No. _____

In the
Supreme Court of the United States

Thomas Jefferson Smallwood,

Petitioner

vs.

Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

Petition for a Writ of Certiorari

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QUESTION PRESENTED

Should a certificate of appealability issue to determine if defense counsel was ineffective in not making an objection to the exclusion of testimony from three witnesses concerning acts of dishonesty by the child complainant on the basis that the exclusion violated Smallwood's right to compulsory process and confrontation under the Sixth and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

LIST OF RELATED PROCEEDINGS

1. *State of Texas v. Thomas Jefferson Smallwood*, No. 1343309R, 396th District Court of Tarrant County, Texas, judgment entered October 25, 2013.

2. *Smallwood v. State*, 471 S.W.3d 601 (Tex. App. – Fort Worth, 2015); petition for discretionary review refused (Tex. Crim. App. January 13, 2016).

3. *Ex parte Smallwood*, WR-87,478-01 (Tex. Crim. App. January 24, 2018) (Application for Writ of Habeas Corpus denied).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CODES AND RULES

CONSTITUTIONAL PROVISIONS

PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas Jefferson Smallwood respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Fifth Circuit denying Smallwood's Motion for Certificate of Appealability was issued on November 28, 2021 and is unpublished. The order is included with this Petition as Appendix A. The Order of the United States District Court for the Northern District of Texas denying Smallwood's Application for Writ of Habeas Corpus under 28 U.S.C. §2254 was issued on November 4, 2019, and is unpublished. It is included with this Petition as Appendix B.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Smallwood's Motion for Certificate of Appealability. The issue Smallwood sought a certificate of appealability concerning was ineffective assistance of counsel under the Sixth Amendment to the United States Constitution as incorporated to state prosecutions by the

Fourteenth Amendment. Therefore, the Supreme Court has jurisdiction pursuant to 28 U.S.C. §1254.

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to… have the Assistance of Counsel for his defence."

The Sixth Amendment to the United States Constitution also provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . ."

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

i) Procedural History

Petitioner, Thomas Jefferson Smallwood, Jr., was convicted in the 396th District Court of Tarrant County of the offenses of Aggravated Sexual Assault and Sexual Assault and assessed sentences of 50 years and 20 years in prison. Appeal was taken to the Texas Second District Court of Appeals, which affirmed the conviction on April 30, 2015. Smallwood filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals, which was refused on January 13, 2016. On April 5, 2017, Petitioner filed a state Application for Writ of Habeas Corpus Pursuant to Art. 11.07, Tex. Code Crim. Proc. On January 24, 2018, that Application was denied by the Texas Court of Criminal Appeals.

On January 25, 2018, Smallwood filed a Petition Under 28 U.S.C. §2254 For A Writ of Habeas Corpus in the United States District Court for the Northern District of Texas. ROA.19-11233.5-33. On November 4, 2019, the District Court denied the Petition. ROA.19-11233.70-87. On November 13, 2019, Smallwood filed Notice of Appeal from the denial of the Petition by the Federal District Court. On January 6, 2020, Smallwood filed a Motion for Certificate of Appealability and Brief in

Support. The Motion for Certificate of Appealability was denied by the United States Court of Appeals on November 18, 2020.

ii) Factual Summary[1]

Appellant and complainant's mother (Mother) had been a couple, had shared a home with complainant and her brother, and were the parents of twin boys, complainant's younger half-brothers. Appellant and Mother parted ways and went through a custody battle over the twins. On July 4, 2012, complainant, who was fourteen years old at the time, was at Appellant's home with her twin brothers. Complainant and Mother were not getting along around this time. Appellant told complainant that he wanted to put Mother in a hole and hire some Mexican assassins to hurt her. In the same conversation, Appellant suggested that complainant have sex with him to make Mother mad, but complainant refused his offer.

Later that same month, complainant, along with her twin brothers, visited Appellant's parents in El Paso. During this trip, complainant received messages from someone who identified himself as "Jayylo"

[1]This summary is taken from the Opinion of the Texas Court of Appeals, *Smallwood v. State*, 471 S.W.3d 601 (Tex. App. - Fort Worth 2015, *pet. ref'd.*).

through Kik, an application on her cell phone. Jayylo sent pictures of his penis to her. She responded by "sen[ding] inappropriate pictures of [her] boobs." She never gave Jayylo her home address or her real name. Jayylo continued to send more pictures of himself to her. When complainant threatened to stop sending Jayylo pictures, he threatened to send the photos she had sent him to her school and to the mailboxes of Mother and her neighbors. Complainant noticed that the background of one of the photos he sent her resembled a portion of Appellant's house. Complainant was then suspicious that Appellant was Jayylo.

She confronted Appellant, but he denied having a Kik account. About an hour later, Appellant called complainant back and asked her why he had pictures of her boobs in his mailbox. Complainant started crying and told him what had happened with Jayylo and that he had threatened her. Complainant also told Appellant's mother why she was crying, and Appellant got mad at complainant for telling his mother. Complainant turned fifteen years old while she was in El Paso.

When complainant returned home from El Paso, she began receiving text messages from Jayylo sent directly to her cell phone number. Complainant noticed that the first six digits of Jayylo's phone

number were the same as Appellant's cell phone number. Jayylo told her that he got her phone number from one of her friends, which complainant knew not to be true. Whenever complainant asked Jayylo who he really was, he would change his story of how complainant was supposed to know him and how old he was. Jayylo texted complainant almost every day at different times of the day. But she could never get a response when she called him.

Jayylo continued threatening complainant and demanded that she send him more photos, have sex with Appellant, videotape it, and send the video to Jayylo. Complainant refused. Jayylo put one of the photos complainant had sent him on a Facebook page he had created and threatened to add all of her friends to that page. Appellant told complainant that Jayylo was also contacting him, but she never saw any of the messages that Appellant claimed to have received.

Appellant and complainant spoke about the situation and decided to acquiesce to Jayylo's demands. Complainant and Appellant had sexual intercourse in Appellant's house while complainant's twin brothers were asleep. Following Jayylo's demands, Appellant and complainant continued their sexual relationship. They had sexual intercourse "eight

to eleven times[,] [m]aybe more," from August 2012 to November 2012. These sexual encounters would occur at either Appellant's or complainant's home.

Complainant testified that she texted Jayylo that it was getting harder for her to keep these incidents a secret, and shortly after she sent this text, Appellant called her and told her that they did not "have to do it anymore." Appellant then told complainant a story about a girl who was babysitting this guy's kids, and he ended up raping her. And then she went to court, and then he pretended to be somebody that he wasn't and hit her up on Facebook and that they met up thinking it was somebody else, and he killed her.

This story scared complainant. At trial, she testified that Appellant knew people from Mexico who were in the Mexican Mafia. Although complainant testified that Appellant never specifically threatened her, she also testified that he made it clear that if he could hurt Mother, he could hurt complainant too. In December 2012, complainant made an outcry to Mother's friend. Shortly afterward, the decision to call the police was made. Appellant pled not guilty to all counts of an eighteen-

count indictment alleging that he had committed sexual assault and aggravated sexual assault on various dates against complainant.

REASONS FOR GRANTING THE WRIT

This case involves the question of the propriety of granting a certificate of appealability in order to allow a convicted state prisoner to appeal the denial of his Petition Under 28 U.S.C. §2254 to the United States Court of Appeals. An analysis of this issue involves a consideration of the standard of review applied to review of a state conviction by a federal court, as well as the standards for issuance of a certificate of appealability. Since the issue raised in state court, as well as the lower federal courts, involves ineffective assistance of counsel, a review of this case also requires a consideration of the legal standards for establishing ineffective assistance of counsel.

As explained below, in denying Smallwood's Application for Certificate of Appealability, the Court of Appeals has misapplied the legal standards applicable to this question as stated by the United States Supreme Court.

i. **Standard of Review of State Conviction by Federal Court**

In *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003), the Court explained the standard of review of a state conviction in Federal Court as follows:

> "The amendments to 28 U.S.C. §2254, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), circumscribe our consideration of Wiggins' claim and require us to limit our analysis to the law as it was "clearly established" by our precedents at the time of the state court's decision. Section 2254 provides:
>
> > (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the State court proceeding.

Thus, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Within the

AEDPA framework, we review the district court's conclusions of law *de novo*."

In *Gongora v. Thaler*, 710 F.3d 267 (5th Cir. 2013), the court found the state court had unreasonably applied Federal law by concluding that the prosecutor's closing remarks did not improperly comment on the Petitioner's failure to testify. In explaining the standard of review, the court stated:

> "We review Gongora's habeas petition under the deferential standard of review provided in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under 28 U.S.C. §2254(d), when a habeas claim has been adjudicated on the merits in the state courts, federal habeas relief may not be granted unless the federal habeas court finds that the state court's decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court' or was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'
>
> A legal principle is 'clearly established' only when it is embodied in a holding of the Supreme Court. For purposes of §2254(d)(1), a state court decision 'involves an unreasonable application of th[e] Court's clearly established precedents if the state court applies th[e] Court's precedents to the facts in an objectively unreasonable manner.' The Supreme Court has repeatedly admonished that 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law."

ii. Standard for Issuance of Certificate of Appealability

In order to appeal from the denial and dismissal of his §2254 petition Smallwood must first obtain a certificate of appealability. *See*, 28 U.S.C. §2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029 (2003); *Buck v. Davis*, 137 S.Ct. 759, 773 (2017). A certificate of appealability should issue if the Court finds that Smallwood made a substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c)(2). This does not mean that Smallwood is required to establish that he will prevail on the merits in the appellate court. In fact, a full consideration of the merits is not required nor even permitted by §2253(c)(2). *Miller-El v. Cockrell*, 537 U.S. at 336. Instead, Smallwood must "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issue (in a different manner); or that questions are adequate to deserve encouragement to proceed further." *Drinkert v. Johnson*, 97 F.3d 751, 755 (5th Cir.), *cert. denied*, 117 S.Ct. 1114 (1997) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4, 103 S.Ct. 3383, 3394 n.4 (1983)); *accord*, *Lozada v. Deeds*, 498 U.S. 430, 111 S.Ct. 860 (1991). "[A] claim can be debatable even though every jurist of reason might agree, after the certificate of appealability has been granted and

the case has received full consideration, that (the Petitioner) will not prevail." *Miller-El v. Cockrell*, 537 U.S. at 337. Any doubts about whether to issue a certificate of appealability should be resolved in favor of Smallwood. *Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir. 1997).

