IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-40969

SHANNON DALE DUKES,

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 Eastern District of Texas

(Filed Oct. 16, 2019)

ORDER:

Shannon Dale Dukes, Texas prisoner # 1743506, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application challenging his 2011 conviction for continuous sexual abuse of a child. He contends that reasonable jurists could debate whether the district court erred in denying his claim that trial counsel was ineffective in failing to request jury instructions on the lesser included offenses of sexual assault of a child under 17 and indecency with a child.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court has rejected a constitutional claim on the merits, a COA will be granted only if the prisoner "demonstrate[s] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that the issues presented are "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted). Dukes has failed to make the requisite showing. *See id.*

Dukes does not reassert his claims that trial counsel was ineffective in: (1) eliciting and failing to object to testimony regarding Dukes's bad character and extraneous acts of misconduct; (2) failing to object to improper hearsay and opinion testimony from Peggy Dukes; and (3) failing to argue that evidence regarding the complainant's prior sexual relationship with her boyfriend was admissible based on Dukes's constitutional rights to confrontation and cross-examination and because the State had opened the door to such evidence. He has therefore abandoned these claims by failing to brief them in his COA motion and brief. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

Accordingly, Dukes's motion for a COA is DENIED.

/s/ Leslie H. Southwick
LESLIE H. SOUTHWICK
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

SHANNON DALE DUKES	§	
VS.	§	CIVIL ACTION NO. 1:15cv137
DIRECTOR, TDCJ -CID	§	

ORDER

(Filed Nov. 14, 2018)

Petitioner Shannon Dale Dukes, through counsel, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was previously denied and dismissed.

Petitioner has filed a notice of appeal and a motion for certificate of appealability. Before petitioner can appeal the judgment a certificate of appealability (COA) must issue. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Barefoot v. Estelle*, 463 U.S. 880 (1982); *Butler v. Byrne*, 845 F. 2d 501, 505 (5th Cir. 1988). "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*, 537 U.S. at 327.

If the petition was denied on procedural grounds, the petitioner must show that jurists of reason would find it debatable (1) whether the petition raises a valid claim of the denial of a constitutional right and (2) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). The court must either issue a certificate of appealability indicating which issues satisfy the required showing, or must state the reasons why such a certificate should not issue. FED. R. APP. P. 22(b).

In this case the standards for issuance of a certificate of appealability are not met. Petitioner has not made a substantial showing of the denial of a constitutional right. Accordingly, the court is of the opinion that a certificate of appealability should not issue in this case. It is therefore

ORDERED that petitioner's motion for a certificate of appealability is **DENIED.**

So **ORDERED** and **SIGNED November 14, 2018.**

/s/ Ron Clark
Ron Clark, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

SHANNON DALE DUKES	§	
VS.	§	CIVIL ACTION NO. 1:15cv137
DIRECTOR, TDCJ-CID	§	

ORDER

(Filed Sep. 24, 2018)

Petitioner Shannon Dale Dukes, an inmate confined at the Pack Unit of the Texas Department of Criminal Justice, Correctional Institutions Division, through counsel, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Factual Background and Prior Proceedings

On June 15, 2011, following a trial by jury in cause number 10-08423 before the Criminal District Court of Jefferson County, Texas, petitioner was found guilty of continuous sexual abuse of a child. Petitioner was sentenced to a term of forty (40) years' imprisonment. Petitioner's conviction was affirmed in an unpublished opinion by the Thirteenth District Court of Appeals on July 26, 2012. *Dukes v. State*, 2012 WL 3041336 (Tex. App. – Corpus Christi 2012, pet. ref'd). Petitioner's petition for discretionary review was refused by the Texas Court of Criminal Appeals on December

19, 2012. *Id.* Petitioner did not file a petition for writ of certiorari with the Supreme Court.

Petitioner's state application for writ of habeas corpus was filed by his present counsel on March 17, 2014. The habeas application was denied without written order by the Texas Court of Criminal Appeals on April 1, 2015. Petitioner filed the above-styled federal petition for writ of habeas corpus on April 2, 2015.

The Petition

Petitioner brings this petition for writ of habeas corpus asserting the state court decision that trial counsel was not ineffective at the guilt-innocence stage was contrary to or involved an unreasonable application of Supreme Court precedent and was based on an unreasonable determination of the facts in light of the evidence presented. First, petitioner alleges trial counsel performed deficiently at the guilt-innocence stage in failing to request instructions on lesser included offenses or object to their omission from the jury charge. Next, petitioner alleges counsel elicited and failed to object to testimony that petitioner had bad character and committed extraneous acts of misconduct. Further, petitioner alleges counsel failed to object to improper hearsay and opinion testimony from petitioner's wife. Finally, petitioner alleges that counsel failed to argue to the court that the evidence regarding the complainant's prior sexual relationship with her boyfriend was admissible based on petitioner's right to confrontation

and cross-examination and because the State had opened to the door to it.

The Response

The respondent filed a response to the court's order to show cause why relief should not be granted. The respondent contends petitioner failed to meet the burden of proof required in order to obtain federal habeas relief under the AEDPA. The respondent asserts the petition is an intrusive, post-trial attack on trial counsel which the Supreme Court has repeatedly discredited. The respondent contends petitioner has failed to demonstrate that the state court's denial of his ineffective assistance of counsel claims was objectively unreasonable. The respondent also asserts petitioner has failed to demonstrate either deficient performance or prejudice. Further, the respondent contends petitioner has failed to show the state court resolution of petitioner's claims 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 resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Accordingly, the respondent asserts that the petition should be dismissed with prejudice.

Standard of Review

Title 28 U.S.C. § 2254(a) allows a district court to "entertain an application for a writ of habeas corpus in

behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

Section 2254 generally prohibits a petitioner from relitigating issues that were adjudicated on the merits in State court proceedings, with two exceptions. *See* 28 U.S.C. § 2254(d). The first exception allows a petitioner to raise issues previously litigated in the State court in federal habeas proceedings if the adjudication "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." 28 U.S.C. § 2254(d)(1). The second exception permits relitigation if the adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Federal habeas relief from a state court's determination is precluded "so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

Federal habeas courts are not an alternative forum for trying facts and issues which were insufficiently developed in state proceedings. *Williams v. Taylor*, 529 U.S. 420, 437 (2000). Further, following the Supreme Court's decision in *Cullen v. Pinholster*, federal habeas review under 2254(d)(1) "is limited to the record that was before the state court that adjudicated

the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

A determination of a factual issue made by a state court shall be presumed to be correct upon federal habeas review of the same claim. The petitioner shall have the burden of rebutting the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A decision is contrary to clearly established federal law if the state reaches a conclusion opposite to a decision reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams*, 529 U.S. at 412-13. An application of clearly established federal law is unreasonable if the state court identifies the correct governing legal principle, but unreasonably applies that principle to the facts. *Id.* Under this standard, an unreasonable application is more than merely incorrect or erroneous; rather, the state court's application of clearly established law must be "objectively unreasonable." *Williams*, 529 U.S. at 409. The focus of this objective reasonableness inquiry is on the state court's ultimate decision, not whether the state court "discussed every angle of the evidence." *Dale v. Quarterman*, 553 F.3d 876, 879 (5th Cir. 2008) (quoting *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc)), *cert. denied*, 558 U.S. 847 (2009). "It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 562 U.S. at 102.

The deferential AEDPA standard of review applies even where the state court fails to cite applicable controlling Supreme Court precedent or fails to explain its decision. *See Early v. Packer*, 537 U.S. 3, 8-9 (2002). Likewise, "[b]ecause a federal habeas court only reviews the reasonableness of the state court's ultimate decision, the AEDPA inquiry is not altered when . . . state habeas relief is denied without [a written] opinion." *Schaetzle v. Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003). For such a situation, a reviewing court (1) assumes 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. *Id*. (citing *Catalan v. Cockrell*, 315 F.3d 491, 493 & n.3 (5th Cir. 2002).

This court must accept as correct any factual determinations made by the state courts unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e). The presumption of correctness applies to both implicit and explicit factual findings. *See Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941, 948 n. 11 (5th Cir. 200 1) ("The presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact."). Deference to the factual findings of a state court is not dependent upon the quality of the state court's evidentiary hearing. *See Valdez*, 274 F.3d at 951 (holding that a full and fair hearing is not a

precondition according to § 2254(e)(1)'s presumption of correctness to state habeas court findings of fact nor to applying § 2254(d)'s standards of review).

Analysis

Ineffective Assistance of Counsel

When addressing the issue of what a petitioner must prove to demonstrate an actual ineffective assistance of counsel claim, courts look to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See United States v. Grammas*, 376 F.3d 433, 436 (5th Cir. 2004). In order to establish an ineffective assistance of counsel claim, the petitioner must demonstrate:

> First . . . 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 makes both showings it cannot be said that the conviction or death sentence resulted in a breakdown of the adversarial process that renders the result unreliable.

Strickland, 466 U.S. at 687.

"To show deficient performance, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness.'" *Reed v. Stephens*, 739 F.3d 753, 773 (5th Cir. 2014) (quoting *Strickland*, 466 U.S. at 688). "Counsel's performance is judged based on prevailing norms of practice, and judicial scrutiny of counsel's performance must be highly deferential to avoid 'the distorting effects of hindsight.'" *Loden v. McCarty*, 778 F.3d 484, 494 (5th Cir. 2015) (quoting *Carty v. Thaler*, 583 F.3d 244, 258 (5th Cir. 2009)). "A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002) (quoting *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983)). "There is a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance." *Woodward v. Epps*, 580 F.3d 318, 329 (5th Cir. 2009) (quoting *Romero v. Lynaugh*, 884 F.2d 871, 876 (5th Cir. 1989)). In this regard, "counsel's performance need not be optimal to be reasonable." *Murphy v. Davis*, ___ F.3d ___, 2018 WL 4042362 (5th Cir. 2018).

Strategic decisions made by counsel during the course of trial are entitled to substantial deference in the hindsight of federal habeas review. *See Strickland*, 466 U.S. at 689 (emphasizing that "[j]udicial scrutiny of counsel's performance must be highly deferential" and that "every effort [must] be made to eliminate the distorting effects of hindsight"). A federal habeas

corpus court may not find ineffective assistance of counsel merely because it disagrees with counsel's chosen trial strategy. *See Crane v. Johnson*, 178 F.3d 309, 312 (5th Cir. 1999).

In order to show prejudice, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112, 131 S.Ct. 770. In cases where the deficiency occurred in the state punishment context, "the relevant inquiry is whether, absent counsel's errors, there is a reasonable probability that the defendant's sentence would have been 'significantly less harsh,' . . . taking into account 'such factors as the defendant's actual sentence, the potential minimum and maximum sentences that could have been received, the placement of the actual sentence within the range of potential sentences, and any relevant mitigating or aggravating circumstances.'" *Dale*, 553 F.3d at 880 (quoting *Spriggs v. Collins*, 993 F.2d 85, 88-89 (5th Cir. 1993) and *United States v. Segler*, 37 F.3d 1131, 1136 (5th Cir. 1994)). Because the petitioner must prove both deficient performance and prejudice, the petitioner's failure to prove either will be fatal to his claim. *Johnson v. Scott*, 68 F.3d 106, 109 (5th Cir. 1995).

The burden of proof in a habeas corpus proceeding attacking the effectiveness of trial counsel is upon the

petitioner, who must demonstrate counsel's ineffectiveness by a preponderance of the evidence. *See Martin v. Maggio*, 711 F.2d 1273, 1279 (5th Cir. 1983). A habeas petitioner must "affirmatively prove," not just allege, prejudice. *Day*, 556 F.3d at 536. If a petitioner fails to prove the prejudice part of the test, the court need not address the question of counsel's performance. *Id*. A reviewing court "must strongly presume that trial counsel rendered adequate assistance and that the challenged conduct was the product of a reasoned trial strategy." *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992). In determining the merits of an alleged Sixth Amendment violation, a court "must be highly deferential" to counsel's conduct. *Strickland*, 466 U.S. at 687.

When a petitioner brings an ineffective assistance claim under the AEDPA, the relevant question is whether the state court's application of the deferential *Strickland* standard was unreasonable. *See Beatty v. Stephens*, 759 F.3d 455, 463 (5th Cir. 2014). "Both the *Strickland* standard and AEDPA standard are 'highly deferential,' and 'when the two apply in tandem, review is doubly so.'" *Id.* (quoting *Richter*, 562 U.S. at 105).

A. Jury Instruction

In his first ground for review, petitioner contends trial counsel provided ineffective assistance when counsel failed to request a jury instruction on lesser included offenses or object to their omission from the

jury charge. Petitioner contends he was entitled to instructions in the jury charge on the lesser included offenses of indecency with a child by contact, aggravated sexual assault of a child (over 14 years of age), and sexual assault.

In Texas, a two-step process determines whether a lesser included offense instruction should be given to the jury. *See Bullock v. State*, 509 S.W. 3d 921, 924 (Tex. Crim. App. 2016); *Hall v. State*, 225 S.W.3d 524, 535-36 (Tex. Crim. App. 2007). First, the trial court must determine "whether the requested instruction pertains to an offense that is a lesser included offense of the charged offense, which is a matter of law." *Bullock*, 509 S.W.3d at 924. The first step is established where the offense is within the proof of the same or less than all the facts necessary to establish the offense charged. *Id.*

"The second step . . . asks whether there is evidence in the record that supports giving the instruction to the jury." *Bullock*, 509 S.W.3d at 924-25. Under the second step, "a defendant is entitled to an instruction on a lesser-included offense when there is some evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense." *Id*. at 925.

In this case, trial counsel developed a trial strategy to attack the credibility of the complaining witness and his wife through the testimony of Chuck Hammack and Allen Dukes based on what he had been told prior to trial. This strategy is reflected in both counsel's affidavit and testimony before the state habeas court.

