APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

In The Fourteenth Court of Appeals

NO. 14-18-00027-CR
NO. 14-18-00028-CR
NO. 14-18-00029-CR

[Filed January 29, 2019]

EX PARTE)
MARK DOUGLAS ROBISON)
)

Affirmed and Memorandum Opinion filed January 29, 2019.

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause Nos. 1324897-B,
1324898-B & 1324899-B

MEMORANDUM OPINION

In this appeal from an order denying habeas corpus relief, we consider four claims of ineffective assistance of counsel. For reasons explained more fully below, we conclude that each claim is without merit. We therefore affirm the habeas court's order.

BACKGROUND

The Trial. Appellant was charged with three counts of possessing child pornography. Appellant testified that he knowingly possessed the pornography, but he claimed that his possession was for a bona fide educational purpose, which is an affirmative defense to prosecution. More specifically, appellant explained that he possessed the pornography because he was researching the scope of child sexual abuse, which he aspired to end.

The prosecutor disputed the sincerity of this defense by pointing out that appellant never discussed his research until after he was indicted. For example, appellant never notified law enforcement before conducting his research, even though he knew that law enforcement frequently tracked the online distribution of child pornography. Similarly, appellant never reached out to a university, a peer review group, or an attorney before conducting his research. Also, he never even alerted his wife about his research.

The prosecutor drew attention to other omissions too. She established that appellant saved thousands of pornographic images to his personal computer, but no scholarly articles. She elicited testimony that appellant chose to remain silent during the execution of a search warrant, rather than explain to his investigators that he possessed child pornography for a bona fide educational purpose. She also elicited testimony that appellant never mentioned his affirmative defense to her during several pretrial hearings.

The jury rejected appellant's affirmative defense, convicted him on all three counts, and recommended that he receive a probated sentence.

The Direct Appeal. Appellant raised three issues in his direct appeal to this court.

In his first issue, appellant argued that the trial court had reversibly erred when it refused to admit two of his self-published books into evidence. We assumed for the sake of argument that the trial court had erred, but we concluded that the error was harmless under the standard for nonconstitutional error.

In his second issue, appellant asserted multiple claims of ineffective assistance of counsel. He first claimed that counsel was deficient by not moving to strike biased members of the venire panel. We concluded that this claim failed because the record did not conclusively establish that the challenged venirepersons were biased. Appellant argued next that counsel was deficient because counsel did not object when the prosecutor elicited testimony about appellant's pre-arrest silence, and because counsel himself also elicited testimony about the same pre-arrest silence. We concluded that these claims failed because the testimony was admissible and because a reasonable strategy could be imagined for counsel's actions. Finally, appellant argued that counsel was deficient by failing to object to the prosecutor's criticism of appellant's post-arrest silence during the pretrial hearings. Even though the record was silent as to counsel's strategy, we concluded that counsel was deficient because no reasonable explanation could be imagined for the failure to object.

However, we held that counsel's deficiency did not result in any prejudice.

In his third issue, appellant argued that the prosecutor had engaged in several forms of misconduct by making improper comments about appellant's pre-arrest and post-arrest silence. We held that this issue was not preserved because counsel never objected to any instance of alleged misconduct.

Having overruled all of appellant's issues, we affirmed the trial court's judgment. *See Robison v. State*, 461 S.W.3d 194, 207 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd).

The Petition for Discretionary Review. Appellant then petitioned for discretionary review before the Texas Court of Criminal Appeals. He asserted two grounds in his petition. First, he argued that the court of appeals had erred by reviewing his evidentiary challenge under the standard for nonconstitutional error, instead of constitutional error. Second, he argued that the court of appeals had erred by holding that a claim of prosecutorial misconduct required a timely objection.

Appellant did not raise a complaint about the ineffective assistance of counsel, and the Court of Criminal Appeals refused his petition without comment.

The Habeas Proceedings. Appellant then filed an application for writ of habeas corpus, in which he asserted four claims of ineffective assistance of counsel.

The first two claims had also been raised as issues in the direct appeal. In these claims, appellant asserted that counsel was deficient for failing to object when the prosecutor referred to appellant's pre-arrest and post-arrest silence.

The third claim was a variation on an issue that had been raised in the direct appeal. Appellant asserted in this claim that counsel was deficient because counsel did not present an argument to the trial court that would make the exclusion of the self-published books reviewable under the more rigorous standard for constitutional error.

The fourth claim was entirely novel. Appellant asserted that counsel was deficient by failing to present expert testimony from two psychologists during the guilt phase of the trial.

Counsel filed an affidavit, addressing his strategy as to each of these claims. The habeas court credited counsel's explanations and denied relief without the benefit of a live hearing. The habeas court also entered written findings of fact and conclusions of law.

Appellant now appeals from the order denying habeas corpus relief.

ANALYSIS

Standard of Review. To prevail on a claim of ineffectiveness, appellant had the burden of proving by a preponderance of the evidence that (1) his trial counsel's performance was deficient, in that it fell below an objective standard of reasonableness; and (2) but for counsel's deficient performance, the outcome

would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The habeas court ruled that appellant did not satisfy this burden with respect to any of his claims. To the extent that the habeas court's ruling was based on an evaluation of credibility and demeanor, we review that ruling for an abuse of discretion, affording almost total deference to the court's findings when they are supported by the record. *See Ex parte Torres*, 483 S.W.3d 35, 42 (Tex. Crim. App. 2016). To the extent that the ruling was based on a pure question of law, or upon a mixed question of law and fact not depending on an evaluation of credibility and demeanor, our review is de novo. *See Ex parte De La Cruz*, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015).