iii. Ineffective Assistance of Counsel - Governing Law

It is well established that a defendant is entitled to the effective assistance of counsel as required by the Sixth and Fourteenth Amendments. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Effective assistance is denied if, "counsel's representation fell below an objective standard of reasonableness," and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

To establish deficient performance, Smallwood must show that his counsel's representation "fell below an objective standard of reasonableness." *Jones v. Jones*, 163 F.3d 285, 301 (5th Cir. 1998) (quoting *Strickland*, 466 U.S. at 688). The court applies a highly deferential standard to the examination of counsel's performance, making every effort to eliminate the distorting effects of hindsight and to

evaluate the conduct from counsel's perspective at the time of trial. *See Pitts v. Anderson*, 122 F.3d 275, 279 (5th Cir. 1997). To satisfy the prejudice requirement, the record must demonstrate 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*. *See also Nealy v. Cabana*, 764 F.2d 1173, 1178 (5th Cir. 1985). That is, "a criminal defendant alleging prejudice must show 'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) (quoting *Strickland*, 466 U.S. at 687). This is not an outcome-determinative test. *Nix. v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988 (1986). The question is not whether a defendant would have more likely than not received a different verdict but for counsel's performance, but whether, "he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 454, 115 S.Ct. 419 (1995).[1]

[1]Although *Kyles* involves the determination of prejudice following the State's suppression of evidence favorable to the defense (*Brady* error) (*Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)), the standard for prejudice employed in such cases is adopted from, and is identical to, that in *Strickland*.

A single error of counsel may support a claim of ineffective assistance if the error was of such magnitude that it rendered the trial fundamentally unfair. *See Nelson v. Estelle*, 642 F.2d 903, 907 (5th Cir. 1981); *Tress v. Maggio*, 731 F.2d 288, 292-94 (5th Cir. 1984) (failure to seek severance); *Summit v. Blackburn*, 795 F.2d 1237, 1244-45 (5th Cir. 1986) (failure to object to proving corpus delecti solely by defendant's confession).

Although *Strickland* requires a showing a prejudice, it does not require the defendant to show that his counsel's deficient performance, *more likely than not*, altered the outcome of the case. *Strickland*, 466 U.S. at 693. The result at trial "can be rendered unreliable, and hence the proceeding itself unfair, even if the error of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. Thus, the *Strickland* requirement that a defendant must show a "reasonable probability" that the outcome of the trial would have been different absent error of counsel does not mean that Smallwood must

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United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). In both circumstances, to demonstrate prejudice, a petitioner must show that "there is a reasonable probability that . . . the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433-434 (quoting *Bagley*, 473 U.S. at 682).

show a better than 50-50 chance. *Strickland* merely imparts the idea that "showing some conceivable effect on the outcome of the proceeding" would not suffice to overturn a conviction. 466 U.S. at 693. Instead, according to *Strickland*, a "reasonable probability" means a reasonable chance that counsel's mistake could have affected the outcome of the case, based upon concrete and identifiable facts and circumstances reflected in the record.

iv. Application of Law to Facts

Defense counsel was ineffective in not making an objection to the exclusion of testimony from Ricky May, Jeannine Redman and Denise Brown concerning the character and reputation for dishonesty by the child complainant on the basis that the exclusion violated Smallwood's right to compulsory process and confrontation under the Sixth and Fourteenth Amendments to the U. S. Constitution.

The specific evidentiary offers at issue are as follows:

Outside the presence of the jury, in an in-camera proceeding pursuant to Rule 412, Tex. R. Evid., Smallwood presented the testimony of Ricky May. (R. Vol. 7 at 140-151).

May testified that he knew the complainant and that, from around 2008-2011, they lived across the street from one another. He testified that he "was around eighteen at the time, she was younger." (Vol. 7 at 142). She was fourteen or fifteen. (R. Vol. 7 at 143).

He further testified that three times, all when he was an adult and she was fourteen:

> She would contact me through phone, text messaging, trying to get me to have sexual intercourse with her.

(R. Vol. 7 at 143 (sealed)).

He testified that she would state that she was "horny" and would want him to sneak over to her house to have sex. *Id*. He further testified that the complaining witness started a lie that went throughout the neighborhood that May had raped her. (*Id*. at 144). May had not raped her and the complaining witness's accusation was false.

He heard about the accusation she had made against him from neighborhood kids and was told about it on multiple days. It hurt his reputation. (*Id*. at 145). May testified that the complaining witness never accused him to his face, but he knew the accusation came from her because she had a huge crush on him. (*Id*. at 146). He said that she sent

him many texts in addition to the approximately three texts asking him to have sex with her.

He testified that in addition to the false rape accusation she made against him, he believed she was a liar because of what other people have said and are saying about her.

The trial court excluded the testimony.

In addition, the defense called Jeannie Redmon as a defense witness. Because of the State's objection, Ms. Redmon was not permitted to testify in front of the jury. But outside of the jury's presence, she confirmed her personal knowledge that the complaining witness falsely accused Ricky May of raping her. (R. Vol 7 at 119).

Ms. Redmon also testified that her daughter, Tristan, had been friends with the complaining witness and that she had known the complaining witness "[a]pproximately seven or eight years." (R. Vol. 7 at 113). In addition to her testimony of the false rape accusation the complaining witness made against Ricky May, she testified to other instances of dishonesty. (R. Vol. 7 at 113-127). Ultimately, she testified that she had an opinion that Alicia was an "untruthful" person. (R. Vol. 7 at 119). *See*, Rule 608(a)(1), Tex. R. Evid. Her testimony was offered

for that purpose. (R. Vol. 7 at 122). The trial court excluded the testimony. (R. Vol. 7 at 128).

Smallwood also offered the testimony of Denise Brown outside the presence of the jury. (R. Vol. 7 at 128). Ms. Brown testified that the complaining witness had been friends with her daughter. (R. Vol. 7 at 128-129). She testified that she knew the complaining witness in 2009-2010. (R. Vol. 7 at 129). She testified that, among other things, the complaining witness was "untruthful." (R. Vol. 7 at 130-131). She testified that the complaining witness spread false rumors at school about her daughter, falsely telling people that her daughter was pregnant. *Id.*

Ultimately, she was asked by defense counsel:

> Q. If I asked you if you had an opinion on whether Alicia was a truthful or untruthful person, what would you say?
> A. Untruthful.

(R. Vol. 7 at 133-134).

As with Ms. Redmon, the trial court excluded her testimony without explanation.

Although defense counsel at trial had not done so, Smallwood attempted to raise a constitutional argument on appeal. However, the Court of Appeals disposed of this by stating:

> "Appellant argues that the trial court abused its discretion by excluding May's testimony that he had heard a rumor that complainant was telling people that he had sexually assaulted her and Redmon's testimony pertaining to the alleged incident. Appellant offered May's testimony under Rule of Evidence 404(b). While Appellant now argues that the trial court's ruling abridged certain of his constitutional rights, at trial he spoke only of credibility and Rule 404(b). Appellant's complaints at trial do not conform to his constitutional complaints on appeal; we therefore do not address his constitutional complaints.
> . . .
> In his fourth and fifth issues, Appellant complains of the exclusion of the testimony of Redmon and Brown concerning their opinions of Complainant's credibility. As we understand the record, Appellant appears to have offered these opinions by having the women explain specific acts that they suspected had occurred and speculate on others. He did not offer their testimony on any constitutional basis. We therefore do not address the constitutional arguments he raises on appeal."

Smallwood v. State, 471 S.W.3d 601 (Tex. App. - Fort Worth 2015, *pet. ref'd.*).

On appeal, Smallwood argued that his offer of this testimony from these three witnesses went to their opinion on the truthfulness of the child and her reputation for honesty and was therefore admissible under the Confrontation Clause of the Sixth and Fourteenth Amendments to

the U. S. Constitution. This argument was based on the fact that the jury would need to believe in the truthfulness of the child in order to find Smallwood guilty.

The question raised concerning this testimony is whether Smallwood's defense counsel was ineffective in not making the constitutional objection under the Confrontation Clause in order to support the admission of this testimony. The Court of Appeals upheld the trial court's exclusion of this testimony under the rules of evidence. However, because defense counsel did not make a constitutional objection, neither the state trial court or the state appellate court addressed the constitutional argument.

It is a well-established principle that constitutional rights, such as the right to confrontation, are superior to state evidentiary rules. Therefore, state evidentiary rules must give way to a defendant's constitutional rights. *See Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974) (right to confrontation of witnesses is paramount to state rule of evidence); *see also*, *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038 (1973) (enforcement of state rule to prohibit cross-examination violative of federal due process); *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704

(1987) (state's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case).

In *United States v. Dvorin*, 817 F.3d 438 (5th Cir. 2016), the court held that the right to confrontation under the Sixth Amendment focuses, fundamentally, on whether the district court's exclusion significantly undermined fundamental elements of the defendant's defense. *See also*, *Kittleson v. Dretke*, 426 F.3d 306 (5th Cir. 2005). In the case at bar, the exclusion of the substantial evidence of the complainant's dishonesty did just that. Therefore, Smallwood's right to confrontation was denied. If the jury heard this testimony, it would certainly have given them good reason to question the validity of the child's allegations. Thus, the exclusion of this testimony directly undermines the defense, and very likely resulted in the guilty verdict returned in this case. Under the above authority, had defense counsel made the proper constitutional objection, the evidence would have been admissible.

As noted by the Federal District Court, at the evidentiary hearing on Smallwood's state application, defense counsel admitted that it was an error on his part to not object that the testimony exclusion violated

Smallwood's right to present a defense under the compulsory process section of the U. S. Constitution.

