No. _____

In The
Supreme Court of the United States

SHANNON DALE DUKES,

Petitioner,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOSH BARRETT SCHAFFER
Counsel of Record
1021 Main, Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
josh@joshschafferlaw.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

For two decades, the Fifth Circuit routinely has denied certificates of appealability (COA) to habeas petitioners with claims that are debatable among reasonable jurists. In several cases, this Court has rejected the Fifth Circuit's COA analysis and granted relief. *See, e.g.*, *Tennard v. Dretke*, 542 U.S. 274 (2004). Yet, the Fifth Circuit remains "too demanding in assessing whether reasonable jurists could debate" the denial of relief. *Jordan v. Fisher*, 135 S.Ct. 2647, 2651 (2015) (Sotomayor, J., dissenting from denial of certiorari, joined by Ginsburg & Kagan, JJ.).

Petitioner's case exemplifies the Fifth Circuit's systemic failure to apply the COA standard properly. Two judges on Texas' highest court dissented from the denial of habeas relief. "When a state appellate court is divided on the merits of the constitutional question, issuance of a [COA] should ordinarily be routine." *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011). Yet, a Fifth Circuit judge summarily denied a COA without analysis.

Given the debatable constitutional claim and the Fifth Circuit's practice of demanding too much in its COA determinations, the questions presented are:

I. Whether petitioner's trial counsel was ineffective at the guilt-innocence stage, in violation of the Sixth Amendment, in failing to request jury instructions on lesser-included offenses that were strongly supported by the trial evidence and would

QUESTIONS PRESENTED—Continued

have significantly reduced petitioner's punishment exposure, and without consulting him on the matter.

II. Whether the Fifth Circuit has ignored this Court's directive on how to apply the COA standard of review and erred in summarily denying a COA in a single-judge order, particularly when two judges on Texas' highest court would have granted relief on petitioner's constitutional claim.

RELATED CASES

- *State v. Dukes*, No. 10-08423, Criminal District Court of Jefferson County, Texas. Judgment entered June 15, 2011.
- *Dukes v. State*, No. 13-11-00434-CR, Thirteenth Court of Appeals of Texas. Judgment entered July 26, 2012.
- *Dukes v. State*, No. PD-1199-12, Texas Court of Criminal Appeals. Order entered December 19, 2012.
- *Ex parte Dukes*, No. 10-08423-A, Criminal District Court of Jefferson County, Texas. Order entered January 20, 2015.
- *Ex parte Dukes*, No. WR-81,845-01, Texas Court of Criminal Appeals. Order entered April 1, 2015.
- *Dukes v. Stephens*, No. 1:15-CV-137, United States District Court for the Eastern District of Texas. Judgment entered September 23, 2018.
- *Dukes v. Davis*, No. 18-40969, United States Court of Appeals for the Fifth Circuit. Order entered October 16, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Shannon Dale Dukes, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Fifth Circuit denying his application for a certificate of appealability (COA).

OPINIONS BELOW

The Fifth Circuit's order denying a COA (App. 1-2) is unpublished. The federal district court's order denying habeas corpus relief (App. 5-40) and its order denying a COA (App. 3-4) are both unpublished. The Texas Court of Criminal Appeals' (TCCA) order denying habeas corpus relief (App. 41) is unpublished. The state trial court's findings of fact and conclusions of law (App. 42-105) are unpublished.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied petitioner's application for a COA on October 16, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236 (1998) (jurisdiction to review single-judge order denying COA).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the [a]ssistance of [c]ounsel for his defen[s]e."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of . . . liberty . . . without due process of law . . . . "

Sections 2253(c)(1) & (2) of Title 28, United States Code, provide, in pertinent part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. Procedural History

A Texas jury convicted petitioner of continuous sexual abuse of a child under 14 years of age and assessed punishment at 40 years in prison on June 15, 2011. The Thirteenth Court of Appeals of Texas affirmed petitioner's conviction on July 26, 2012. The TCCA refused discretionary review on December 19, 2012. *Dukes v. State*, 2012 WL 3041336, No. 13-11-00434-CR (Tex. App.—Corpus Christi 2012, pet. ref'd) (unpublished).

Petitioner filed a state habeas corpus application on March 17, 2014. Without conducting an evidentiary hearing, the state trial court made findings of fact and conclusions of law and recommended that the TCCA deny relief on July 16, 2014. Concluding that petitioner had "alleged facts [concerning his ineffective assistance of counsel claim] that, if true, might entitle him to relief," the TCCA remanded for an evidentiary hearing on September 24, 2014. *Ex parte Dukes*, No. WR-81,845-01, 2014 WL 5388111, at *1 (Tex. Crim. App. 2014) (unpublished). The trial court conducted an evidentiary hearing on remand on November 21, 2014. It entered supplemental findings and conclusions and again recommended that relief be denied on January 20, 2015. The TCCA denied relief without written order, with two judges dissenting, on April 1, 2015. *Ex parte Dukes*, No. WR-81,845-01 (Tex. Crim. App. 2015) (unpublished).

