APPENDIX A

Fifth Circuit Order Denying Petition For
Rehearing En Banc
(3 pages Dated 2-24-20)

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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NEW ORLEANS, LA 70130

February 24, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 17-50891 Bobby Buckner v. Lorie Davis, Director
USDC No. 6:15-CV-177

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Melissa B. Courseault, Deputy Clerk
504-310-7701

Mr. Bobby Joe Buckner
Ms. Casey Leigh Jackson Solomon

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50891

BOBBY JOE BUCKNER,

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

ON PETITION FOR REHEARING EN BANC

(Opinion 12/19/19, 5 Cir., _____, _____ F.3d _____)

Before HIGGINBOTHAM, DENNIS, and HO, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Patrick E. Higginbotham

UNITED STATES CIRCUIT JUDGE

APPENDIX B

Decision of the Fifth Circuit
(15 pages Dated 12-19-19)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
December 19, 2019
Lyle W. Cayce
Clerk

No. 17-50891

D.C. Docket No. 6:15-CV-177

BOBBY JOE BUCKNER,

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 HIGGINBOTHAM, DENNIS, and HO, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
December 19, 2019
Lyle W. Cayce
Clerk

No. 17-50891

BOBBY JOE BUCKNER,

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 HIGGINBOTHAM, DENNIS, and HO, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Bobby Joe Buckner was convicted of aggravated sexual assault of a child. He contends that one of the convicting jurors was biased by the juror's personal and family history. The district court denied his petition for federal habeas relief. We affirm.

I.

At Buckner's trial, several voir dire questions addressed the potential jurors' experiences relating to sexual assault or abuse. First, the trial judge asked the potential jurors whether they or someone they knew had been

accused of certain sexual crimes.[1] Defense counsel later asked the potential jurors whether they or someone they knew had been a victim of either child abuse or sexual abuse that "would affect your ability to sit in a trial and be fair and impartial."

The juror at issue here, R.H., did not respond to these questions. After the jury was selected but before the start of trial, R.H. privately disclosed to the judge and the attorneys that his father had been convicted of sexually assaulting his stepsister. R.H. explained that he was too embarrassed to answer during voir dire because he knew several other prospective jurors. He had hoped for a chance to speak privately, but jury selection concluded sooner than he had expected. He said the abuse was an "emotional issue" for him, but he repeatedly stated that he could be fair and impartial.

R.H. remained on the jury, which convicted Buckner and sentenced him to 50 years' imprisonment.[2] Buckner filed a motion for a new trial. The motion stated that Buckner's trial counsel learned, after trial, that R.H. "withheld material information during voir dire." Specifically, Buckner's counsel asserted in a supporting affidavit that not only had R.H.'s father sexually abused his stepsister, R.H.'s father had also abused R.H. Counsel also asserted that R.H. was the victim, in a separate incident, of kidnapping and attempted sexual assault. The affidavit is silent as to how Buckner's counsel learned this information and as to the particulars of the alleged incidents.[3] The affidavit

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[1] "Is there anyone on the panel who either they, or a close, personal friend or a family member has ever been accused or charged with Aggravated Sexual Assault, Sexual Assault, Sexual Assault of a Child, Indecency with a Child, anything of that nature?"

[2] *See Buckner v. State*, No. 10-11-00277-CR, 2013 WL 3482134 (Tex. App.—Waco July 11, 2013, pet. ref'd) (unpublished).

[3] On the personal-abuse point, the affidavit states: "After trial, I learned that [R.H.] himself had been sexually abused by his father, and on another occasion had been kidnapped

stated that R.H.'s supposed omission was made "more egregious" by R.H. disclosing his stepsister's abuse without mentioning his own. In his motion for a new trial, Bucker argued that he was denied an impartial jury by R.H.'s failure to disclose this personal abuse and his belated disclosure of his stepsister's abuse.

This motion was denied by operation of law,[4] the Texas Court of Appeals affirmed Buckner's conviction and sentence on direct appeal,[5] and the Texas Court of Criminal Appeals ("TCCA") refused Buckner's petition for discretionary review and denied his state habeas application without written order. Buckner then filed a Section 2254 application raising several issues. In relevant part, he argued he was denied due process by the trial court's denial of his motion for a new trial. The district court concluded that the "implicit finding [of the state court] that the subject juror was impartial was not manifestly erroneous." It noted that Buckner had not submitted an affidavit from R.H. to support the assertion that R.H. had been the victim of sexual abuse, and therefore there was no actual evidence that R.H. was abused. The district court also noted that R.H. had stated repeatedly that, even though his father abused his stepsister, "he could reach a verdict based on the evidence." Thus, the district court concluded that because no juror "demonstrated bias

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and the victim of an attempted sexual assault. If he had disclosed this information, I would have asked whether he could set his feelings aside about that and be fair and impartial in Mr. Buckner's trial, in an effort to challenge him for cause. If [R.H.] had persisted that he would be fair and impartial in Mr. Buckner's trial, I would have exercised a peremptory challenge against him."

[4] In Texas, if a motion for a new trial is not granted ten days after judgment is entered, the motion is considered denied. *See* TEX. CODE CRIM. PROC. ANN. art. 45.038(b).

[5] *See Buckner*, 2013 WL 3482134, at *7. The Texas Court of Appeals rejected challenges based on sufficiency of the evidence and admission of a doctor's testimony under a hearsay exception. Buckner did not raise the juror-bias issue at this stage.

such that [Buckner] was deprived of his right to an impartial jury," the state court's rejection of this claim "was not contrary to or an unreasonable application of federal law." The district court denied Buckner's federal petition and denied a certificate of appealability.

Buckner submitted a timely notice of appeal, raising only his claim of juror bias. We granted a certificate of appealability on the claim that he had been denied "due process when [the trial court] denied his motion for a new trial, which itself was based on a claim that he was denied an impartial jury because one of the jurors had failed to timely disclose a family history of sexual abuse and had not disclosed a personal history of sexual abuse."

II.

This is an appeal from the denial of Section 2254 relief. Under the Antiterrorism and Effective Death Penalty Act of 1996, this court reviews issues of law de novo and findings of fact for clear error, applying the same deference to the state court's decision as did the district court.[6] The district court was required to defer to state court decisions on questions of law and mixed questions of law and fact unless they were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."[7] "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."[8]

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[6] *Ortiz v. Quarterman*, 504 F.3d 492, 496 (5th Cir. 2007).

[7] 28 U.S.C. § 2254(d)(1).

[8] *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

III.

"The Sixth Amendment guarantees an impartial jury, and the presence of a biased juror may require a new trial as a remedy."[9] A juror is biased if his "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[10] "A claim of alleged bias is ordinarily addressed in a hearing where the judge examines the juror and obtains assurances of the juror's impartiality."[11] Where a juror has a close connection to the circumstances at hand, however, bias may be presumed as a matter of law.[12]

On federal habeas review, state court findings concerning a juror's impartiality are factual determinations entitled to a presumption of correctness.[13] As noted above, the district court found that Buckner had not shown that the state court's implicit finding that R.H. was impartial was erroneous.

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[9] *Hatten v. Quarterman*, 570 F.3d 595, 600 (5th Cir. 2009).

[10] *Id.* (quoting *Soria v. Johnson*, 207 F.3d 232, 242 (5th Cir. 2000)).

[11] *Id.* (citing *Brooks v. Dretke*, 444 F.3d 328, 330 (5th Cir. 2006)).

[12] *See Brooks*, 444 F.3d at 330.

[13] *See Patton v. Yount*, 467 U.S. 1025, 1036 (1984); *see also Virgil v. Dretke*, 446 F.3d 598, 610 n.52 (5th Cir. 2006) ("Juror bias is a finding of fact."). We note that Buckner raised the juror-bias claim in his state habeas application, but the Texas courts did not specify reasons for denying relief. The motion for a new trial was denied automatically by the passage of time, and the fact findings made in the state habeas proceeding did not concern the issue of juror bias or the denial of the motion for a new trial. The TCCA then denied relief without written order. When "a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits" even without written explanation of the court's reasoning. *Harrington*, 562 U.S. at 99. "For such a situation, our court: (1) assumes that the state court applied the proper 'clearly established Federal law'; and (2) then determines whether its decision was 'contrary to' or 'an objectively unreasonable application of that law." *Schaetzle v. Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003).

A.

Buckner argues that R.H.'s failure to disclose his family and personal history during voir dire demonstrates his bias. To obtain a new trial due to a juror's alleged failure to answer questions honestly during voir dire, the defendant must satisfy the test set out in *McDonough Power Equipment v. Greenwood.*[14] Under this test, the defendant must show that the complained-of juror failed to provide an honest answer to a material question and that a truthful response would have provided a valid basis to challenge the juror for cause.[15] To demonstrate actual bias, "admission or factual proof" of bias must be presented.[16]

Assuming for argument that R.H. failed to answer a question honestly, the second *McDonough* prong—whether a truthful response would have been a valid basis to challenge R.H. for cause—dooms Buckner's claim of actual bias. The question of cause turns on state law.[17] Under the applicable law and the facts in this case, a challenge for cause could have been made based on a claim of bias.[18] However, Texas courts have found that a juror who was the victim of a similar crime but who credibly states he will not be affected by that fact is

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[14] 464 U.S. 548, 556 (1984).