Specifically, defense counsel testified as follows at the hearing:

> Q. Okay. Now, let me move to the next area. What we're talking about there is Ricky May, Jeannie Redmon and Dennis Brown -- you attempted to offer these witnesses concerning acts of dishonesty by the child, and the Court excluded that.
> A. Yes.
> Q. And the issue we've raised is whether or not you should have offered that under the right to confrontation under the US Constitution.
> A. (Witness nods.)
> Q. And you agree that you made arguments for admissibility but you did not make the constitutional argument for admissibility.
> A. In hindsight, the correct argument that I should have made and didn't was not necessarily confrontation -- she wasn't saying anything bad about -- these witnesses weren't saying anything about Mr. -- our client -- but was the right to present a defense the compulsory process section of the United States Constitution, as incorporated under the 14th Amendment due process clause. That would have been a stronger objection, and I should have made that. I did not.
> Q. Okay. had you made that objection and the Court gone along with you and said, "Okay. You're right. We're letting this evidence in," do you think that would have been helpful to the defense?
> A. Yes.

(State Court Evidentiary Hearing p. 38-39)

Despite this testimony, the state habeas court found that there was no showing that a constitutional objection would have been successful.

The state court further found that Smallwood's constitutional right of confrontation and to present a complete defense were not offended when the trial court excluded the evidence. The Federal District Court found this to be a reasonable application of *Strickland* and rejected Smallwood's argument.

Smallwood submits that, contrary to the finding of the Federal District Court, the state court's conclusion is unreasonable for the following reasons. First, based on the case law cited above, the exclusion of this evidence went to the heart of Smallwood's defense and, therefore, his Sixth Amendment rights were violated. The complainant in this case was well known as someone who made up stories and made false accusations and it cannot seriously be contended that this is not something that could be crucial for a jury to know in order to reach a just verdict. Moreover, the Federal District Court's conclusion that there is no showing that a constitutional objection would have been successful really misses the point. The question is not whether the objection would have been successful, it is whether the objection would have been proper.

Additionally, Smallwood did argue to the Federal District Court the state court's findings were incorrect under the Confrontation Clause of

the Sixth and Fourteenth Amendments to the U. S. Constitution. Smallwood reiterates here that the state court's conclusions were both erroneous and unreasonable.

For this reason, the state court's opinion, as adopted by the Federal District Court, resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court, *i.e., Strickland* and its progeny. A correct interpretation of the Supreme Court cases cited previously in this petition is that, under the Sixth and Fourteenth Amendments, Smallwood had the right to present this evidence. And, since he had this constitutional right, it is deficient performance to not make the appropriate constitutional argument.

Additionally, the state court's opinion, as adopted by the Federal District Court, resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. This is based on the record showing that defense counsel should have made a constitutional argument for the admissibility of this evidence.

The remaining question is whether the second prong of the ineffective assistance of counsel is established based on the failure of defense counsel to make this constitutional objection. Under *Strickland*, ineffective assistance of counsel is established if counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. In Smallwood's case, defense counsel admitted to the first prong of the *Strickland* test: deficient performance. The second prong requires only a showing that confidence in the outcome of the proceeding is undermined. Since the jury in this case did not have a full and accurate picture of the complainant, this standard is met. And, since the jury would necessarily be required to find the complainant credible in order to find Smallwood guilty, the fact that the jury did not hear the substantial available evidence that she was not credible certainly undermines confidence in the outcome of this case.

In determining whether to issue a Certificate of Appealability, the court should remain mindful of the purpose of a certificate of appealability. A certificate of appealability is to issue when a habeas

petitioner has made a substantial showing of denial of a constitutional right. 28 U.S.C. §2253; *Miller-El v. Cockrell*, 545 U.S. 231 (2003). Further, as the court explained in *Miller-El*, to obtain the certificate of appealability a habeas petitioner must show that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. However, the issuance of a certificate of appealability does not require a showing that the appeal will ultimately succeed. *See also*, *Buck v. Davis*, 137 S.Ct. 759 (2017) (Court of Appeals was required to determine only if district court's decision was debatable at the Certificate of Appealability stage).

The case at bar raises a very substantial question concerning the constitutional rights of a defendant to present a complete defense. Specifically, the question before the court is whether it is violative of a defendant's confrontation rights to preclude them from presenting evidence of the poor reputation and character of his accuser for truthfulness. Moreover, this case presents the equally serious question of when a defense counsel renders ineffective assistance by not making a proper constitutional objection. Reasonable jurists could debate the

proper outcome of these issues. At the very least, these are issues that should proceed further in the courts. The question is not whether Smallwood would ultimately prevail on these questions. Rather, the question is whether Smallwood has met the standard for issuance of a certificate of appealability. The record shows he has met these standards and the Court of Appeals erred in refusing to grant him a certificate of appealability.

CONCLUSION

Based on these arguments and authorities, this Petition for a Writ of Certiorari should issue to determine whether the Court of Appeals erred in denying Smallwood's Motion for Certificate of Appealability.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

APPENDIX

TABLE OF CONTENTS

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 19-11233

THOMAS JEFFERSON SMALLWOOD,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:18-CV-53

ORDER:

IT IS ORDERED that Appellant's opposed motion for a certificate of appealability is DENIED.

/s/ Don R. Willett
DON R. WILLETT
United States Circuit Judge

APPENDIX B

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

THOMAS JEFFERSON SMALLWOOD,	§	
	§	
Petitioner,	§	
	§	
v.	§	**Civil Action No. 4:18-cv-00053-O**
	§	
LORI DAVIS-DIRECTOR TDCJ-CID,	§	
	§	
Respondent.	§	

ORDER

In 2013, a Texas jury convicted Thomas Jefferson Smallwood of sexually assaulting his 15-year old stepdaughter ("the child") on multiple occasions during a three-month period in 2012.[1] *See* Admin. R. 231-39, ECF No. 10-17. The trial court entered judgements on the convictions and sentenced Smallwood to 50 years' confinement.[2] *Id*. at 241-278. The trial court's judgments were affirmed on direct appeal. *See Smallwood v. State*, No. 02-13-00532-CR, 471 S.W.3d 601 (Tex. App.—Ft. Worth Aug. 6, 2015, pet. ref'd).

In 2017, Smallwood filed an application for a writ of habeas corpus in the trial court ("state application"). *See* Admin. R. 1-41, ECF No. 11-19. In it, Smallwood claimed that his trial lawyers, Paul Stuckle and Allen Ayers, provided him ineffective assistance of counsel in various instances during the guilt-innocence and punishment phases of his trial. *Id*. The trial court[3] held an evidentiary

[1] The jury convicted Smallwood of six counts of aggravated sexual assault of a child under 17 years of age and three counts of sexual assault of a child under 17 years of age. *See* Admin. R. 231-39, ECF No. 10-17; *see also* Tex. Penal Code Ann. §§ 22.011(a)(2), 22.021(a)(2)(B) (West, Westlaw through 2019 Legis. Sess.).

[2] Judge George Gallagher of the 396th Judicial District Court, Tarrant County, Texas sentenced Smallwood to 50 years' confinement on each aggravated-sexual-assault count and 20 years' confinement on each sexual-assault count. *Id*. at 241-278. He ordered that the sentences run concurrently. *Id*.

[3] Smallwood filed his state application in Judge Gallagher's court—the court in which he was convicted. But Tarrant County Criminal Magistrate Judge Charles P. Reynolds presided over the evidentiary hearing on Smallwood's application and ultimately entered the findings of fact and conclusions of law.

hearing on Smallwood's application and entered findings of fact and conclusions of law, recommending that the Court of Criminal Appeals of Texas ("the TCCA") deny Smallwood relief. *See* Admin. R. 32-49, ECF No. 11-20; *see also* Admin. R. 33, ECF No. 11-21. The TCCA subsequently did so without a written order on the findings of the trial court. *See* Admin. R., ECF No. 11-9.[4]

Now before this Court is Smallwood's application for a writ of habeas corpus under 28 U.S.C. § 2254 ("federal application"). *See* Pet. & Mem., ECF Nos. 1, 2. In it, Smallwood raises the same claims that he raised in his state application—that his trial lawyers, Stuckle and Ayers, provided him ineffective assistance of counsel in violation of the Sixth Amendment. *Id*. Respondent answers that the Court should deny Smallwood's claims on their merits.[5] *See* Resp't Answer & Admin. R., ECF Nos. 9-11. Smallwood has not filed a reply.

After reviewing the pleadings, the entirety of the state-court records submitted by Respondent, and relevant law, the Court, for the following reasons, DENIES Smallwood's application.

I. LEGAL STANDARD

A. 28 U.S.C. § 2254(d)

Because Smallwood filed his federal application after 1996 and the TCCA adjudicated his claims on their merits,[6] it is subject to review under the highly deferential standard of the Antiterrorism and Effective Death Penalty Act, which provides, in pertinent part, as follows:

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[4] For the convenience of the reader, the trial court's findings of fact and conclusions of law are attached to this order as Exhibit A.

[5] Respondent believes that Smallwood has exhausted his state remedies and that his application is neither successive nor barred by limitations. *See* Resp't Answer 7, ECF No. 9.

[6] *See Heiselbetz v. Johnson*, 190 F.3d 538 (5th Cir. 1999)(citing *Drinkard v. Johnson*, 97 F.3d 751, 755 (5th Cir. 1996)(finding "no question" that a claim was adjudicated on the merits in state court proceedings where state trial court entered explicit findings later adopted by the Texas Court of Criminal Appeals)); *see also Hilll v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000)(citations omitted).

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. 28 U.S.C. § 2254(d)(1)-(2).[7]

A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" on the correctness of the state court's decision. *Harrington v. Richter*, 562 U.S. 86, 100, 131 S.Ct. 770, 786, 178 L.Ed.2d 624 (2011)(citing *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004)). This means that, if any fairminded jurist could believe that the state court *reasonably*, but not necessarily *correctly*, applied "clearly established Federal law, as determined by the Supreme Court" in rejecting a petitioner's claim, then game over—the petitioner is not entitled to relief. *See Sanchez v. Davis*, 936 F.3d 300, 304-05 (5th Cir. 2019); *see also Richter*, 562 U.S. at 102. Federal habeas relief is not a substitute for ordinary error correction through direct appeal. *Sanchez*, 936 F.3d at 305 (citation omitted). It's a difficult standard to meet, because it was meant to be. *Id.*

A state court's factual findings are "presumed to be correct," and an applicant has "the burden of rebutting the presumption of correctness by clear and convincing evidence." *Barbee v. Davis*, 728 F.App'x 259, 263 (5th Cir. 2018)(quoting § 2254(e)(2)). "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." *Id*. (quoting *Valdez v. Cockrell*,

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[7] A decision is contrary to clearly established Federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000)(quoting *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000)). Under § 2254(d)(1)'s "unreasonable application" language, a writ may issue "if the state court identifies the correct governing legal principle from [the] Court's decision but unreasonably applies that principle to the facts of the prisoner's case." *Id*.