Petitioner filed a timely federal habeas corpus petition in the United States District Court for the Eastern District of Texas on April 2, 2015. The district court denied relief on September 23, 2018. Petitioner filed a timely notice of appeal on October 11, 2018. The district court denied a COA on November 14, 2018. Petitioner applied for a COA with the United States Court of Appeals for the Fifth Circuit on January 29, 2019. Without requiring the respondent to file a response, a single judge of the Fifth Circuit denied a COA on October 16, 2019.

B. Factual Statement

1. The Jury Trial

The amended indictment alleged that, from September 1, 2007,[1] through March 23, 2008, petitioner committed two or more sexual offenses against a child under 14 years of age (known as L.G.), which constituted the offense of continuous sexual abuse of a child in violation of TEXAS PENAL CODE § 21.02 (West 2008) (ROA.845-46). For the first predicate offense, the indictment alleged that petitioner committed indecency with a child by contact by intentionally and knowingly touching part of L.G.'s genitals with the intent to arouse and gratify the sexual desire of any person in violation of TEXAS PENAL CODE § 21.11. For the second predicate offense, it alleged that he committed aggravated sexual assault by intentionally and knowingly penetrating L.G.'s

[1] Section 21.02 of the TEXAS PENAL CODE became effective on September 1, 2007.

mouth with his penis in violation of TEXAS PENAL CODE § 22.021. Petitioner pled not guilty and had a jury trial.

L.G., whose date of birth was March 24, 1994, testified at trial that petitioner, her step-father, began touching her genitals with his hand and mouth when she was 12 years old (ROA.1113). He touched her breast and vaginal area and put his penis in her mouth when she was 13 years old (ROA.1106-07, 1110-11). The alleged sexual abuse occurred three to four times per week while she was 13, between September 1, 2007, and March 24, 2008 (ROA.1112-13). After she turned 14, he began having vaginal intercourse with her once per week, which increased to three to four times per week and continued until September 19, 2009 (ROA.1114-16).

L.G. testified that petitioner learned of her romantic interest in J.D. Mull, a teenage boy, when she was 14 years old (ROA.1084). Petitioner opposed the relationship, told her to end it because Mull was older, and threatened Mull and his family (ROA.1043-44, 1119, 1140). Peggy Dukes, petitioner's wife and L.G.'s mother, confronted L.G. about Mull in petitioner's presence on September 21, 2009; accused them of having sex; threatened to prosecute Mull; and said that she would take L.G. to a doctor to determine if she was having sex (ROA.1041-42, 1045, 1122). Petitioner became furious, said that L.G. was lying when she denied having sex with Mull, said that she would be "grounded forever," and then went outside to mow the lawn (ROA.1046, 1124). L.G. only then told Peggy that petitioner had been sexually abusing her since she was 12

years old (ROA.1047, 1124). Peggy reported the abuse to the police; she and L.G. lived in a hotel for three weeks (ROA.1049-54). L.G., who was 17 years old at trial, admitted that she remained romantically involved with Mull, that he took her to the homecoming dance after petitioner was arrested, and that she accepted a "promise ring" from him (ROA.1133, 1136).

Peggy Dukes testified that, after petitioner was arrested, he called her from jail and acknowledged that he "did it one time" with L.G. (ROA.1054, 1056-58, 1216, 2017). The prosecution played a recording of that phone call for the jury (State's Trial Exhibit 37).

Brenda Garison, a sexual assault nurse examiner (SANE), performed a sexual assault examination on L.G. on September 23, 2009 (ROA.1146-47). As part of the exam, she obtained the "history" of the alleged sexual abuse (ROA.1147). L.G. told Garison that petitioner's sexual abuse of her "started after" Hurricane Ike in September of 2008 and lasted until September 19, 2009, shortly before his arrest (ROA.1148-49, 1160). Garison memorialized what L.G. told her in a written report on the day of the exam (ROA.2018-25).[2]

Police officers obtained sheets from L.G.'s bed and a buccal swab from petitioner (ROA.1169-72). The

---

[2] L.G.'s out-of-court statements fell within an exception to the hearsay rule under Texas Rule of Evidence 803(4) and were admitted as substantive evidence of guilt. *See*, *e.g.*, *Fahrni v. State*, 473 S.W.3d 486, 498-99 (Tex. App.—Texarkana 2015, pet. ref'd); *Prieto v. State*, 337 S.W.3d 918, 920-21 (Tex. App.—Amarillo 2011, pet. ref'd).

sheets tested positive for semen (ROA.1230-32, 1241-42). Petitioner's semen did not contain spermatozoa because he previously had a vasectomy (ROA.1038, 1261). A DNA analyst testified that the semen on L.G.'s sheets did not contain spermatozoa and that petitioner could not be excluded as the contributor of the semen (ROA.1262-63). The analyst admitted that she could not determine the age of the sample (ROA.1267). Peggy testified that she and petitioner never had sex in L.G.'s bed (ROA.1041).