[15] *See United States v. Bishop*, 264 F.3d 535, 554 (5th Cir. 2001) (citing *McDonough*, 464 U.S. at 556). Although *McDonough* was a federal civil case on direct appeal, this Court has applied its standards in reviewing state criminal cases on federal habeas review. *See Montoya v. Scott*, 65 F.3d 405, 418–19 (5th Cir. 1995) (assuming without deciding that a *McDonough* theory of juror bias would warrant federal habeas relief); *see also Austin v. Davis*, 876 F.3d 757, 786 & n.262 (5th Cir. 2017) (citing *Montoya* and again assuming *McDonough* applies in a federal habeas proceeding), *cert. denied* 138 S. Ct. 2631 (2018).

[16] *Bishop*, 264 F.3d at 554.

[17] *See Montoya*, 65 F.3d at 419.

[18] *See* TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(9) (allowing a challenge for cause if a juror is biased or prejudiced).

not biased.[19] In addition, in cases in which potential jurors have disclosed the grounds for possible bias but have stated that they could be fair, we have held that the defendant was not denied an impartial jury.[20]

First, information about R.H.'s family history would not have supported a challenge for cause.[21] That R.H. came forward to disclose his family history of abuse—and explained that he initially failed to disclose it out of embarrassment—indicates he was not biased.[22] During the meeting in chambers, R.H. repeatedly stated that he had intended to disclose this family history privately, but was never given the opportunity. R.H. did not express a view adverse to any party and he repeatedly stated he would be fair and impartial.[23] There is no indication that R.H. concealed this family history due to bias or an effort to secure a place on the jury.[24]

Second, to the extent Buckner alleges R.H. personally suffered abuse, he has not presented evidence this occurred.[25] As the district court noted, "[t]he

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[19] *See, e.g.*, *Williams v. State*, No. 05-06-00447-CR, 2006 WL 3742904, at *4 (Tex. App.—Dallas Dec. 21, 2006, pet. ref'd) (unpublished).

[20] *See Green v. Quarterman*, 213 F. App'x 279, 281 (5th Cir. 2007) (unpublished) (finding counsel was not ineffective for failing to challenge jurors who had stated that they or their family members had been victims of similar offenses, given their assurance that they could be fair).

[21] *See McDonough*, 464 U.S. at 556.

[22] *Cf. Bishop*, 264 F.3d at 555 ("Failure to disclose a conviction . . . due to embarrassment, also does not suggest bias.").

[23] He stated that he did not believe his family history of abuse would impair his judgment and that the "facts are the facts." He acknowledged it was an emotional issue but said, "no, it does not impair."

[24] *Cf. United States v. Colombo*, 869 F.2d 149, 150 (2d Cir. 1989) (remanding to determine whether juror's brother-in-law was a lawyer for the Government, where juror allegedly told another juror that she had not revealed this because she wanted to be on the jury).

[25] *See United States v. Moore*, No. 92-8589, 1994 WL 395070, at *5 (5th Cir. June 28, 1994) (unpublished but precedential under 5TH CIR. R. 47.5.3) ("Moore's affidavit setting forth his subjective belief about events over which he has no personal knowledge is thus

allegations in the affidavit are not supported by an affidavit from the juror—there is no sworn statement from the *juror* that they withheld the fact of their own abuse from defense counsel or the trial court." And while counsel's affidavit is sworn, it fails to provide any explanation of how counsel learned of R.H.'s alleged past abuse. Buckner's assertion in his reply brief that counsel learned of this information from a court coordinator also fails to explain how the court coordinator learned this alleged fact and thus suffers from the same deficiencies. Thus, the affidavit was insufficient under state law to support a motion for a new trial.[26]

The only remaining issue related to actual bias is whether a post-conviction evidentiary hearing was required. While the attorneys and the trial judge questioned R.H. in chambers, there was no post-conviction hearing, which is how a claim of bias is ordinarily addressed.[27] But there is no due process right to an evidentiary hearing on every allegation of juror bias.[28]

Buckner, a pro se prisoner, argues he cannot provide direct evidence of

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inadequate to state a claim for habeas relief."); *McGowen v. Thaler*, 675 F.3d 482, 502 (5th Cir. 2012) (holding prisoner failed to make a showing of actual innocence where his new evidence consisted, in part, of affidavits, "most of which are based on hearsay").

[26] When a motion for a new trial is based on an allegedly untruthful juror, Texas law requires an affidavit from a "person who was in a position to know the facts," or the motion "must state some reason or excuse for failing to produce the affidavits." *Baldonado v. State*, 745 S.W.2d 491, 493 (Tex. App.—Corpus Christi 1988, reh'g denied).

[27] *Brooks*, 444 F.3d at 330 (citing *Smith v. Phillips*, 455 U.S. 209, 215 (1982), for the proposition that "in most cases the remedy for claims of juror bias is a post-event hearing").

[28] *Haxhia v. Lee*, 637 F. App'x 634, 636–37 (2d Cir.), *cert denied*, 137 S. Ct. 97 (2016) ("[E]ven if the facts here were analogous to those in [*Smith v. Phillips*], *Smith* does not require a court to hold a hearing in investigating prejudicial occurrences, and it does not specify what actions short of a hearing may be appropriate under a different set of circumstances. It is possible that the trial court's response to Haxhia's objections were a sufficient 'determination' under *Smith*."); *Sims v. Rowland*, 414 F.3d 1148, 1155 (9th Cir. 2005) (*Smith* "do[es] not stand for the proposition that any time evidence of juror bias comes to light, due process requires the trial court to question the jurors alleged to have bias.")).

R.H.'s history or bias without an evidentiary hearing. Yet Buckner had counsel at the trial court, and that attorney supplied only a one-sentence hearsay statement—unaccompanied by an investigation or explanation of its source—regarding R.H.'s personal abuse. The district court did not err in concluding that Buckner failed to show that the state court's denial of his claim of actual bias was contrary to or an unreasonable application of clearly established federal law.[29]

B.

The next question is whether R.H.'s assurances of impartiality should have been disregarded and his bias presumed, given his alleged personal and family history of sexual abuse. Justice O'Connor, concurring in *Smith v. Phillips*, described "extreme situations that would justify a finding of implied bias."[30] Thus, while the question of an individual juror's bias is a factual determination entitled to deference on review, the Supreme Court has not "precluded the use of the conclusive presumption of bias" in "extreme" or "extraordinary cases."[31] "In the exceptional circumstances that may require application of an 'implied bias' doctrine, the lower federal courts need not be deterred by 28 U.S.C. § 2254(d)" and "state-court proceedings resulting in a finding of 'no bias' are by definition inadequate to uncover the bias that the law conclusively presumes."[32]

The Government first argues that, for Section 2254 purposes, there is no "clearly established" Supreme Court precedent recognizing "implied bias."

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[29] *See* 28 U.S.C. § 2254(d)(1).
[30] 455 U.S. at 222 (O'Connor, J., concurring).
[31] *Id.* at 223.
[32] *Id.* at 220 n.10.

Although this Court has discussed implied bias in several prior cases, we recently noted in *Uranga v. Davis* that it was unclear whether this court has recognized the implied-bias doctrine as clearly established federal law.[33] In *Uranga*, the petitioner argued that implied bias was clearly established federal law based on *Brooks*,[34] while the Government countered that an earlier decision, which found that the Supreme Court had not "embraced the implied bias doctrine," controlled.[35] *Uranga* acknowledged a circuit split but declined to settle the issue because the facts of the case were "outside of the extreme genre of cases . . . that would be sufficient to trigger the application of the implied bias doctrine."[36]

In enumerating some of these "extreme situations" where a hearing may be inadequate to uncover juror bias, Justice O'Connor stated:

> While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction. Whether or not the state proceedings result in a finding of "no bias," the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances.[37]

In *Uranga*, the prosecution introduced evidence of the defendant's prior offenses at the punishment stage of his trial.[38] This included a dashcam video

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[33] *Uranga v. Davis*, 893 F.3d 282, 288 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1179 (2019).

[34] *Id.*

[35] *Id.* (citing *Andrews v. Collins*, 21 F.3d 612 (5th Cir. 1994)).

[36] *Id.*

[37] *Smith*, 445 U.S. at 222 (O'Connor, J., concurring).

[38] *Uranga*, 893 F.3d at 286–87.

recording of the defendant driving across a residential lawn to elude pursing police.[39] After this recording was played for the jury, one juror realized that it was his lawn that Uranga had driven across.[40] The trial court conducted a hearing, but the juror was allowed to remain after he indicated that this fact would not influence his decision.[41] The *Uranga* court held that this factual situation did not rise to the level of the examples provided in Justice O'Connor's concurrence in *Smith*.[42] One judge dissented, relying on the panel's original determination that the facts warranted a finding of implied bias because the damage was "personal to the juror, as it affected the premises of his home" and because the juror had not previously known how the damage was caused or who was responsible.[43]

In this case, R.H.'s *family* history does not warrant a presumption of bias. The case law does not signal willingness to imply bias where a juror's family member was the victim of conduct similar to the defendant's.[44] That R.H. *himself* was allegedly a victim of conduct similar to Buckner's presents a closer question. We have stated that, "looking to other cases embracing the

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[39] *Id.* at 287.