Re-litigated Claims. The habeas court noted in its findings of fact that appellant's first two claims had already been raised and rejected on direct appeal. The habeas court further determined that relief should be denied as to these claims because "issues raised and rejected on direct appeal may not be reconsidered on a post-conviction writ." *See Ex parte Schuessler*, 846 S.W.2d 850, 852 n.6 (Tex. Crim. App. 1993) ("Habeas corpus is traditionally unavailable to review matters which were raised and rejected on appeal.").

Appellant invokes an exception to the habeas court's rule, arguing that a claim may be re-litigated "where direct appeal cannot be expected to provide an adequate record to evaluate the claim in question, and the claim might be substantiated through additional evidence gathering in a habeas corpus proceeding." *See Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App.

1997). Appellant believes this exception applies because "the structure and design of the Texas system . . . make it 'virtually impossible' for an ineffective assistance claim to be presented on direct review." *See Trevino v. Thaler*, 569 U.S. 413, 417 (2013).

For the sake of argument, we will assume without deciding that appellant was allowed to re-litigate his claims, because the outcome is the same in either event. We therefore proceed to the merits.

Pre-arrest Silence. When appellant testified during the guilt phase of his trial, the prosecutor elicited testimony that appellant had been less than forthcoming when he met with investigators during the execution of a search warrant, which occurred before his arrest. The testimony established that appellant never mentioned his alleged research to the investigators when they were executing the search warrant; that appellant terminated a voluntary interview with the investigators and asked to speak to an attorney; and that appellant never disclosed to the investigators which of his personal computers possessed the child pornography. The prosecutor elicited similar testimony from the investigators, who testified that, after a certain point in his interview, appellant "didn't want to talk anymore" and "he stated he no longer wished to cooperate." The prosecutor emphasized all of this evidence in her closing arguments.

In the direct appeal, we were asked to consider whether counsel was deficient because counsel never objected to any of these references to appellant's pre-arrest silence. We held that counsel was not

deficient because "evidence of the defendant's pre-arrest and pre-*Miranda* silence . . . may be admitted for purposes of impeachment without violating the defendant's Fifth Amendment right against self-incrimination." *See Robison*, 461 S.W.3d at 205. And in support of that holding, we cited to two cases from the Texas Court of Criminal Appeals: *Salinas v. State*, 369 S.W.3d 176 (Tex. Crim. App. 2012), *aff'd*, 570 U.S. 178 (2013) (plurality op.), and *Turner v. State*, 719 S.W.2d 190 (Tex. Crim. App. 1986).

Appellant did not challenge our analysis in a motion for rehearing or in his petition for discretionary review. But in his application for writ of habeas corpus, he disputed our reliance on *Salinas*, for apparently two reasons. First, appellant noted that, in his case, the evidence of pre-arrest silence was admitted for impeachment purposes, whereas in *Salinas*, the evidence of pre-arrest silence was admitted for substantive purposes because the defendant there did not testify. Second, appellant noted that when *Salinas* was considered by the United States Supreme Court, a majority of the justices there could not reach a consensus as to whether the Fifth Amendment was applicable to the use of a non-testifying defendant's pre-arrest silence.

These arguments fail for at least three reasons.

First, when we cited to *Salinas*, we were referring to the majority opinion from the Texas Court of Criminal Appeals, which is binding on us—not on the plurality opinion from the United States Supreme Court, which is not binding on us. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987) ("As the

plurality opinion in *MITE* did not represent the views of a majority of the Court, we are not bound by its reasoning."); *Unkart v. State*, 400 S.W.3d 94, 100 (Tex. Crim. App. 2013) ("Plurality opinions do not constitute binding authority.").

Second, the majority opinion from the Texas Court of Criminal Appeals clearly holds that evidence of pre-arrest silence is admissible "regardless of whether a defendant testifies." *See Salinas*, 369 S.W.3d at 179 ("We hold that pre-arrest, pre- *Miranda* silence is not protected by the Fifth Amendment right against compelled self-incrimination, and that prosecutors may comment on such silence regardless of whether a defendant testifies.").

And third, appellant totally failed to address our citation to *Turner*, which involved evidence of pre-arrest silence for impeachment purposes, exactly like appellant's case. *See Turner*, 719 S.W.2d at 193 ("The attorney for the State was correct in his impeachment of the appellant through appellant's pre-arrest statements which failed to mention his alibi. The fact that the appellant failed to inform the police of his alibi on March 28 and April 7, 1983, when he had an opportunity to do so, and in circumstances in which he would be expected to speak out, was admissible to impeach the appellant at trial.").

In one final point, appellant asserts that "this Court should order factual development on the issue to determine counsel's thinking." But counsel has already explained his thinking. Counsel testified in his affidavit that he did not object to the prosecutor's comments about appellant's pre-arrest silence because

he believed that such evidence was admissible for purposes of impeachment. Counsel was correct on that point, for the reasons we have stated here and in appellant's direct appeal. The habeas court was also correct in noting that "counsel cannot be found ineffective for failing to object to admissible evidence." *See Ex parte Jimenez*, 364 S.W.3d 866, 887 (Tex. Crim. App. 2012) ("The failure to object to proper questions and admissible testimony . . . is not ineffective assistance.").

Post-arrest Silence. The prosecutor also remarked on appellant's post-arrest silence. More specifically, she elicited testimony that appellant had appeared for eleven pretrial hearings, and on each of those occasions, he never once approached her to explain that he had been researching child pornography for a bona fide educational purpose.

On direct appeal, we held that counsel was deficient by failing to object to this line of questioning. As we explained:

> Appellant may have had an opportunity to approach the prosecutor and discuss the merits of his defense, but he was under no legal obligation to do so. *See Franklin v. State*, 606 S.W.2d 818, 848 (Tex. Crim. App. 1978) (op. on reh'g) ("Merely having the opportunity to say something does not constitute circumstances in which one would be expected to speak out."). The pretrial hearings were conducted for the limited purpose of resetting the case for a later date, and appellant was represented by counsel during each of the hearings. Appellant was

> entitled to rely on counsel's representation and avoid direct contact with the prosecutor, who acted as his legal adversary. The prosecutor's line of questioning was neither relevant nor appropriate, and we can think of no reason why counsel would not object to the improper criticisms of appellant's in-court silence.

Robison, 461 S.W.3d at 206.

But we further explained that counsel's deficiency did not result in any prejudice:

> The jury heard testimony that appellant was silent during the execution of the search warrant and that he had not mentioned to his wife that he had been researching child pornography. That evidence of pre-arrest silence, which was admissible for impeachment purposes, had already cast serious doubt on appellant's credibility. There is no reasonable likelihood that the jury would have disregarded appellant's pre-arrest silence but not his in-court silence.

Id.

In response to appellant's habeas application, counsel offered the following explanation for his failure to object:

> I did not object to the prosecutor's comments on Mr. Robison's post-arrest silence because the defense has no duty to inform the State of its available defenses. I did not want to alert the State during pre-trial settings of the *bona fide* educational affirmative defense (which, while

certainly codified as an affirmative and available defense, is rarely applied).

Appellant correctly observes that this explanation misses the mark. The claim of ineffectiveness arises out of counsel's omissions during the trial on the merits (when appellant's defensive theory was already known to the prosecutor), not during the pre-trial settings (when the defensive theory may not have been known).

In any event, appellant could not prevail on this claim of ineffectiveness without establishing that the outcome of the trial would have been different but for counsel's failure to object. And as to that point, appellant did not develop any new facts in the habeas record that would alter our conclusion that he suffered no prejudice. Considering the abundance of admissible evidence that appellant had neglected to mention his research to anyone before his arrest, there is no reasonable likelihood that appellant's post-arrest silence moved the jury from a state of non-persuasion to a state of persuasion.

In the absence of any new factual points, appellant challenges our prejudice analysis with two new legal points.

First, appellant argues that we were "wrong" on direct appeal because the failure to object to post-arrest silence is itself prejudicial, citing *Hall v. State*, 161 S.W.3d 142 (Tex. App.—Texarkana 2005, pet. ref'd). But *Hall* is distinguishable because it involved evidence of post-arrest silence only (not pre-arrest silence too), and the defense attorney in that case was found to be deficient in more ways than just his failure

to object to the post-arrest silence. *Id.* at 152–55. Also, the court of appeals in *Hall* conducted a full analysis of prejudice. *Id.* at 155–56. The court of appeals did not summarily conclude that the defendant was entitled to relief due to counsel's failure to object, as appellant would seemingly have us do.

Second, appellant argues that the prejudice from the post-arrest silence is cumulative of the prejudice from the pre-arrest silence, and that we cannot point to one error to excuse the other. This argument is fatally flawed because it depends on the faulty premise that counsel was deficient by not objecting to the evidence of pre-arrest silence. As we explained in the direct appeal and again in this opinion, counsel was not deficient in that regard because the evidence of pre-arrest silence was admissible.

Self-published Books. Counsel offered into evidence two books that appellant authored and self-published. The first book was a collection of poems that appellant wrote nearly twenty years before child pornography was discovered on his personal computer. None of the poems expressly broached the subject of child pornography, but some addressed themes such as "right and wrong" and "nastiness" in the world.

The second book was an educational book that appellant wrote after he was indicted. This book was organized into three parts. The first part addressed appellant's personal relationship with child sexual abuse. The second part addressed the societal problems associated with child sexual abuse, including the harm to the child and the proliferation of child pornography.

The third part included proposals for tackling such problems.

The prosecutor objected to both books on grounds of relevancy and hearsay. Counsel responded that he was not offering the books for the truth of the matter asserted. Counsel also explained that the book of poetry was relevant because it showed that appellant was trying "to get the word out." As for the educational book, counsel explained:

> It's directly relevant as to our affirmative defense as to educational use. [Appellant] has published a document relating to this. The jury can weigh the credibility as to whether it's bona fide or not. But he specifically talks about child pornography, specifically talks about child sexual abuse, references acts that are—most people would classify as that. So, it's part and parcel of our defense.

On direct appeal, we assumed without deciding that the trial court had erred by excluding the books. But we held that the errors were harmless under the standard for nonconstitutional error because the books were cumulative of other evidence. We explained that appellant had testified at length about the contents of his books. We also noted that appellant had produced evidence that he co-hosted a radio program and created a website, both of which were aimed at spreading awareness of child sexual abuse. "Thus," we held, "the jury was still able to consider whether appellant possessed the child pornography for a bona fide educational purpose." *See Robison*, 461 S.W.3d at 201–02.

In his habeas application, appellant asserted that counsel was deficient because counsel did not specifically argue that the exclusion of appellant's books amounted to a constitutional violation. Appellant asserted that if counsel had made that argument—for example, by objecting that the exclusion deprived him of his constitutional right to present a defense—then the exclusion of his books would have been reviewable under the standard for constitutional error, instead of nonconstitutional error.

Counsel did not directly respond to appellant's claim in his affidavit. Instead of addressing the distinction between the two standards for reversible error in criminal cases, counsel merely explained his actions as follows: "I believe I properly invoked Rule 401 of the Texas Rules of Evidence and sufficiently stated my reasons for offering the books into evidence, thereby preserving the complaint for appellate review."

The habeas court found that counsel's actions were appropriate, and we agree for the reasons stated in our opinion on direct appeal.