The trial court instructed the jury in the charge on continuous sexual abuse of a child—based on the predicate acts of indecency with a child and aggravated sexual assault—but did not instruct the jury on any lesser-included offenses (ROA.1457-69). Petitioner's counsel did not object to the charge and did not request jury instructions on any lesser-included offenses (ROA.1270-71).

During closing arguments, the prosecutor emphasized L.G.'s testimony, petitioner's recorded admission that he "did it one time," and the semen found on L.G.'s sheets (ROA.1285-87).

Petitioner's counsel took conflicting approaches in his brief closing argument. He initially argued that the prosecution had to prove that petitioner sexually assaulted L.G. between September 1, 2007 (the effective date of the statute for the charged offense) and March 23, 2008 (the day before L.G. turned 14). He contended that L.G. had told "people" (apparently referencing Garison) that the sexual abuse occurred after

Hurricane Ike, which was in September of 2008 and "outside the period" (ROA.1281-82). Counsel's primary argument, however, took an alternative and inconsistent approach by attacking the credibility of L.G. and Peggy Dukes and by arguing that their testimony did not have the "ring of truth." He argued that L.G., who was "sophisticated" and "power[ful]," had entirely fabricated the claim of sexual abuse because petitioner had threatened to end her relationship with Mull. Counsel characterized petitioner as an "innocent man" who was "wrongly charged with a crime" (ROA.1281-84). Significantly, counsel ignored both petitioner's admission in the recorded telephone call from the jail and the semen found on L.G.'s sheets.

The jury convicted petitioner of continuous sexual abuse of a child and assessed punishment at 40 years in prison (ROA.1470, 1480, 1482-83).

2. The Post-Conviction Evidentiary Hearing

Counsel testified at an evidentiary hearing in the state habeas corpus proceeding. He asserted that, in preparing for trial, his sole strategy was to impeach the credibility of the two key prosecution witnesses, L.G. and Peggy Dukes, by calling two rebuttal witnesses, Allen Dukes and Chuck Hammock (ROA.238-39, 305). After the prosecution rested its case-in-chief, counsel learned that those potential witnesses would commit perjury, so he decided not to call them (ROA.306). At that time, his defense strategy "imploded" as the

result of the "irrevocable" and "catastrophic failure" of the all-or-nothing strategy—in the apt words of respondent's pleading in the district court (ROA.105). Counsel testified that, when he learned that these witnesses would commit perjury, he "became nauseous" because he had "lost his paddle in the creek" (ROA.306, 783). As the state habeas trial court found, because he was caught off guard, "counsel was unable to come up with an alternative case for the defense" (ROA.399-400).

Counsel agreed that the charged offense of continuous sexual abuse of a child included lesser offenses (ROA.265-67); that he did not discuss with petitioner whether to request instructions on lesser-included offenses (ROA.259, 278); that he should have explained the effect that a conviction for one or more lesser-included offense would have had on the applicable punishment range (ROA.315-16); that he probably did not consider whether to request these instructions (ROA.308); and that he should have requested them and no sound strategy justified his omission (ROA.260, 273, 278).

3. Lower Courts' Rulings on Petitioner's Ineffectiveness Claim and COA Application

Petitioner contended in state and federal court that counsel was ineffective in violation of the Sixth and Fourteenth Amendments by failing to request jury instructions on the lesser-included offenses of (1) sexual assault of a child between 14 and 16 (oral sex) and

(2) indecency with a child under age 17 (sexual contact). The prosecution's trial evidence supported that claim, including: (1) Garison's testimony (corroborated by her written report) that L.G. told her that petitioner started to sexually abuse her *after* Hurricane Ike (which occurred in September of 2008, when L.G. was 14 years old and, thus, too old to be the victim of continuous sexual abuse of a child); and (2) the recorded telephone call from the jail in which petitioner admitted that he had sexual contact with L.G. "one time."

The state habeas trial court concluded that counsel was not ineffective in failing to request jury instructions on lesser-included offenses because, as a threshold matter, the trial evidence did not permit a rational jury to convict petitioner only of a lesser-included offense (ROA.375-85). The court reasoned that "Garison's testimony . . . provides no evidence directly germane to either of the two lesser included alleged predicate offenses" because it did not "consist of affirmative evidence that both raises either of the two lesser included alleged predicate offenses . . . and rebuts or negates an element of the greater included [sic] Continuous Sex Abuse offense . . . " (ROA.382).

Importantly, the TCCA did *not* adopt the trial court's findings of fact and conclusions of law.[3] Instead,

---

[3] In a Texas state habeas corpus proceeding, the state trial court does not enter a judgment. Rather, like a federal magistrate judge on a referral from a federal district court, the state trial court makes findings of fact and conclusions of law, which the TCCA may adopt in full, in part, or not at all. *See*, *e.g.*, *Ex parte*

it denied relief "without written order"—without offering any reason—over the dissent of two judges (ROA.166).