274 F.3d 941, 948 n. 11 (5th Cir. 2001)); *see Pippin v. Dretke*, 434 F.3d 782, 785 (5th Cir. 2005)(citations omitted). Determining whether a lawyer has rendered ineffective assistance is a mixed question of law and fact. *Sanchez*, 936 F.3d at 304 (citing *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).[8]

B. Ineffective Assistance of Counsel

To prevail on a claim of constitutionally ineffective assistance of counsel, a petitioner must show (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Meja v. Davis*, 906 F.3d 307, 314 (5th Cir. 2018)(quoting *Strickland*, 466 U.S. at 687).

To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 688). A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.* The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*

With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

"Surmounting *Strickland's* high bar is never an easy task." *Id*. at 105 (citing *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010)). Even under de novo review, the standard for judging counsel's representation is a most deferential one. *Id.* Unlike a later-

[8] Such mixed questions are reviewed under 28 U.S.C. § 2254(d)(1). *See Clark v. Johnson*, 202 F.3d. 760, 764 (5th Cir. 2000)(citing *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996)).

reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. *Id.* It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.* The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom." *Id.*

Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. *Id*. The standards created by *Strickland* and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. *Id*. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. *Id*. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). *Id*. When § 2254(d) applies, the question is not whether counsel's actions were reasonable. *Id*. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard. *Id*.

II. ANALYSIS

In his federal application, Smallwood claims that his trial lawyers were constitutionally ineffective in eight ways. *See* Pet. & Mem., ECF Nos. 1, 2. Smallwood raised these exact claims in his state application. And the trial court, after conducting an evidentiary hearing where it heard the sworn testimony of Stuckle and Ayers, determined that Smallwood's claims had no merit. The trial court issued 19 pages of detailed findings of fact and conclusions of law in support of its determination. *See* Admin. R. 33, ECF No. 11-21. The TCCA adopted those findings as its own and denied Smallwood's state application. *See* Admin. R., ECF No. 11-9.

To determine whether Smallwood is entitled to federal habeas relief, the Court must answer one pivotal question—Could any fairminded jurist believe that the state court ***reasonably*** applied the *Strickland* standard in rejecting Samallwood's claims? If the Court answers "yes," then

Smallwood is not entitled to relief.[9]

In answering this question, the Court must presume that the state court's explicit findings of fact and unarticulated findings which are necessary to its conclusions of mixed law and fact are correct, ***unless*** Smallwood rebuts that presumption of correctness by clear and convincing evidence.

The Court will now consider whether Smallwood has met his burden under § 2254(d) for each of his claims.

A. Failure to object to hearsay testimony

Smallwood claims that he received ineffective assistance of counsel at the guilt-innocence phase of his trial when counsel did not object to the incriminating hearsay testimony of Monica Stewart and Krista Carpenter. *See* Mem. 5-7, ECF No. 2. Both witnesses testified about what the child had told them, *i.e.* the details of and circumstances surrounding Smallwood's sexual assault of her. *Id*.

The trial court concluded that Smallwood failed to show that counsel's performance was deficient or that the result of his trial would have been different had counsel objected to the hearsay testimony. *See* Admin. R. 37-38, ECF No. 11-20. In doing so, the trial court found that:

> The evidence of [Smallwood]'s guilt presented at trial was overwhelming, and it included but was not limited to: (1) testimony from the victim that [Smallwood] sexually assaulted her; (2) a custodial interview of [Smallwood] where he essentially corroborates the victim's testimony; (3) DNA evidence showing the presence of [Smallwood]'s semen in the victim's underwear; and (4) strong circumstantial evidence showing [Smallwood] manipulated the victim into having sex with him through an elaborate scheme where [Smallwood] pretended to be another person on social media. *Id.* at 35.

The trial court concluded that counsel's decision to not object to the hearsay testimony was made pursuant to his trial strategy. *Id.* at 37-38, 44. It credited and relied on the sworn testimony of Stuckle, who testified that, given the horrible facts of the case and his belief that the State's case against Smallwood was strong, "[Stuckle] decided not to object to M.S.'s and K.C.'s testimony in

[9] *See Sanchez*, 936 F.3d at 304-05.

an attempt to uncover the inconsistencies in their respective stories and play their statements off of each other to establish reasonable doubt." *Id.* The trial court also concluded that the hearsay testimony was cumulative of the child's own testimony, which was properly admitted against Smallwood. *Id.*

In his federal application, Smallwood argues conclusorily that the hearsay testimony would have been excluded if counsel had made a hearsay objection. He also argues that the testimony strongly bolstered the child's testimony and that, without it, the State's case against it would have been substantially weaker. *See* Mem. 8, ECF No. 2. However, he does not argue that there is a reasonable probability that the result of his trial would have been different had the testimony been excluded. And he does not offer any evidence to rebut the findings of the trial court, which the Court must presume are correct. Nor does Smallwood make any meaningful effort to establish that the trial court's application of *Strickland* to this claim was *unreasonable*. Although he does argue perfunctorily that the trial court's decision was unreasonable,[10] he, in substance, asks the Court to find that its application of *Strickland* to this claim was *incorrect*. But that is not the question before the Court under § 2254(d); this is not a direct appeal.

Given the double deference afforded to IEAC claims under § 2254(d), the Court concludes that a fairminded jurist could easily believe that the trial court, given the evidence before it, reasonably applied the *Strickland* standard in rejecting this claim.

B. Disparaging remarks in closing argument

Smallwood claims that he received ineffective assistance of counsel at the guilt-innocence phase of his trial when his counsel, Allen Ayers, made the following disparaging statements about him in closing argument:

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[10] On the last page of his brief, Smallwood states, "Here, the Texas Court issued a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court. Additionally, the Texas Court's decision was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." *See* Mem. 18, ECF No. 2.

> Thomas Smallwood, we're not going to tell you that he's the man of the year. In fact, Thomas Smallwood is a 49-year-old lonely man. You know what he does in his spare time? He gets on the computer and looks at porn. That's it. He looks at pornography. He looks at some weird porn. He looks at S&M, of fantasies, of things that make us all blush.
>
> But you know what? He's living in a house by himself. He's divorced. He finds a pair of panties. And he does something unthinkable. He grabs those panties – *See* Mem.7, ECF No. 2.

The trial court concluded that Smallwood failed to show that counsel's performance was deficient or that the result of his trial would have been different had counsel not made these statements. *See* Admin. R. 41, ECF No. 11-20. In applying *Strickland*, the trial court cited to *Yarborough v. Gentry*,[11] for the proposition that "counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." *Id*. at 47. It ultimately concluded that Ayers's comments were made as part of the defense team's trial strategy to deal with the presence of Smallwood's seminal DNA being present in the child's underwear. *Id*. at 40-41. The trial court credited and relied on the sworn testimony of Ayers, who testified that, in an effort to help Smallwood's case and not disparage him, he was trying to argue that Smallwood's semen was present in the child's underwear as a result of his using the underwear to masturbate while looking at pornography—-not as a result of a sexual assault. *Id.*

In his federal application, Smallwood makes one conclusory statement in support of this claim—"Under *Strickland*, this argument constitutes deficient performance, as well as prejudice because it assisted the state, rather than the defense." *See* Mem. 7, ECF No. 2. Here again, Smallwood, in essence, asks the Court to conduct a de novo review of his claim, which is not appropriate under § 2254(d). He does not offer any evidence to rebut the findings of the trial court or otherwise make any meaningful effort to show how the trial court's application of *Strickland* to

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[11] *Yarborough v. Gentry*, 540 U.S. 1, 5-6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003)

this claim was unreasonable.

Given the double deference afforded to IEAC claims under § 2254(d), the Court again concludes that a fairminded jurist could easily believe that the trial court, given the evidence before it, reasonably applied the *Strickland* standard in rejecting this claim.

C. Failure to cross examine the State's expert witness

The State's expert witness, Joy Hallum, who is a forensic interviewer at Alliance for Children, testified at Smallwood's trial about the science of grooming and delayed outcry in sexual-abuse cases. *See* Admin. R. 38, ECF No. 11-20. Smallwood claims that his counsel was ineffective for not cross-examining her. *See* Mem. 7-8, ECF No. 2.

The trial court concluded that Smallwood failed to show that counsel's performance was deficient or that the result of his trial would have been different had he cross-examined Hallum. *See* Admin. R. 39, 44, ECF No. 11-20. Specifically, the trial court concluded that counsel's decision to not cross-examine Hallum was made pursuant to his trial strategy. *Id*. The trial court relied on the sworn testimony of Stuckle, who testified that (1) he believed that the matters of grooming and delayed outcry were relatively insignificant to the case; (2) he believed that Hallum's testimony was factually correct; (3) he did not want to lose more credibility with the jury by cross-examining Hallum on concepts that are generally accepted as being valid and well-grounded in science; and (4) he did not want to reinforce Hallum's direct-examination testimony by cross-examining her. *Id.* at 38-39. The trial court also concluded that Smallwood did not set forth what could have been achieved had counsel cross-examined Hallum, *i.e.* what testimony would have been elicited from her. *Id.* at 44.

In his federal application, Smallwood once again offers conclusory allegations of inadequate performance and prejudice. He urges that "defense counsel is required to subject the state's evidence to challenge and inquiry," and that "failing to cross-examine an important witness is a clear

dereliction of counsel's duties." *See* Mem. 8, ECF No. 2. He concludes that "to not engage in any cross-examination of this witness is certainly deficient performance and clearly prejudiced Smallwood." *Id*.

He does not however argue that there is a reasonable probability that the result of his trial would have been different had counsel cross-examined Hallum. And he does not offer any evidence to rebut the findings of the trial court or otherwise make any meaningful effort whatsoever to convince the Court that the trial court's application of *Strickland* to this claim was unreasonable.