[40] *Id.*

[41] *Id.*

[42] *See id.* at 288–89 (noting that the damage to the lawn was minimal and could be repaired for less than $500, that the juror indicated that he did not intend to pursue charges for the damage, and that the juror indicated he could fix the damage himself). The *Uranga* court also distinguished *Brooks*, where this court found implied bias. *See Uranga*, 893 F.3d at 288–89. In *Brooks*, a juror was arrested on a firearms offense during the sentencing phase of the defendant's trial. The juror's offense would be subject to prosecution by the same district attorney's office that was prosecuting the defendant, which justified a finding of implied bias. *Brooks*, 418 F.3d at 431–35.

[43] *See id.* at 289–90 (Haynes, J., dissenting).

[44] *See United States v. Powell*, 226 F.3d 1181 (10th Cir. 2000) (rejecting an implied bias claim where a juror, in a kidnapping and sexual assault case, had a daughter who had been raped ten years before).

implied bias doctrine, we find that most have done so because the juror had a close relationship with one of the important actors in the case or was otherwise emotionally involved in the case, usually because the juror was the victim of a similar crime."[45] Further, "some courts have cautioned that bias should not be inferred unless the facts underlying the alleged bias are such that they 'would inherently create in a juror a substantial emotional involvement, adversely affecting impartiality.'"[46]

At bottom, however, the unsupported affidavit of Buckner's counsel is not actual evidence of R.H.'s personal abuse. Even if it were, and we were accordingly convinced R.H. was a victim of a crime similar to Buckner's, these scant facts do not reveal circumstances so inevitably attended by emotional involvement that protestations of fairness cannot sufficiently cure the resulting bias. R.H. did not disclose any personal history during voir dire or afterward, the trial court was presented with this allegation but opted not to explore it in a hearing, and R.H. stated he was "emotional" about the case. This conceivably makes this a situation in which a juror, who was a victim of a similar crime, has a substantial—and undisclosed—emotional involvement with the case. But while there is case law holding that such a situation can warrant a presumption of bias,[47] there is also case law holding that a juror who is a prior victim of the defendant can be impliedly biased, and cases like

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[45] *Solis v. Cockrell*, 342 F.3d 392, 398–99 (5th Cir. 2003) (footnote omitted).

[46] *Id.* (quoting *Powell*, 226 F.3d at 1188–89).

[47] *See Dyer v. Calderon*, 151 F.3d 970, 979–82 (9th Cir.), *cert. denied*, 525 U.S. 1033 (1998) (imputing bias in murder trial when juror deliberately failed to disclose that her brother had been murdered and that she had been the victim of numerous burglaries and crimes); *see also Green*, 213 F. App'x at 281 (unpublished) (citing *Solis*, 342 F.2d at 399) (declining to impute bias where, "[u]nlike other cases in which courts have found bias because a juror failed to disclose he was a victim of a similar crime, the jurors in this case all disclosed their experiences" and there were no additional factors of inherent emotional involvement).

Uranga show that the doctrine inevitably eludes simple categorization. If the connection is too attenuated, it is not enough to be related to the defendant or a victim[48] or even to be personally harmed by the defendant's conduct.[49] In the absence of additional supporting details of R.H.'s alleged abuse, we find no factors, save perhaps for R.H.'s family history, that would create inherent emotional involvement. Thus, we can only conclude that this case, like *Uranga*, is outside the "extreme genre of cases" that would warrant revisiting whether this Court recognizes the implied-bias doctrine as clearly established law.

IV.

We affirm the denial of Section 2254 relief.[50]

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[48] *See Andrews*, 21 F.3d at 620 (declining to presume bias where the victim's grandson had, prior to the victim's death, been married to the juror's daughter but where there was no evidence that the juror even knew he had at one time been related to the victim); *United States v. Wilson*, 116 F.3d 1066, 1087 (5th Cir. 1997) (declining to presume bias because "friendship with the victim of a defendant's alleged crime does not, standing alone, justify a finding of bias").

[49] *See Uranga*, 893 F.3d at 286.

[50] Buckner's motion for appointment of counsel, which was carried with the case, is denied.

APPENDIX C

Fifth Circuit Order Granting C.O.A.
(2 pages Dated 8-23-18)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-50891

BOBBY JOE BUCKNER,

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:

Bobby Joe Buckner, Texas prisoner # 1740805, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. §2254 application, which challenged his conviction for sexual assault of a child. Although Buckner raised a number of claims in the district court, he seeks a COA only as to his claim that the trial court denied him due process when it denied his motion for a new trial, which itself was based on a claim that he was denied an impartial jury because one of the jurors had failed to timely disclose a family history of sexual abuse and had not disclosed a personal history of sexual abuse.

To obtain a COA, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner 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 v. Cockrell,* 537 U.S. 322, 327 (2003).

Buckner has made the requisite showing. Accordingly, his motion for a COA is GRANTED.

STEPHEN A. HIGGINSON
UNITED STATES CIRCUIT JUDGE

APPENDIX D

Order of the District Court
(34 pages Dated 9-12-17)

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

BOBBY JOE BUCKNER	§	
	§	
V.	§	**6-15-CV-0177-RP**
	§	
LORIE DAVIS	§	

ORDER

Before the Court are Petitioner's Application for Habeas Corpus Relief under 28 U.S.C. § 2254 (Docket Entry "DE" 1); and Respondent's Answer (DE 9). Also before the Court is Petitioner's Motion to Amend Petition (DE 13). Petitioner, proceeding pro se, has paid the full filing fee for this matter. For the reasons set forth below, Petitioner's application for writ of habeas corpus is **denied**.

STATEMENT OF THE CASE

Respondent has custody of Petitioner pursuant to a judgment and sentence entered by the 54th District Court of McLennan County, Texas. A jury found Petitioner guilty on one count of aggravated sexual assault of a child and the trial court assessed punishment at a term of fifty years' imprisonment. Petitioner asserts he is entitled to habeas relief because he is actually innocent, because he was denied his rights to due process and a fair trial, and because he was denied the effective assistance of counsel.

BACKGROUND

A. Factual background

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

A.L., who was eighteen years old at the time of trial, testified that when she was seven years old and in the first grade, her mother dated Buckner. One afternoon in April 2000, when A.L. was seven, Buckner picked her up from school and took her home to her apartment. She did not remember ever being alone with Buckner before that time. They were watching cartoons in the living room when Buckner asked her if she could keep a secret. She knew that her mother did not usually allow her to have candy, so she thought that was what he was talking about. She asked Buckner if she could have some candy, and he said that she could. She got some candy and returned, and they continued to watch television. At some point, Buckner had A.L. lay down in the living room. She had been born with a bladder condition that still required her to see an urologist, so she assumed that Buckner was making her lay down to help her. Buckner then started undoing and pulling down her skort. The living room windows were partially open, so A.L. became embarrassed and said something like "not in here." Buckner then told her to go into the bathroom, take off her clothes, and meet him in the bedroom of the single-bedroom apartment.

A.L. testified that she went to the bathroom and then met Buckner in the bedroom. Buckner was at the foot of the bed and told her to lie down. A.L. complied. Buckner knelt on the bed and spread her legs. She asked him if he could help her with her bladder problem, and he replied that he could. Buckner then unfastened his pants and pulled out his penis. A.L. looked away. A.L. stated that, based on what she knows now, she would describe their interaction as intercourse, meaning penetration. She stated that Buckner put his penis inside her vagina. A.L. said that when she got up to get dressed, she felt pain between her legs and in her lower abdomen. When asked on cross-examination if she did not remember exactly what happened, A.L. replied that she recalled some of it and that she recalled the sensations afterward so "it was pretty apparent what had taken place." She stated that Buckner must have penetrated her because the pain was so excruciating afterward that she blocked it.

A.L. testified that after the incident, they went and picked her mother up from work. A.L. did not tell her mother what had happened at that point, and the relationship between Buckner and her mother did not last much longer. A.L. did not testify to any other sexual encounters with Buckner, but she remembered an occasion when she was sitting in a truck between Buckner and her mother, and he pulled out a pocketknife and was showing it to her mother. He held the pocketknife in front of her face. She was scared and felt as though he was threatening her. Buckner did not say anything to her at that time, but at some point, he did tell her not to tell her mother what had happened.

A.L. testified that she was very close to her grandmother because her grandmother helped raise her in place of her father. A.L. told her grandmother part of what had happened with Buckner in October of the next year. She told her grandmother only that Buckner had touched her inappropriately. Her grandmother

> then told A.L.'s mother. When A.L. was fourteen years old, she finally told everything that had happened with Buckner to her boyfriend R.S. R.S. encouraged her to tell her mother and grandmother. A.L. said that a week or two later, she told her grandmother and mother that there had actually been intercourse with Buckner. A.L. did not want to report it to the police, but after her grandmother "badgered [her] for a year" about it, she agreed to report it to the police.
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> Sanya [A.L.'s mother] testified that about a year and a half after she and Buckner had ended their relationship, her mother told her that something had happened between Buckner and A.L. Sanya asked A.L. if it was true, and A.L. said that Buckner had touched her inappropriately. Sanya asked A.L. if Buckner had done more than touch her, and A.L. said no. Sanya did not push A.L. to talk about it because A.L. did not want to talk about it. Sanya encouraged A.L. to talk to her therapist about it, but A.L. did not. Sanya did not go to the police at that time because A.L. did not want to tell the police. Sanya also knew that Buckner was no longer in Texas, so she felt like the threat had been removed.
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> Sanya testified that after A.L. started dating R.S. when she was about fourteen or fifteen, A.L. finally told Sanya and Sanya's mother that Buckner had "raped" her. Sanya took that to mean that Buckner had forced sex on her. A.L. said that she had been afraid to tell Sanya or Sanya's mother because Buckner had threatened to hurt them. Sanya knew that A.L. had seen Buckner's pocketknife. Sanya wanted A.L. to go to the police, but A.L. would not go because she did not want to talk about it. About a year later in 2008, however, Sanya was able to talk A.L. into going to the police.