Rather than rely on the state trial court's legal conclusion that the trial evidence did not support jury instructions on any lesser-included offenses, the federal district court concluded that the TCCA made an "implicit determination" that counsel made a "strategic" decision to attack the credibility of L.G. and Peggy Dukes and seek a complete acquittal. The district court deemed that implicit legal conclusion "reasonable," thus warranting deference on federal habeas corpus review (under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)) (ROA.143.) The district court stated that counsel's "strategy" was reasonable "based on the facts known to counsel at the time" (ROA.143.) It also found "reasonable" the TCCA's alternative "implicit determination" that any deficiency did not "prejudice" petitioner under *Strickland v. Washington*, 466 U.S. 668 (1984) (ROA.143). The district court stated—erroneously[4]—that:

> The victim [L.G.] had presented *uncontested testimony* that before she was 14 years old, petitioner committed numerous repeated acts

---

Reed, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008). In petitioner's case, the TCCA did not adopt any of the trial court's findings and conclusions.

[4] As discussed above, L.G. told Garison that petitioner began sexually abusing her after Hurricane Ike, at which point L.G. had been 14 years old for many months. Thus, the evidence seriously contested whether he sexually abused her before she turned 14.

> of sexual abuse against her over a two year period. . . .
>
> While a lesser included offense charge would have a resulted in a sure conviction of the offense to which petitioner admitted [in his recorded jail call], it does not necessarily follow that the jury would have overlooked petitioner's countless other acts of sexual abuse in order to acquit him of the continuous sexual abuse. Thus, while it is possible petitioner might have been sentenced to a lesser term of confinement if convicted only of a lesser included offense, petitioner has not shown a reasonable probability he would have been convicted only of a lesser included offense [had the court submitted jury instructions on lesser-included offenses].

(ROA.143-44) (emphasis added).

The district court entered a separate order denying a COA. It cited the COA standard and stated, "In this case the standards for issuance of a certificate of appealability are not met" (App. 4). Similarly, the Fifth Circuit cited the COA standard and concluded, "Dukes has failed to make the requisite showing" (App. 2). Neither court engaged in meaningful analysis beyond these conclusory statements.

REASONS FOR GRANTING THE PETITION

This Court repeatedly has faulted the Fifth Circuit for improperly applying the COA standard of

review under 28 U.S.C. § 2253. Despite several reversals of COA denials, the Fifth Circuit continues to be "too demanding in assessing whether reasonable jurists could debate" a district court's denial of habeas corpus relief. *Jordan v. Fisher*, 135 S.Ct. 2647, 2651 (2015) (Sotomayor, J., dissenting from denial of certiorari, joined by Ginsburg & Kagan, JJ.).

Petitioner's case is a prime example of the Fifth Circuit's erroneous approach. *Cf. McGee v. McFadden*, 139 S.Ct. 2608, 2611 (2019) (Sotomayor, J., dissenting from denial of certiorari) ("This case provides an illustration of what can be lost when COA review becomes hasty."). For the reasons set forth below, petitioner's ineffectiveness claim is substantial and meritorious. At a minimum, it is debatable among reasonable jurists—including two judges on the TCCA who dissented from the denial of state habeas corpus relief—and deserves plenary consideration on appeal.

I. Petitioner's Ineffective Assistance of Counsel Claim Is Meritorious

Counsel was ineffective in failing to request jury instructions on lesser-included offenses. *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, this Court set forth the two-part standard to determine whether criminal defense counsel rendered ineffective assistance. The defendant first must show that counsel's performance was "deficient." *Id.* at 687-88. Second, the defendant must show that the deficient performance "prejudiced" the defense. *Id.* at 694-95. Regarding the

alleged deficiency, the defendant must identify specific acts or omissions of counsel that were not the result of reasonable professional judgment or "strategy." The reviewing court then must determine whether, considering all the facts and circumstances, the identified acts or omissions fell outside the range of professionally competent assistance. *Id.* at 689. Once deficient performance is proven, the defendant must show "a reasonable probability" that, but for counsel's deficient performance, 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; *see also Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (showing *Strickland* prejudice requires less than preponderance of evidence that result of proceeding would have been different); *United States v. Dominguez Benitez*, 542 U.S. 74, 82 n.9 (2004) (same).

A. Counsel Performed Deficiently

Counsel's "all-or-nothing" approach constituted unsound strategy under the circumstances for two reasons. First, counsel conceded at the evidentiary hearing that he did not consider other, more viable defensive options—including seeking a conviction for one or more lesser-included offenses that carried significantly less harsh punishment ranges (discussed further below). Second, his all-or-nothing approach was internally inconsistent. He argued to the jury that there was a reasonable doubt whether the predicate offenses occurred before L.G.'s fourteenth birthday *and* that petitioner was a totally "innocent man" who was

"wrongly charged with a crime" based on the claims of L.G. and Peggy Dukes that did not "ring true." The all-or-nothing approach that challenged the credibility of L.G. and Peggy Dukes was totally undermined by two key pieces of unrebutted evidence—the recorded phone call in which petitioner admitted that he "did it one time" and the DNA evidence on L.G.'s sheets.

At the evidentiary hearing, counsel admitted that he did not consider asking the court to submit jury instructions on one or more lesser-included offenses and that he did not discuss that option with petitioner (ROA.259, 278, 308). Therefore, counsel's failure to pursue this option in lieu of his untenable all-or-nothing approach was not "strategic" under *Strickland*. To be strategic, counsel's decisions must be "made after thorough investigation of law and facts relevant to plausible [defensive] options" at trial. *Strickland*, 466 U.S. at 690-91; *accord Wiggins v. Smith*, 539 U.S. 510, 521 (2003). In a *Strickland* analysis, a reviewing court defines the "deference owed such [purported] strategic judgments in terms of the adequacy of the investigations supporting those judgments." *Wiggins*, 539 U.S. at 521. Because counsel conceded that he did not consider, let alone make, a thorough investigation of the law and facts concerning potential lesser-included offenses, his failure to request jury instructions on lesser-included offenses was not a "strategic" decision warranting deference under *Strickland*.

Importantly, the state habeas trial court did not conclude that counsel acted strategically by weighing his defensive options and then choosing the all-or-nothing

approach instead of requesting lesser-included offenses. Rather, it erroneously concluded that, based on the trial evidence and the applicable law, petitioner would not have been entitled to jury instructions on any lesser-included offenses had he requested them. Perhaps that faulty analysis explains why the TCCA did not adopt the trial court's findings and conclusions.

Counsel's failure to consider instructions on lesser-included offenses as an alternative to an all-or-nothing approach was clearly erroneous as a matter of Texas law. When considering whether a defendant is entitled to an instruction on a lesser-included offense, a court engages in a two-step process. *Hall v. State*, 225 S.W.3d 524, 535-36 (Tex. Crim. App. 2007). First, it determines as a matter of law whether an offense is a lesser-included offense of the alleged offense by comparing the elements of the alleged offense with the elements of the potential lesser-included offense to see if its elements are a subset. *Id.* If the elements of the lesser offense are a subset of the elements of the greater offense, the court next determines whether there is some evidence in the record that would permit a jury rationally to find that, if the defendant is guilty, he is guilty only of the lesser-included offense. *Id.* at 536. Anything more than a "scintilla of evidence" entitles a defendant to a jury instruction on a lesser-included offense. *Id.*

The elements of continuous sexual abuse of a child under TEXAS PENAL CODE § 21.02 are: (1) the defendant was 17 years old or older at the time of the sexual

abuse; (2) the defendant committed a series of two or more predicate acts of sexual abuse; (3) the two acts occurred during a period of 30 days or more; and (4) at the time of at least two predicate acts of sexual abuse, the victim was under 14 years of age. *Hines v. State*, 551 S.W.3d 771, 781-82 (Tex. App.—Fort Worth 2017, no pet.). Both predicate offenses alleged against petitioner—aggravated sexual assault and indecency with a child—are lesser-included offenses of continuous sexual abuse as a matter of law. *See Lee v. State*, 537 S.W.3d 924, 926-27 (Tex. Crim. App. 2017) (aggravated sexual assault of child under 14 is lesser-included offense of continuous sexual abuse of child under 14); *Soliz v. State*, 353 S.W.3d 850, 854 (Tex. Crim. App. 2011) (same); *Hines*, 551 S.W.3d at 782 (aggravated sexual assault of child under 14 and indecency with child under 14 are lesser-included offenses of continuous sexual abuse of child under 14).

If the evidence would permit a rational jury to conclude that the complainant was over age 13 but under age 17 at the time of the conduct, then a defendant is entitled to a lesser-included offense instruction on (non-aggravated) sexual assault of a child under 17 (but over 13) and/or indecency with a child under 17, depending on the type of sexual abuse. *See Puente v. State*, 320 S.W.3d 352, 357 (Tex. Crim. App. 2010) (non-aggravated sexual assault of child older than 14 is lesser-included offense of aggravated sexual assault of child younger than 14); *cf. Ex parte Stroud*, 2008 WL 383630, at *1 (Tex. Crim. App. 2008) (unpublished) ("[The victim] was fourteen years old at the time of

the offense. The trial court concludes that applicant has met his burden of proving by clear and convincing evidence that no reasonable juror could have convicted applicant of aggravated sexual assault in light of the newly discovered evidence. . . . The parties agreed at oral argument that appellant is not guilty of aggravated sexual assault but is guilty of sexual assault. TEX. PENAL CODE § 22.011(a)(2)(A). We agree.").[5]

---

[5] In *Griffith v. State*, 2019 WL 1486926 (Tex. Crim. App. 2019) (unpublished), the defendant was convicted of continuous sexual abuse of a child under age 14. On appeal, the TCCA found insufficient evidence that the defendant committed *two* predicate sexual offenses before the complainant turned 14. It reformed the conviction for continuous sexual abuse of a child to the lesser-included offense of aggravated sexual assault of a child under age 14. *Id.* at *5.