Also, we conclude that appellant's new arguments in this appeal are meritless. Contrary to appellant's suggestions, we would not have reviewed his evidentiary complaints under the more rigorous standard for constitutional error if counsel had worded his objection differently. "The exclusion of a defendant's evidence will be constitutional error only if the evidence forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense." *Potier v. State*, 68 S.W.3d 657, 665 (Tex. Crim. App. 2002). As we explained in the

direct appeal, appellant was not deprived of the right to present a defense because "the jury was still able to consider whether appellant possessed the child pornography for a bona fide educational purpose." *See Robison*, 461 S.W.3d at 201–02; *see also Vasquez v. State*, 501 S.W.3d 691, 700 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (rejecting a similar argument that the exclusion of evidence was reviewable under the standard for constitutional error).

Expert Testimony. Counsel called two psychologists during the punishment phase of appellant's trial. The primary purpose of the psychologists' testimony was to establish that appellant was not at risk for harming children, and that he would be a good candidate for a sex-offender treatment program while on community supervision.

The psychologists addressed other matters too. They said that appellant admitted to knowingly possessing child pornography, and they indicated that it was possible for a person to possess such pornography without being physically or sexually aroused.

Appellant asserted in his habeas application that counsel was deficient by not calling the same two psychologists during the guilt phase of trial. According to appellant, the psychologists' testimony that a person could possess child pornography without being aroused by it would have supported a finding that he possessed his pornography for a bona fide educational purpose.

Counsel filed a response affidavit, which gave the following explanation for his actions:

My trial strategy involving the two expert witnesses was very straightforward. [The psychologists] were called for the sole and express separate and respective purposes of providing a sex offender diagnostic assessment and then therapist's treatment. They were not consulted on providing expert testimony on Mr. Robison's claims of a *bona fide* educational purpose for viewing child pornography. [The psychologists] were integral to the overall defense of blunting the State's attack that Mr. Robison presented a clear and present danger within the community, and to show that there was absolutely no clinical support whatsoever for the State's comments that Mr. Robison was actually assaulting or could potentially assault children. Was Mr. Robison gathering computer-based images admittedly containing child pornography? Yes. Were those images then fueling later actions of assault against children? No. During guilt-innocence, the experts' testimony would have had to specifically addresses these issues, which [were] outside the scope of their engagement: (1) for a bona fide educational use of child pornography, were they aware that Mr. Robison had never approached law enforcement before he decided to investigate child pornography?; (2) for a bona fide educational use of child pornography, were they aware that Mr. Robison had made no attempt to contact any university, peer review group, or any attorney for guidance before or during his "research" into child pornography; (3) for a bona fide educational use of child pornography, were

> they aware that Mr. Robison had failed to even alert his wife about his desire to research the issue of child pornography (as evidenced by his wife's comments that she was unaware that he had been downloading child pornography); and (4) for a bona fide educational use of child pornography, were they aware that despite saving literally thousands of child pornographic images to his computer, he had written no scholarly peer reviewed articles on this subject?

The habeas court expressly found that counsel's trial strategy was reasonable.

Now on appeal, appellant challenges counsel's explanation by arguing that counsel was deficient by not enlarging the scope of the psychologists' engagement to include these other areas of discussion. This argument fails for two reasons.

First, the habeas court found that both psychologists had formed a preliminary diagnosis of appellant as "a possible pedophile." The habeas court also found that if the psychologists had been called to testify during the guilt phase of trial, this diagnosis would have been revealed to the jury. Counsel could have reasonably determined that the jury should not know this diagnosis when it was deciding appellant's guilt.

Second, the habeas court found that appellant "gave lengthy testimony during guilt-innocence as to his reasons for possessing child pornography, and the jury was free to disbelieve those reasons." Because the psychologists' testimony would have been cumulative

at best, the habeas court found that appellant had not shown a reasonable likelihood of a different outcome. Appellant offers no challenge to this finding, which is supported by the record. Deferring to this finding as we must, we conclude that appellant failed to prove his claim of ineffective assistance of counsel.

CONCLUSION

The habeas court's order is affirmed.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Bourliot, and Spain.

Do Not Publish — Tex. R. App. P. 47.2(b).

APPENDIX B

IN THE 351ST DISTRICT COURT
HARRIS COUNTY, TEXAS

NO. 1324897-B, 1324898-B, 1324899-B

[Filed December 12, 2016]

EX PARTE	)
	)
MARK ROBISON,	)
Applicant	)
	)

STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Court has considered the application for writ of habeas corpus, official court records in the above-captioned cause, and filings by all parties. The Court recommends that the relief requested be denied for the following reasons:

1. The applicant was charged with three counts of possession of child pornography in Harris County, Texas cause numbers 1324897, 1324898, 1324899 (the primary cases)

2. The applicant was represented in the primary cases by retained counsel Thomas Martin. The court finds from the affidavit of Thomas Martin that he was hired in late 2011 or early 2012 and that he

represented applicant at pretrial settings as well as at trial.

3. The applicant pled not guilty to the primary cases and the primary cases proceeded to jury trial.

4. The jury found the defendant guilty and sentenced the applicant to a probated sentence often (10) years and a $10,000.00 fine

5. The Fourteenth Court of Appeals affirmed the applicant's conviction in an opinion delivered on January 22, 2015. *Robison v. State,* 461 S.W.3d 194 (Tex. App.—Houston [14th Dist.] Jan. 22, 2015, pet. Ref'd).

6. The United States Supreme Court held in *Strickland v. Washington,* 466 U.S. 668, 686 (1984), that the benchmark for judging any claim of ineffective assistance of counsel is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. The Court in *Strickland* set forth a two-part standard, which has been adopted by Texas. *See Hernandez v. State,* 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). First, the defendant must prove by a preponderance of the evidence that counsel's performance was deficient, i.e., that counsel's representation fell below an objective standard of reasonableness. *Mitchell v. State,* 68 S. W.3d 640, 642 (Tex. Crim. App. 2002); *Narvaiz v. State,* 840 S.W.2d 415, 434 (Tex. Crim. App. 1992)(citing *Strickland,* 466 U.S. at 688). Second, there must be a reasonable probability that, but for counsel's unprofessional errors,

the result of the proceeding would have been different. *Strickland,* 466 U.S. at 694.