Buckner v. State, No. 10-11-00277-CR, 2013 WL 3482134, at *1-*4 (Tex. App.–Waco 2013, pet. ref'd).

B. Petitioner's state criminal proceedings

A grand jury indictment returned March 11, 2009, charged Petitioner with one count of aggravated sexual assault of a child, alleging the assault occurred on or about April 28, 2000. (DE 10-7 at 5).[1] Petitioner was released on bond pending trial. (DE 10-7 at 9). Petitioner was represented by retained counsel in his criminal proceedings. (DE 10-7 at 13).

[1] The State Court Record in this matter is lodged at CM/ECF docket entry 10.

Petitioner's trial began July 13, 2011. (DE 10-10 at 1). On July 7, 2011, the State filed notice of its intention to use extraneous offenses and prior convictions to impeach Petitioner's testimony, i.e., Petitioner's commission of aggravated sexual assault and possession of prohibited weapons, which was adjudicated as delinquent conduct in 1992; Petitioner's 1996 arrest for escape; Petitioner's 1997 arrest for forgery; Petitioner's 1998 conviction for distribution of marijuana; Petitioner's 1998 arrest for aggravated sexual assault; Petitioner's 1999 arrest for prohibited weapons; and Petitioner's 2000 arrest for failure to comply with sex offender registration requirements. (DE 10-7 at 30-31). On July 12, 2011, the State also filed a Notice of Intent to Enhance Punishment Range by means of Petitioner's 1998 conviction for distribution of marijuana. (DE 10-7 at 36).

Petitioner did not testify at the guilt/innocence phase of his trial, but did testify at the punishment phase of his trial. (DE 10-14 at 23-44). Petitioner's counsel sought a jury instruction on a lesser-included offense of indecency with a child, which motion was denied. (DE 10-6 at 14). After deliberating for approximately two hours, the jury returned a guilty verdict. (DE 10-7 at 49, 61-62). During the punishment phase of the trial, Petitioner's counsel elicited testimony that Petitioner was both physically and sexually abused at an early age and, despite a serious juvenile record, Petitioner had not committed any crimes in the eleven years since the act involving A.L. (DE 10-14 at 18-20; DE 10-14 at 25-26). Petitioner pleaded true to the enhancement charge and the trial court assessed his punishment at a term of fifty years' imprisonment. (DE 10-7 at 63).

Petitioner's trial counsel withdrew and Petitioner was appointed appellate counsel. (DE 10-7 at 74). Petitioner filed a motion for a new trial, alleging that one of the seated jurors withheld material information during voir dire. (DE 10-7 at 81). The motion for a new trial was denied by operation of law. (DE 10-19 at 17, 96).

Petitioner appealed his conviction and sentence, asserting the evidence was insufficient to support Petitioner's conviction and that the trial court abused its discretion by admitting a treating psychologist's testimony because the testimony included statements made by a third-party declarant. (DE 10-6 at 3-26).[2] The Texas Court of Appeals denied the appeal and the Texas Court of Criminal Appeals denied a petition for discretionary review. *Buckner*, 2013 WL 3482134, at *1 & *7.

Petitioner filed a pro se application for a state writ of habeas corpus. (DE 10-19 at 6-24). Petitioner alleged he was actually innocent of the crime of conviction and that he was denied his right to the effective assistance of trial and appellate counsel. (DE 10-19 at 11-13, 15). Petitioner asserted the trial court erred by denying his motion for a new trial and by failing to rule on a defense motion regarding the State's failure to notice its intent to introduce extraneous bad acts. (DE 10-19 at 17). Petitioner argued the trial court erred by denying the request to include an instruction on the lesser-included offense of indecency with a child. (DE 10-19 at 18). Petitioner alleged that the trial court erred by allowing a detective to show A.L.'s mother her previous statement over the objection of defense counsel. (DE 10-19 at 18).[3] Petitioner also asserted there was a fatal variance between the

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[2] The prosecution argued this testimony was allowed because it was necessary to medical treatment and to refute the defense theory that A.L. was inconsistent in her reports of the abuse. (DE 10-12 at 213-16). After hearing from the witness outside the presence of the jury, the trial court overruled defense counsel's objection that the testimony was double-hearsay. *Id.*

[3] The trial transcript indicates that the prior statement was shown to A.L.'s mother by the prosecutor. (DE 10-12 at 91-93).

indictment and the evidence presented at trial. (DE 10-19 at 19). Petitioner maintained the he was denied due process because the prior conviction used to enhance his sentence was too remote, and because a visiting judge presided over his case without a record order of assignment. (DE 10-19 at 20). Additionally, Petitioner complained that the prosecutor committed misconduct by interjecting a medical opinion during voir dire. (DE 10-19 at 22).

The habeas trial court designated Petitioner's ineffective assistance of counsel claims for resolution. (DE 10-19 at 33-36). Petitioner's trial counsel filed an affidavit, declaring: "There was no basis for a plea to the jurisdiction. Hence, one was not filed. . . ." (DE 10-19 at 42). Counsel further averred:

> First, while an issue of remoteness may be applicable when a prior conviction is used for impeachment purposes, *see* Tex. R. Crim. Evid. 609, the same does not apply to the use of a prior conviction for enhancement purposes. There is no time limit on use of prior convictions for enhancement purposes. *See* Tex. Penal Code § 12.42. Hence, I made no objection to remoteness as to the conviction for enhancement purposes.
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> . . . [T]he State read the enhancement paragraph and Mr. Buckner pleaded true to it. If Mr. Buckner is complaining that the enhancement was not read earlier, he should read Art. 36.01(a)(1).
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> . . . Mr. Buckner complains that I did not object to a comment by the prosecutor regarding how fast a female anus and vagina heal. Mr. Buckner makes a blanket statement without specifying how this statement was improper.
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> In this case, the sexual assault was alleged to have occurred in approximately 2000. The outcry was not made until years later. . . . However, because of the length of time between the alleged sexual assault and the outcry, based upon past trials and common sense, I did not believe that such a claim existed in this case, and therefore did not believe that such a comment by the prosecutor was improper. . . .
>
> The State's notice of outcry listed two witnesses, Sanya and Margaret Lopez. I objected to the State using two outcry witnesses and argued that the statute only allowed the use of one outcry witness. The State responded that multiple outcry

witnesses were allowed if everything was not disclosed to the first person. The objection was overruled, which I believed preserved error as to the issue.

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I am not sure why Mr. Buckner believes that I was ineffective for failing to request a pretrial hearing to determine bias. I have not seen any cases or statutes that provide for a pretrial hearing to determine bias of a State's witness. That is what cross-examination is for, to determine the bias of the witness.

. . . Mr. Buckner has not identified why the pictures he complains of are irrelevant other than that they show the complainant at a younger age. The admissibility of a photograph is within the sound discretion of the trial judge. *Young v. State*, 283 S.W.3d 854, 875 (Tex. Crim. App. 2009). I did not believe the pictures to be inherently prejudicial, and did not object because I did not want the prosecutor to make it appear as though the defense were trying to hide something from the jury.

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I worked extremely hard throughout Mr. Buckner's trial to not open the door to the fact that Mr. Buckner had previously been convicted of a sexual offense involving his little brother and another little girl. Mr. Buckner had been sent to TYC for that offense. I was able to keep that out during Mr. Buckner's trial. The use of a forensic expert, to elicit testimony that the complainant was lying or that Buckner was not disposed to commit that type of offense, would have opened the door to his prior conviction. I did not want that to happen.

. . . [T]he defense hired an investigator, Rose Enmark, to investigate whether records existed that would have shown who was allowed to pick up the children from St. Albans school. That investigation did not produce any records. . . .

As stated previously, I worked very hard throughout the trial to not open the door to testimony that Mr. Buckner had previously been sent to TYC for the offense of aggravated sexual assault, which offenses I knew to have involved his younger brother and a young girl. There were also other offenses; some arrests, others convictions, that I did not want to have brought up in response to character testimony in front of the jury. As for punishment, as stated previously, it was before Judge Allen, not the jury. Mr. Buckner and his wife both testified. Character witnesses at that point would have been repetitive and the State would have been able to go over his criminal history with each witness. I did not believe that the minimal value of having character witnesses testify to the same things as Mr. Buckner and his wife was worth hearing about the criminal history over and over.

Further, while I did get character letters from people on Mr. Buckner's behalf, I did not receive any directive from Mr. Buckner at any point for witnesses that he wanted to present at trial . Nor did I get a list from him of witnesses that were ready and willing to testify.