In his affidavit counsel stated, in pertinent part, the following:

> It was the theory of the case to attack the credibility of the complaining witness and Mrs. Dukes through the testimony of Chuck Hammack and Allen Dukes. Hours had been spent in preparation with both gentlemen to attack, impeach and question the credibility of the complaining witness and Mrs. Dukes. Both gentlemen had numerous contradicting recollections that would have questioned both the complaining witness and Mrs. Dukes. Once I learned that Mr. Dukes and Mr. Hammack had lied, and would continue to lie if put on as witnesses, I chose not to call them. This also raised the question that obviously my client, Mr. Shannon Dukes, had lied to me. This information and the realization of its consequences on my planned trial strategy was akin to being hit over the head with a club. I actually became nauseous.

13 SHCR at 152 (Docket entry no. 10-13 at 154).

Additionally, when questioned at the state habeas evidentiary hearing, counsel provided the following:

> Q. So, now you have let the Court know here that your basic strategy was a challenge to the credibility the State's witnesses; is that correct?
>
> A. [Trial counsel]: Yes.
>
> Q. And that is based on what you had been told prior to trial; is that correct?

A. It is what I knew prior to trial.

Q. What you knew prior to trial. Would it be fair to say, and please correct me if I am wrong, that your strategy was to show that the complaining witness lied?

A. Yes.

Q. And that you had two witnesses to refute her testimony?

A. Yes.

Q. Okay. And at what point in the trial was it that you found out these two witnesses were lying?

A. The State had rested and I was getting ready to open my case and call them.

Q. Okay. So, directly in the midpoint of trial –

A. Things changed.

Q. You lost your paddle in that creek; is that correct?

A. Yes.

Q. Just to address the point of lesser included offenses, and there must have been a lot more going through your head than this at the time, was there any doubt in your mind at that point that if offered [a] lesser included offense [charge] your client would definitely be convicted?

A. You know, I don't even know if I thought that.

Q. Okay. At that point with your strategy blown, was there anything about the case that you could have attacked other than the element of continuous?

A. I don't think so. I don't think so. I don't know.

Q. Okay. Everything that you said you might have done differently has been a result of hindsight; is that correct?

A. Well, yes. And, you know, there are always different ways to do things. I should have probably taken a different path.

Q. Well, before you went to trial did you recognize that there might be two or three or four pathways you could take in trial?

A. I had, but this is the path I chose fit the witnesses I had and the evidence they knew and I felt comfortable with it.

Q. And had those witnesses, and I assume the defendant been truthful with you, would you have taken a different strategy?

A. Well, I mean, I felt they were being truthful with me. I took that strategy, yes.

Q. Correct. So, if you had known a month before trial that this was not true you would have –

> A. I would have done something differently, yeah.
>
> * * *
>
> Q. Okay. And generally speaking, I mean, you've tried a lot of cases here. Is using a lesser included offense, is that generally a defense tool or a State's tool, in your experience?
>
> A. Normally, it's – I don't know. I've kind of seen it 50/50 both ways. It just depends so much on the facts and the case.
>
> Q. And because of what you believed you knew about this case, did you even consider?
>
> A. I don't think I considered him. I just – I thought I had a very strong case that Mr. Dukes could be found innocent on.

9 SHCR at 352-54 (Docket entry no. 10-9 at 105-09). The state habeas trial court also made the following conclusions based on the evidence presented:

> 52. Trial counsel's testimony at the evidentiary hearing establishes that the entire foundation of this main defensive strategy rested on the testimony of defense witnesses, Allen Dukes, applicant's brother, and Chuck Hammock, a long-time family friend of the Dukes' family, and a man trial counsel had known for "many years" and who trial counsel believed to be very credible. [Supp.RR.pp.37-38, 43-44, 79, 82, 84-85]
>
> * * *

> 54. Trial counsel's testimony at the evidentiary hearing establishes it was shortly after the State rested its case-in-chief and counsel was about to open his case for the defense, at the guilt-innocence phase of trial, when counsel first learned, during the lunch-time recess, both Allen Dukes and Chuck Hammock had been entirely dishonest with him regarding their knowledge of truthful impeachment-evidence about which they were to testify in applicant's defense. [4RR77-78; Supp.RR105]
>
> 55. Trial counsel's testimony establishes that up until he was about to open the guilt-innocence phase case for the defense, just before uncovering Hammock's and Allen Dukes' deception, trial counsel firmly believed the testimony from Allen Dukes and Chuck Hammock would not have merely refuted the complainant's sexual abuse allegations and Peggy Dukes' testimony relating to applicant's character flaws and extraneous misconduct, but would have shown that L.G. and Peggy "were lying." [Supp.RR pp. 37-38, 81, 105; 4RR77-78].

10 SHCR at 43-44 (docket entry no. 10-10 at 44-45).

Petitioner argues there was no sound strategic reason for counsel to conclude the jury would acquit petitioner where it did not have the option to convict him of one or more lesser included offense. However, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690-91.

Federal courts will not question a counsel's reasonable strategic decisions. *Bower v. Quarterman*, 497 F.3d 459, 470 (5th Cir. 2007), *cert. denied*, 553 U.S. 1006 (2008); *see also Pondexter v. Quarterman*, 537 F.3d 511, 521 (5th Cir. 2008) (trial counsel's tactical decisions do not fall below *Strickland* standards simply because they do not succeed as planned). Further, the *Strickland* standard calls for an inquiry into the objective reasonableness of counsel's performance at the time without the distorting effect of hindsight. *See Strickland*, 466 U.S. at 689.

The record supports the implicit reasonable conclusion by the Texas Court of Criminal Appeals, as the habeas trial court found, that trial counsel formulated a defense strategy to directly impeach the victim and her mother, in an effort to obtain a full acquittal of the charged offense, as well as refute the previous testimony relating to other extraneous misconduct by petitioner. This strategy, however, was tainted by lies perpetuated by petitioner and his potential witnesses, facts unknown to counsel until after the prosecution had rested its case.

Petitioner also argues counsel failed to consult petitioner prior to deciding not to request instructions in the jury charge on lesser included offenses. However, the trial strategy was to have the jury disbelieve the complaining witness and her mother, but counsel had his whole strategy blown by the planned perjury of the defense witnesses. *See* 9 SHCR at 353 (docket entry no. 10-9 at 106). While petitioner disagrees with this strategy, he has failed to show it was so unreasonable as to

constitute deficient performance, based on the facts known to counsel at the time. Accordingly, petitioner has failed to show the implicit determination by the Court of Criminal Appeals that he failed to establish deficient conduct related to his claim of ineffective assistance of counsel was unreasonable. Moreover, as explained below, even assuming counsel's performance was deficient, petitioner has failed to show prejudice.

Petitioner has failed to show the implicit determination by the Court of Criminal Appeals that he failed to establish prejudice related to his claim of ineffective assistance of counsel was unreasonable. The victim had presented uncontested testimony that before she was 14 years old, petitioner committed numerous repeated acts of sexual abuse against her over a two year period. Additionally, there was uncontested physical evidence including the presence of petitioner's semen on the victim's bedsheet indicating he had sexual intercourse with the victim.

The state habeas court made the following findings:

> 77. Without any defensive evidence to question the credibility of L.G.'s testimony describing the months, and years, of applicant's sexual abuse, the evidence of applicant's guilt for Continuous Sex Abuse, as alleged in the indictment, was substantial and uncontested, to-wit:
>
> (a) the fact this Court has concluded applicant was not entitled to having the jury instructed on any lesser included offense as a

> matter of law under Ground 1, IAC allegation (1);
>
> (b) the fact that the jury was presented with uncontested testimony from L.G. that applicant sexually abused her on numerous occasions, over a period of time that exceeded 30 days, when she was 13 years of age as alleged in the indictment;
>
> (c) the fact that the jury was presented with physical evidence, also uncontested, strongly suggesting the presence of applicant's semen on L.G.'s bedsheet following DNA analysis of said bedsheet, this evidence additionally corroborating L.G.'s testimony that the last time applicant had sexual intercourse with her was a few days before her September 21, 2009, outcry [3RR135]; and,
>
> (d) the fact the jury heard applicant acknowledge to Peggy Dukes he "did it one time" with L.G., which was construed by Peggy Dukes as applicant admitting to having committed some type of sexual abuse of L.G. [3RR 77].

10 SHCR at 51-52 (docket entry no. 10-10 at 52-53) (alterations in original).

Although petitioner may have only admitted one improper sexual act to his wife, it is purely speculative, in light of the strong evidence against him concerning multiple acts of sexual abuse, that the jury would have believed he committed only the one act to which he admitted and not the other acts as claimed by the victim

and supported by the evidence. While a lesser included offense charge would have resulted in a sure conviction of the offense to which petitioner admitted, 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 offense. Thus, while it is possible petitioner might have been sentenced to a lesser term of confinement if convicted of only a lesser included offense, petitioner has not shown there is a reasonable probability he would have been convicted only of a lesser included offense. Thus, petitioner has failed to show a reasonable probability his sentence would have been significantly less harsh when all of the relevant factors present in this case are taken into consideration, namely the strong evidence of other countless acts of sexual abuse against the victim by petitioner. Thus, the Court of Criminal Appeals could have reasonably concluded petitioner failed to show prejudice with respect to this claim. "It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 562 U.S. at 102.

Petitioner has failed to demonstrate he is entitled to relief with respect to the habeas court's determination that trial counsel's performance was constitutional. Petitioner has failed to show counsel's performance was either deficient or prejudicial. Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state

court adjudication 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. Accordingly, petitioner's ground for relief should be denied.

B. Failure to Object

Next, petitioner alleges counsel elicited and failed to object to testimony that petitioner had bad character and committed extraneous acts of misconduct. Petitioner claims counsel did not request more specific notice or file a motion in limine to exclude alleged inadmissible evidence regarding petitioner's bad character and extraneous acts of misconduct, including the violation of a protective order, physical abuse, and threatening to kill the victim's boyfriend and his family.

The state habeas trial court made the following relevant findings:

> 57. Trial counsel explained that he wanted the "objectionable" testimony at issue admitted before the jury during trial stating "[i]t was going to come in at some point[,]" because, pursuant to his strategy, "[t]here was a lot of evidence I was going to develop through my witnesses that might have got into that[.]" [Supp.RRp.85]
>
> 58. Peggy Dukes' testimony, elicited by the State, relating her therapist's opinion that applicant had "control issues," and that the

abuse went on so long because there was a bond between applicant and L.G. based on his control and her sympathy, was the only objectionable ["inadmissible hearsay"] testimony at issue to which trial counsel admitted to not having intended for the jury to hear, explaining, "I just missed it." [Supp.RRpp.95-96]

59. Trial counsel's testimony at the evidentiary hearing established that it was immaterial to him that the particular testimony at issue from either L.G. or Peggy Dukes was admissible or inadmissible because counsel had intended to place it before the jury in furtherance of his defensive strategy to destroy the credibility of those witnesses, and he was confident that the testimony of Allen Dukes, in whom Peggy and L.G. had confided on several occasions, and Chuck Hammock, a longtime family friend, would accomplish this. [Supp.RRpp. 116-119; 3RR67-68; 114-115; 117-118; 162]

60. Trial counsel's testimony establishes that only in hindsight, and with the knowledge he now possesses that the evidentiary foundation of his defensive strategy – Allen Dukes' and Chuck Hammock's impeachment-testimony – was never presented to the jury, does he now concede that objecting to, and not eliciting, the alleged objectionable testimony at issue would have been the more appropriate method of defending applicant during trial. [Supp.RRpp.88, 90-94]

10 SHCR at 45-46 (docket entry no. 10-10 at 363-64). Additionally, the state habeas trial court found the relevant testimony was admissible under Texas law. The state court made the following findings:

> 63. Because Continuous Sex Abuse is one of the offenses listed under Article 38.37, § 1(a)(1), the State is not restricted in its proof to only those acts of sexual abuse alleged in the Continuous Sex Abuse indictment; the State, as it did during applicant's jury trial, is permitted to introduce, notwithstanding Rules of Evidence 404(b) and 405, relevant "evidence of other crimes, wrongs, or acts committed by the defendant against the child . . . including:" the child's and the defendant's state of mind, and the previous and subsequent relationship between the child and the defendant. Article 38.37, § l(b)(1) & (2) (emphasis added).
>
> 64. Because the Legislature used the word "including" immediately before the two listed purposes for introducing extraneous crime or misconduct evidence committed against the child in Article 38.37, § 1 (b), the two listed purposes are considered illustrative and not exclusive. Berry v. State, 233 S.W.3d 847, 848 (Tex. Crim. App. 2007) (construing Texas Rule of Evidence 404(b)'s list of "other purposes" in such a manner.)
>
> * * *
>
> 70. Based on the nature of the offense, and the availability of Article 38.37 to the State, trial counsel was faced with the fact that in

> the State's case-in-chief, the jury would learn not only of applicant's multiple and repeated acts of sexual abuse of L.G. as alleged in the indictment, but would also hear evidence of any other relevant "crimes, wrongs, or acts" perpetrated on L.G. by applicant both before and after the book-end dates alleged in the indictment.

10 SHCR at 47, 49 (docket entry no. 10-10 at 48, 50).

Petitioner bases his argument on the Fifth Circuit opinion in *Lyons v. McCotter* wherein the court stated "[t]o pass over the admission of prejudicial and arguably inadmissible evidence may be strategic; to pass over the admission of prejudicial and clearly inadmissible evidence . . . has no strategic value." *Lyons v. McCotter*, 770 F. 2d 529, 534 (5th Cir. 1985). However, as the Fifth Circuit has noted, *Lyons* was a pre-AEDPA case and did not rely on the "doubly deferential standard" applicable to this case. *See Cortez v. Davis*, 683 F. App'x 292, 297 n.3 (5th Cir. 2017). Moreover, to obtain relief, the state court's application of the law has to be an unreasonable application of federal law as determined by the Supreme Court, not by the Fifth Circuit. *Id.*

Additionally, based on the record before the court, the Court of Criminal Appeals could reasonably have concluded that trial counsel believed his prospective witnesses' testimony would be both damaging to the credibility of victim and her mother, and that it would enable an attack on their credibility. At the time of counsel's failure to object of which petitioner now

complains, it was not material to trial counsel that such testimony was not yet admissible during the prosecution's case because his later attack on their credibility would open the door to the testimony. Counsel believed the information was going to come in at some point. Further, based on counsel's testimony at the state habeas proceeding, the Court of Criminal Appeals could reasonably have concluded that trial counsel believed he could show that the complaining witness and her mother were lying about the extraneous conduct also.