7. The applicant first claims Martin failed to object to the prosecutor's comments on the applicant's pre-arrest silence. *Applicant's Writ* at *6-7.*

8. The applicant claimed on his direct appeal that Martin was ineffective for allowing evidence of silence to be elicited at the applicant's trial. *Robison,* 461 S.W.3d at 202.

9. The appellate court rejected that claim. The appellate court held that evidence of the applicant's pre-arrest and *pre-Miranda* silence could be used for purposes of impeachment without violating the applicant's Fifth Amendment right against self-incrimination. *Id.* at 205. The appellate court found that Martin had no reason to object to the prosecutor's comments regarding the applicant's pre-arrest silence. *Id.* Indeed, trial counsel cannot be found ineffective for failing to object to admissible evidence. *See McFarland v. State,* 845 S.W.2d 824, 846 (Tex. Crim. App. 1992).

10. Issues raised and rejected on direct appeal may not be reconsidered on a post-conviction writ. *Ex parte Schuessler,* 846 S.W.2d 850 (Tex. Crim. App. 1993); *Ex parte Acosta,* 672 S.W.2d 470, 472 (Tex. Crim. App. 1984). Because the applicant has failed to show that Martin was deficient, the applicant's claim should be denied.

11. The applicant next claims Martin failed to object to the prosecutor's comments on the applicant's post-arrest silence. *Applicant's Writ* at *8.*

12. The applicant claimed on his direct appeal that Martin was ineffective for allowing evidence of the applicant's post-arrest silence to be elicited at the applicant's trial. *Robison,* 461 S.W.3d at 206. Again, the appellate court rejected that claim.

13. While the appellate court recognized that Martin was deficient for failing to object to this evidence, it held that the applicant cannot show that he was prejudiced by that error.[1] *Id.* The applicant's claim should be denied.

14. The applicant claims Martin failed to object to the trial court's exclusion of books authored by the applicant on constitutional grounds that it deprived the applicant of his right to present a defense. *Applicant's Writ* at *10-11.*

15. Similarly, on direct appeal, the applicant claimed that the trial court reversibly erred by excluding these books, and that these books were essential to establishing the applicant's affirmative defense. *Robison,* 461 S.W.3d at 200. The appellate court rejected that claim as well. The appellate court held that because the applicant was able to discuss his interest in writing about sexual abuse, exclusion of these books was harmless because the nature of the evidence was established through other means. *Id.*

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[1] Notwithstanding the prosecutor's comments on the applicant's post-arrest silence, the jury had already heard testimony that cast doubt on the applicant's credibility. They heard the applicant was silent during the execution of the search warrant and that he had not mentioned to his wife that he had been researching child pornography. *Robison,* 461 S.W.3d at 206.

16. The appellate court further stated that the admission of these books would have been cumulative of the evidence already established through live testimony. *Id* at 201-202. The court reasoned that even without the books being admitted into evidence, the jury was still able to consider whether the applicant possessed child pornography for a bona fide educational purpose. *Id.*

17. Furthermore, the appellate court held that Martin sufficiently stated the reasons for offering the books into evidence, and that he properly preserved his complaint for appellate review. *Id.* at 201. Because Martin objected to the exclusion of these books and properly preserved the issue for appeal, the applicant fails to show Martin was deficient or that he was prejudiced by Martin's deficiency. The applicant's claim should be denied.

18. The applicant finally claims Martin failed to call as witnesses Dr. Saunders and Dr. Luepnitz in the applicant's case-in-chief during guilt-innocence. *Applicant's Writ* at *12-13.*

19. For this type of claim, the applicant must show that these witnesses were available and that their testimony would have been of some benefit to the defense. *See King v. State,* 649 S.W.2d 42 (Tex. Crim. App. 1983).

20. During the applicant's case-in-chief, Martin called the applicant and the applicant's wife Debra Robison (IV R.R. at 40-97, 140-156).

21. The applicant testified at length that he only possessed child pornography for purposes of

understanding the scope of the problem of child sexual abuse, i.e., for a bona fide educational purpose (IV R.R. at 40-97).

22. The applicant's wife testified that she co-wrote a book with the applicant addressing the problem of child sexual abuse and child pornography, that they started a website for people who had been abused to share their stories, and that they hosted a radio show addressing child sexual abuse (IV R.R. at 140-156).

23. During the punishment phase, Martin called Saunders and Luepnitz to testify regarding their treatment approaches, the applicant's candidacy for the sex offender treatment program, and their belief that the applicant had not acted on any fantasies (VI R.R. at 7-51, 64-70, 71-92).

24. Saunders testified that most participants in the program begin treatment without a disclosure of sexual interest in children, and that the applicant expectedly denied a sexual interest in children but admitted to possessing child pornography (VI R.R. at 39-40).

25. Saunders also testified that the applicant's denial of sexual arousal to children could indicate deception, and would also be at odds with his initial diagnosis of the applicant as a possible pedophile (VI R.R. at 53-54, 58-59, 70).

26. Luepnitz testified that he treated the applicant in fourteen pretrial sessions, and that while the applicant admitted an addiction to adult pornography, he engaged in denial, minimization, and justification to sexual arousal from child pornography

(VI R.R. at 82-84). Luepnitz testified that his preliminary diagnosis of the applicant was a possible pedophile (VI R.R. at 91).

27. While the applicant can show Saunders and Luepnitz were available, he fails to show that their testimony would have been of some benefit to the defense. When evaluating whether there would have been "some benefit," the correct standard is whether that evidence establishes a reasonable probability that the result would have been different, and a reasonable probability is one "sufficient to undermine confidence in the outcome." *Ex parte Flores,* 387 S.W.3d 626, 638 (Tex. Crim. App. 2012).