(DE 10-19 at 42-44).

Petitioner's appellate counsel also filed an affidavit in Petitioner's state habeas action:

> After a careful review of the trial record and based on my professional experience, I filed an appellant's brief with the Waco Court of Appeals that presented 2 issues: (1) a challenge to the sufficiency of the evidence based primarily on inconsistent statements made by the complainant A.L.; and (2) a challenge to the admissibility of the testimony of clinical psychologist Deborah Brock because of the State's failure to lay a proper predicate.
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> 5. I did not request oral argument in Buckner's appeal. I did not request oral argument because the Waco Court of Appeals rarely grants oral argument. In my professional opinion, the Waco Court of Appeals would not have granted oral argument in Buckner's appeal. Even if the court of appeals had granted oral argument, it is my further opinion that oral argument would not have changed the outcome of the appeal.
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> 6. The complainant A.L. testified at trial. She was 18 years' old at the time of trial. In the appellant's brief, I challenged the sufficiency of the evidence because of her delayed outcry, because of inconsistencies in her various statements and her testimony, because of her vague testimony regarding the sexual assault itself, because of her lack of recall about the details of the sexual assault, and because of her grandmother's strong dislike for Buckner, which gave the grandmother motive to convince A.L. to make false allegations against Buckner. Trial counsel called these matters to the jury's attention during cross-examination and in closing argument. However, they do not form the basis for a legal objection to A.L.'s testimony. And they do not form the basis for a challenge to the admissibility of A.L.'s testimony on appeal.
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> 7. Buckner questions why I failed to present an appellate issue regarding the admission of the testimony of "multiple out-cry witnesses." The State offered two outcry witnesses: A.L.'s mother and her grandmother. Trial counsel objected to the mother's testimony on this basis but not the grandmother's. As the prosecutor stated to the trial court, a case can involve multiple outcry witnesses. *See e.g. Josey v. State*, 97 S.W.3d 687 (Tex. App.–Texarkana 2003, no pet.). A trial court's ruling on the admissibility of outcry testimony is reviewed for an abuse of discretion. For each of these reasons, I exercised my professional judgment and chose not to pursue such an issue because its likelihood of success on appeal was virtually non-existent.

(DE 10-19 at 38-39).

The habeas trial court made findings of fact and conclusions of law, finding Petitioner's claims without merit and recommending that all relief be denied. (DE 10-19 at 47-53). The Texas Court of Criminal Appeals denied the writ without written order. (DE 10-16).

C. Federal habeas claims

Petitioner states the following claims for federal habeas relief:

1. He is actually innocent.

2. Trial counsel was ineffective because he:

   a. failed to enter a plea to the jurisdiction;
   b. failed to object to the prior conviction used for enhancement;
   c. failed to object to a prosecutor's improper comment during voir dire;
   d. failed to object to the introduction of outcry witnesses without proper notice;
   e. failed to obtain a pretrial hearing regarding the outcry witnesses;
   f. failed to obtain a pretrial hearing regarding two witnesses' bias;
   g. failed to object to the admission of pictures of A.L. as overly prejudicial;
   h. failed to secure a forensic psychologist as an expert witness;
   i. failed to investigate the school business records; and
   j. failed to investigate any of the character witnesses whose names he provided.

3. Appellate counsel was ineffective because he

   a. failed to request oral argument;
   b. failed to raise a claim regarding the victim's testimony that she could not recall petitioner placing his penis inside of her vagina; and
   c. failed to challenge the trial court's admission of testimony from multiple outcry witnesses.

4. The trial court erred and denied him due process by:

   a. denying the defense's motion for new trial;
   b. failing to rule on an objection regarding the notice of extraneous offenses;
   c. denying the lesser-included offense instruction; and,
   d. allowing Detective Bucher to show a witness her prior statement.

5. There is a fatal variance between the indictment and the evidence adduced at trial.

6. He was illegally sentenced based upon enhancement paragraphs that alleged convictions which were too remote for this purpose.

7. He was denied due process because a visiting judge presided over his case without an order of assignment in the record.

8. He was denied due process because of prosecutorial misconduct.

Respondent allows that the petition is timely and not successive. (DE 9 at 10). Respondent also allows that Petitioner exhausted his claims in the state courts. *Id.* Respondent asserts that the claims should be denied because they are not meritorious.

ANALYSIS

A. The Antiterrorism and Effective Death Penalty Act of 1996

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(d) 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.

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). Each of these three grounds for relief presents an independent inquiry. *Williams*, 529 U.S. at 404-05 (holding that the "contrary to" and "unreasonable application" clauses have independent meaning); *Salts v. Epps*, 676 F.3d 468, 479 (5th Cir. 2012).

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 reviewing federal court presumes the state court's factual findings are sound unless the petitioner rebuts the "presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005); *Maldonado v. Thaler*, 625 F.3d 229, 236 (5th Cir. 2010). This presumption extends to both express findings of fact and 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*), *cert. denied*, 135 S. Ct. 1160 (2015).

This standard of review applies to Petitioner's federal habeas claims notwithstanding the fact that the Texas Court of Criminal Appeals' decision denying relief in Petitioner's state habeas action was unexplained. *Cantu v. Collins*, 967 F.2d 1006, 1015 (5th Cir. 1992), *citing Marshall v. Lonberger*, 459 U.S. 422, 433-34 (1983). If a state court summarily denies a petitioner's claim, the Court's authority under AEDPA is limited to determining the reasonableness of the ultimate decision. *Charles v. Thaler*, 629 F.3d 494, 498-99 (5th Cir. 2011); *Catalan v. Cockrell*, 315 F.3d 491, 493 (5th Cir. 2002). When state habeas relief is denied without an opinion, the Court must assume the state court applied the proper "clearly established Federal law," and determine whether the decision was "contrary to" or "an objectively unreasonable application of" that law. *Schaetzle v. Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003).

B. Petitioner's claims for relief

1. Actual innocence

Petitioner alleges he is incarcerated despite his actual innocence, in violation of his right to due process of law. (DE 1 at 6). Petitioner argues there was insufficient credible evidence for a

reasonable jury to find him guilty, essentially presenting an insufficiency of the evidence claim rather than a *Herrera*-type due process claim based on newly discovered evidence.[4]

The controlling federal law is stated in *Jackson v. Virginia*, 443 U.S. 307, 325-26 (1979), i.e., to be entitled to relief on a sufficiency of the evidence claim, a petitioner must prove that no rational trier of fact could have found the existence of facts necessary to establish guilt beyond a reasonable doubt. When applying this standard, all evidence is viewed in the light most favorable to the prosecution, *id.* at 319, and all credibility choices and conflicts in the evidence are resolved in favor of the verdict. *Ramirez v. Dretke*, 398 F.3d 691, 695 (5th Cir. 2005). A federal habeas court " must defer to the factual findings in the state court proceedings" and "respect the ability of the fact-finder to evaluate the credibility of the witnesses." *Knox v. Butler*, 884 F.2d 849, 851 (5th Cir. 1989).

A.L.'s testimony, when viewed in the light most favorable to the prosecution and with all credibility choices resolved in favor of the verdict, was sufficient to establish the existence of facts necessary to establish Petitioner's guilt beyond a reasonable doubt. Accordingly, the state court's denial of Petitioner's sufficiency of the evidence claim was not contrary to or an unreasonable application of federal law, and Petitioner is not entitled to habeas relief on this claim.

2. Ineffective assistance of trial counsel

a. The *Strickland* standard

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

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[4] The Supreme Court held in *Herrera v. Collins* that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." 506 U.S. 390, 400 (1993). The Supreme Court reaffirmed this basic principle in *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013).

> 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. Accordingly, in order to prevail on a claim of ineffective assistance of counsel, a petitioner must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

When deciding whether counsel's performance was deficient, the Court must apply a standard of objective reasonableness, mindful that judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 686-89. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (citation omitted). Federal habeas courts presume that counsel's choice of trial strategy is objectively reasonable unless clearly proven otherwise. *Id.*

The prejudice prong of *Strickland* requires a petitioner to show 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. 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).

The Fifth Circuit has determined that both prongs of the *Strickland* test involve mixed questions of law and fact. *Nobles v. Johnson*, 127 F.3d 409, 418 (5th Cir. 1997). Whether counsel made a decision to pursue a particular trial strategy is a question of fact and whether that strategy was reasonable is a question of law. *Wood v. Allen*, 558 U.S. 290, 304 (2010); *Trottie v. Stephens*, 720 F.3d 231, 244 (5th Cir. 2013). And 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).

When considering a state court's application of *Strickland*, this Court's review must be "doubly deferential," to afford "both the state court and the defense attorney the benefit of the doubt." *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015), *citing 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 v. Cockrell*, 343 F.3d 440, 444 (5th Cir. 2003).

b. Trial counsel

Petitioner argues his trial counsel's performance was deficient because counsel: failed to challenge the trial court's jurisdiction; failed to object to the prior conviction used to enhance his sentence; failed to object to the prosecutor's improper comment during voir dire; failed to object to the introduction of outcry witnesses without proper notice; failed to obtain a pretrial hearing regarding the outcry witnesses; failed to seek a pretrial hearing regarding two witnesses' bias; failed

to object to the admission of pictures of A.L. because they were overly prejudicial; failed to secure a forensic psychologist as an expert witness; failed to investigate A.L.'s school records to establish Petitioner did not retrieve A.L. from school on the date in question; and failed to investigate any of the character witnesses whose names he provided to counsel.