Notably, the TCCA rejected the defendant's request to reform the judgment to a conviction for the lesser-included offense of sexual assault of a child over age 14 but under age 17 *only* because the evidence permitted a rational jury to find that the one predicate act occurred when the victim was under age 14. *See id.* *4 ("We think that a fair reading of Donna's testimony shows that, when she spoke about the prior allegation made by A.G., she was talking about the first instance of abuse in Dawson in 2012 when A.G. was twelve years old."); *id.* at 5 ("Appellant argues that his conviction for continuous sexual abuse of a child should be reformed to reflect that he was convicted of sexual assault [of a child over 14 but under 17 years of age]. We agree that the judgment of conviction should be reformed, but we conclude that it should be reformed to show that Appellant was convicted of aggravated sexual assault of a child [under 14]."). The TCCA clearly would have reformed the conviction to non-aggravated sexual assault of a child age 14 or older but under age 17 had the evidence shown that all predicate acts occurred after the victim turned 14.

At the evidentiary hearing, counsel agreed that Garison's testimony that L.G. stated that the sexual abuse began "after Hurricane Ike"—when L.G. already was 14 years old—entitled petitioner to jury instructions on the lesser-included offenses of non-aggravated sexual assault and indecency with a child and that he should have requested them (ROA.260, 268-70, 273, 278).

This Court has recognized that, in an all-or-nothing situation, "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." *Keeble v. United States*, 412 U.S. 205, 212-13 (1973).[6] That scenario presented itself in petitioner's case. His recorded admission that he committed one act of sexual abuse and the evidence of semen on L.G.'s sheets strongly corroborated the allegation that he sexually abused her, at least when she was 14 or older. When faced with an all-or-nothing choice, the jury was not going to acquit petitioner under the circumstances.

---

[6] As this Court recognized in *Keeble*, "True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." 412 U.S. at 211-12.

Conversely, had counsel requested jury instructions on the lesser-included offenses of non-aggravated sexual assault and indecency with a child, and had he emphasized Garison's testimony and her contemporaneous written report, the jury would have had a viable "third option" to convict petitioner of a serious sex offense but acquit him of the greater charged offense of continuous sexual abuse of a child. Counsel could have bolstered this argument by noting that L.G., while truthful in her testimony that petitioner sexually abused her at some point (after Hurricane Ike), had a powerful motive to fabricate her testimony that the conduct occurred before she turned 14. That she maintained her relationship with Mull in 2009, after she made an outcry of sexual abuse, and continued it through trial in 2011 provided a strong basis to impeach her for fabricating when the conduct began so the State could prosecute petitioner for the most serious offense. Under the circumstances, counsel had no sound strategic reason not to request jury instructions on lesser-included offenses based on Garison's testimony and written report.[7]

The state habeas trial court correctly acknowledged that the predicate offenses listed in subsection (c) of § 21.02 of the TEXAS PENAL CODE—including

[7] Importantly, this case does not present a scenario where counsel deferred to the defendant's unwise decision to forego instructions on lesser-included offenses. Counsel never conferred with petitioner on the topic (ROA.259, 278). Counsel believed that there was a 50-percent chance that the jury would have convicted petitioner of one or more lesser-included offenses if it had the option (ROA.275).

indecency by contact, aggravated sexual assault, and sexual assault—are lesser-included offenses of continuous sexual abuse of a child as a matter of law (ROA.362). Yet, it also concluded that, under the specific allegations in the indictment and the trial evidence, petitioner was not entitled to any lesser-included offense instructions (ROA.375-76).

The state trial court's legal conclusion was clearly erroneous, and the TCCA did not adopt it. As discussed above, non-aggravated sexual assault of a child under age 17 but over age 13 and indecency with a child are lesser-included offenses of continuous sexual abuse of a child if raised by the evidence. Based on L.G.'s statements to Garison—to whom L.G. had no motive to lie—regarding the timing of petitioner's alleged sexual abuse, a rational jury could have concluded that the prosecution proved every element of the offense beyond a reasonable doubt *except* that L.G. was under the age of 14 when the conduct occurred. The state habeas trial court's failure to appreciate the legal significance of Garison's testimony is seen in its finding that L.G.'s testimony that the sexual abuse occurred "when she was 13 years old" was "uncontested" (ROA.406). Garison's testimony clearly undermined L.G.'s assertion that the sexual abuse occurred when she was under age 14.

A defendant is entitled to a lesser-included offense instruction when there is "affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense." *Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012).

Garison's testimony did just that. It negated the element of TEXAS PENAL CODE § 21.02 requiring the prosecution to prove that the complainant was under age 14 when the sexual abuse occurred.

Importantly, neither the TCCA nor the federal district court credited the state habeas trial court's erroneous application of state law on lesser-included offenses. Instead, the district court concluded that the TCCA had "implicitly determined" that counsel was not deficient for taking an all-or-nothing approach seeking a complete acquittal and believed that this determination was "reasonable" (ROA.139-44). The district court ignored the significance of Garison's testimony, as well as petitioner's recorded admission that he sexually abused L.G. "one time" and the semen on L.G.'s sheets. Considered together, that evidence strongly supported a lesser-included offense strategy and undermined counsel's all-or-nothing strategy.

Furthermore, the district court and TCCA unreasonably applied the deficient performance prong of *Strickland* to counsel's purported all-or-nothing strategy even after that strategy "imploded" mid-trial. *After the implosion*, counsel still had a duty to represent petitioner in a reasonably competent manner. Counsel had an obvious fallback option—requesting jury instructions on lesser-included offenses based on Garison's testimony. But he did not do so, nor did he consider or discuss it with petitioner. Rather, he made a feeble argument that L.G. and Peggy Dukes lied, that the jury should not believe "anything" they said, and that petitioner was an "innocent man"—even though

the recorded phone call and semen on L.G.'s sheets fatally undermined the credibility of that defense theory. Therefore, the TCCA and the federal district court erroneously and unreasonably concluded that counsel did not perform deficiently.[8]

B. Counsel's Deficient Performance Prejudiced Petitioner

Based on the prosecution's evidence, the jury was going to convict petitioner of a sex offense. The only issue was whether counsel could minimize the damage by convincing the jury to convict of one or more offenses less serious than continuous sexual abuse. Reasonably competent counsel would have pursued that strategy. Indeed, it was the only viable defensive theory under the circumstances. The prejudice that flowed from counsel's deficient performance is indisputable.

Petitioner "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. "The result of a proceeding can be rendered unreliable, and hence, the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. "The reasonable-probability standard is not the same as, and

[8] Under the AEDPA, a federal habeas court must defer to the state court decision unless it was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1).

should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *Dominguez Benitez*, 542 U.S. at 82 n.9.

There is more than a reasonable probability that, given the option, the jury would have convicted petitioner of non-aggravated sexual assault and/or indecency with a child. Garison's testimony, supported by her contemporaneous written report (ROA.2018-25), provided a powerful basis to acquit petitioner of the charged offense of continuous sexual abuse. Unlike L.G., who had a motive to testify falsely about the timing of the abuse, Garison had no motive to fabricate the date of the abuse—and L.G. had no motive to lie to Garison about the date. Had the trial court submitted jury instructions on the lesser-included offenses of non-aggravated sexual assault and indecency with a child, counsel could have emphasized Garison's testimony as a basis to acquit of the charged offense, while conceding that the recorded phone call and the semen on L.G.'s sheets provided a basis to convict of one or more lesser-included offenses.

Had the jury convicted petitioner of one or more lesser-included offenses, the punishment range would have been significantly less harsh than what he faced. Additionally, he would have been eligible for release on parole, which is not available to a person convicted of continuous sexual abuse of a child. The trial court instructed the jury only on the charged offense, which carries a punishment range of 25 to 99 years or life in

prison without parole (ROA.1457-69). *See* TEX. PENAL CODE § 21.02(h); TEX. GOV'T CODE § 508.145(a). Conversely, the statutory maximum punishment for non-aggravated sexual assault of a child over age 13 but under age 17 is 20 years in prison, *see* TEX. PENAL CODE §§ 22.011 & 12.33; and the statutory maximum punishment for indecency with a child under age 17 is ten years in prison, *see* TEX. PENAL CODE §§ 21.11 & 12.34. Both lesser-included offenses carry maximum prison terms below the 25-year minimum sentence that petitioner faced and well below the 40-year sentence that he received; and both offenses are eligible for release on parole.

In sum, counsel's deficient performance prejudiced petitioner. The state courts' conclusion to the contrary, to which the federal district court deferred, was unreasonable. But for counsel's deficient performance, there is a reasonable probability that the jury would have acquitted petitioner of continuous sexual abuse, convicted him of one or more lesser-included offenses, and sentenced him to significantly less than 40 years; and he would have been eligible for parole. *Cf. Glover v. United States*, 531 U.S. 198, 203 (2001) ("Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice [under *Strickland*]. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.").

II. The Constitutional Claim Is Debatable Among Reasonable Jurists

A federal habeas corpus petitioner who does not prevail in the district court is entitled to a COA if he makes a "substantial showing of the denial of a constitutional right." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). A "substantial showing" means that at least one issue raised on appeal is debatable among reasonable jurists, that another court could resolve the issues in a different manner than the district court, or that the issues are adequate to deserve encouragement to proceed further. *Id.*; *accord Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983) (discussing standard governing certificate of probable cause, statutory predecessor of COA, this Court stated "probable cause requires something more than the absence of frivolity" and "requires petitioner to make a 'substantial showing of the denial of [a] federal right,' " *i.e.*, that petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further' ") (citations and internal quotation marks omitted); *see also Slack v. McDaniel*, 529 U.S. 473, 483 (2000) ("Except for substituting the word 'constitutional' for the word 'federal,' § 2253['s COA standard] is a codification of the CPC standard announced in *Barefoot v. Estelle*").

To obtain a COA, a petitioner need not show that his appeal will succeed on the merits. Indeed, "a court of appeals should not decline the application for a COA merely because it believes the applicant will not

demonstrate an entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). This Court does "not require [a] petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

Petitioner has made at least a "substantial showing" of the denial of a constitutional right under the *Barefoot* standard. Reasonable jurists unquestionably could debate whether counsel was ineffective. Indeed, two reasonable judges on the TCCA dissented from that court's denial of relief (ROA.166). That fact alone demonstrates that the constitutional claim is debatable among reasonable jurists and should entitle petitioner to a COA. *See Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011) ("When a state appellate court is divided on the merits of the constitutional question, issuance of a [COA] should ordinarily be routine."). Furthermore, the district court's deference to the TCCA's "implied determinations" of no deficiency or prejudice under *Strickland* also is reasonably debatable. *See Miller-El*, 537 U.S. at 336 ("The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason.").

Disturbingly, petitioner's case is not an isolated example of the Fifth Circuit's failure to apply the COA standard properly. During the past two decades, the Fifth Circuit *routinely* has denied COAs to habeas corpus petitioners who did not prevail in the district court, despite their claims being clearly debatable among reasonable jurists. In several cases, after the Fifth Circuit denied a COA, this Court not only disagreed with that threshold determination *but also ultimately held that those petitioners were entitled to habeas relief*. *See Buck v. Davis*, 137 S.Ct. 759 (2017); *Jimenez v. Quarterman*, 555 U.S. 113 (2009); *Tennard v. Dretke*, 542 U.S. 274 (2004); *Banks v. Cockrell*, 540 U.S. 668 (2004); *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *later proceeding*, 545 U.S. 231 (2005); *Penry v. Johnson*, 532 U.S. 782 (2001). These cases demonstrate a systemic, epidemic failure by the Fifth Circuit to understand and properly apply the COA standard. That should end now.

In other cases where the Fifth Circuit initially denied a COA, this Court later granted certiorari and either remanded for additional proceedings or denied relief in a split decision after plenary consideration—which necessarily meant that the Fifth Circuit had denied a COA erroneously. *See*, *e.g.*, *Davila v. Davis*, 137 S.Ct. 2058 (2017) (5-4 decision against habeas petitioner); *Haynes v. Thayler*, 569 U.S. 1015 (2013) (GVR in light of *Trevino v. Thaler*, 569 U.S. 902 (2013)); *Webster v. Cooper*, 558 U.S. 1039 (2009) (GVR in light of *Jimenez v. Quarterman*, 555 U.S. 113 (2009)).

Despite repeated signals from this Court that the Fifth Circuit serially misapplies the COA standard—

including the six reversals *on the merits* cited above—that court continues to demand too much. Petitioner's case is just the latest example. Despite "paying lip-service to the principles guiding issuance of a COA," *Tennard*, 542 U.S. at 283, the one sentence of conclusory analysis of petitioner's ineffectiveness claim in a single judge's order utterly failed to apply the standard properly. This Court should send a strong message to the Fifth Circuit to discontinue that pattern of erroneous decision-making.

III. Summary Reversal Is Appropriate

Because of the clear-cut nature of the Fifth Circuit's misapplication of the COA standard, this Court should issue a summary reversal and remand with instructions to grant a COA and consider the merits of petitioner's appeal. *See Lozada v. Deeds*, 498 U.S. 430, 432 (1991) (per curiam) ("We conclude that the Court of Appeals erred in denying Lozada a certificate of probable cause [the predecessor to a COA] because, under the standards set forth in *Barefoot*, Lozada made a substantial showing that he was denied the right to effective assistance of counsel."); *cf. Tharpe v. Sellers*, 138 S.Ct. 545, 546 (2018) (per curiam) ("At the very least, jurists of reason could debate whether Tharpe has shown by clear and convincing evidence that the state court's factual determination was wrong. The Eleventh Circuit erred when it concluded otherwise [in denying a COA].").

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the judgment of the Fifth Circuit, and remand with instructions to grant a COA and consider the merits of the constitutional claim.

Respectfully submitted,

JOSH BARRETT SCHAFFER
Counsel of Record
1021 Main, Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
josh@joshschafferlaw.com

January 2020