28. Saunders and Luepnitz could have testified to their beliefs that the applicant had not acted on any of his fantasies and that it is possible for a person to possess child pornography and not be sexually aroused, but they would have also had to testify to their classification of the applicant as a possible pedophile.

29. Moreover, the applicant gave lengthy testimony during guilt-innocence as to his reasons for possessing child pornography, and the jury was free to disbelieve those reasons. The applicant fails to show that had Martin called these additional witnesses during guilt-innocence, there is a reasonable probability that the result would have been different. As such, the applicant's claim should be denied.

30. The court finds from the affidavit of Thomas Martin that he had a reasonable trial strategy for failing to object to the prosecutor's comments on the applicant's post-arrest silence.

31. The court finds from the affidavit of Thomas Martin that he had a reasonable trial strategy for failing to call Dr. Saunders and Dr. Luepnitz in the applicant's case-in-chief during guilt-innocence to support applicant's defense that he possessed child pornography for a bona fide educational purpose.

32. In all things, the applicant has failed to demonstrate that his conviction was improperly obtained or that he is being improperly confined.

ORDER

Habeas corpus relief is denied.

SIGNED and ENTERED on 12-12, 2016

/s/
Presiding Judge, 351st District Court

APPENDIX C

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

COA No. 14-18-00027-CR
Tr. Ct. No. 1324897-B
PD-0184-19

[Filed May 8, 2019]

ROBISON, EX PARTE)
MARK DOUGLAS)
)

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

14TH COURT OF APPEALS CLERK
CHRISTOPHER A. PRINE
301 FANNIN, SUITE 245
HOUSTON, TX 77002-7006
* DELIVERED VIA E-MAIL *

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

COA No. 14-18-00028-CR
Tr. Ct. No. 1324898-B
PD-0185-19

[Filed May 8, 2019]

ROBISON, EX PARTE	)
MARK DOUGLAS	)
	)

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

14TH COURT OF APPEALS CLERK
CHRISTOPHER A. PRINE
301 FANNIN, SUITE 245
HOUSTON, TX 77002-7006
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APPENDIX D

IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

NOS. PD-0184-19, PD-0185-19, PD-0186-19

[Filed March 29, 2019]

EX PARTE	)
MARK DOUGLAS ROBISON	)
	)

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
OF THE OPINION OF THE FOURTEENTH COURT OF APPEALS
NOS. 14-18-00027-CR, 14-18-00028-CR,
14-18-00029-CR

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Trial Judge:

The Honorable Mark Kent Ellis
351st District Court of Harris County, Texas

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

CODES AND RULES

STATEMENT REGARDING ORAL ARGUMENT

This case involves complex issues of fact and law. Oral argument will assist the Court and is requested.

STATEMENT OF THE CASE

The Court of Appeals found that defense counsel was deficient in his representation by failing to object to the prosecutor questioning Robison about his post-arrest silence. However, the Court found that no prejudice was shown. In reaching this conclusion, the Court misapplied the prejudice element of the ineffective assistance test.

Additionally, the Court of Appeals applied a very narrow test in determining what constitutes constitutional error when admissible evidence is erroneously excluded by the trial court. Had the proper test for constitutional error been applied, the Court would have been compelled to find that defense counsel was ineffective in not making a constitutional objection to the exclusion of Robison's defense evidence.

STATEMENT OF THE PROCEDURAL HISTORY

Appellant, Mark Douglas Robison, filed an Application for Writ of Habeas Corpus pursuant to Art. 11.072, Tex. Code Crim. Proc. challenging his convictions for possession of child pornography in cause numbers 1324897, 1328498 and 1324899. On December 12, 2016, the trial court denied these applications without any notice to Robison or his counsel. Subsequently, Robison requested habeas relief so that his notice of appeal would be considered timely. This

request was granted by the trial court. Appeal was taken to the Fourteenth Court of Appeals, which affirmed the order of the trial court denying relief on January 29, 2019. No motion for rehearing was filed.

GROUND FOR REVIEW ONE

The Court of Appeals incorrectly applied the harm element of the ineffective assistance of counsel test in analyzing whether defense counsel's failure to object to the prosecutor's comments on Robison's post-arrest silence was ineffective.

ARGUMENT

During Robison's testimony, the prosecutor asked him about his failure to assert his defensive theory at various pre-trial hearings:

> [Prosecutor]: So, on all those dates that you and I were in court together, which one of them did you tell me about this research that you've been doing?
>
> [Robison]: Under advice of counsel, which I–we discussed this in depth and I wanted to use this and bring this forward to you but counsel advised otherwise, so we did not discuss this.

[Prosecutor]: Well, you mentioned a phrase a little earlier where you said the game was afoot. Do you remember when you said that?

> [Robison]: Yes.
>
> [Prosecutor]: So, are you having fun with your game with the jury here?

[Robison]: No, but I think there's a chance, respectfully, that you are.

[Prosecutor]: Oh. I appreciate your candor. Thank you.

[Robison]: I'm trying to be respectful. I have a history with –my son has some legal issues, so yes, I do have some, perhaps, unproductive feelings about the judicial process. For example, it's been –

[Prosecutor]: We'll get to that in just a moment if you can answer my questions, please, sir. Now, all those times you said on the advice of counsel you didn't talk to anyone, right? All those different resets, you didn't talk to –

[Robison]: You used the word "anyone." That's not accurate. I didn't talk to you particularly about his.

[Prosecutor]: You saw me in court every time.

[Robison]: Yeah, I don't believe you ever spoke to me either, sir.

[Prosecutor]: Well, rules are a little different between me and you, correct? You'd agree with that?

[Robison]: I don't know the legal rules. (RR4:105-07)

Even though this was an improper comment on Robison's post-arrest, in court silence, Robison's counsel did not object. Based on the failure of counsel

to object, Robison argued that he received ineffective assistance of counsel.

As to this ground, on direct appeal, the Fourteenth Court of Appeals agreed counsel's failure was objectively unreasonable:

> Appellant may have had an opportunity to approach the prosecutor and discuss the merits of his defense, but he was under no legal obligation to do so. *See Franklin v. State,* 606 S.W.2d 818, 848 (Tex. Crim. App. 1978) (op. on reh'g) ("Merely having the opportunity to say something does not constitute circumstances in which one would be expected to speak out."). The pretrial hearings were conducted for the limited purpose of resetting the case for a later date, and appellant was represented by counsel during each of the hearings. Appellant was entitled to rely on counsel's representation and avoid direct contact with the prosecutor, who acted as his legal adversary. The prosecutor's line of questioning was neither relevant nor appropriate, and we can think of no reason why counsel would not object to the improper criticisms of appellant's in-court silence.

Robison, 461 S.W.3d at 206.[2] And the court was right. *See Hall, supra* ("We cannot envision a reason for counsel's failure to…object to comments by the State about Hall's post-arrest silence."). The court was "not persuaded, however, that the outcome of the trial

---

[2] On the current appeal, the Court reiterated that counsel should have objected to this line of questioning. (p. 9).

would have been different but for counsel's failure to object." *Id.* "The jury [had already] heard testimony that [Robison] was silent during the execution of the search warrant and that he had not mentioned to his wife that he had been researching child pornography," the court noted. *Id.* From this, the court reasoned "[t]here is no reasonable likelihood that the jury would have disregarded appellant's pre-arrest silence but not his in-court silence." *Id.* (citing *Miller v. State,* 939 S.W.2d 681, 691 (Tex.App.–El Paso 1996, no pet) (defendant was not prejudiced by counsel's failure to object to evidence of post-arrest silence where the record contained other evidence that amply refuted the defendant's claim of self-defense)).[3]

Ultimately, the Court of Appeals found the prejudice prong of the ineffective assistance test not established, stating the following:

> "In any event, appellant would not prevail on this claim of ineffectiveness without establishing that the outcome of the trial would have been different but for counsel's failure to object." p. 10.

However, in stating its rationale for finding no ineffectiveness, the Court of Appeals has incompletely and improperly applied the prejudice prong of the ineffective assistance test.

It is, of course, well-established that a criminal defendant has a Sixth Amendment right to effective

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[3] Again, on the instant appeal, the Court restated this conclusion from the direct appeal. (pp. 9-10).

assistance of counsel at every critical stage of the proceedings against him. *Powell v. Alabama*, 287 U.S. 45, 69 (1932). This right extends to state prisoners through the Fourteenth Amendment. *Robison v. Georgia*, 365 U.S. 570, 596 (1961).

To determine whether to grant relief for ineffective assistance of counsel, Texas courts, like all others, apply the standard set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *See*, *e.g.*, *Ex parte Martinez*, 330 S.W.3d 891, 900 (Tex. Crim. App. 2011); *Hernandez v. State*, 726 S.W.2d 53, 55–56 (Tex. Crim. App. 1986). *Strickland* requires defendants claiming they received ineffective assistance of counsel to establish two components by a preponderance of the evidence: (1) deficient performance of trial counsel; and (2) but for counsel's errors, there is a "reasonable probability" of a different outcome at trial. *Strickland*, 466 U.S. at 687.

To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id*. at 688. The Supreme Court has declined to articulate specific guidelines for appropriate attorney conduct and instead has emphasized that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id*. Essentially, counsel is obliged to fulfill "certain basic duties," including "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id*. at 688.

As to the second *Strickland* requirement—an applicant must also demonstrate that, but for counsel's

errors, there is a "reasonable probability" of a different outcome at trial—a reasonable probability is but a probability sufficient to undermine confidence in the outcome. *Id.* at 692-94. An applicant need not establish that his attorney's deficient performance more likely than not altered the outcome in order to establish prejudice. *Nix v. Whiteside*, 475 U.S. 157, 175 (1986). "[*Strickland*] specifically rejected the proposition that the [applicant] had to prove it more likely than not that the outcome would have been altered." *Woodford v. Visciotti*, 537 U.S. 19, 22 (2002). "[T]he touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding." *Lockhart v. Fretwell*, 506 U.S. 364 (1993). The question is not whether Robison would more likely than not have received different verdicts with the evidence, but whether, in its absence, he received a fair trial, understood as a trial resulting in verdicts worthy of confidence. *Strickler v. Greene*, 527 U.S. 263, 289-90 (1999).

Thus, while the Court of Appeals correctly analyzed the first prong of the *Strickland* test - deficient performance - the Court has incorrectly applied the second prong - prejudice, by simply finding that Robison has not established that the outcome of the trial would have been different. According to *Strickland*, *Nix*, *Lockhart*, and *Strickler*, it is not necessary that Robison show that he would have been acquitted. Rather, he is only required to show that the ineffective performance of counsel affected the fairness of the adversary proceeding, and that the result was a trial not resulting in a verdict worthy of confidence.

In the case at bar, the Court of Appeals has misapplied the law and rendered a decision in conflict with the applicable caselaw from the U. S. Supreme Court. Moreover, the analytical error by the Court of Appeals is one that is routinely made by Texas courts. For this reason, this Petition for Discretionary Review should be granted in order that the Court of Criminal Appeals can address and correct this error, as well as give guidance to the lower courts on the proper application of the prejudice prong of the ineffective assistance test. T. R. App. P. 66.3(c).

GROUND FOR REVIEW TWO

The Court of Appeals incorrectly decided that an application of the constitutional error standard to the exclusion of crucial defense evidence submitted by Robison would not have resulted in a reversal of this conviction.