Petitioner's trial counsel filed an affidavit in Petitioner's state habeas action, swearing that the decisions with regard to the prosecutor's "improper comment," the retention of a forensic psychologist, and the admission of the pictures of A.L., were sound trial strategy. Counsel further averred he cross-examined the witnesses as to their bias. Counsel did not challenge the court's jurisdiction because there was no valid reason to do so. Counsel declared that he did investigate the school records. Counsel further stated Petitioner did not provide him with the names of character witnesses, and the decision to limit character testimony was strategic. Counsel notes that he did object to the introduction of testimony from multiple outcry witnesses, which objection was overruled. Counsel stated Petitioner's claim regarding the enhancement of his sentence was without merit.

Counsel's strategic choices, made after a thorough investigation of the law and facts relevant to plausible options, are virtually unchallengeable. *Strickland*, 466 U.S. at 673; *Pape v. Thaler*, 645 F.3d 281, 289-90 (5th Cir. 2011). 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). And counsel's failure to raise non-meritorious issues does not constitute deficient performance. *Turner*, 481 F.3d at 298 ("For Turner's counsel to be deficient in failing to object, the objection must have merit under Texas law."); *Parr*, 472 F.3d at 256. If a state appellate court found

a claim based on state law without merit, counsel's failure to assert the claim cannot be found prejudicial. *Garza v. Stephens*, 738 F.3d 669, 677 (5th Cir. 2013); *Charles*, 629 F.3d at 500-01. Additionally, given the weight of the evidence against Petitioner, i.e., the testimony of A.L., which the jury evidently found credible, Petitioner has not established that any of the alleged errors were prejudicial. *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) (noting the weight of the evidence of guilt in finding alleged deficient performance of counsel not prejudicial); *Pondexter v. Quarterman*, 537 F.3d 511, 525 (5th Cir. 2008) (same).

Petitioner fails to rebut the presumption that counsel's decisions were made in the proper exercise of professional judgment. *Strickland*, 466 U.S. at 690. Petitioner has not established a reasonable probability that, but for counsel's challenged conduct, the result of the proceeding would have been different Accordingly, the state court's decision denying Petitioner's ineffective assistance of trial counsel claims was not an objectively unreasonable application of *Strickland* and Petitioner is not entitled to federal habeas relief on this claim.

b. Appellate counsel

Petitioner contends his appellate counsel was ineffective because counsel did not request oral argument; failed to raise a claim regarding the victim's testimony that she could not recall petitioner placing his penis inside of her vagina during the time of the alleged sexual assault; and failed to challenge the trial court's admission of testimony from multiple outcry witnesses. Petitioner asserted these claims in his state habeas action. Petitioner's appellate counsel filed an affidavit in that matter, averring he did not request oral argument because the request was likely to be denied and because it would not have promoted relief. Counsel further declared he did challenge the victim's vague

testimony in the appeal, and that he did not challenge the introduction of multiple outcry witnesses because this claim was without merit.

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 raise arguable issues in the appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Dorsey v. Stephens*, 720 F.3d 309, 319-20 (5th Cir. 2013). If the petitioner is able to make such a showing, he must also 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 that appeal. *Robbins*, 528 U.S. at 286. An appellate attorney need not, and should not, raise every non-frivolous claim, but rather should "winnow out weaker arguments" to maximize the likelihood of success on appeal. *Robbins*, 528 U.S. at 288; *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). The Supreme Court has stated that "'[g]enerally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" *Robbins*, 528 U.S. at 288, *quoting Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986).

Petitioner has not shown that appellate counsel's performance was deficient or that counsel's alleged failure to request oral argument, to more thoroughly challenge the victim's testimony, or to challenge the introduction of testimony from multiple outcry witnesses, was prejudicial. Accordingly, the state court's denial of Petitioner's claim that his appellate counsel's performance denied him the right to the effective assistance of counsel was not an unreasonable application of *Strickland*.

4. Trial court error

Petitioner asserts the trial court erred by denying his motion for new trial; failing to rule on an objection to the prosecution's failure to provide notice of extraneous offenses; denying the defense's request for a lesser-included-offense instruction; and allowing a detective to show a witness her prior statement.

a. Motion for a new trial

Petitioner's motion for a new trial was predicated on the allegation that a juror failed to disclose during voir dire that he had been sexually abused by his father and was a victim of a kidnapping and attempted sexual assault. (DE 10-7 at 81-82, 84). Petitioner's trial counsel filed an affidavit asserting that, after the trial, he "learned" this information had been withheld. (DE 10-7 at 84). The affidavit stated this juror disclosed to the trial court, in chambers and on the record, that his step-sister had been sexually abused by his father, but the juror did not disclose the sexual assault perpetrated on the juror at that time. (DE 10-7 at 84). Trial counsel declared that, had he been aware of this at the time, he would have challenged the juror for cause or exercised a peremptory strike to remove this individual from the jury. *Id.*

After the jury was selected, in chambers in the presence of counsel but not Petitioner, the trial court questioned Venireperson Number 2. (DE 10-10 at 126). The juror had approached the court and asked to be seen in chambers. The juror stated: "I want to say I apologize. The question was asked I think by the Judge and then you . . . if we've ever had a family member, you know, accused or a victim. I've had both. It was my stepsister, and my father was the accused." (DE 10-10 at 127).

The juror then stated:

> The question was always followed up by, do you think that would impair your judgment?
>
> No, I do not. But, however, if I was in his shoes, I would – I just wanted to bring that out. I was hoping for maybe more of a private opportunity to come to you. I didn't think the jury selection was gonna go that fast, because I know at least five or six people that were in the courtroom. That's not like something you just want to, you know, say. And I was basically just hoping for more of a private thing . . . And, anyways, it was a part of our life that we're not very proud of. . . .

(DE 10-10 at 127-28).

The juror told the court his father had been charged with two counts of aggravated sexual assault, and found guilty on one count and not guilty on the other count. (DE 10-10 at 128). The juror told the court this would not affect his ability to be fair and impartial: "The facts are the facts. We dealt with it as a family. He came clean. Told me everything. . . . He didn't try to hide anything. He was a man about the whole thing and, uh, it wasn't that bad. He received probation." (DE 10-10 at 128-29). Defense counsel noted: "It seems to be an emotional situation for you," and the juror responded: "It is. It really is. It was an emotional time. Yes, it brings up memories. That's about all I can say. I – I feel really horrible for you." (DE 10-10 at 129). He then added:

> No, it does not impair my judgment. If I was sitting in his shoes, if I was in my dad's shoes then – and I realize I may have caused – because I did not have the opportunity to speak up. I apologize for not speaking up. Because I did know so many people in the courtroom, I was reluctant to say anything . . . I was talking to two people out in the courtyard awhile ago. I said, I'm gonna say this when we come back in. I don't care who's listening or whatever, but it's important for him.
>
> Later on if that was found out, if he got guilty and what was found out about me, you know, I felt like, you know, that was an unfair thing for me to – uh, to not say.

(DE 10-10 at 130). Defense counsel asked this juror: "And if you felt like the evidence did not convince you beyond a reasonable doubt, would you be able to say not guilty?" (DE 10-10 at 130). The juror responded:

> Oh, this would have nothing to do with what has happened to me in the past. It's basically the fact it's on my head and being present on a juror – a jury for the same thing . . .
>
> In light of recent things, I've just – you know, I just don't want to be scrutinized if that was found out, if a guilty verdict did come about, because I know a lot of people in Waco and a lot of people know me . . . But if he gets guilty and – and they find that fact out, I would be scared, you know, maybe for later on. I don't know. I don't care. It's up to – I just wanted to tell you guys. Honestly, I'm here if you need me, but I wanted to bring that out because I think it was fair to bring that out.

(DE 10-10 at 131).

The trial court then asked if the juror could be "fair to both sides?" and the juror responded: "Absolutely. I could be fair." (DE 10-10 at 131).

The Sixth and Fourteenth Amendments guarantee a defendant the right to an impartial jury. *Parker v. Gladden*, 385 U.S. 363, 364 (1966); *King v. Lynaugh*, 850 F.2d 1055, 1058 (5th Cir. 1988). "Due process means a jury capable and willing to decide the case solely on the evidence before it . . ." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). A jury is "initially cloaked with a presumption of impartiality." *De La Rosa v. State of Tex.*, 743 F.2d 299, 306 (5th Cir. 1984). When determining if a defendant's right to an impartial jury has been violated, the pertinent inquiry is whether the jurors who actually served were impartial. *Ross v. Oklahoma*, 487 U.S. 81, 86 (1988); *Jones v. Dretke*, 375 F.3d 352, 355 (5th Cir. 2004). The standard for determining if a juror was biased is whether the juror's views would prevent or substantially impair the performance of his duties. *Soria v. Johnson*, 207 F.3d 232, 242 (5th Cir. 2000). "In evaluating claims of juror partiality,

we must consider whether the jurors in a given case had such fixed opinions that they could not judge impartially the guilt of the defendant." *Chavez v. Cockrell*, 310 F.3d 805, 811 (5th Cir. 2002) (internal quotation omitted). Bias may be actual or implied, i.e., it may be revealed through express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed as a matter of law. *Brooks v. Dretke*, 444 F.3d 328, 329-30 (5th Cir. 2006).[5] The trial court's determination as to juror impartiality can be overturned only for "manifest error." *Patton v. Yount*, 467 U.S. 1025, 1031 (1984).