Given the double deference afforded to IEAC claims under § 2254(d), the Court concludes that a fairminded jurist could easily believe that the trial court, given the evidence before it, reasonably applied the *Strickland* standard in rejecting this claim.

D. Failure to object to the prosecutor's misstatement of law

As previously noted, the jury convicted Smallwood of six counts of aggravated sexual assault of a child under 17 years of age in violation of Texas Penal Code § 22.021(a). *See* Admin. R. 231-39, ECF No. 10-17. As stated by the trial court in its conclusions of law, a person commits this offense if the person (1) commits an act constituting sexual assault of a child, and (2) by acts or words places the victim in fear...that death, serious bodily injury, or kidnapping will be imminently inflicted on any person. *See* Admin. R. 43, ECF No. 11-20.

In his state application, Smallwood claimed that the State, during voir dire, told the jury panel that "the threat made in connection with the sexual assault could come after the sexual assault was completed," and "a conditional threat could qualify as an imminent threat." *See* Admin. R. 34, ECF No. 11-19. Smallwood claimed that both statements were incorrect statements of law and that his counsel was therefore constitutionally ineffective for not objecting to them. *Id.* He argued that "had counsel properly objected to these misstatements of the law, either the trial court would have sustained the objection and the jury would have properly understood the law, or the Court of Appeals

would have reversed the conviction." *Id.*

The trial court concluded that Smallwood failed to show that counsel's performance was deficient or that the result of his trial would have been different had counsel objected to the State's explanation of the law. *See* Admin. R. 43, ECF No. 11-20. The trial court entered the following conclusions of law:

- In the context of section 22.021, there is no requirement that the threat of death or serious bodily injury occur simultaneously with the act constituting sexual assault.
- The authority that [Smallwood] cites for the proposition that the State misstated the law in voir dire is inapplicable to this case because it relies on a statute that has since been modified considerably.
- The State did not misstate the law in voir dire.
- Counsel was not ineffective for failing to make what would have been a futile objection to a correct statement of law. *Id.*

In his federal application, Smallwood presents the exact same argument that he presented to the state court—that the State misstated the law during voir dire and his counsel was ineffective for failing to object. *Compare* Admin. R. 34-38, ECF No. 11-19 *with* Mem. 8-12, ECF No. 2. But here once again, Smallwood does not offer any evidence or argument to address how the trial court's application of *Strickland* in rejecting this claim was *unreasonable*. He instead argues that the trial court's application of *Strickland* to this claim was *incorrect* and attempts to re-litigate it here. But it is not the province of the Court to do so.[12]

Given the double deference afforded to IEAC claims under § 2254(d), the Court concludes that a fairminded jurist could easily believe that the trial court, given the evidence before it,

[12] To the extent that Smallwood is asking the Court to review the propriety of the state court's interpretation of its own state law, such a request has no part of a federal court's habeas review of a state conviction. *See Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 480, 116 L.Ed.385 (1991)(citations omitted)(It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions)).

reasonably applied the *Strickland* standard in rejecting this claim.

E. Failure to offer the testimony of Ricky May under Texas Rule of Evidence 608(a)

In an in camera hearing before the trial court, Ricky May testified that he had heard from his neighbors that the child had falsely accused him of rape. Stuckle attempted to offer May's testimony under Texas Rule of Evidence 404(b)[13] to attack the child's credibility, but the trial court sustained the State's objections to the testimony.

In his state application, Smallwood claimed that Stuckle was constitutionally ineffective at trial for not attempting to offer May's testimony under Texas Rule of Evidence 608(a)[14]—as reputation or opinion evidence of the child's truthfulness. *See* Admin. R. 38-39, ECF No. 11-19. He argued that "since this case largely depended on the jury believing that the child was being truthful, this testimony would have been helpful to the defense and there is a reasonable probability of a different outcome had the jury heard it." *Id.*

The trial court concluded that Smallwood failed to show that counsel's performance was deficient or that the result of his trial would have been different had counsel offered the testimony of May under Rule 608(a). *See* Admin. R. 39, 45 ECF No. 11-20. In doing so, the trial court credited the sworn testimony of Stuckle, who testified that, although he believed that May's testimony would have been helpful to the defense, he did not believe that the trial court would allow it.

> Gary Udashen: Okay. Having considered or looked at the argument [Smallwood] made, do you agree that the testimony from May could have been offered under 608(a) as reputation or opinion evidence on the child's truthfulness?
>
> Paul Stuckle: When the Court shut our offer of proof under Rule 412, I don't believe that I could call Mr. May, have

[13] *See* TEX. R. EVID. 404(b).

[14] *See* TEX. R. EVID. 608(a).

> him testify that she was untruthful, in his opinion, without the State being allowed to get into the reasons why. And we couldn't do that because the Court said, "We're not going there. We're not going to allow this testimony." *See* Admin. R. 41, ECF No. 11-13

Stuckle also testified that he was aware that, if he had offered May's testimony under Rule 608, the State would then be able to call rebuttal witnesses to establish the child's truthfulness:

> Character evidence is very risky during guilt-innocence. You attack the complainant, maybe you gain a couple of opinions from people that are usually associated with the defendant that she's untruthful. Soon as that happens, the State starts rolling in teachers and neighbors and Sunday school teachers, on and on, to testify that the complainant is truthful. And many times, you would end up losing that war, so it is a risk. *See* Admin. R. 14, ECF No. 11-14.

Stuckle also testified that, even if May's opinion of the child's truthfulness had been admitted under Rule 608, he did not believe that it would make a difference in the outcome of the case:

> It really would have helped the defense. Anything that goes against the victim's credibility is important and we went with it. Given the – again, the bad facts, no, it would not have made a difference. *Id.* at 9.

In his federal application, Smallwood again presents the same argument that he presented to the trial court—-that Stuckle should have offered May's testimony under Rule 608. But here again, Smallwood does not offer any evidence to rebut the trial court's findings or address how the state court's application of *Strickland* in rejecting this claim was *unreasonable*. He instead attempts to re-litigate it.

The Court acknowledges that the trial court's reasons for rejecting this claim are less clear, *e.g.* the trial court does not explicitly conclude that Stuckle's failure to offer May's testimony under Rule 608 was a result of his trial strategy or because he believed that any effort to do so would be futile. However,"[a] habeas court must determine what arguments or theories supported or, as here, *could have supported*, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding

in a prior decision of [the Supreme Court]." *Byrom v. Epps*, 518 F.App'x 243, at *15 (5th Cir. 2013)(quoting *Richter*, 131 S.Ct. at 786). Under the deferential standard of *Strickland*, [the Court] must "affirmatively entertain the range of 'possible reasons [defendant's] counsel may have had for proceeding as they did.'" *Clark v. Thaler*, 673 F.3d 410, 418 (5th Cir. 2012)(citations omitted).

Respondent argues that Stuckle articulated viable trial strategies for not calling May as a witness under Rule 608—to not open the door for the State to call rebuttal witnesses to testify about the child's truthfulness. *See* Resp't Answer 16-17, ECF No. 17. Although the trial court did not explicitly conclude so, the Court agrees with Respondent that, based on the above-referenced testimony of Stuckle, a trial-strategy argument *could have* supported the state court's ultimate determination that Stuckle was not constitutionally ineffective. In addition, Smallwood has presented no evidence to suggest that the trial court would have admitted May's testimony under Rule 608; he merely speculates that it would have. Smallwood therefore cannot establish that the trial court's conclusion—that the outcome of Smallwood's trial would not have been different had Stuckle offered testimony of May under Rule 608—was unreasonable.

Under these circumstances, the Court concludes that a fairminded jurist could easily believe that the trial court, given the evidence before it, reasonably applied the *Strickland* standard in rejecting this claim.

F. Failure to object to the exclusion of testimony on constitutional ground

At trial, Stuckle attempted to admit the testimony of Ricky May, Jeannie Redman, and Denise Brown, all of whom would testify to various acts of dishonesty by the child, *e.g.* her telling lies and stealing. The trial court sustained the State's various objections to their testimony and excluded it.

Smallwood now claims, as he did before the trial court, that he received ineffective assistance at trial when counsel failed to make a constitutional objection to the exclusion of their testimony.

He argues that counsel should have objected that the testimony exclusion violated his right to confrontation under the Sixth and Fourteenth Amendments.

At the evidentiary hearing on Smallwood's state application, Stuckle admitted that it was error on his part to not object that the testimony exclusion violated Smallwood's right to a present a defense under the compulsory process section of the United States Constitution. *See* Admin. R. 10, ECF No. 11-14. The following exchange took place between Landon Wade, counsel for the State, and Stuckle:

Landon Wade:	And given the Court was reluctant to get you – to get into those – testimony of specific instances of conduct --
Paul Stuckle:	Court made that very clear before we started the trial.
Landon Wade:	Given the Court's – right. Given the Court's reluctance to let you into that, are you entirely sure a constitutional objection of a right to present a defense – do you think that would have even been successful
Paul Stuckle:	No –
Landon Wade:	– or–
Paul Stuckle:	– it would not have been successful. But I believe it would have been a proper objection. It should have been made.
Landon Wade:	So you should have made it, but you think the Court would have almost certainly overruled it?
Paul Stuckle:	Speculating but what I had seen of relatively consistent rulings by Judge Gallagher, I do not believe we would have been successful at the trial court level with that objection, but it should have been made.
Landon Wade:	And, again, certainly any testimony that attacks the credibility of the witness would help. You've testified – or you've testified to that. But, again, do you think, given the bad facts of this case – the [custodial] interview [of Smallwood], everything you had to work against – do you think that their testimony would have ultimately made a difference in the ultimate outcome?

Paul Stuckle: No. *Id.* at 10-11.

The trial court ultimately concluded that Smallwood failed to show that counsel's performance was deficient or that the result of his trial would have been different had counsel made a constitutional objection. *See* Admin. R. 47, ECF No. 47. In doing so, the trial court, based on the foregoing testimony, found that Smallwood had not shown that Stuckle's hypothetical, constitutional objection to the exclusion of the witnesses' testimony would have been successful. *Id.* It also concluded that Smallwood's constitutional rights of confrontation and to present a complete defense were not offended when the trial court excluded the witnesses' proffered testimony under Texas Rule of Evidence 608(b). *Id.* at 46-47.