In the Fifth Circuit, a reasonable effective defense attorney could pursue counsel's strategy at issue in this case. *See Pape v. Thaler*, 645 F.3d 281, 290-91 (5th Cir. 2011). In *Pape*, the court determined counsel had not acted deficiently allowing in evidence that would otherwise be inadmissible where it was based on a reasonable trial strategy and would not question tactical questions made petitioner's counsel when, in hindsight, an alternative course of action existed during trial. *Id*. at 291; *see also Cotton v. Cockrell*, 343 F.3d 746, 752-53 (5th Cir. 2003) (giving deference to decision not to present two witnesses as part of counsel's decision to pursue a different defense); *Green v. Johnson*, 116 F.3d 1115, 1121-23 (5th Cir. 1997) (discussing counsel's decision not to present an expert defense witness after choosing a different course of strategy). It is clear in the Fifth Circuit that "counsel is not required to make futile motions or objections." *See Roberts v. Thaler*, 681 F.3d 597, 611 (5th Cir. 2012); *Murray v. Maggio*, 736 F.2d 279, 283 (5th Cir. 1984). "Failure to

raise meritless objections is not ineffective lawyering; it is the very opposite." *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994).

The implicit conclusion by the Texas Court of Criminal Appeals that it would have been a reasonable furtherance of the defensive strategy to permit such testimony so that trial counsel could later impeach it is not an unreasonable determination. The court did not unreasonably apply the *Strickland* standard when implicitly concluding counsel had not acted deficiently in this regard. Accordingly, petitioner has failed to show counsel was deficient in his performance or that the implicit findings of the Court of Criminal Appeals were unreasonable determinations.

Further, petitioner has failed to show prejudice regarding this claim in light of the strong evidence against him. Counsel was unaware of the planned perjury of his defense witnesses until the middle of trial. While the introduction of the complained of prior bad acts might have given the jury additional reasons to find him guilty, the Court of Criminal Appeals could have reasonably found petitioner would have been convicted of the charged offense without the additional acts because of the unimpeached testimony in the record. Thus, petitioner has failed to satisfy his burden regarding prejudice.

Petitioner has failed to demonstrate he is entitled to relief with respect to the state court's determination that trial counsel's performance was constitutional. Petitioner has failed to show counsel's performance was

either deficient or prejudicial. Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication 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. Accordingly, petitioner's grounds for relief should be denied.

C. Failure to Object to Improper Testimony

In his next ground for review, petitioner alleges counsel failed to object to improper hearsay and opinion testimony from petitioner's wife. Petitioner claims counsel failed to object to improper hearsay, confrontation, and opinion testimony from petitioner's wife that her therapist told her petitioner had "control issues" and that the abuse went on for so long because of his control and the complainant's sympathy.

Here, counsel spent hours in preparation with the two witnesses to attack, impeach and question the credibility of the complaining witness and petitioner's wife only to find out the witnesses had lied and would continue to lie if put on as witnesses. *See* Counsel's Supplemental Affidavit, 13 SHCR at 152-53 (docket entry no. 10-13 at 154-155). Counsel then realized petitioner had also lied to him. *Id.* At the time of the testimony, however, counsel could have reasonably believed he had sufficient rebuttal testimony to overcome

any inferences drawn as a result of the questionable testimony. "There is a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance." *Woodward*, 580 F.3d at 329. "[C]ounsel's performance need not be optimal to be reasonable." *Murphy*, ___ F.3d ___, 2018 WL 4042363. Given petitioner's involvement in the failure of counsel's planned trial strategy in this case, petitioner has failed to show counsel's performance was deficient for believing him.

While the complained of testimony may have been inadmissible hearsay, counsel had a trial strategy to impeach petitioner's wife on all aspects of her testimony which would have opened the door to issues including petitioner's alleged manipulation of his wife and the complaining witness. At the state habeas hearing, counsel admitted that with the benefit of hindsight, he would have made the objection. However, counsel's conduct is not judged based on hindsight. A fair assessment of an attorney's performance requires that the distorting effects of hindsight be eliminated and requires an evaluation of the conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 691. As explained in the preceding section, a reasonable effective defense attorney could pursue counsel's strategy at issue in this case. *See Pape*, 645 F.3d at 290-91.

The Court of Criminal Appeals could have reasonably implicitly found that counsel's alleged failure to object was reasonable under *Strickland's* objectively reasonableness test for counsel's performance. "The

reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.* Accordingly, the court did not unreasonably apply the *Strickland* standard when implicitly concluding counsel had not acted deficiently in this regard. Therefore, petitioner has failed to show counsel was deficient in his performance or that the implicit findings of the Court of Criminal Appeals were unreasonable determinations.

Further, in light of the strong evidence against him, petitioner has failed to demonstrate he was prejudiced by counsel's conduct. Again, counsel was unaware of the planned perjury of his defense witnesses until the middle of trial. While the introduction of the allegedly improper testimony might have given the jury additional reasons to find him guilty and a different result is conceivable, petitioner has failed to show there was a reasonable probability of a different result in this case. The Court of Criminal Appeals could have reasonably found petitioner would have been convicted of the charged offense without the additional testimony because of the other testimony in the record. Thus, petitioner has failed to satisfy his burden regarding prejudice.

Petitioner has failed to demonstrate he is entitled to relief with respect to the state court's determination

that trial counsel's performance was constitutional. Petitioner has failed to show counsel's performance was either deficient or prejudicial. Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication 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. Accordingly, petitioner's grounds for relief should be denied.

D. Failure to Argue Evidence was Admissible

In his final ground for review, petitioner alleges that counsel failed to argue to the court that the evidence regarding the complainant's prior sexual relationship with her boyfriend, J.D. Mull, was admissible based on petitioner's constitutional rights to confrontation and cross-examination and because the State had opened to the door to it. Petitioner argues counsel wanted to impeach the complaining witness's testimony on direct examination that she did not have sex with anyone before petitioner, including Mull. According to petitioner's argument, if she denied a previous sexual relationship when asked about it on cross-examination, he was prepared to call witnesses to impeach her and testify that petitioner tried to prevent her from being sexually active, suggesting a possible motive for the witness to falsely accuse petitioner.

This issue was not addressed on appeal because it was not properly preserved. However, petitioner's argument is without the existence of any underlying admissible evidence in the record to impeach the witness's statement because the strategy at the time was based, unknowingly, on the witnesses' plan to commit perjury. Petitioner only assumes such evidence existed based on the actions and reactions of the prosecution. However, petitioner has failed to show any actual evidence existed to impeach the witness.

The state habeas trial court made the following findings regarding this issue:

> 82. This particular IAC allegation appears based on the premise that admissible evidence existed prior to trial, or came to light during trial, that would have impeached L.G.'s testimony denying any prior sexual relations with anyone, including her boyfriend, J.D. Mull.
>
> 83. Applicant's argument contains two inferences that are not supported in the instant habeas record: (1) that impeachment evidence in some admissible form existed affirmatively demonstrating that L.G. and her boyfriend, J.D. Mull, did have a sexual relationship prior to, or at the time of, L.G.'s sexual abuse outcry; and (2) that trial counsel had witnesses he could call to impeach L.G. on this particular matter, and further testify applicant tried to prevent L.G. from being sexually active. [Supporting Brief p. 23]

84. Trial counsel's uncontested testimony at the evidentiary hearing establishes he had no additional defense witnesses after he refrained from calling Allen Dukes and Chuck Hammock upon learning of their intent to present fabricated testimony to the jury. [Supp.RR38]

85. Applicant's legal premise here asserts "[e]vidence of the complainant's previous sexual behavior is admissible when its exclusion would violate the accused's constitutional rights to confrontation or due process." [Supp.Br.23-24]

86. While applicant points to the fact that L.G. had denied any previous sexual relations with anyone, including Mull, on direct examination [Supp.Br.25], applicant does not direct the Court's attention to where in the habeas record there is evidence that L.G. and Mull had indeed established a sexual relationship prior to, or at the time of, L.G.'s sexual abuse outcry on September 21, 2009.

87. The authority cited on pages 24-25 of applicant's Supporting Brief concern cases where evidence of the complainant's relationship or sexual encounter with men other than the defendant did exist, but for whatever reason, the defendant was prevented from presented said evidence at trial; whereas, in the instant habeas record, no such evidence appears, nor is there any showing such evidence was available to trial counsel from some

source, including L.G., prior to, or during, trial.

88. The emphasized-portion of the following assertion [emphasis by this Court] appearing in applicant's Supporting Brief [p.25] – "The exclusion of testimony regarding L.G.'s sexual relationship with Mull violated applicant's Sixth Amendment right to cross-examine and confront L.G., which trump Rule 412[." – assumes a fact [L.G.'s sexual relationship with Mull] the existence of which has no evidentiary support in the instant habeas record.

89. Applicant's position in IAC allegation (5) is that, because the Confrontation Clause of the Sixth Amendment has been interpreted to give applicant a right to "present a defense," and to cross-examine adverse witnesses to expose a witness's partiality, bias, and motivation to testify, trial counsel was entitled to provide the jury with L.G.'s testimony regarding her sexual relationship with Mull.

90. While applicant presents a proper IAC claim regarding counsel's failure to present a Confrontation Clause argument in attempting to cross-examine L.G. regarding her sexual relationship with J.D. Mull, and it is uncontested that the habeas record supports the fact that trial counsel did not present the Court with said argument, applicant fails to submit evidence supporting the existence of the fact that L.G. and Mull did indeed have a sexual relationship prior to, or at the time of, L.G.'s outcry, in order to demonstrate

> applicant was actually harmed by counsel's failure to raise said argument. See Ex parte McCain, 67 S.W.3d 204, 209 n.10 (Tex. Crim. App. 2002) ("Appellant properly made a claim of an involuntary/unintelligent plea but failed to offer evidence at the habeas hearing to support it. Without any allegation or evidence of actual harm, this Court cannot grant habeas relief on an abstract proposition of law.")

10 SHCR at 53-56 (docket entry no. 10-10 at 54-57).

As previously stated, petitioner has failed to show any actual evidence of a sexual relationship between the complaining witness and Mull existed to impeach the witness. Petitioner's argument calls for speculation about evidence not before the state habeas court. However, federal habeas review under 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 181. Accordingly, petitioner has failed to show the state court's determination that counsel's conduct was not deficient performance was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication 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.

Further, petitioner has failed to show how he was prejudiced by this alleged deficient conduct. Habeas counsel's argument is premised on having witnesses to provide competent testimony regarding the victim's

sexual activity at the time of the outcry statement. However, this argument is based on the prospective witnesses' plan to commit perjury. Thus, there was no evidence in the record, or even available, to impeach the victim's denial of a sexual relationship with her boyfriend. As previously stated, federal habeas review is limited to the record before the state court that adjudicated the claim on the merits. *See Pinholster*, 563 U.S. at 181. Thus, the Court of Criminal Appeals could have reasonably concluded petitioner failed to show prejudice with respect to this claim.

Petitioner has failed to demonstrate he is entitled to relief with respect to the state court's determination that trial counsel's performance was constitutional. Petitioner has failed to show counsel's performance was either deficient or prejudicial. Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication 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. Accordingly, petitioner's ground for relief should be denied.

Conclusion and Order

After careful review and consideration of all of petitioner's grounds for relief presented in this petition, the court finds petitioner's grounds for review fail

to state a claim warranting federal habeas relief. Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication 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. Accordingly, petitioner's grounds for relief should be denied and dismissed. It is therefore

ORDERED that the above-styled petition for writ of habeas corpus is **DENIED** and **DISMISSED**.

So Ordered and Signed
Sep. 23, 2018

/s/ Ron Clark
Ron Clark, Senior District Judge

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

4/1/2015
DUKES, SHANNON DALE
Tr. Ct. No. 10-08423-A **WR-81,845-01**

This is to advise that the Court has denied without written order the application for writ of habeas corpus. JUDGE YEARY DISSENTED; JUDGE NEWELL DISSENTED

Abel Acosta, Clerk

IN THE CRIMINAL DISTRICT COURT
OF JEFFERSON COUNTY, TEXAS

EX PARTE	*	WRIT NO. 10-08423-A
	*	
SHANNON DALE DUKES	*	[CCA NO. WR-81,845-01]

SUPPLEMENTAL FINDINGS, CONCLUSIONS, AND RECOMMENDATION FOLLOWING ARTICLE 11.07 EVIDENTIARY HEARING; AND TRANSMITTAL ORDER

(Filed Jan. 20, 2015)

PRESENT ABATEMENT MATTER

On September 24, 2014, the Court of Criminal Appeals ["CCA"] issued an abatement order in the instant habeas proceeding, directing this Court to conduct a live hearing allowing trial counsel to respond in detail to applicant's five (5) allegations of constitutionally ineffective assistance.

Following the evidentiary hearing, this Court was further directed to enter additional findings of fact and conclusions of law, to supplement the Court's initial findings and conclusions entered July 16, 2014, as to whether the performance of trial counsel, James R. Makin, was deficient and, if so, whether his deficient performance prejudiced applicant's defense.

On November 21, 2014, the Court conducted the evidentiary hearing at which trial counsel was the only witness called to testify by either party.

Although applicant appeared in person along with his well-prepared habeas counsel, Mr. Josh Schaffer, applicant did not testify.

A single volume of reporter's record [hereinafter "Supp.RR"] was transcribed and forwarded to this Court to assist it in entering these supplemental findings and conclusions.

ATTORNEY-CLIENT-PRIVILEGE OBJECTION OVERRULED

As a preliminary matter, and for purposes of clarification to all participants, the Court had formally overruled applicant's attorney-client privilege objection, relating to the scope of the Court's order directing trial counsel to submit a responsive affidavit to applicant's IAC claim. Applicant renewed this objection prior to eliciting trial counsel's testimony at the November 21, 2014, evidentiary hearing.

The Court finds the issue firmly settled based on the following observation in *State v. Thomas*, 428 S.W.3d 99, 106 (Tex. Crim. App. 2014), in which the Court of Criminal Appeals affirmed the appellate court's reversal of a trial court's grant of a new trial "in the interest of justice" absent defense counsel's submission of an otherwise valid legal claim: "When counsel faces an ineffective-assistance claim, the attorney-client privilege is waived, and trial counsel has the opportunity to explain his actions."

The Thomas-Court also agreed with the State's argument that it is "a miscarriage of justice to grant a new trial on the basis of evidence that the defense chose not to introduce, especially when defense counsel [during the motion-for-new-trial hearing] immunized himself from testifying about his strategy [by refusing to answer the State's question asserting attorney-client privilege] by explicitly declining to allege ineffective assistance of counsel." *Id.* at 106-107.

JUDICIAL NOTICE

This Court judicially notices the contents of its file in the underlying case, Trial Cause 10-08423; the contents of the trial record [clerk's and reporter's] in said cause; the contents of the clerk's file in the instant habeas proceeding, No. 10-08423-A; the Thirteenth Court of Appeals' unpublished memorandum opinion in applicant's direct appeal, *Dukes v. State*, No. 13-11-00434-CR, 2012 WL 3041336 (Tex. App. - Corpus Christi July 26, 2012, pet. ref'd) (mem. op., not designated for publication); the contents of the supplemental clerk's record in the present abatement matter; and the supplemental reporter's record from the November 21, 2014, evidentiary hearing.

Additionally, this Court may occasionally rely on its personal recollection of certain facts and circumstances which occurred during the course of applicant's trial in the underlying case, and will note herein when it is doing so.

LAW APPLICABLE TO THE CASE

A. Ineffective Assistance of Counsel

To obtain habeas relief for an IAC claim, the applicant must meet the two-prong standard established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Under the first prong, the applicant must demonstrate, by a preponderance of the evidence, that counsel's performance was deficient, meaning that his assistance fell below an objective standard of reasonableness. *Id.* at 687-688, 694.

If applicant demonstrates deficient performance by his counsel, under the second prong of *Strickland*, applicant must then show resulting prejudice, also by a preponderance of the evidence. *Id.* at 694.

This showing of prejudice requires applicant to establish a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.*

Put another way, to establish prejudice in a non-capital trial setting, the applicant must show that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

Pertinent to the IAC claim in this case is the well-recognized deficient performance-construct that "[s]trategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690.

Along the same line, "[a] conscious and informed decision on trial tactics and strategy cannot be the basis of constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Pape v. Thaler*, 645 F.3d 281, 291 (5th Cir. 2011) (internal quotations and citations omitted).

B. Law on Lesser Included Offense Instructions

Texas Code of Criminal Procedure Article 37.09(1) provides that an offense is a lesser included offense if "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged."

In the "*Royster-Rousseau*" line of cases, the Court of Criminal Appeals established a two-step analysis for determining when a trial judge should submit lesser included offense instructions requested by the defendant in the charge to the jury. *See Grey v. State*, 298 S.W.3d 644, 645 (Tex. Crim. App. 2009).

In *Hall v. State*, 225 S.W.3d 524, 525, 535 (Tex. Crim. App. 2007), the Court of Criminal Appeals adopted the "cognate pleadings approach," to the exclusion of all other approaches, as the first step in the *Royster-Rousseau* analysis for determining whether the allegation of a greater offense includes a lesser offense. *See also Ex parte Watson*, 306 S.W.3d 259, 273, 273 n. 19 (Tex. Crim. App. 2009) (opn. on reh'g) (citing to *Hall*, 225 S.W.3d at 526, CCA in n. 19 "emphatically" rejects more liberal "cognate evidence" approach,

which includes facts adduced at trial in its lesser included analysis.) (internal quotation marks omitted)

Under the cognate pleadings approach, this first step in determining whether an offense is a lesser included offense of the greater alleged offense is a question of law because it does not depend on the evidence to be produced at trial; therefore, this first step is "capable of being performed before trial by comparing the elements of the offense as they are alleged in the indictment or information with the elements of the potential lesser-included offense." *Hall*, 225 S.W.3d at 535-536.

"To the extent that a continuous-sexual-abuse indictment alleges certain specific offenses [CCA here referring specifically to those predicate-offenses listed under Subsection (c) of § 21.02]," said specific offenses alleged in the indictment "will *always* meet the first step of the *Hall* analysis." *Soliz v. State*, 353 S.W.3d 850, 854 (Tex. Crim. App. 2011) (emphasis in original).

The second step in the *Royster-Rousseau* analysis requires examining all the evidence presented at trial to determine if some evidence exists that would permit a rational jury to find that, if the defendant is guilty, he is guilty only of the lesser offense. *Hall*, 225 S.W.3d at 536; *Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993).

"The purpose of the second step is to ensure that the lesser-included offense is a 'valid, rational alternative' to the charged offense. [T]here must be some evidence directly germane to the lesser-included offense

for the finder of fact to consider before an instruction on a lesser-included offense is warranted. Anything more than a scintilla of evidence entitles the defendant to the lesser charge. . . . However, such evidence cannot be mere speculation – it must consist of affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense." *Wortham v. State*, 412 S.W.3d 552, 557-558 (Tex. Crim. App. 2013) (footnotes of supporting authority omitted).

PERTINENT PRETRIAL PROCEEDINGS – JUNE 2011 JURY TRIAL

A. Trial-Amendment of Indictment and Pretrial Article 38.37 Discussion

1. Applicant was indicted for Continuous Sexual Abuse of Young Child or Children [hereinafter "Continuous Sex Abuse], under Texas Penal Code § 21.02, an offense which became effective on September 1, 2007.

2. Under § 21.02(b), a defendant may be convicted of Continuous Sex Abuse when he commits two or more "acts of sexual abuse" [see the predicate offenses listed under § 21.02(c)] during a period that is thirty or more days in duration. *Id.* § 21.02(b)(1), (c).

3. Additionally, a conviction under § 21.02 can be sustained only if the State proves that the alleged child-victim, or child-victims, were younger than 14 years of age at the time of the commission of each act of sexual abuse alleged in the indictment. *Id.* § 21.02(b)(2).

4. The trial record establishes that the child-complainant, L.G., was born March 24, 1994, and had been applicant's step-daughter since L.G.'s biological mother, Peggy, married applicant on May 19, 1997, at which time L.G. was almost 3 years of age. [3RR30-32]

5. The trial record establishes that L.G. was 17 years of age when she testified at trial [on June 14, 2011], and that L.G. was 15 years of age when she made her outcry [of applicant's Continuous Sex Abuse] to her mother, Peggy Dukes, on September 21, 2009. [3RR61, 123]

6. The trial record establishes that L.G. turned 13 years of age on March 24, 2007, and turned 14 years of age on March 24, 2008. [3RR125]

7. The trial record establishes that prior to the start of the State's case-in-chief, trial counsel pointed out to the Court the indictment charged applicant with certain acts of criminal conduct which violated § 21.02 committed prior to September 1, 2007, the effective date of the statute; which counsel characterized as an *ex post facto* violation on the part of the State. [3RR6]

8. The trial record establishes some initial confusion existed on the part of the State and the Court regarding trial counsel's complaint of the State's flawed indictment language, with both the State and the Court initially believing that the indictment was worded correctly, based on the evidence the State anticipated presenting to the jury and on the fact that the words "on or about" preceded the book-end dates alleged, to-wit: "on or about the 24th DAY OF MARCH, TWO

THOUSAND AND SIX, and continuing through on or about the 23rd DAY OF MARCH, TWO THOUSAND AND EIGHT, . . . ," and that any confusion engendered by the dates alleged could be cured by an appropriately worded instruction to the jury. [3RR6-8; 14-15]

9. The trial record establishes trial counsel's repeated and specific objections to the indictment's continuous-abuse dates [quoted above in Finding 8] appear in the resulting, and lengthy, colloquy among the three participants [the Court and both counsel], and which eventually resolved the matter, to-wit: [3RR8-10; 11-12; 12-16]

> [Trial Counsel]: Then, Your Honor, my further objection is with respect to the 18 month period before the effective date of the statute. It's our position that there is no offense on an on or about date that could be included since it wasn't against the law then. That would be irrelevant, highly prejudicial and improper, for one, just the reading of the indictment as it stands now.
>
> THE COURT: There is no – that proof of wrongdoing or criminality against the defendant alleged to have occurred prior to September 1st, 2007, you're objecting to?
>
> [Trial Counsel]: Yes, Your Honor. Anything prior to that. And in the language in the indictment, they had on or about the 24th day of March, 2006. We feel that that's improper and highly prejudicial that it even gets in front of the jury.

THE COURT: Number one, I don't think it would sustain a conviction if it solely relies on that evidence; that is, evidence prior to September 1st, 2007. That, I think, is a foundation of law. However, could there be other basis under the law for the entry of such evidence other than to support the indictment's elements?

[State's Attorney]: Yes, Your Honor. I didn't mean to interrupt.

****

[The State and the Court then segued to the Article 38.37 matter; see trial facts on Art. 38.37 matter set out below in Finding 10]

****

[Trial Counsel]: [attempting to refocus colloquy away from Art. 38.37 matter] Your Honor, this is a narrowing statute and under aggravated sexual assault, I can understand where just a whole everything (sic) probably come in. However, under this narrow statute, we have this limitation period; and it's our position that any facts need to be within that limitation period to prove this offense as they've charged him. I believe the statute itself speaks to that issue. [3RR9-10]

****

[Trial Counsel]: Your Honor, I'm aware of all of that [admissibility of Art. 38.37 evidence of extraneous offenses or acts] and my

concern here is we have things that are before the effective date of the statute and that's my concern and I'm telling you now. [3RR11]

****

[Trial Counsel]: . . . , Your Honor, I'm still concerned. In the reading of the indictment, I think it's going to be confusing to the jury and prejudicial to my client if they read on or about the 24th day of March, 2006, and continuing through on or about and they have the 23rd day of March, 2008.

THE COURT: I understand.

[Trial Counsel]: They are telling the jury to consider this period before the enactment of the law, and I think it's wrong. [3RR11-12]

****

[It is at this point the Court first suggests to the State that it amend the indictment language to omit any dates prior to Sept. 1, 2007]

****

[State's Attorney]: I was going to say this: If Mr. Makin agrees, can make an oral amendment and make it the 1st of September of 2007 so that there is no confusion.

THE COURT: Do you agree to that?

[Trial Counsel]: We would agree to that, Your Honor. . . . [3RR13]

****

THE COURT: All right. Then the date shall be changed from the beginning date of on or about the 24th day of March, 2006, to on or about the 1st day of September, 2007; is that correct?

[State's Attorney]: Yes, Your Honor.

THE COURT: And without objection.

[Trial Counsel]: Well, Your Honor, I still object to the on or about language on the 1st day of September of 2007 since the offense they are charging didn't exist before that date.

THE COURT: Well, I think he's got you on a technicality there from on or from the 1st day of March – I'm sorry – 1st day of September, 2007, and continuing through on or about March 23rd. Is that what you want?

[State's Attorney]: Well, no, because on or about can also mean within the few days after September 1st; and I don't think the witness can testify that he actually committed that act on September 1st because she won't recall that.

THE COURT: Well, we have to couch language that will preclude them from considering dates prior to September 1st. So, how would you do that?

[State's Attorney]: Well, I think that the – I think the on or about language needs to be because it can encompass any time within September or after September 1st.

THE COURT: ***But it can encompass August of '07***. [emphasis added]

[State's Attorney]: Well, then, I think that there is no need to change the on or about language.

THE COURT: So, you're not making a motion then?

[State's Attorney]: No. I'm not removing – I'm not making a motion to change it to on September 1st. I think the on or about September 1st of September (sic) 2007 is adequate.

THE COURT: I don't think so. I mean, we're not going to spend a lot of time on this, but I don't think so. Because can they just as well consider evidence prior to September 1st under that language and how does that –

[State's Counsel]: I think simply with an instruction from the Court that can be done.

THE COURT: What is my instruction, for them to avoid the wording of the indictment?

[State's Attorney]: I think –

THE COURT: No. Let's clarify the indictment. If you're going to change it, then clarify it in light of the statutory enactment.

[State's Attorney]: Well, we just agreed that we would change the date from to the 1st of September of 2007; but I don't think that

there is a need to change the on or about. A jury instruction can cure that.

THE COURT: I would suggest this, okay. How about ***from on or about but after*** September 1st? [emphasis added]

[State's Attorney]: That would be fine. I mean, because I think that gives them latitude that it could be any date after September 1st.

THE COURT: Any objection to that?

[Trial Counsel]: No, Your Honor, as written with the inclusion of the words "but after," we're okay. [3RR13-16]

****

THE COURT: All right. The indictment is therefore amended beginning on line 4 after the words State of Texas, comma, on or about, comma, but after the 1st day of September, comma, 2007, comma and continuing through on or about the 23rd day of March, 2008. Agreed?

[Trial Counsel]: Agreed, Your Honor. [3RR16]

10. The trial record establishes that during the pretrial indictment-amendment colloquy, quoted above, there was a brief segue into the matter of "extraneous offense or bad act" evidence the State anticipated presenting to the jury pursuant to former-Article 38.37, Texas Code of Criminal Procedure, to-wit: [3RR9-11]

[State's Attorney]: I anticipate that after there is testimony of the conduct between September 1st, 2007, and the subsequent date, that I think by that point, think the State will have been able to establish a common scheme or a plan and previous dealings between the defendant and the substance would, therefore, be admissible under Texas Code of Criminal Procedure 38.37 and a notice that I was intending to use such evidence was provided to Mr. Makin. [3RR9]

****

THE COURT: Under Article 38.37 of the Texas Code of Criminal Procedure, this article applies to a proceeding in the prosecution of a defendant in an offense under the following provisions of the penal code if committed against a child under 17 years of age. Chapter 21, sexual offenses for which this continuing (sic) sexual abuse of a child, albeit it's misnumbered on the caption of the indictment but the title and the body of the indictment support the elements of continuing (sic) sexual abuse of a child under Section 21 of the Texas Penal Code. So, this article then would apply to those – such a crime as this one.

Section 2 of Article 38.37 goes on to state notwithstanding Rules 404 and 405 of the Texas Rules of Evidence, evidence of other crimes, wrongs, or other acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters including the

> state of mind of the defendant and the child and the previous and subsequent relationship between the defendant and the child.
>
> So long as it fits those elements, the Court shall admit it. [3RR10-11]
>
> **********
>
> THE COURT: Well, I think what should be done in light of the Court's experience under the law is that when such evidence is admitted, I think maybe an instruction to the jury might be in order for them to consider it for certain purposes only and ensure that for the purposes of proving the elements of the indictment, only such proof supporting dates of occurrences from September 1st, '07, to on or about March 23rd, 2008, can be used for the supporting of the elements of the indictment and proof of matters prior to that date or after that date can be used for their deliberations only under the restrictions of Article 38.37 and for no other purpose. If you want that instruction, I think that is probably appropriate.
>
> [Trial Counsel]: You had anticipated my next request. We would be asking for that instruction[.] [3RR11]

11. The Court notices the fact that at the time the underlying case was tried, beginning on June 13, 2011, neither this Court nor the parties had the benefit of the detailed statutory analysis, including legislative intent, undertaken by the CCA in either *Soliz v. State*, 353 S.W.3d 850 (Tex. Crim. App. 2011) [handed down

on October 5, 2011], or *Price v. State*, 434 S.W.3d 601 (Tex. Crim. App. 2014), after determining subsection (e)(3) [*Soliz*] and subsection (c) [*Price*] of § 21.02 to be ambiguous.

12. The trial record establishes, based on the pretrial colloquy reproduced above, that at least part of trial counsel's strategy for defending applicant was to narrow the "window of criminal culpability" by which the jury would be authorized to convict applicant under § 21.02, to-wit:

> (a) by having the alleged predicate acts of sexual abuse restricted to only those committed on or after September 1, 2007, the date § 21.02 went into effect; and,
>
> (b) by having the Court modify the indictment's "on or about" wording to insert the additional restrictive averment "but after," thereby strictly limiting applicant's criminal culpability to acts of sexual abuse committed between the amended book-end dates September 1, 2007 and March 23, 2008, but not before September 1, 2007.

13. The trial record establishes that narrowing the indictment's wording to its final form resulted in narrowing the time-frame the jury was authorized to convict applicant under § 21.02 [of two or more acts of sexual abuse during a 30-day period or more] to the approximately six-month-and-twenty-three-day-period from September 1, 2007 through March 23, 2008.

14. The trial record establishes that, prior to the start of testimony, the Court, the State's Attorney, and trial counsel were aware of the State's intent to introduce, in its case-in-chief, extraneous-offense or "bad act" evidence pursuant to Article 38.37, Texas Code of Criminal Procedure, which authorized admission of such evidence against a defendant "[n]otwithstanding Rules 404 and 405, Texas Rules of Evidence[.]"

SUPPLEMENTAL FINDINGS AND CONCLUSIONS

A. Failure To Request Lesser Included Offenses

Application of IAC Law and Lesser Included Offense Law to Facts in Habeas Record

15. In making its supplemental findings relating to Ground 1, IAC allegation (1), the Court has reviewed the entire habeas record, including the underlying trial record, in light of the applicant's argument and authorities appearing on pages 8-13 of his Brief In Support of Application For Writ of Habeas Corpus, filed May 19, 2014 [hereinafter "Supporting Brief"], and particularly in light of habeas counsel's closing remarks and detailed clarifying responses to the Court's questions toward the end of the November 21, 2014, evidentiary hearing, appearing in the Supp.RR at pp. 125-147.

16. The habeas record establishes, based on the affidavits supplied by trial counsel, and his responses elicited at the November 21, 2014, evidentiary hearing, that trial counsel did not request that any lesser

included offenses be submitted to the jury in the Court's guilt-innocence phase instructions, nor did trial counsel object to the absence of any such lesser included instructions. [Supp.RR72]

17. The habeas record establishes that trial counsel did not discuss with applicant what options, if any, were available to him regarding requesting lesser included offense instructions in the guilt-innocence phase jury instructions. [*See* Supp.RR57-58]

18. For purposes of addressing applicant's Ground 1, IAC allegation (1), the Court's review of the trial record has focused particularly on testimony of the complainant, L.G. [3RR121-163], on testimony of L.G.'s mother, Peggy Dukes [3RR30-120], and on testimony of the Sexual Assault Nurse Examiner "[S.A.N.E."], Brenda Garison [3RR163-181].

19. The habeas record establishes the particular offenses of aggravated sexual assault, sexual assault, and indecency by contact were each suggested by applicant as the available lesser included offenses of the greater included Continuous Sex Abuse offense, for which applicant had been indicted. [Supporting Brief pp. 8, 910; Supp.RR68-71]

20. The habeas record establishes applicant's particular assertion that the trial record contains "more than a scintilla of evidence from which the jury rationally could have found that applicant was guilty of one or more" of the three suggested lesser included offenses; the bases for this assertion appearing in applicant's supporting brief, to-wit: [Supporting Brief pp.10-11]

> "Primarily, the jury could have believed that applicant committed one or more acts of sexual abuse but also believed that L.G. already was 14 years old when it began based on Brenda Garrison's [sic] testimony that L.G. stated that the sexual abuse began after Hurricane Ike in September of 2008, when she already was 14 years old."
>
> If the jury so believed – or had a reasonable doubt as to whether more than two acts of abuse occurred during a period that was more than 30 days in duration before she turned 14 – it would have convicted him of indecency by contact or sexual assault of a child between the ages of 14 and 17, or both.
>
> Alternatively, the jury rationally could have believed that applicant committed either indecency or aggravated sexual assault of a child under the age of 14, but not both, in which case he was not guilty of continuous sexual abuse.
>
> In another scenario, the jury rationally could have believed that he committed indecency before L.G. turned 14 but that he did not commit sexual assault until after she turned 14, in which case he was not guilty of aggravated sexual assault and, by extension, not guilty of continuous sexual abuse.

21. The habeas record establishes that the two predicate offenses set out in applicant's indictment alleged Indecency by Contact by "engaging in sexual contact by touching part of the genitals of [L.G.], . . . with his

hand," and Aggravated Sexual Assault by "causing the penetration of *the mouth* of [L.G.], . . . *with his male sexual organ*" and at the time of each act of sexual abuse [L.G.] "was a child younger than 14 years of age." [emphasis added]

22. Thus, examining the allegations pleaded in the indictment charging applicant with Continuous Sex Abuse in light of the pertinent holdings in *Hall* and *Soliz*, the Court concludes that of the four lesser included offense scenarios suggested by applicant [see Finding 20 above], the only scenario that meets the first step of the *Hall* analysis is contained in the third paragraph, which suggests a conviction for either the alleged predicate offense, Indecency With a Child, by applicant's hand touching part of L.G.'s genitals, committed within the time frame of the indicted offense, or a conviction for the alleged predicate offense, Aggravated Sexual Assault, by penetration of L.G.6's mouth with applicant's male sexual organ, committed within the time frame of the indicted offense, but not a conviction for both.

23. Again applying the first step of the *Hall* analysis to the allegations contained in the Continuous Sex Abuse indictment, the Court further concludes applicant was not entitled to jury instructions on the suggested lesser included offenses of Indecency With a Child, Aggravated Sexual Assault, or Sexual Assault that contain allegations said offenses were committed after L.G. turned 14 years of age; nor was applicant entitled to jury instructions on the suggested lesser included offenses of Aggravated Sexual Assault or

Sexual Assault with either offense alleging the penetration of L.G. female sexual organ by applicant's male sexual organ, either before or after L.G. turned 14 years of age; because, under both sets of suggested lesser included sex-offenses, a conviction for any one of said suggested lesser included sex-offenses necessitates proof of an additional fact not otherwise required to establish the commission of the indicted greater included Continuous Sex Abuse offense. *See* Texas Code of Criminal Procedure Article 37.09(1); *Irving v. State*, 176 S.W.3d 842, 845-846 (Tex. Crim. App. 2005).

24. In other words, there is at least one fact necessary to prove the offense of Sexual Assault (of a Child between the ages of 14 to 17), and the offense of Indecency With a Child (between the ages of 14 to 17) [by contact]; and the offense of Aggravated Sexual Assault (of a Child younger than 14 years of age) [by any manner and means other than by causing the penetration of the mouth of L.G. by applicant's male sexual organ] that is not included within the proof necessary to establish the offense of Continuous Sex Abuse of L.G. as alleged in applicant's indictment in the underlying cause. *Sorto v. State*, 173 S.W.3d 469, 475-476 (Tex. Crim. App. 2005).

25. As noted above, the trial record contains L.G.'s affirmative testimony which establishes that from September 1, 2007 up to March 23, 2008, the day *before* she turned 14 years of age, the repeated acts of sexual abuse committed by applicant on her consisted of applicant touching L.G.'s "vaginal area" both outside and inside of her clothes [3RR129, 131], and applicant

forcing L.G. to "[p]erform oral sex on him" whereby applicant would "put his penis in [L.G.'s] mouth[.]" [3RR130, 131]; and L.G.'s affirmative testimony establishes that both of these two alleged acts of sexual abuse occurred "for more than 30 days duration" for the entire year L.G. was 13 years of age, which was within the alleged book-end dates of September 1, 2007 and March 23, 2008. [3RR131-132].

26. The trial record contains L.G.'s affirmative testimony which establishes that it was only after she turned 14 years of age that applicant began engaging in sexual intercourse [penetrating her vagina with his penis]; and there is no evidence in the trial record establishing sexual intercourse [vaginal penetration by applicant's penis] between applicant and L.G. occurred before she turned 14. [3RR133]

27. The trial record contains L.G.'s affirmative testimony which establishes that the last incident of sexual intercourse [vaginal penetration by applicant's penis] perpetrated on her by applicant occurred on September 19, 2009, when L.G. was 15 years of age. [3RR135]

28. The trial record contains L.G.'s affirmative testimony which establishes that other than applicant's repeated instances of forced sexual intercourse [vaginal penetration by applicant's penis] after she turned 14 years of age, L.G. had never engaged in sexual intercourse with anyone, including her subsequent boyfriend, J.D. Mull. [3RR135-137].

29. The portions of Brenda Garison's trial testimony pertinent to applicant's suggested lesser included

offenses appear in the trial record, in pertinent part, as follows: [3RR166-167; 170-171; 177-178]

> Q. [State's Attorney] Okay. And what is the first thing you do?
>
> A.[Garison] The first thing I'm going to do is get authorization from Mom to be able to do the examination; and then I'm going to take the child in the office, in my office. I'm going to take a brief history of the incident and letting her explain to me what has happened, and then we proceed with the physical examination.
>
> Q. Okay. And with regard to [L.G.'s] history, I mean, it the history of assault, does it affect what or how you perform your examination?
>
> A. It does. We take her history strictly for diagnosis and treatment. So, the history that she gives me is going to dictate the type of examination that I'm going to perform.
>
> Q. And what was the history you were given at that time?
>
> A. She had given me a history that her stepdad had been having sex with her. She said it had started after Hurricane Ike, and I think the last time had been four days prior to the date I saw her.
>
> **********
>
> Q. And did [L.G.] provide answers to all of that stuff?
>
> A. She did.

Q. And what were her answers with regard to penetration?

A. She said that he had penetrated her female sexual organ but also orally, her mouth.

Q. And did she indicate whether ejaculation had occurred?

A. Yes. She said in her female sexual organ, yes.

Q. After you do that, after you get that information, what is the purpose of getting all of that information?

A. Well, we're going to get that information so we know how to proceed with our examination and know what evidence we need to obtain; and then we're going to go into the exam room and start our actual examination.

Q. What did you determine from the history that you had been given?

A. Well, it had been determined that it had been four days since the last incident. So, I knew that we were going to be limited as to what type of evidence I would be obtaining. So, we did vaginal swabs and vaginal smears; and we collected blood for DNA.

****

Q.[Trial Counsel] And just going through your report here, she told you it started after Hurricane Ike?

A.[Garrison] That's correct.

Q. Do you know when Hurricane Ike was?

A. I don't. I think it was like in '08, '07. I don't know.

Q. September of '08 maybe?

A. That might be about right.

30. The portions of Peggy Dukes' trial testimony pertinent to applicant's suggested lesser included offenses appear in the trial record as follows: [3RR75- 77]

Q.[State's Attorney] I'm showing you what is marked State's Exhibit No. 37. Without going into detail what's on it, can you recognize it?

A.[Peggy Dukes] Yes, ma'am.

Q. And did you listen to the contents of this disk?

A. Yes, I did.

Q. And is your voice on it?

A. Yes, it is.

Q. Is Tori's voice on it?

A. Yes.

Q. And is the defendant's voice on it?

A. Shannon's is too, yes.

Q. Is it a phone call made by the defendant from the jail?

A. That's correct.

Q. And when you listened to it, was it a fair and accurate depiction of the conversation that occurred particularly between yourself and the defendant?