The Court of Criminal Appeals' implicit finding that the subject juror was impartial was not manifestly erroneous. The allegations in the affidavit are not supported by an affidavit from the juror – there is no sworn statement from the juror that they withheld the fact of their own abuse from defense counsel or the trial court. During the conference in chambers the juror repeatedly stated he could reach a verdict based on the evidence. Additionally, as a matter of state law, even if the juror's bias could be presumed, Petitioner was not entitled to a new trial unless the state court determined

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[5] [I]n most cases the remedy for claims of juror bias is a post-event hearing, in which the trial judge can examine the juror and obtain assurances that, despite the event leading to the claim of bias, the person is able to continue serving as an impartial juror. [In *Smith v. Phillips*, 455 U.S. 209, 217-18,] Justice O'Connor, concurring in the judgment, wrote separately to emphasize that, in some circumstances, a juror's assurances could not suffice. She explained,

> Some examples might include revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction. Whether or not the state proceedings result in a finding of "no bias," the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances.

Brooks v. Dretke, 444 F.3d 328, 330 (5th Cir. 2006).

beyond a reasonable doubt that the juror's bias contributed to Petitioner's conviction. *Franklin v. State*, 138 S.W.3d 351, 358 (Tex. Crim. App. 2004). The Court of Criminal Appeals' determination of state law is binding on this Court, as the Court may not rule that a state court incorrectly interpreted its own law. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005); *Charles*, 629 F.3d at 500-01; *Schaetzle*, 343 F.3d at 449 ("[W]e defer to [the TCCA's] determination of state law. 'It is not our function as a federal appellate court in a habeas proceeding to review a state's interpretation of its own law. . . .'") (citation omitted)).

Petitioner has not established that any seated juror demonstrated bias such that Petitioner was deprived of his right to an impartial jury. *Chavez*, 310 F.3d at 811 (collecting cases); *Willie v. Maggio*, 737 F.2d 1372, 1379 (5th Cir. 1984). Because the record does not support a conclusion that any juror who served in Petitioner's trial was actually biased, the state court's decision denying the claim was not contrary to or an unreasonable application of federal law. *Soria*, 207 F.3d at 242.

b. Notice of extraneous offenses

Petitioner asserts the trial court "erred and abused its discretion by failing to rule on defense objection to the State's failure to provide the requisite notice concerning extraneous offense . . ." (DE 1 at 15). Petitioner raised this claim in his state habeas action and relief on this claim was denied.

Prior to trial, defense counsel made requests pursuant to Rule 404(b) and Rule 609, Texas Rules of Evidence, and article 37.07 §3g, Code of Criminal Procedure, asking the State "to timely notify the Defendant with written notice prior to trial" of the prosecution's intent to introduce Petitioner's prior bad acts or convictions into evidence, including for the purpose of impeachment or punishment. (DE 10-7 at 18-20).

On the first day of trial the prosecutor stated:

> We did receive a copy of the request for Notice of Extraneous Offenses, but it was never ruled upon by the Court. So the Judge never ordered it be produced. We have had an open file policy from the beginning of the trial. We also allowed Mr. Donahue to review all of our TYC records . . . He came to our office on Friday and reviewed those. We also provided him a copy with the 404(b), 609, 37.07 Notice here in Court, as well as a copy of the new offense that we've just discovered yesterday that includes a statement from the defendant. And we just wanted to make sure that that was all on the record.

(DE 10-10 at 4). Defense counsel replied that his requests for notice were not motions, and that these requests were "self–activating, effectuating . . . without the need for any sort of a ruling by the Court, and those were filed back in June of 2010." (DE 10-10 at 5). Defense counsel stated he had not received the notice of extraneous offenses until that morning. *Id.* The prosecution noted defense counsel "had an opportunity to view all of the prior offense reports, as well as the judgments and sentences that have been in our file and have been available to him since the case has been indicted." *Id.* The trial court ruled that the statute required the information be "furnished" to the defense, rather than made available, and sustained the defense's objection to allowing into evidence the extraneous offenses. (DE 10-10 at 8, 10-11).

Because the trial court did rule on the objection, Petitioner is not entitled to federal habeas relief on this claim. *Evans v. Cain*, 577 F.3d 620, 625 (5th Cir. 2009).

c. Lesser-included offense

Petitioner contends the trial court erred by denying the defense's request for a jury instruction on a lesser-included offense of indecency with a child by contact. (DE 15-24). Petitioner raised this claim in his application for state habeas relief, which application was denied.

Federal habeas relief may not be granted absent the violation of a federal constitutional right. "[I]n a non-capital case, the failure to give an instruction on a lesser-included offense does not raise a constitutional issue." *Creel v. Johnson*, 162 F.3d 385, 390 (5th Cir. 1998); *Alexander v. McCotter*, 775 F.2d 595, 601 (5th Cir. 1985). In denying this claim in Petitioner's state habeas action, the Texas Court of Criminal Appeals impliedly concluded that a lesser-included offense instruction was not warranted. Absent a violation of the United States Constitution, 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*, 162 F.3d at 390-91; *Valles v. Lynaugh*, 835 F.2d 126, 128 (5th Cir. 1988).

Because the Court is bound by the Court of Criminal Appeals' determination of state law that a lesser-included offense instruction was not warranted, Petitioner is not entitled to federal habeas relief on the basis of this claim.

d. Prior statement of witness

Petitioner asserts the "trial court abused its discretion by allowing Detective Bucher to show A.L.'s mother a previous statement over the objection of defense counsel, making it a "reported recollection" versus a spontaneous recollection concerning her inconsistent statement . . ." (DE 1 at 15). As previously noted, it was the prosecutor who showed the witness her prior statement. Petitioner raised this claim in his state habeas action, and relief was denied.

Federal habeas relief is predicated on the finding of a violation of a petitioner's federal constitutional rights. *Lawrence v. Lensing*, 42 F3d 255, 258 (5th Cir. 1995). To be entitled to federal habeas relief, the petitioner must demonstrate that his conviction occurred by means of a violation of a specific provision of the United States Constitution. *Lockett v. Anderson*, 230 F.3d 695, 707 (5th Cir. 2000). A state court's evidentiary decisions rise to constitutional dimension only if they rendered

the trial so fundamentally unfair as to deny due process. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Petitioner does not assert that the this alleged error violated any state rule of evidence or procedure. Texas law permits a witness to refresh her present recollection by reviewing a memorandum made when her memory was fresh. *Welch v. State*, 576 S.W.2d 638, 641 (Tex. Crim. App. 1979). Additionally, a thorough review of the record indicates that this single event did not render Petitioner's trial fundamentally unfair. Accordingly, the state court's denial of this claim was not clearly contrary to or an unreasonable application of federal law.

5. Variance in the indictment

Petitioner contends that "a fatal variance existed between the charging instrument and the evidence adduced at trial." (DE 16 at 1).

> Petitioner complains that a fatal variance exists between the material allegations contained in the charging instrument and evidence adduced at trial, to-wit: the indictment handed [up] by the Grand Jury was based upon the amended version of the related penal code, instead of the penal code which existed at the time of the alleged offense occurred. The law at that time allowed for "contact" to be alleged as an element in addition to penetration alone, as the code stated at the time Petitioner was indicted. The State should only have been able to indict Petitioner for the instant offense based upon the penal [code] enacted at the time of the offense and any amendments thereafter would be prohibited from being applied retroactively based upon the saving clause and the ex post facto prohibition of the United States Constitution.

Id. This claim was rejected by the Court of Criminal Appeals.

"It is settled in this Circuit that the sufficiency of a state indictment is not a matter for federal habeas corpus relief unless it can be shown that the indictment is so defective that the convicting court had no jurisdiction." *Branch v. Estelle*, 631 F.2d 1229, 1233 (5th Cir. 1980). *See also McKay v. Collins*, 12 F.3d 66, 68 (5th Cir. 1994). "When it appears . . . that 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," *Alexander v. McCotter*, 775 F.2d 595, 598 (5th Cir. 1985), then the question "as to whether a state trial court was deprived of jurisdiction . . . is a question foreclosed to a federal habeas court." *Liner v. Phelps*, 731 F.2d 1201, 1203 (5th Cir. 1984). The Court of Criminal Appeals necessarily, though not expressly, held that the trial court had jurisdiction in this matter. *Evans v. Cain*, 577 F.3d 620, 624-25 (5th Cir. 2009).

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). 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).

The indictment against Petitioner, citing § 22.021, Texas Penal Code, alleges: [Petitioner] . . . did then and there intentionally or knowingly cause the sexual organ of [A.L.] , to contact or be penetrated by the sexual organ of the Defendant . . ." (DE 10-7). The statute in effect at the time of

the offense in 2000 provides: "A person commits an offense: (1) If the person . . . (B) intentionally or knowingly: (i) causes the penetration of the . . . female sexual organ of a child by any means . . . (iii) causes the sexual organ of a child to contact . . . the sexual organ of another person, including the actor. . ." The indictment alleged the elements of the crime as stated in the section of the Penal Code in effect at the time of the alleged crime. The material allegations contained in the charging instrument, and the evidence adduced at trial did not present a fatal variance.