In his federal application, Smallwood, again, offers the same conclusory argument that he made before the trial court. But he does not offer any evidence to reubt the trial court's findings and he does not argue that its conclusions of law were erroneous.[15]

Under these circumstances, the Court concludes that a fairminded jurist could easily believe that the trial court, given the evidence before it, reasonably applied the *Strickland* standard in rejecting this claim.

G. Failure to object to the admission of certain evidence at punishment

Smallwood elected for the trial court to assess his punishment. In his state application, Smallwood claimed that his counsel was ineffective when he, at the punishment phase of his trial, failed to object to the State's offering evidence of Smallwood's viewing legal pornography. *See* Mem. 13-15, ECF No. 2. Smallwood argued that viewing legal pornography is a constitutionally-protected activity and that evidence of his doing so was therefore inadmissible at sentencing. *Id.*

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[15] The United States Supreme Court has suggested that the right to present a complete defense is rarely violated when a court excludes defense evidence under a state rule of evidence. *See United States v. Reed*, 908 F.3d 102, n. 33 (5th Cir. 2018)(citing *Nevada v. Jackson*, 569 U.S. 505,509, 133 S.Ct. 1990, 186 L.Ed.2d 62 (2013)(per curiam)(discussing state rules of evidence and distinguishing cases where a rule "did not rationally serve any discernable purpose" or "could not be rationally defended," or where the state "did not even attempt to explain the reason for its rule")).

The trial court determined that Smallwood failed to show that counsel's performance was deficient or that the result of his trial would have been different had counsel objected to evidence of his pornography habits. *See* Admin. R. 43, ECF No. 11-20. In reaching its determination, the trial court concluded that, "considering [Smallwood] was convicted of sexually assaulting his stepdaughter," "[t]he pornography sites [he] visited—which focused on sex between family members—were relevant in demonstrating a motive for his crime" and were therefore admissible under Texas Code of Criminal Procedure 37.07, § 3(a). *Id.* at 48.

The trial court also concluded that counsel's decision not to object to this evidence was made pursuant to his trial strategy. *Id.* at 48. In doing so, the trial court again relied on and credited the sworn testimony of Stuckle, who testified that he believed evidence of Smallwood's viewing of legal, adult pornography did not hurt his case but instead supported his expert witness's opinion that Smallwood was not sexually interested in or aroused by children. *Id.* at 42.

In his federal application, Smallwood again makes the same argument that he made before the trial court. He does not offer any evidence to rebut the findings of the state habeas court, which the Court must presume are correct. Nor does he make any meaningful effort to establish that the trial court's application of *Strickland* to this claim was unreasonable.

Under these circumstances, the Court concludes that a fairminded jurist could easily believe that the trial court, given the evidence before it, reasonably applied the *Strickland* standard in rejecting this claim.

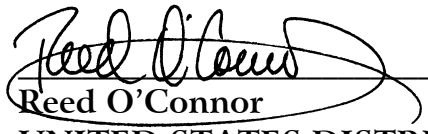
III. CONCLUSION

For the foregoing reasons, the Court concludes that Smallwood has failed to demonstrate to the Court that he is entitled to relief under 28 U.S.C. § 2254. His application is therefore DENIED.

In addition, for the same reasons, the Court concludes that Smallwood has failed to show that reasonable jurists would debate whether Smallwood has put forward a valid claim of a constitutional

deprivation. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Court therefore DENIES a certificate of appealability. *See* FED. R. APP. P. 22(b)(1); 28 U.S.C. § 2253(c)(2).

SO ORDERED this **4th day** of **November, 2019.**



Reed O'Connor
UNITED STATES DISTRICT JUDGE

Exhibit A

NO. C-396-011023-1343309-A

EX PARTE	§	IN THE 213th JUDICIAL
	§	
	§	DISTRICT COURT OF
THOMAS JEFFERSON SMALLWOOD, JR.	§	TARRANT COUNTY, TEXAS

ORDER

The Court adopts the State's Memorandum, Findings of Fact and Conclusions of Law as its own and recommends that the relief Applicant requests should be denied. The Court further orders and directs:

1. The Clerk of this Court to file these findings and transmit them along with the Writ Transcript to the Clerk of the Court of Criminal Appeals as required by law.

2. The Clerk of this Court to furnish a copy of the Court's findings to Applicant through his attorney of record, the Hon. Gary A. Udashen, 2311 Cedar Springs Road, Suite 250, Dallas, Texas 75201, and to the Post-Conviction section of the Criminal District Attorney's Office.

SIGNED AND ENTERED this 20th day of December, 2017.

JUDGE PRESIDING

CHARLES P. REYNOLDS
TARRANT COUNTY
CRIMINAL MAGISTRATE

145

NO. C-396-011023-1343309-A

EX PARTE	§	IN THE 396th JUDICIAL
	§	
	§	DISTRICT COURT OF
THOMAS JEFFERSON	§	
SMALLWOOD, JR.	§	TARRANT COUNTY, TEXAS

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

The State proposes the following Memorandum, Findings of Fact and Conclusions of Law regarding the issues raised in the present Application for Writ of Habeas Corpus.

MEMORANDUM

Applicant was convicted by a jury of six counts of aggravated sexual assault of a child under seventeen years of age and three counts of sexual assault of a child under seventeen years of age, all charged in a single indictment. CR 1: 241-278. The trial court assessed Applicant's punishment at fifty years' confinement on six counts and twenty years' confinement on the remaining three counts. *Id.* The trial court sentenced Applicant accordingly, ordering that his sentences run concurrently. *Id.*

Applicant appealed his conviction. *See* Notice of Appeal. The Second Court of Appeals affirmed the trial court's judgment on August 6, 2015. *See Smallwood v. State*, 471 S.W.3d 601, 614 (Tex. App.—Fort Worth 2015, pet. ref'd).

Applicant alleges his confinement is illegal because he received ineffective assistance of counsel (Grounds One and Two). *See* Application, p. 6-8. In Ground

One, Applicant complains that he received ineffective assistance of counsel during the guilt-innocence phase of trial because:

(1) Counsel failed to object to hearsay testimony of outcry witnesses Monica Stewart and Krista Carpenter as to what the child told them about what Applicant had done to her. Applicant alleges the testimony of both witnesses was inadmissible as hearsay because the child was fifteen years old at the time the abuse occurred and, therefore, the testimony of an outcry witness was not admissible under article 38.072 of the Texas Code of Criminal Procedure;

(2) Counsel disparaged Applicant in his closing argument by saying he was a lonely man who looks at pornography in his spare time;

(3) Counsel conducted insufficient cross-examination of the State's expert witness on matters such as grooming and delayed outcry;

(4) Counsel failed to object to the prosecutor's misstatement of the law during voir dire—that the threat made in connection with the sexual assault could come after the completion of the sexual assault, and that a conditional threat would qualify as an imminent threat.

(5) Counsel failed to properly offer the testimony of Ricky May as to the child's reputation or opinion on truthfulness under Texas Rule of Evidence 608(a); and

(6) Counsel did not object to the exclusion of testimony from Ricky May, Jeannie Redman, and Denise Brown concerning acts of dishonesty by the child on the basis that exclusion violation his right to confrontation.

See id. at 6-7. In Ground Two, Applicant complains that he received ineffective assistance of counsel during the punishment phase of trial because:

(1) Counsel failed to object to testimony and evidence concerning Applicant viewing legal pornography, because the viewing of legal pornography is not a crime or bad act and was not admissible.

See id. at 8. This Court should consider and adopt the following proposed findings of fact and conclusions of law.

INEFFECTIVE ASSISTANCE OF COUNSEL

In Ground One and Ground Two, Applicant alleges that he received ineffective assistance of counsel. *See* Application at 6-8. With respect to these allegations, the trial court hereby makes the following findings of fact and conclusions of law, and accordingly recommends that the requested relief be denied.

FINDINGS OF FACT

Applicant's Representation

1. Applicant was represented at trial by the Hon. Paul Stuckle and his associate, the Hon. Allen Ayers (collectively referred to herein as "Applicant's counsel" or "counsel"). 1RR 1: 2.[1]

2. Mr. Stuckle has been licensed to practice as an attorney in the State of Texas since 1983. *See* State Bar of Texas profile.

3. Mr. Ayers has been licensed to practice as an attorney in the State of Texas since 2010. *See* State Bar of Texas profile.

4. Mr. Stuckle and Mr. Ayers practice in the area of criminal law and devote almost all of their practice to cases involving sexual assault allegations. 2RR 2: 42, 70.

5. Mr. Stuckle was retained by Applicant in this case. CR 1: 26.

6. At the time Applicant's case was pending, the Tarrant County Criminal District Attorney's Office maintained an open file policy through the Tarrant County Electronic Case Filing System (ECFS).

[1] "1RR" references the reporter's record of Applicant's trial. "2RR" references the reporter's record of the writ hearing.

7. Mr. Stuckle and Mr. Ayers had access to the State's files through ECFS.

8. From the outset of the case, counsel believed that the State's case against Applicant was strong. 2RR 2: 43.

9. Mr. Stuckle characterized the facts of the case as "horrible." 2RR 2: 43.

10. The evidence of Applicant's guilt presented at trial was overwhelming, and it included but was not limited to: (1) testimony from the victim that Applicant sexually assaulted her; (2) a custodial interview of Applicant where he essentially corroborates the victim's testimony; (3) DNA evidence showing the presence of Applicant's semen in the victim's underwear; and (4) strong circumstantial evidence showing Applicant manipulated the victim into having sex with him through an elaborate scheme where Applicant pretended to be another person on social media. 1RR 5, 6, 7: *passim*.

11. Despite the evidence against him, Applicant rejected all plea offers from the State. *See* Affidavit of the Hon. Paul Stuckle and the Hon. Allen Ayers at 1.

Applicant's Custodial Interview

12. In this case, Applicant was alleged to have blackmailed the child victim, A.C., into having sex with him on multiple occasions. 2RR 2: 43-44.

13. During the investigation, Applicant was interviewed by Detective Timothy Paulson of the Grand Prairie Police Department. 1RR 6: 134.

14. In his interview, Applicant confirmed much of what A.C. had alleged, including the elaborate blackmail scheme. *Compare* 1RR 5: 117-171 (A.C.'s testimony at trial) *with* State's Exhibit 1 (Applicant's custodial interview).[2]

15. The only material difference between Applicant's story and A.C.'s story was that Applicant claimed he did not actually engage in sexual acts with A.C.; rather, he claimed that he had sexual intercourse and performed sexual acts on an unidentified woman who he would periodically pick up from a 7-11 convenience store. *See* State's Exhibit 1; Affidavit of Trial Counsel at 1-3.

[2] "State's Exhibit 1" refers to the exhibit admitted at the writ hearing.

16. Applicant claimed that he had sex with the woman from 7-11 in order to trick the blackmailer into believing he was actually having sex with A.C., which is purportedly what the blackmailer had demanded of him. *See* State's Exhibit 1; 2RR 2: 43-47.

17. Applicant's counsel understood that the State intended to publish his interview with Detective Paulson to the jury at trial. *See* Affidavit of Trial Counsel at 1.

18. Counsel believed the statements Applicant made during his interview were highly prejudicial to himself and defied belief. *See* Affidavit of Trial Counsel at 1.

19. Counsel anticipated that the jury would not believe Applicant's story he told during his interview, and that the jury would hold his statements against him. *See* Affidavit of Trial Counsel at 1; 2RR 2: 47-48.

20. Counsel filed a motion to suppress evidence of his Applicant's interview, but that motion was denied by the trial court. 2RR 2: 14.

21. Knowing that the jury would see Applicant's interview, counsel sought to seek reasonable doubt by attacking A.C.'s credibility and by employing a "throw everything against the wall strategy." 2RR 2: 48.

22. Applicant's interview was published to the jury at trial. 1RR 6: 140.

23. While the interview was being published, several jurors laughed. 2RR 2: 14; Affidavit of Trial Counsel at 1.

Failure to Object to Alleged Misstatement of the Law

24. In its indictment, the State alleged in multiple counts that Applicant, in committing the offense of aggravated sexual assault, "by acts or words placed [A.C.] in fear that death or serious bodily injury would be imminently inflicted on [A.C.] or [K.C.]." *See* Indictment.

25. In explaining this element of the offense, the State indicated in voir dire that threats of imminent death or serious bodily injury could occur after the commission of the sexual assault. *See* 1RR: 4: 77-87.

26. Counsel did not object to the prosecutor's statements regarding the timing of the threat of imminent death or serious bodily injury.

27. Counsel did not believe the prosecutor misstated the law regarding that element of the offense. 2RR 2: 52.

28. The prosecutor did not misstate the law in voir dire.

29. The authority cited by Applicant to support his claim that the prosecutor misstated the law relies on language contained in a previous version of the penal code's aggravated sexual assault statute that has since been modified considerably. *See Smallwood*, 471 S.W.3d at 607.

30. Counsel did not err by failing to object to a correct statement of the law.

31. Applicant has failed to show that counsel's performance was deficient with respect to this issue.

32. Applicant has failed to show that the result of his trial would have been different had counsel objected to the prosecutor's explanation of the law.

Failure to Object to Outcry-Witness Testimony

33. The State called M.S. and K.C. as witnesses to testify, in part, about what A.C. told them that Applicant had done to her. 1RR 5: 68-75, 256-257.

34. M.S.'s and K.C.'s testimony about what A.C. told them was hearsay. *See* TEX. R. EVID. 801(d).

35. A.C. was over the age of fourteen when Applicant sexually assaulted her. 1RR 5: 138.

36. Therefore, M.S.'s and K.C.'s testimony about what A.C. told them was not admissible under Texas Code of Criminal Procedure 38.072's hearsay exception. *See* TEX. CODE CRIM. PROC. art. 38.072.

37. Counsel understood that M.S.'s and K.C's testimony about what A.C. told them was not admissible under article 38.072. *See* Affidavit of Trial Counsel at 3; 2RR 2: 48.

38. Counsel decided not to object to M.S.'s and K.C.'s testimony in an attempt to uncover the inconsistencies in their respective stories and play their statements off of each other to establish reasonable doubt. *See* Affidavit of Trial Counsel at 3.

39. The decision to not object to M.S.'s and K.C.'s testimony was made pursuant to counsel's trial strategy.

40. A.C. testified at trial about what Applicant had done to her and relayed essentially the same facts that M.S. and K.C. testified to. 1RR 5: 108-204.

41. Applicant has failed to show that counsel's performance was deficient with respect to this issue.

42. Applicant has failed to show that the result of his trial would have been different had counsel objected to M.S.'s and K.C.'s testimony.

Testimony Regarding Grooming and Delayed Outcry

43. Joy Hallum, a forensic interviewer at Alliance for Children, testified about the matters of grooming and delayed outcry. 1RR 6: 86-94.

44. Counsel objected to Hallum's testimony regarding grooming and delayed outcry, but the objection was overruled. 1RR 6: 82-83.

45. Counsel asked no questions of Hallum during cross-examination. 1RR 6: 95.

46. Counsel believed that grooming and delayed outcry were relatively insignificant in this case. *See* Affidavit of Trial Counsel at 5.

47. Counsel believed that Hallum's testimony about the science of grooming and delayed outcry was factually correct. *See* Affidavit of Trial Counsel at 5-6; 2RR 2: 50.

48. Counsel did not want to lose more credibility with the jury by cross-examining Hallum on concepts that are generally accepted as being valid and are well-grounded in science. *See* Affidavit of Trial Counsel at 6; 2RR 2: 50-51.

49. Counsel also did not want to reinforce what Hallum had already testified to on direct examination regarding grooming and delayed outcry.

50. The decision to not cross-examine Hallum was made pursuant to counsel's trial strategy.

51. Applicant has failed to show that counsel's performance was deficient with respect to this issue.

52. Applicant has failed to show that the result of his trial would have been different had counsel cross-examined Ms. Hallum on the matters of grooming and delayed outcry.

The Testimony of Ricky May

53. In the defense's case-in-chief, counsel offered the testimony of Ricky May with the intent to show that A.C. had made a previous false allegation of sexual assault. *See* Affidavit of Trial Counsel at 7; 1RR 7: 141.

54. The testimony was offered to attack A.C.'s credibility. 2RR 2: 35.

55. Counsel attempted to offer May's testimony under Texas Rule of Evidence 404(b). 2RR 2: 35

56. Counsel did not believe May knew enough to qualify as a reputation witness under Rule 608(a). 2RR 2: 38.

57. Counsel believed that, at best, May could have testified that, in his opinion, A.C. was not truthful. 2RR 2: 54.

58. Counsel was also aware, however, that the State could call rebuttal witnesses if May's testimony had been offered under Rule 608. *See* Affidavit of Trial Counsel at 7-8.

59. The trial court indicated that it would not allow the testimony of Ricky May under any rule of evidence. 2RR 2: 36.

60. Applicant has failed to show that counsel's performance was deficient with respect to this issue.

61. Applicant has failed to show that the result of his trial would have been different had counsel offered the testimony of Ricky May under Rule 608(a).

The Testimony of Jeannie Redmon and Denise Brown

62. Counsel also offered the testimony of Jeannie Redmon and Denise Brown outside the presence of the jury to show acts of dishonesty of A.C. 1RR 7: 112-139; 2RR 2: 38-39.

63. The State made various objections to their testimony under the rules of evidence, which the trial court sustained. 1RR 7: 127, 139-140.

64. Counsel believed, in hindsight, that he should have objected to the exclusion of Redmon and Brown's testimony as a violation of Applicant's right to present a defense under the due process clause. 2RR 2: 39.

65. However, counsel also believed that a due process objection would not have been successful. 2RR 2: 55.

66. Applicant has failed to show that counsel's performance was deficient with respect to this issue.

67. Applicant has failed to show that the result of his trial would have been different had counsel objected to the exclusion of Redmon's and Brown's testimony on constitutional grounds.

Counsel's Alleged Disparaging Comments

68. The State showed throughout trial that Applicant had accessed a large amount of pornography, but no child trial pornography. 2RR 2: 67.

69. Counsel believed the fact that Applicant had accessed pornography was not necessarily a bad factor in this case. 2RR 2: 67.

70. In its case-in-chief, the State presented evidence indicating that Applicant's seminal DNA was present in one of A.C.'s pieces of underwear. 1RR 7: 76-102; 2RR 2: 73.

71. As a part of their strategy to deal with the DNA evidence, counsel tried to give the jury an alternative explanation for how Applicant's semen would have been present in A.C.'s underwear. 2RR 2: 76.

72. Counsel attempted to argue that Applicant's semen was present in A.C.'s underwear because used the underwear to masturbate while looking at pornography. 2RR 2: 79.

73. Counsel made the comment that Applicant was "lonely" to account for the fact that he had viewed a large amount of pornography. 2RR 2: 80.

74. Counsel's statements were made in an effort to help his case—not to disparage him. 2RR 2: 49, 81.

75. Counsel's comments about Applicant in closing argument were made pursuant to their trial strategy in presenting an alternative explanation to account for the presence of his semen in A.C.'s underwear.

76. Applicant has failed to show that counsel's performance was deficient with respect to this issue.

77. Applicant has failed to show that the result of his trial would have been different had counsel not made the complained-of statements in closing argument.

Failure to Object During the Punishment Phase

78. Applicant elected for the trial court to assess punishment. *See* Affidavit of Trial Counsel at 9.

79. Counsel believed that the jury would have assessed a longer sentence than the fifty-year sentence imposed by the trial court due to the gravity of the crime. *See* Affidavit of Trial Counsel at 57.

80. In punishment, the State presented evidence of the types of pornography that Applicant had accessed. 1RR 9: 7-15.

81. The evidence showed that Applicant had accessed pornography sites that depicted interfamilial sexual activity. 1RR 9: 10[3]

[3] The sites Applicant visited included, but were not limited to the following: mommyfucktube.com, rawfamilysex.com, familyunderground.com, familytaboo.org, mommytapes.com, and daughterdesires.com. 1RR 9: 10.

82. Counsel did not object to the State's evidence because they believed that Applicant's viewing of legal, adult pornography did not hurt his case; rather, counsel believed it showed that Applicant was not sexually interested in children. *See* Affidavit of Trial Counsel at 9.