ARGUMENT

During the guilt-innocence phase of the trial, defense counsel sought to introduce two books written by Robison. (RR4: 65). Robison began writing the first book, titled *Man to Man: Poems for Men*, in 1990 and published it in 1992. *Men*. (RR4: 65); (DX1). The State objected on relevance and hearsay grounds, to which defense counsel argued that the book "forms his initial beliefs as to communicating and starting to get the word out. That's the only reason I'm offering this booklet. It goes heart and soul into the affirmative defense, the wording." (RR4: 67). Counsel further explained that in the book Robison began to talk about "nasty people and allegations of abuse." (RR4: 66-67).

In a poem titled "Nasty People," Robison is struggling with what to do about nasty people. (Def. Ex. 1). There is also a poem titled "Right and Wrong," which discusses wrong actions committed for the pleasure of the actor and how that is "not the world in which we choose live." (Def.'s Ex. 1). Additionally, there is a poem titled "I Get Excited," which discusses Robison's wife's abuse in the past, and making "humanity all it can be." (Def.'s Ex. 1).

Though counsel made clear he was not offering anything in the book for the truth of the matter asserted, the judge nonetheless sustained the State's objections. (RR4: 67). Without the admission of the book, Robison then testified that the preparation and publication of this book helped to develop his thoughts on abuse clearer in his head. (RR4: 69).

Defense counsel also sought to introduce into evidence Robison's second book, *HELP US PLEASE: What YOU Can Do to Eradicate Sexual Abuse and Child Pornography*, in which Robison more directly addressed the problem of child pornography and child sexual abuse. (RR4: 85). Robison came up with the idea for this book prior to his arrest in October of 2011. (RR4: 82). He wanted to identify solutions in a book to the "real problem"—children being abused. (RR4: 84).

The State again objected on hearsay grounds, and defense counsel again asserted that the book was not being offered for the truth of the matter asserted, and that it went directly to Robison's defense of bona fide educational purpose. (RR4: 86-87). The State responded the book was too voluminous and that there would be "problems with confusion of the issues when you start

doing a 403 analysis." (RR4: 88). The judge initially withheld a ruling, but later denied the admission of both books into evidence. (RR5: 93).

On direct appeal to Houston's Fourteenth Court of Appeals, Robison argued that the trial court reversibly erred when it refused to admit his two books into evidence. The court "assum[ed] without deciding that the book[s] should have been admitted." *Robison*, 461 S.W.3d at 199-200, 201. But though Robison's trial counsel argued that the books went to the "heart and soul [of] the affirmative defense" and were "part and parcel of [his] defense," and his appellate counsel argued he "had the right to present a defense under the Sixth Amendment to the United States Constitution and Article I, section 10 of the Texas Constitution," the court "conclude[d] that any error in the trial court's decision to exclude the book[s] was harmless" by treating the error as non-constitutional. (RR4: 67, 87); Exhibit B at 9; *Robison*, 461 S.W.3d at 201 (citing TEX. R. APP. P. 44.2(b)).

This was hugely significant. Under Rule of Appellate Procedure 44.2(b), any non-constitutional "error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Constitutional error, by contrast, demands reversal on appeal unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. TEX. R. APP. P. 44.2(a). But the court of appeals had no choice in analyzing the harm under the non-constitutional standard because Robison's trial counsel's general references to the books as the "heart and soul [of] the affirmative defense," and

"part and parcel of [his] defense," were not sufficiently specific to alert the trial judge that the exclusion of the books would prevent him from exercising his constitutional right to present a complete defense.

In rejecting Robison's argument, the Court of Appeals on the instant appeal stated:

> "Contrary to appellant's suggestions, we would not have reviewed his evidentiary complaints under the more rigorous standard for constitutional error if counsel had worded his objection differently. 'The exclusion of a defendant's evidence will be constitutional error only if the evidence forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense.' *Potier v. State*, 68 S.W.3d 657, 665 (Tex. Crim. App. 2002). As we explained in the direct appeal, appellant was not deprived of the right to present a defense because 'the jury bona fide educational purpose.' *See Robison*, 461 S.W.3d at 201-02; *see also Vasquez v. State*, 501 S.W.3d 691, 700 (Tex. App. - Houston [14th Dist.] 2016, pet. ref'd) (rejecting a similar argument that the exclusion of evidence was reviewable under the standard for constitutional error)." (pp. 12-13)

Robison submits that, in finding that the exclusion of this evidence did not effectively preclude him from presenting a defense, the Court of Appeals has improperly applied the caselaw on constitutional error. *See*, *Potier v. State*, 68 S.W.3d 657 (Tex. Crim. App. 2002) (the exclusion of a defendant's evidence will be constitutional error only if the evidence forms such a

vital portion of the case that exclusion effectively precludes the defendant from presenting a defense). Although the Court of Appeals stated the proper test and quoted *Potier*, their application of the test was so exacting and narrow that it permits the exclusion of crucial defense evidence and allows a trial court to deny a defendant, like Robison, the right to present a defense. In fact, the exclusion of these books so undercut and undermines Robison's defense that he was precluded from presenting an effective defense to these charges. The fact that he was able to present some version of his defense in some other way does not change the fact that his constitutional right to present a defense was violated by the exclusion of this evidence.

This case presents an opportunity for the Court of Criminal Appeals to set out some clear standards as to when the exclusion of evidence constitutes constitutional error. The current caselaw is vague and insufficiently specific to guide the courts on this question. This is an issue that needs to be decided by the Court of Criminal Appeals. T. R. App. P. 66.3(b).

PRAYER FOR RELIEF

Based on the foregoing, Appellant, Mark Douglas Robison, prays that this Petition for Discretionary Review be granted.

Respectfully submitted,

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