Additionally, for a conviction to violate the *Ex Post Facto* Clause of the Constitution, Petitioner must establish that a law was retroactively applied to him, causing him some disadvantage. *Ortiz v. Quarterman*, 504 F.3d 492, 499 (5th Cir. 2007), *citing Weaver v. Graham*, 450 U.S. 24, 29 (1981). Petitioner has failed to make such a showing, as the version of the statute in effect in 2000 is substantially the same as the version of the statute in effect at the time of his indictment and trial, and criminalizes the same conduct.

Because there was no variance between the indictment and the evidence produced at trial, and because Petitioner's conviction did not violate the *Ex Post Facto* Clause, the state court's decision denying relief on this claim was not clearly contrary to or an unreasonable application of federal law.

6. Enhancement of sentence

Petitioner contends he was denied due process and was illegally sentenced because the prior conviction used to enhance his punishment was too remote to be used for this purpose.

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle*, 502 U.S. at 67-68. It is not the function of a federal habeas court to review a state's interpretation of its own law. *Weeks v. Scott*,

55 F.2d 1059, 1063 (5th Cir. 1995); *Moreno v. Estelle*, 717 F.2d 171, 179 (5th Cir. 1983). Whether an offense has been properly enhanced is generally a matter of state law. *Rubino v. Lynaugh*, 845 F.d 1266, 1271 (5th Cir. 1988); *Rubio v. Estelle*, 689 F.2d 533, 536 (5th Cir. 1982).

Respondent argues:

> In this case, even as a matter of state law, there is no merit to [Petitioner's] claim that his punishment was improperly enhanced. [Petitioner] mistakenly argues that his prior conviction in cause number W-98-CR-029 was unavailable for punishment enhancement purposes because it was more than ten years old when he was indicted. Fed. Pet. at 17. Buckner seems to rely upon the limits on extraneous offense evidence used for impeachment, *see* Tex. R. Evid. 609, or the now-repealed ten-year rule, which applied to prior convictions used for enhancement under § 49.09 of the Texas Penal Code — a provision dealing with driving while intoxicated. *See id.* However, [Petitioner's] punishment was enhanced under section 12.42 of the Texas Penal Code, . . . which has never imposed any limit on how long a prior conviction may be used for punishment enhancement. *See Hicks v. State*, 545 S.W.2d 805, 810 (Tex. Crim. App. 1977) (finding that a remote-in-time prior conviction may be used for punishment enhancement pursuant to Texas Penal Code § 12.42(d)).

(DE 9 at 16-17).

Because the enhancement of a sentence is a matter of state law, and Respondent's explanation of the Texas Court of Criminal Appeals' presumed logic in denying this claim is reasonable, Petitioner is not entitled to federal habeas relief on this claim.

7. Visiting judge

Petitioner asserts a senior judge was assigned to preside over his case as a visiting judge without a proper order of assignment in the record. (DE 1 at 18). Petitioner argues that because no order of assignment appears in the record, the judge was not "legally authoriz[ed]" to preside over his case and that "anything done by said judge should have no legal force or effect and the proceedings should be considered *void abinitio*." *Id.* Petitioner also contends that his right to due

process was further violated because the judge did not have a current oath of office on file with the Secretary of State at the time of Petitioner's trial. *Id.*

Petitioner cites no Supreme Court case holding that a criminal conviction entered by a jury in a case wherein there is no record order of assignment to the presiding judge constitutes a violation of the defendant's federal constitutional rights. The absence of an order of assignment in the record, or a current oath of office on file with the Secretary of State, presents only a claim that state law or state rules of criminal procedure were violated. Because this claim is premised on the violation of state law, the Texas Court of Criminal Appeals' decision denying relief cannot be said to be clearly contrary to or an unreasonable application of federal law. *Cf. Pierce v. Director, TDCJ-CID*, 2013 WL 1796137, at *17 (E.D. Tex. 2013) ("procedural irregularities in the referral of a matter to a visiting judge do not render a judgment void, and is not a basis for federal habeas relief"), *citing Davis v. State*, 956 S.W.2d 555, 560 (Tex. Crim. App. 1997), *and Ramos v. Dretke*, 2005 WL 39144, at *3 (N.D. Tex. 2005) (finding a claim based on the failure of the trial judge to take the oath of office required by state law not cognizable in a federal habeas action). *See also Brewster v. Quarterman*, 2009 WL 35041, at *11 (N.D. Tex. 2009) (determining a federal habeas court must defer to the state court's determination that a visiting judge had jurisdiction).

8. Prosecutorial misconduct

To be entitled to federal habeas relief on a claim of prosecutorial misconduct, the petitioner must establish that improper conduct rendered the trial so fundamentally unfair as to make the result a denial of due process. *Greer v. Miller*, 483 U.S. 756, 765 (1987); *Barrientes v. Johnson*, 221 F.3d 741, 753 (5th Cir. 2000). A trial is fundamentally unfair if there is a reasonable probability that the verdict would have been different but for the prosecutor's improper behavior. *Barrientes*, 221 F.3d

at 753; *Foy v. Donnelly*, 959 F.2d 1307, 1317 (5th Cir. 1992). The Fifth Circuit Court of Appeals has held a prosecutor's improper statements exceed constitutional limitations in only the most egregious cases. *Ortega v. McCotter*, 808 F.2d 406, 410-11 (5th Cir. 1987); *Houston v. Estelle*, 569 F.2d 372, 382 (5th Cir. 1978).

One of the elements considered by the Texas appellate courts to determine the existence of prosecutorial misconduct is whether the misconduct was so blatant as to border on being contumacious. *Stoker v. State*, 788 S.W.2d 1, 14 (Tex. Crim. App. 1989). The term "blatant" is defined as completely obvious or obtrusive in an offensive manner. *Gonzales v. State*, 775 S.W.2d 776, 780 (Tex. App.–San Antonio 1989, pet. ref'd). Even if a prosecutor's conduct is found to be improper, reversal of a conviction based on this type of error is warranted only if the defendant was harmed by the conduct. *Kelley v. State*, 845 S.W.2d 474, 479 (Tex. App.–Houston 1993, pet. ref'd). An improper statement made during voir dire has less impact on the jury than the same statement made during closing argument. *Jackson v. State*, 726 S.W.2d 217, 221 (Tex. App.–Dallas 1987, pet. ref'd).

The statement of which Petitioner complains was made during voir dire. The state court considered this claim in Petitioner's state habeas action and denied relief, impliedly applying state law and finding the statement allowable. Having thoroughly reviewed the entire trial record, the Court concludes there is no reasonable probability that, but for this comment, the verdict would have been different. Accordingly, the state court's denial of this claim was not clearly contrary to or an unreasonable application of federal law.

CONCLUSION

Petitioner's rights to due process of law and the effective assistance of counsel were not violated by his state criminal proceedings. Petitioner is not entitled to federal habeas relief on his claims that state laws or rules were violated during his criminal proceedings, as none of the errors asserted by Petitioner constituted a violation of his federal constitutional rights to due process and a fair trial.

MOTION TO AMEND PETITION

Petitioner's motion to amend his petition asks the court to liberally construe his pro se pleadings. (DE 13 at 1). Petitioner seeks to correct a typographical error, which error does not affect the Court's decision regarding the merits of his claims.

In his memorandum in support of his motion, Petitioner supplies additional citations to state law with regard to his claim regarding a juror's failure to disclose that he was the victim of abuse. (DE 14). Petitioner asserts that this juror "likely" had "deep-seated feelings over allegations of this nature, and the apparent pervasiveness of abuse in his life make[s] it all the more unlikely that he would be able to remain impartial." (DE 14 at 2). Petitioner cites the Ninth Circuit Court of Appeals' opinion in *United States v. Gonzalez*, 214 F.2d 1109, 113-14 (9th Cir. 2000), for the proposition that implied bias may be found where a juror has personal experience similar to the fact pattern at issue, or where the juror was privy to prejudicial information about the defendant. However, the juror in *Gonzalez*, who had disclosed that her ex-husband had used and dealt cocaine, never affirmatively stated that she could be impartial with regard to a defendant charged with conspiracy, distribution of cocaine, and money laundering. Additionally, *Gonzalez* is not "clearly established federal law," i.e., an opinion issued by the United States Supreme Court. The opinion of the Ninth Circuit does

not establish that the state court's denial of this claim was clearly contrary to or an unreasonable application of federal law as those terms are defined by section 2254. And, as previously noted, there is no actual evidence that the juror in Petitioner's case was abused such that bias could be implied. Therefore, because amendment of the petition would not result in relief, the motion to amend is 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 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, the Court shall not issue a certificate of appealability.

It is therefore ORDERED that the Application for Writ of Habeas Corpus [Docket Entry 1], docketed on June 1, 2015, is **DENIED**.

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

It is further ORDERED that the Motion to Amend [Docket Entry 13] is **DENIED**.

SIGNED on September 12, 2017.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE