Id.* at 449. Thus, the court concluded that counsel was not deficient by not raising the issues because she had no reason to believe there was a legal basis for doing so. *Id.* at 449. Again, there is no general duty on the part of counsel to anticipate changes in the law. *Fields,* 565 F.3d at 294-95.

Petitioner claims counsel was ineffective by failing to inform him of the state's 15-year plea bargain offer and by erroneously advising him that he was eligible for probation. Petitioner asserts that had he known he was ineligible for probation, he would have accepted an earlier 10-year plea bargain offer. Under Texas law, counsel has a duty to inform a defendant about plea bargain offers. *Ex parte Wilson,* 724 S.W.2d 72, 74 (Tex. CIM. App. 1987). The state habeas court found that

counsel properly advised Petitioner of the 15-year plea offer on two occasions. Adm. R., vol. 3, 450, ECF No. 16-15. The court also found that, following a discussion on the record in open court, Petitioner rejected the state's 10-year plea offer again *after* he was advised that he was not eligible for probation. *Id.* at 451. Thus, the court concluded that Petitioner failed to prove that he would have accepted the 10-year plea offer had he been advised differently about his probation eligibility. *Id.* at 458. These claims are refuted by the record and/or conclusory, both of which are insufficient to raise a constitutional issue. *Koch v. Puckett,* 907 F.2d 524, 530 (5th Cir. 1990); *Ross v. Estelle,* 694 F.2d 1008, 1012 (5th Cir. 1983).

V. CONCLUSION

For the reasons discussed herein, Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **DENIED** and a certificate of appealability is **DENIED**.

SO ORDERED on this 13th day of March, 2017.

Reed O'Connor
UNITED STATES DISTRICT JUDGE