A. That is correct.

****

Q. Do you recall that his phone call was made approximately November 18th, 2009, about ten days after the defendant was rearrested?

A. That would be about right, yes, ma'am.

[State's Attorney]: I re-offer State's Exhibit No. 37.

Mr. Makin: It was made on November 18th, 2009?

[State's Attorney]: I'm sorry. Yes. Did I say that wrong?

Mr. Makin: The[n] we'd have no objection.

THE COURT: State's Exhibit 37 is admitted.

[State's Attorney]: May I publish it to the jurors, Your Honor?

THE COURT: Yes.

Q.[State's Attorney] Is there something on her that's very, very significant on this recording?

A. [Peggy Dukes] Yes, there is.

Q. At one point in this conversation when you're talking to the defendant, did you say to

him that you could have handled if he had an affair; but you couldn't that he did it with your daughter?

A. Yes, I did say that.

Q. Did he acknowledge it?

A. Yes, he did.

Q. But did he claim that he did it one time?

A. That is correct.

Q. And did you say to him, no, it was more?

A. Yes, I did.

(State's Exhibit No. 37 played to the jury)

31. For purposes of satisfying the second step in the *Royster-Rousseau* analysis, the Court finds the portion of Brenda Garison's testimony, set out above in Finding 29, provides no evidence directly germane to either of the two lesser included alleged predicate offenses that met the first step of the *Hall* [and *Soliz*] analysis, as determined above in Conclusion 22. *Wortham*, 412 S.W.3d at 557.

32. For purposes of satisfying the second step in the *Royster-Rousseau* analysis, the Court further finds the portion of Brenda Garison's testimony, set out above in Finding 29, does not consist of affirmative evidence that both raises either of the two lesser included alleged predicate offenses [that met the first step of the *Hall* (and *Soliz*) analysis, as determined above in Conclusion 22] and rebuts or negates an element of the

greater included Continuous Sex Abuse offense, as indicted. *Wortham*, 412 S.W.3d at 558.

33. For purposes of satisfying the second step in the *Royster-Rousseau* analysis, the Court finds the portion of Peggy Dukes' testimony, set out above in Finding 30, provides no evidence directly germane to either of the two lesser included alleged predicate offenses that met the first step of the *Hall* [and *Soliz*] analysis, as determined above in Conclusion 22. *Wortham*, 412 S.W.3d at 557.

34. For purposes of satisfying the second step in the *Royster-Rousseau* analysis, the Court further finds the portion of Peggy Dukes' testimony, set out above in Finding 30, does not consist of affirmative evidence that both raises either of the two lesser included alleged predicate offenses [that met the first step of the *Hall* (and *Soliz*) analysis, as determined above in Conclusion 22] and rebuts or negates an element of the greater included Continuous Sex Abuse offense, as indicted. *Wortham*, 412 S.W.3d at 558.

35. Among the arguments applicant presents in support of his suggested entitlement to instructions on one or more lesser included offenses is that the jury could have simply disbelieved one or more portions of L.G.'s affirmative testimony that established each of the essential elements of the Continuous Sex Abuse allegations. [*See e.g.*, Supp.RR130 – "So, if the jury believed the nurse, then that would have been a basis to reject the testimony from the Complainant that everything

happened during the time frame alleged in the indictment."]

In *Bignall v. State*, 887 S.W.2d 21, 24 (Tex. Crim. App. 1994), this type of argument was rejected with the observation that "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense; there must be some evidence directly germane to a lesser included offense for the factfinder to consider before an instruction on a lesser included offense is warranted." *See also Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011) (same).

36. Along these lines, the CCA has repeatedly directed reviewing courts conducting the second step of the *Royster-Rousseau* analysis to "examine the entire record instead of plucking certain evidence from the record and examining it in a vacuum." *Enriquez v. State*, 21 S.W.3d 277, 278 (Tex. Crim. App. 2000) (citing *Ramos v. State*, 865 S.W.2d 463, 465 (Tex. Crim. App. 1993)); *Godsey v. State*, 719 S.W.2d 578, 584 (Tex. Crim. App. 1986) ("The Court of Appeals gave a meaning to appellant's statement that appellant did not. The statement cannot be plucked out of the record and examined in a vacuum.").

37. Citing to *Beck v. Alabama*, 447 U.S. 625, 634 (1980), applicant suggests that trial counsel's failure to secure at least one lesser included offense instruction for the jury to consider violated applicant's right to due process because the jury had no choice but to convict applicant of the greater Continuous Sex Abuse offense as indicted "in view of the recorded jail conversation in

which applicant admitted that he 'did it one time' and the DNA evidence on L.G.'s sheet, from which he could not be excluded as a source[,]" quoting the following from that case: "[P]roviding the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." [*See* Supporting Brief pp. 11-12]

38. Although this quote from *Beck* appears directed to proceedings in death-penalty cases, the pertinent response appears in *Moreno v. State*, 858 S.W.2d 453, 459 (Tex. Crim. App. 1993), also a death-penalty case, to-wit:

> In every case in which the evidence is sufficient to support a conviction for *capital* murder, however, it will, *a fortiori*, support a conviction for the lesser offense of murder. This is only to say that murder is conceptually a lesser included offense of capital murder. See Article 37.09(1), V.A.C.C.P. But that acknowledges only half the test. In *Cordova*[*v. Lynaugh*, 838 F.2d 764 (5th Cir. 1988)], the Fifth Circuit made clear that before it can be said that failure to submit the lesser included offense violates due process, the evidence must be such that "the jury could rationally *acquit on the capital crime* and convict for the noncapital crime." *Id.* at 767 (emphasis supplied). Thus, it is not enough that the evidence would support a conviction for the lesser included offense, as if that were the only offense the jury was authorized to convict upon. The record must also present a rational basis for a

jury to reject conviction for the greater, capital offense.

39. Having examined all of the record-evidence presented in applicant's trial in its proper context, the Court can find no evidence that would permit a jury rationally to find that if applicant is guilty, he is guilty only of either the predicate-offense of Indecency With a Child, as alleged in the indictment, or of the predicate-offense of Aggravated Sexual Assault, as alleged in the indictment.

40. L.G. testified that applicant repeatedly committed *both* alleged predicate-offenses for more than 30 days during the alleged six-month period when she was only 13 years of age. There is no affirmative record-evidence "directly germane" to the contrary, and no such evidence that both raises the fact that either lesser included predicate-offense was committed *singularly* while at the same time rebutting or negating the commission of the remaining lesser included predicate-offense.

41. Having examined all of the record-evidence presented in applicant's trial and having determined applicant was not entitled to have any of his suggested lesser included offense instructions submitted to the jury because they fail to meet the two-step *Royster-Rousseau* analysis, including the *Hall* cognate pleadings approach, the Court finds applicant has failed to establish that trial counsel rendered objectively unreasonable assistance for having failed to request jury instructions on the suggested lesser included offenses of

Indecency With a Child, Sexual Assault, and Aggravated Sexual Assault. *See Ex parte Chandler*, 182 S.W.3d 350, 356 (Tex. Crim. App. 2005) ("But a reasonably competent counsel need not perform a useless or futile act, such as requesting a jury instruction to which the defendant is not legally entitled or for which the defendant has not offered legally sufficient evidence to establish.")

B. Failure To Object To "Bad Character," "Extraneous Offense/Misconduct," and "Improper Opinion" Evidence

Application of IAC Law to Facts in Habeas Record

42. This portion of the Court's supplemental findings and conclusions address the IAC allegations corresponding to Ground 1, LAC allegations (2), (3), and (4) to-wit:

> (2) Counsel failed to object to testimony that applicant has bad character. Peggy Dukes testified that applicant had a bad temper, was destructive, had outbursts of rage, and was controlling and manipulative. The complainant testified that, when applicant gets mad, he goes on a rampage, punches holes in the wall, and breaks things.
>
> (3) Counsel elicited and failed to object to testimony that applicant committed extraneous offenses and specific acts of misconduct. The State presented evidence that applicant was arrested twice for violating a protective order. Counsel elicited that applicant

> physically abused Peggy numerous times and hurt a neighbor's child and destroyed property. The prosecutor elicited that applicant threatened to kill the complainant's boyfriend and his family.
>
> (4) Counsel failed to object to improper opinion testimony from the complainant's mother that her therapist told her that applicant had "control issues" and that the sexual abuse went on so long because of applicant's control and the complainant's sympathy.

43. In addressing the three IAC allegations set out above in Finding 42, the Court again notices that prior to applicant's trial, the State gave trial counsel timely notice of its intent to introduce extraneous offense and misconduct evidence pursuant to Article 38.37, Texas Code of Criminal Procedure. [*See* Article 38.37 discussion by the Court and both counsel set out above in Finding 10]

44. The Court also notices that in enacting Article 38.37, "the Legislature has made its intent to dispense with certain evidentiary rules clear through [Article 38.37's] specific language." *Smith v. State*, 5 S.W.3d 673, 678 (Tex. Crim. App. 1999) (*See id.* at n. 10, quoting former-Article 38.37, §2: "*notwithstanding Rules 404 and 405*, Texas Rules of Criminal Evidence, evidence of other crimes, wrongs, or acts committed by the defendant against the child . . . shall be admitted") (emphasis in original).

45. In addition to the responses contained in trial counsel's two affidavits, the contents of which the

Court has taken judicial notice, the record from the November 21, 2014, evidentiary hearing contains the following pertinent responses from trial counsel relating to Ground 1's IAC allegations (2), (3), and (4): [Supp.RRpp.32-35; 37-38; 80-82; 88-89; 94-96]

> Q.[Habeas Counsel] You testified a moment ago that you are more of a trial objection lawyer. Tell me what you mean by that?
>
> A.[Trial Counsel] Well, I would have knowledge beforehand what areas I think they are going to go into and looking at my big picture of my entire trial strategy, just because something is objectionable I don't object every time.
>
> Q. But would you agree with me that if there is evidence that is clearly inadmissible and would be prejudicial to your client and you are aware of that before trial, that there is a strategic advantage to getting an order in limine to try to prevent the witness from even uttering that testimony?
>
> A. Well, if you know you have evidence to develop your defense, you might want to let that in.
>
> Q. I understand that and my question was: Let's assume that the evidence is clearly inadmissible and prejudicial to your client.
>
> A. Uh-huh.
>
> Q. I mean, is that the kind of evidence that you are going to want a jury to hear about, generally?

A. Not generally, no.

Q. Okay. So, for the purpose of my question let's assume it's evidence you do not want admitted.

A. Sure. You should object.

****

Q. Was your strategy in Mr. Dukes' case to exclude clearly inadmissible prejudicial testimony to him?

A. No.

Q. Do you agree that constitutionally effective defense counsel should try to exclude clearly inadmissible prejudicial testimony?

A. I think it depends on each case individually and the overall trial strategy.

Q. So, it is your position that it can be sound strategy to not object to clearly inadmissible prejudicial testimony?

A. Correct.

Q. Okay. I want to discuss your defensive theories in this case. In a nutshell tell us what was your defense?

A. I had witnesses that were going to attack the complaining witness, her mother and family as liars fabricators. They had lured our client – my client into violating certain things. Their versions of the stories were all wrong, pretty much.

Q. So, it was your defense that there was no crime whatsoever, no sexual relationship with the Complainant that Mr. Dukes did not commit any offense?

A. That was the beginning defense, yes.

Q. Well, when you say "the beginning defense," was there another defense going into the trial?

A. No, one didn't come up. When I lost the witnesses, I didn't have a defense and I couldn't go back then and retry the case.

Q. You did not have any defense once you made the decision mid-trial not to call those witnesses?

A. Correct.

Q. And the witnesses, for the record, that you are referring to are?

A. Mr. Hammock –

Q. Let me ask the question.

A. Okay. Sorry.

Q. Mr. Dukes' brother, Allen Dukes; and his friend, Chuck Hammock, correct?

A. Yes.

Q. Those were the two witnesses that you intended to call in the defense to challenge the credibility of the State's witnesses?

A. Yes.

****

Q. And isn't it black letter law that it is impermissible to try a defendant as a person of bad character or a criminal, generally?

A. Yes.

Q. And isn't it black letter law that the character of a defendant in a criminal case is not admissible unless it is offered by the defendant or by the prosecution to rebut that?

A. Correct.

Q. That's Rule 404(a)(1)(A), okay. So, we can agree that Peggy's testimony, which I summarized moments ago, was clearly inadmissible, wasn't it?

A. Clearly.

Q. When it was offered. And you knew that at the time, didn't you?

A. Yes.

Q. And you did not object to any of it, did you?

A. I did not object.

Q. And if you had objected and Judge Stevens had sustained that objection and the jury never would have heard any of that testimony about his bad character, then would you agree with me that that would not have been an issue you would have needed Allen Dukes or Chuck Hammock to address, would it have been?

A. Correct, but it would – well, correct.

Q. You have stated in your affidavits that your plan, your strategy, was to use those witnesses to rebut that harmful testimony from the State's witnesses, correct?

A. More than rebut; to show they were lying.

Q. Well, but that's still a judgment call the jury needs to make?

A. Sure.

Q. I mean, just because the brother and the friend come in and say he didn't have a bad temper does not make it so, does it? I mean, that's a subjective call?

A. Sure.

****

Q. But you can agree with me that had you excluded that testimony either by a motion in limine or by objection when it was offered, that would not have been an issue you would have needed to use the brother, Allen, and the friend, Chuck, to clean up?

A. Well, my plan with Mr. Hammock was to attack both Peggy and the complaining witness and I, frankly, wanted the doors open.

****

Q. And as you look at it more carefully, you would agree with me that was not a sound decision not to object to Peggy's testimony about his character, was it?

A. Looking back, you know, it's hard to say. I think if I would have objected and the way things worked out in hindsight, that would have been one thing. That's not what happened.

Q. Well, it would have been better, wouldn't it?

A. Well, sure.

Q. Do you agree with me that the – Peggy's testimony was not admissible, correct?

A. Correct.

Q. And you agree with me if you had objected you believe Judge Stevens would have granted the objection, correct?

A. Well, I think he would have heard it and then heard the State and then, you know, I don't know.

****

Q. But by not making the objection, Mr. Dukes was not able to raise that issue on appeal, was he?

A. Correct.

****

Q. You also elicited that Mr. Dukes had destroyed phones, lawnmowers and weed eaters, correct?

A. I don't remember, but I'm not questioning you, I mean, I know I was going along with the absurdity of some of the things.

Q. You think it was absurd the claim that he had been destructive with physical property?

A. They were going over the edge on a bunch of stuff that I knew I could rebut.

Q. Well, but you are the one eliciting it?

A. I know.

Q. That kind of makes things worse, didn't it?

A. In hindsight, yes.

Q. So, collectively, those different areas of character testimony and extraneous misconduct that we have discussed, you would agree with me that you either should have objected to it in the first place or should not have elicited it on your own, correct?

A. In hindsight they probably would have been. You are correct.

Q. Moving on to the fourth allegation of deficient performance. The prosecutor was questioning Peggy and elicited from her that Peggy's therapist had told her that Mr. Dukes had control issues and that the abuse went on for so long because there was a bond between Mr. Dukes and the Complainant based upon his control of her and sympathy of him, okay? You follow all that?

A. I follow it.

Q. So, basically, the prosecutor is eliciting from Peggy opinions that her therapist had?

A. Correct.

Q. Correct? Do you agree with me that, first of all, that was inadmissible hearsay as to what the therapist had said?

A. Absolutely.

Q. And certainly deprived you of the opportunity to confront the therapist on those opinions, correct?

A. Correct.

Q. You also agree with me that the substance of the testimony itself communicated an opinion either from Peggy or the therapist that the abuse had gone on, that the abuse had occurred?

A. Correct.

Q. And, in fact, had occurred for a long time?

A. Correct.

Q. Do you agree with me that it is improper for a witness to give their opinion that the crime occurred?

A. Correct.

Q. And so that testimony was objectionable as improper opinion, as well as hearsay and confrontation, correct?

A. Correct.

Q. And you did not make an objection, did you?

A. There is not one on the record.

Q. And you agree with me that you should have, correct?

A. Correct.

Q. And that was not something that, you know, the friend, Chuck, and the brother, Allen, were in a position to refute, was it? I mean, they couldn't testify as to what Peggy's therapist had told her and whether that was accurate?

A. No. I just missed it.

46. The trial record establishes that all of the testimony at issue [IAC allegations (2), (3), and (4) of Ground 1] was either admitted before the jury without objection from trial counsel, or was elicited from the State's witnesses by trial counsel and admitted before the jury.

47. The Court takes notice of *Ex parte Bryant*, No. WR-74,973-01, 2014 WL 6478637, at *7 (Tex. Crim. App. Nov. 19, 2014) (publication pending), in which the Court of Criminal Appeals refused to hold all trial attorneys render constitutionally deficient performance under *Strickland* who repeatedly fail to object to State-elicited polygraph evidence, as did that defendant's trial counsel, to-wit:

> Instead, we hold that, although the introduction of polygraph evidence almost always falls below an objective standard of reasonableness because most attorneys will have no reasonable strategy in allowing the introduction of such evidence, we cannot categorically exclude the possibility that a trial attorney, under certain circumstances, could use the admission of polygraph evidence to his client's favor. We do find, however, that Applicant's trial counsel was deficient in this case.

48. The Court also takes notice of *Ex parte Ellis*, 233 S.W.3d 324 (Tex. Crim. App. 2007), in which that defendant, convicted for cocaine possession, raised an IAC claim because his trial counsel introduced into evidence a police report which allowed the jury to learn about the defendant's prior conviction for robbery and a prior murder charge. *Id.* at 327.

Counsel explained at the habeas evidentiary hearing he introduced the police report to impeach the testimony of the co-defendant, Davis, who was on probation for marijuana possession at the time of the arrest, with the fact that defendant-Ellis' prior criminal history did not include any drug offenses; counsel further explained that with the police report, he intended to show the jury that defendant-Ellis had been convicted of robbery, had served his time, and had made parole early, thereby demonstrating defendant-Ellis to be "an exemplary person[;] that there was "nothing to connect [Ellis] or tie him to these drugs except the testimony of Mr. Davis who had cut a deal; and that, short of having defendant-Ellis testify, which

Ellis declined to do, "counsel knew of no way to impeach Davis other than by using the police report." *Id.* at 328.

49. By unanimous opinion in *Ex parte Ellis*, the Court determined trial counsel did not perform deficiently under its *Strickland* analysis, explaining:

> We conclude that trial counsel's strategic reasons for offering Deputy Donahoe's police report were not unreasonable according to prevailing professional norms as required under the first prong of the *Strickland* framework. Although the defensive course chosen by counsel was risky, and perhaps highly undesirable to most criminal defense attorneys, we cannot say that no reasonable trial attorney would pursue such a strategy under the facts of this case.
>
> Deputy Donahoe's testimony supplied only circumstantial evidence of Ellis's knowledge. Because the cocaine was discovered behind the console between the driver and passenger seats of the truck, his testimony left unresolved the issue of which individual, Davis or Ellis, was in possession of the cocaine. The testimony of Davis, an accomplice, although sufficiently corroborated by non-accomplice evidence, was the only direct evidence connecting Ellis to one of the cocaine "cookies" seized by Deputy Donahoe. Ellis's conviction depended entirely on the credibility of Davis. The theory of the case offered by counsel was that Ellis was in the wrong place at the wrong time. Counsel's trial strategy

> therefore was to convince the jury that it was Davis who possessed both of the "cookies." To effectuate this strategy, counsel had to undermine Davis's credibility and, at the same time, bolster that of his client. Our review of the trial record shows that counsel, consistent with his testimony at the evidentiary hearing, utilized Davis's and Ellis's criminal histories to accomplish these objectives.
>
> **********
>
> Nevertheless, the admission of the robbery conviction and murder charge did serve a strategic purpose. Although potentially detrimental on the one hand, their admission was potentially beneficial on the other. Because Ellis's criminal history did not include and drug-related offenses, it diminished the likelihood of his involvement here. When coupled with the evidence and arguments made by counsel concerning Davis's extensive involvement with drugs, Ellis's criminal history strengthened counsel's theory of the case. A rational jury considering both Ellis's and Davis's criminal histories could have concluded that Davis was the sole possessor of the cocaine when weighing the evidence in this case.
>
> *Id.* at 331-332, 335. (footnote omitted)

50. In *Garcia v. State*, 57 S.W.3d 436 (Tex. Crim. App. 2001), a death penalty conviction, the Court of Criminal Appeals determined trial counsel did not perform deficiently under *Strickland* when, during the punishment phase, trial counsel elicited from a defense expert

that blacks and Hispanics are overrepresented among dangerous people in the general population:

> Appellant has failed to demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. Counsel might have been attempting, with Quijano's testimony, to do two things: (1) place before the jury all the factors it might use against appellant, either properly or improperly, in its assessment of his future dangerousness and (2) persuade the jury that, despite all those negative factors, appellant would not be a future danger if imprisoned for life because the prison system's procedures and techniques would control or eliminate his tendency toward violence. Under the circumstances – the State had already presented evidence before the jury that appellant had a long and violent criminal record – we cannot say that counsel's conduct could not be considered sound trial strategy.
>
> *Id*[.] at 439, 440-441.

51. Trial counsel's testimony at the evidentiary hearing establishes that, with one exception, his failure to object to, and his affirmative elicitation of, the testimony depicted in Ground 1, IAC allegations (2), (3), and (4) was in furtherance of his main defensive strategy, which was to destroy the credibility of both complaining witness, L.G., and her mother, Peggy Dukes. [*See* Supp.RR.pp.37, 40, 79, 117-119]

52. Trial counsel's testimony at the evidentiary hearing establishes that the entire foundation of this main defensive strategy rested on the testimony of defense witnesses, Allen Dukes, applicant's brother, and Chuck Hammock, a long-time family friend of the Dukes' family, and a man trial counsel had known for "many years" and who trial counsel believed to be very credible. [Supp.RR.pp.37-38, 4344, 79, 82, 84-85]

53. The habeas record contains no evidence indicating applicant expressed to trial counsel his desire to testify at trial in his own defense, and applicant does not now allege trial counsel was ineffective for failing to call him as a witness for the defense.

54. Trial counsel's testimony at the evidentiary hearing establishes it was shortly after the State rested its case-in-chief and counsel was about to open his case for the defense, at the guilt-innocence phase of trial, when counsel first learned, during the lunch-time recess, both Allen Dukes and Chuck Hammock had been entirely dishonest with him regarding their knowledge of truthful impeachment-evidence about which they were to testify in applicant's defense. [4RR77-78; Supp.RR105]

55. Trial counsel's testimony establishes that up until he was about to open the guilt-innocence phase case for the defense, just before uncovering Hammock's and Allen Dukes' deception, trial counsel firmly believed the testimony from Allen Dukes and Chuck Hammock would not have merely refuted the complainant's sexual abuse allegations and Peggy Dukes' testimony

relating to applicant's character flaws and extraneous misconduct, but would have shown that L.G. and Peggy "were lying." [Supp.RRpp. 37-38, 81, 105; 4RR77-78]

56. As confirmed by the trial record, trial counsel's testimony establishes that once he discovered Allen Dukes' and Chuck Hammock's plan to present fabricated testimony, and then dismissed them as defense witnesses, trial counsel was unable to come up with an alternative case for the defense, and he rested the case for the defense without presenting any defense witnesses. [Supp.RRpp.45, 112; 4RR77-78]

57. Trial counsel explained that he wanted the "objectionable" testimony at issue admitted before the jury during trial stating "[it] was going to come in at some point[,]" because, pursuant to his strategy, "Where was a lot of evidence was going to develop through my witnesses that might have got into that[.]" [Supp.RRp.85]

58. Peggy Dukes' testimony, elicited by the State, relating her therapist's opinion that applicant had "control issues," and that the abuse went on so long because there was a bond between applicant and L.G. based on his control and her sympathy, was the only objectionable ["inadmissible hearsay"] testimony at issue to which trial counsel admitted to not having intended for the jury to hear, explaining, "I just missed it." [Supp.RRpp.95-96]

59. Trial counsel's testimony at the evidentiary hearing established that it was immaterial to him that the particular testimony at issue from either L.G. or Peggy

Dukes was admissible or inadmissible because counsel had intended to place it before the jury in furtherance of his defensive strategy to destroy the credibility of those witnesses, and he was confident that the testimony of Allen Dukes, in whom Peggy and L.G. had confided on several occasions, and Chuck Hammock, a long-time family friend, would accomplish this. [Supp.RRpp.116-119; 3RR67-68; 114-115; 117-118; 162]

60. Trial counsel's testimony establishes that only in hindsight, and with the knowledge he now possesses that the evidentiary foundation of his defensive strategy – Allen Dukes' and Chuck Hammock's impeachment-testimony – was never presented to the jury, does he now concede that objecting to, and not eliciting, the alleged objectionable testimony at issue would have been the more appropriate method of defending applicant during trial. [Supp.RRpp.88, 90-94]

61. The Court notices that in enacting the Continuous Sex Abuse offense under § 21.02, the Legislature sought to bridge a perceived gap in Texas criminal law when the underlying facts ties a suspect to "a sexually abusive relationship with a young child . . . marked by continuous and numerous acts of sexual abuse of the same or different varieties." *See Price v. State*, 434 S.W.3d 601, 607-608 (Tex. Crim. App. 2014) (discussing the circumstances of enactment and legislative history of § 21.02).

62. A defendant charged with an offense under § 21.02 is aware from the face of the indictment that

the State, in its case-in-chief, will be permitted to introduce evidence before the factfinder that during a period of 30 or more days, the defendant committed at least two [and usually more than two] acts of "sexual abuse," which will include proof of at least two of the eight predicate sex-offenses listed under § 21.02(c), committed against one or more children under 14 years of age.

63. Because Continuous Sex Abuse is one of the offenses listed under Article 38.37, § 1(a)(1), the State is not restricted in its proof to only those acts of sexual abuse alleged in the Continuous Sex Abuse indictment; the State, as it did during applicant's jury trial, is permitted to introduce, notwithstanding Rules of Evidence 404(b) and 405 relevant "evidence of other crimes, wrongs, or acts committed by the defendant against the child . . . *including*:" the child's and the defendant's state of mind, and the previous and subsequent relationship between the child and the defendant. Article 38.37, § 1(b)(1) & (2) (emphasis added).

64. Because the Legislature used the word "including" immediately before the two listed purposes for introducing extraneous crime or misconduct evidence committed against the child in Article 38.37, § 1(b), the two listed purposes are considered illustrative and not exclusive. *Berry v. State*, 233 S.W.3d 847, 848 (Tex. Crim. App. 2007) (construing Texas Rule of Evidence 404(b)'s list of "other purposes" in such a manner[)].

65. Applicant claims portions of the objectionable evidence at issue were inadmissible because applicant's

character had not been made an issue during trial, and was not relevant when said evidence was admitted, and that trial counsel erroneously believed it was. [Supp.RR79-81, 84, 88-89]

66. The Court notices that in *Hammer v. State*, 296 S.W.3d 555, 561 (Tex. Crim. App. 2009), the Court observed: "Trials involving sexual assault may raise particular evidentiary and constitutional concerns because the credibility of both the complainant and the defendant is a central, often dispositive, issue."

67. At the evidentiary hearing, it appears that applicant's questions and trial counsel's responses on the matter of whether applicant's "character" had been relevant during trial confuse the term "character" with "credibility."

68. Taken in the context of "credibility," the Court finds trial counsel was correct in his opinion that "character" – in other words "credibility" – "was always an issue." [Supp.RR84]

69. Because the jury was provided with DNA evidence strongly indicating the presence of applicant's semen on L.G.'s bedsheets, corroborating L.G.'s testimony that applicant had sexual intercourse with her on her bed three days before her outcry, and with the tape-recorded phone call by applicant from jail to Peggy during which he admitted committing some type of sexual abuse of L.G. "one time," the trial-evidence does not present what is typically considered a strict "he said, she said" battle of credibility between the complaining witness and the defendant. *See e.g.*,

Pawlack v. State, 420 S.W.3d 807, 811 (Tex. Crim. App. 2013); *Barshaw v. State*, 342 S.W.3d 91, 95 (Tex. Crim. App. 2011); *Hammer*, 296 S.W.3d at 561-562, 568; *Ex parte Thompson*, 153 S.W.3d 416, 422 (Tex. Crim. App. 2005) (Cochran, J., concurring).

70. Based on the nature of the offense, and the availability of Article 38.37 to the State, trial counsel was faced with the fact that in the State's case-in-chief, the jury would learn not only of applicant's multiple and repeated acts of sexual abuse of L.G. as alleged in the indictment, but would also hear evidence of any other relevant "crimes, wrongs, or acts" perpetrated on L.G. by applicant both before and after the book-end dates alleged in the indictment.

71. Having considered Ground 1, IAC allegations (2), (3), and (4) in light of the trial record, of trial counsel's testimony at the evidentiary hearing, and of the clearly controlling legal principles noticed above, and after eliminating the distorting effects of hindsight, this Court cannot find the defensive strategy undertaken by trial counsel – to destroy the credibility of L.G. and Peggy Dukes by first permitting their extraneous misconduct/character-attack testimony relating to applicant to reach the jury, in anticipation of testimony by the two defense witnesses tearing apart and exposing as "lies" each individual instance of said extraneous misconduct/character-attack testimony – was objectively unreasonable under prevailing professional norms based on the totality of the circumstances as they existed at the time of trial.

72. To find otherwise would require this Court to find trial counsel's defense strategy under the totality of the circumstances existing at the time of trial to be "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

73. On the habeas record presented, this Court cannot find trial counsel's strategy "outrageous," especially when deficient performance of defense counsel was not found under the arguably more egregious facts and circumstances presented in *Ex parte Ellis* [*see* Findings 48 & 49 above], and *Garcia v. State* [*see* Finding 50 above], and when the CCA rejected a *per se* finding of deficient performance as to all defense counsel who repeatedly fail to object to State-elicited evidence relating to polygraph results in *Ex parte Bryant* [*see* Finding 47 above].

74. From the totality of the circumstances existing at the time of trial, and considering the totality of trial counsel's representation appearing in the entire trial record, the Court finds trial counsel did not render objectively unreasonable assistance by either failing to object, or by affirmatively eliciting, the "bad character," "extraneous offense/misconduct," "character," and "improper opinion" evidence of which applicant complains in Ground 1, IAC allegations (2), (3), and (4).

75. Additionally, assuming without deciding that trial counsel performed deficiently regarding the evidentiary complaints raised in Ground 1, IAC allegations (2), (3), and (4), the Court finds that applicant has

failed to show, by a preponderance of the evidence, there is a reasonable probability that, but for counsel's errors, the jury would have had a reasonable doubt respecting applicant's guilt. *Strickland*, 466 U.S. at 695.

76. In other words, applicant has failed to prove by a preponderance of the evidence that if all of the extraneous-offense/misconduct, character, and opinion evidence at issue had been excluded by the trial judge, the outcome at trial would have been different. *See Ex parte Howard*, No. AP-76,809, 2013 WL 4859010, at * 4 (Tex. Crim. App. Sept. 11, 2013) (not designated for publication) [not cited for any proposition of law, but for instructive purposes in *Strickland* analysis]

77. Without any defensive evidence to question the credibility of L.G.'s testimony describing the months, and years, of applicant's sexual abuse, the evidence of applicant's guilt for Continuous Sex Abuse, as alleged in the indictment, was substantial and uncontested, to-wit:

> (a) the fact this Court has concluded applicant was not entitled to having the jury instructed on any lesser included offense as a matter of law under Ground 1, IAC allegation (1);
>
> (b) the fact that the jury was presented with uncontested testimony from L.G. that applicant sexually abused her on numerous occasions, over a period of time that exceeded 30 days, when she was 13 years of age as alleged in the indictment;

> (c) the fact that the jury was presented with physical evidence, also uncontested, strongly suggesting the presence of applicant's semen on L.G.'s bedsheet following DNA analysis of said bedsheet, this evidence additionally corroborating L.G.'s testimony that the last time applicant had sexual intercourse with her was a few days before her September 21, 2009, outcry [3RR135]; and,
>
> (d) the fact the jury heard applicant acknowledge to Peggy Dukes he "did it one time" with L.G., which was construed by Peggy Dukes as applicant admitting to having committed some type of sexual abuse of L.G. [3RR77]

78. The Court notices the IAC prejudice-prong analysis in *Ex parte Martinez*, 330 S.W.3d 891, 902-904 (Tex. Crim. App. 2011) concludes with the following:

> We conclude that the record does not support the conclusion that Applicant met the second prong of the *Strickland* test. There was ample evidence to support a reasonable jury's finding of guilt. We cannot say that there is a reasonable probability that the outcome would have been different if Counsel had objected to all of the gang-related evidence. It is unlikely, in the face of all the evidence with which the jury was presented, that the jury would have reached a different conclusion in the absence of the gang-related evidence, and so we need not address the first prong of *Strickland.*
>
> *Id.* at 904.

79. From the foregoing analysis of Ground 1, IAC allegations (2), (3), and (4), the Court concludes that applicant has not proven, by a preponderance of the evidence, (a) that trial counsel's performance was objectively um-reasonable, and (b) that that applicant was prejudiced by any of counsel's alleged performance-deficiencies relating to those evidentiary matters.

C. Failure To Argue Evidence of L.G. 's Prior Sexual Relationship Admissible Under Federal Confrontation Clause and Because State Opened Door

80. This portion of the supplemental findings and conclusions addresses Ground 1, IAC allegation (5), to-wit:

> (5) Counsel failed to argue that evidence regarding the complainant's prior sexual relationship with her boyfriend was admissible based on applicant's federal constitutional rights to confrontation and cross-examination and because the State had opened the door to it.

81. In his Supporting Brief, applicant expands on this IAC allegation in the following manner: [Supporting Brief p. 23, 25]

> Counsel wanted to impeach L.G.'s testimony on direct examination that she had not had sex with anyone, including Mull. If she denied previous sexual relations when he asked her about it on cross-examination, he was prepared to call witnesses to impeach her and to

> testify that applicant tried to prevent her from being sexually active.
>
> **********
>
> Applicant was entitled to confront and cross-examine L.G. about her prior sexual relationship with Mull to demonstrate her motive to protect Mull from prosecution for sexual assault and to provide an alternative medical explanation for the results of the sexual assault examination that indicated that her hymen had been penetrated.
>
> Even if the proffered testimony was otherwise inadmissible, L.G.'s testimony on direct examination that she had not had sex with anyone before applicant, including Mull, opened the door to impeachment on that issue. Rule of Evidence 107 "permits the introduction of otherwise inadmissible evidence when that evidence is necessary to fully and fairly explain a matter 'opened up' by the adverse party." *Walters v. State*, 247 S.W.3d 204, 217-18 (Tex. Crim. App. 2007).

82. This particular IAC allegation appears based on the premise that admissible evidence existed prior to trial, or came to light during trial, that would have impeached L.G.'s testimony denying any prior sexual relations with anyone, including her boyfriend, J.D. Mull.

83. Applicant's argument contains two inferences that are not supported in the instant habeas record: (1) that impeachment evidence in some admissible form existed affirmatively demonstrating that L.G. and her

boy-friend, J.D. Mull, did have a sexual relationship prior to, or at the time of, L.G.'s sexual ab-use outcry; and (2) that trial counsel had witnesses he could call to impeach L.G. on this particular matter, and further testify applicant tried to prevent L.G. from being sexually active. [Supporting Brief p. 23]

84. Trial counsel's uncontested testimony at the evidentiary hearing establishes he had no additional defense witnesses after he refrained from calling Allen Dukes and Chuck Hammock upon learning of their intent to present fabricated testimony to the jury. [Supp.RR38]

85. Applicant's legal premise here asserts "[e]vidence of the complainant's previous sexual behavior is admissible when its exclusion would violate the accused's constitutional rights to confrontation or due process." [Supp.Br.23-24]

86. While applicant points to the fact that L.G. had denied any previous sexual relations with anyone, including Mull, on direct examination [Supp.Br.25], applicant does not direct the Court's attention to where in the habeas record there is evidence that L.G. and Mull had indeed established a sexual relationship prior to, or at the time of, L.G.'s sexual abuse outcry on September 21, 2009.

87. The authority cited on pages 24-25 of applicant's Supporting Brief concern cases where evidence of the complainant's relationship or sexual encounter with men other than the defendant did exist, but for whatever reason, the defendant was prevented from

presented said evidence at trial; whereas, in the instant habeas record, no such evidence appears, nor is there any showing such evidence was available to trial counsel from some source, including L.G., prior to, or during, trial.

88. The emphasized-portion of the following assertion [emphasis by this Court] appearing in applicant's Supporting Brief [p.25] – "The exclusion of *testimony regarding L.G.'s sexual relationship with Mull* violated applicant's Sixth Amendment right to cross-examine and confront L.G., which trump Rule 412[." [sic] – assumes a fact [L.G.'s sexual relationship with Mull] the existence of which has no evidentiary support in the instant habeas record.

89. Applicant's position in IAC allegation (5) is that, because the Confrontation Clause of the Sixth Amendment has been interpreted to give applicant a right to "present a defense," and to cross-examine adverse witnesses to expose a witness's partiality, bias, and motivation to testify, trial counsel was entitled to provide the jury with L.G.'s testimony regarding her sexual relationship with Mull.

90. While applicant presents a proper IAC claim regarding counsel's failure to present a Confrontation Clause argument in attempting to cross-examine L.G. regarding her sexual relationship with J.D. Mull, and it is uncontested that the habeas record supports the fact that trial counsel did not present the Court with said argument, applicant fails to submit evidence supporting the existence of the fact that L.G. and Mull did

indeed have a sexual relationship prior to, or at the time of, L.G.'s outcry, in order to demonstrate applicant was actually harmed by counsel's failure to raise said argument. *See Ex parte McCain*, 67 S.W.3d 204, 209 n. 10 (Tex. Crim. App. 2002) ("Appellant properly made a claim of an involuntary/unintelligent plea but failed to offer evidence at the habeas hearing to support it. Without any allegation or evidence of actual harm, this Court cannot grant habeas relief on an abstract proposition of law.")

91. In the instant habeas matter, assuming without deciding counsel performed deficiently by not arguing either Confrontation Clause or "State-opened-the-door" as a basis for cross-examining L.G. on her prior sexual relationship with Mull, without any evidence that L.G. and Mull had established a sexual relationship prior to, or at the time of, L.G.'s September 21, 2009, sexual abuse outcry, the Court finds applicant has failed to establish actual harm to his defense because, as previously noted above in Finding 76, applicant was not entitled to any lesser included offense instructions as a matter of law, and the evidence of his guilt for the charged offense, Continuous Sex Abuse, was substantial.

92. From the foregoing analysis of Ground I, allegation (5), the Court concludes that applicant has not proven, by a preponderance of the evidence, that he was prejudiced by trial counsel's performance relating to the alleged omissions set out therein.

RESOLUTION OF GROUND 1'S IAC CLAIM

93. Considering Ground 1's IAC claim in its entirety in light of the totality of trial counsel's representation, the Court finds applicant has not proven, by a preponderance of the evidence, both *Strickland*-prongs for establishing constitutionally ineffective assistance. The Court, therefore, concludes that applicant has failed to demonstrate he received ineffective assistance of counsel in violation of the Sixth Amendment.

RECOMMENDATION

Because applicant has failed to establish he did not receive reasonably effective assistance of counsel at trial in violation of the Sixth Amendment, the Court respectfully recommends that all relief requested in the instant habeas application, No. 10-08423-A, be **DENIED**.

ORDER

THE CLERK OF THIS COURT IS HEREBY ORDERED to immediately forward to the Texas Court of Criminal Appeals the following:

1. this Court's supplemental findings, conclusions, and recommendation in the present abatement matter, Writ No. 10-08423-A;

2. any additional answers, responses, affidavits, exhibits, attachments, or other papers received by the Court from either the applicant or the State after the Court of Criminal Appeals issued its September 24, 2014, abatement order in the present abatement matter, Writ No. 10-08423-A;

3. the supplemental clerk's record in the present abatement matter, Writ No. 10-08423-A;

4. the reporter's record from the November 21, 2014, evidentiary hearing conducted in the present abatement matter, Writ No. 10-08423-A; and,

5. all records, documents, papers, or other matters, from any other relevant sources, used by this Court during the preparation of its supplemental findings, conclusions, and recommendation in the present abatement matter, Writ No. 10-08423-A.

THE CLERK OF THIS COURT IS FURTHER ORDERED to transmit a copy of this Order, including this Court's supplemental findings, conclusions, and recommendation, to the Jefferson County District Attorney's

Office, and to transmit same to applicant's habeas counsel, as petitioner, Josh Schaffer, 1301 McKinney, Suite 3100, Houston, TX 77010.

ENTERED this day, the 20th of January, 2015.

/s/ John B. Stevens
John B. Stevens, Presiding Judge
The Criminal District Court
Jefferson County, Texas