83. Applicant's viewing of legal pornography supported his expert witness's opinion that he had normal arousal and was not sexually aroused by children. *See* Affidavit of Trial Counsel at 9-10; 1RR 9: 28.

84. Moreover, the trial court had either already seen or been made aware of the evidence of Applicant's pornography habits. 2RR 2: 57.

85. Applicant has failed to show that counsel's performance was deficient with respect to this issue.

86. Applicant has failed to show that the result of his trial would have been different had his counsel objected to the evidence of Applicant's pornography habits in punishment.

CONCLUSIONS OF LAW

Ineffective-Assistance Claims

1. In a habeas corpus proceeding, the burden of proof is on the applicant. *Ex parte Rains*, 555 S.W.2d 478, 481 (Tex. Crim. App. 1977).

2. To establish ineffective assistance of counsel, the applicant must show by a preponderance of the evidence that (1) his counsel's representation was deficient and (2) there is a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005).

3. Review of counsel's performance is highly deferential, and the reviewing court indulges a strong presumption that counsel's conduct was not deficient, but rather the product of sound trial strategy. *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003).

4. The constitutional right to counsel does not mean errorless counsel. *Ex parte Robinson*, 639 S.W.2d 953, 954 (Tex. Crim. App. 1982).

5. An attorney is not ineffective for failing to make futile objections or filing frivolous motions. *See Kinnamon v. State*, 791 S.W.2d 84, 97 (Tex. Crim. App. 1990), *overruled on other grounds*, *Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994).

Failure to Object to Alleged Misstatement of Law

6. A person commits the offense of aggravated sexual assault of a child if the person (1) commits an act constituting sexual assault of a child and (2) by acts or words places the victim in fear . . . that death, serious bodily injury, or kidnapping will be imminently inflicted on any person. *See* TEX. PENAL CODE § 22.021.

7. In the context of section 22.021, there is no requirement that the threat of death or serious bodily injury occur simultaneously with the act constituting sexual assault. *See id.*

8. The authority Applicant cites for the proposition that the State misstated the law in voir dire is inapplicable to this case because it relies on a statute that has since been modified considerably. *See Smallwood*, 471 S.W.3d at 601; *Nichols v. State*, 692 S.W.2d 178, 180 (Tex. App.—Waco 1985, pet. ref'd).

9. The State did not misstate the law in voir dire.

10. Counsel was not ineffective for failing to make what would have been a futile objection to a correct statement of the law. *Kinnamon*, 791 S.W.2d at 97.

11. Applicant has failed to show that counsel's performance was deficient with respect to this issue. *Salinas*, 163 S.W.3d at 740.

12. Applicant has failed to show that the result of his trial would have been different had counsel objected to the prosecutor's explanation of the law. *Id.*

Failure to Object to Outcry-Witness Testimony

13. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted, and is inadmissible unless it falls under an exception to the general rule against hearsay. *See* TEX. R. EVID. 801(d), 802.

14. Article 38.072 of the Texas Code of Criminal Procedure provides an exception to the rule against hearsay for testimony by outcry witnesses in cases involving sexual offenses against disabled persons and children under fourteen. *See* TEX. CODE CRIM. PROC. art. 38.072.

15. M.S.'s and K.C.'s testimony about what A.C. told them about what Applicant had done to her was hearsay that did not fall within the exception provided by article 38.072 because she was over fourteen years old when Applicant sexually assaulted her. *See id.*

16. Counsel's decision to not object to M.S's and K.C.'s testimony was made pursuant to their trial strategy. *See Rylander*, 101 S.W.3d at 110.

17. Applicant has failed to show that counsel's performance was deficient with respect to this issue. *Salinas*, 163 S.W.3d at 740.

18. Applicant has failed to show that the result of his trial would have been different had counsel objected to M.S.'s and K.C.'s testimony. *Id.*

Testimony Regarding Grooming and Delayed Outcry

19. Decisions about cross-examination are often the result of wisdom acquired by experience in the combat of trial, making the cross-examination of witnesses inherently based on trial strategy. *Ex parte McFarland*, 163 S.W.3d 743, 756 (Tex. Crim. App. 2005); *Coble v. State*, 501 S.W.2d 344, 346 (Tex. Crim. App. 1973).

20. Moreover, to prevail on a claim of ineffective assistance, the applicant must set forth what could have been achieved by cross-examination. *McFarland*, 163 S.W.3d at 756; *Coble*, 501 S.W.2d at 346.

21. Counsel's decision to not cross examine Joy Hallum on the matters of grooming or delayed outcry was made pursuant to their trial strategy. *McFarland*, 163 S.W.3d at 756; *Coble*, 501 S.W.2d at 346.

22. Applicant has not set forth what could have been achieved had counsel cross-examined Hallum on those issues. *McFarland*, 163 S.W.3d at 756; *Coble*, 501 S.W.2d at 346.

23. Applicant has failed to show that counsel's performance was deficient with respect to this issue. *Salinas*, 163 S.W.3d at 740.

24. Applicant has failed to show that the result of his trial would have been different had counsel cross-examined Hallum on the matters of grooming and delayed outcry. *Id.*

The Testimony of Ricky May

25. Evidence of other acts or wrongs may be admissible to prove matters such as motive, intent, scheme, or any other relevant purpose except conduct in conformity with bad character. *See* TEX. R. EVID. 404(b).

26. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. *See* TEX. R. EVID. 608(a).

27. Evidence of truthful character is admissible if a witness's character for truthfulness has been attacked. *Id.*

28. A party may not, however, inquire into or offer extrinsic evidence to prove specific instances of the witness's conduct in order to attack or support the witness's character for truthfulness. *See* TEX. R. EVID. 608(b).

29. Applicant has failed to show that counsel's performance was deficient with respect to this issue. *Salinas*, 163 S.W.3d at 740.

30. Applicant has failed to show that the result of his trial would have been different had counsel offered the testimony of Ricky May under Rule 608(a). *Id.*

The Testimony of Jeannie Redmon and Denise Brown

31. The Sixth Amendment right to confront witnesses includes the right to cross-examine witnesses to attack their general credibility or to show their possible bias, self-interest, or motives in testifying. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

32. A defendant's right of confrontation is not unqualified; the trial judge has wide discretion in limiting the scope and extent of cross-examination. *Lopez v. State*, 18 S.W.3d 220, 222 (Tex. Crim. App. 2000).

33. In those rare situations in which the applicable rule of evidence conflicts with a federal constitutional right, Rule 101(c) provides that the United States Constitution controls over the evidentiary rule. TEX. R. EVID. 101(c); *see Lopez*, 18 S.W.3d at 220.

34. The Confrontation Clause mandate of *Davis v. Alaska* is not inconsistent with Texas evidence law. *Hammer v. State*, 296 S.W.3d 555, 566 (Tex. Crim. App. 2009).

35. Thus, compliance with a rule of evidence will, in most instances, avoid a constitutional question concerning the admissibility of such evidence. *Id.*

36. The testimony of Jeannie Redmon and Denise Brown was inadmissible under the rules of evidence because it revealed specific instances of conduct to attack A.C.'s credibility for truthfulness. *See* TEX. R. EVID. 608(b).

37. Applicant has not shown that Rule 608 conflicts with a federal constitutional right or that Redmon's and Brown's testimony would have been admissible under the Confrontation Clause. *See* Rains, 555 S.W.2d at 481 (burden of proof rests with the applicant).

38. The Sixth Amendment right to compulsory process, on the other hand, "is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies." *Coleman v. State*, 966 S.W.2d 525, 528 (Tex. Crim. App. 1998) (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)).

39. A criminal defendant does not, however, have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. *Taylor v. Illinois*, 484 U.S. 400, 410 (1988).

40. Redmon's and Brown's testimony was inadmissible under the Texas rules of evidence; thus, Applicant's Sixth Amendment right to compulsory process was not offended when the trial court excluded their testimony. *See* TEX. R. EVID. 608(b).

41. Applicant has not shown that counsel's hypothetical, constitutional objection to the exclusion of Redmon's and Brown's testimony would have been successful.

42. Applicant has not shown that counsel's performance was deficient with respect to this issue. *Salinas*, 163 S.W.3d at 740.

43. Applicant has not shown that the result of his trial would have been different had counsel objected to the exclusion of Redmon's and Brown's testimony on constitutional grounds. *Id.*

Counsel's Alleged Disparaging Comments

44. The right to effective assistance of counsel encompasses closing arguments. *Yarborough v. Gentry*, 540 U.S. 1, 5–6 (2003) (per curiam).

45. The type of closing argument to make is an inherently tactical decision "based on the way a trial is unfolding, the trial strategy employed, the experience and judgment of the defense attorney, and other factors." *Taylor v. State*, 947 S.W.2d 698, 704 (Tex. App.—Fort Worth 1997, pet. ref'd).

46. "[C]ounsel has wide latitutde in deciding how best to represent a client, a deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. *Yarborough*, 540 U.S. at 1.

47. Judicial review of an attorney's closing argument is therefore highly deferential, and reviewing courts will second-guess that strategy only if the attorney's actions are without any plausible basis. *Ex parte Hatcher*, No. AP-76620, 2011 WL 6225406, at *7 (Tex. Crim. App. Dec. 14, 2011); *Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002).

48. Applicant has failed to show that his counsel's actions in closing argument were without any plausible basis. *Hatcher*, 2011 WL 6225406, at *7.

49. Applicant has failed to show that his counsel's performance was deficient with respect to this issue. *Salinas*, 163 S.W.3d at 740.

50. Applicant has failed to show that the result of his trial would have been different had counsel not made the complained-of statements in closing argument. *Id.*

Failure to Object During the Punishment Phase

51. Under article 37.07, section 3(a) of the Texas Code of Criminal Procedure, the State may offer evidence during the punishment phase of trial as to "any matter the court deems relevant to sentencing, including evidence of a defendant's character and the circumstances of the offense for which he is being tried. *See* TEX. CODE CRIM. PROC. art 37.07, § 3(a).

52. The pornography sites Applicant visited—which focused on sex between family members—were relevant in demonstrating a motive for his crime, considering he was convicted of sexually assaulting his stepdaughter. *See Briscoe v. State*, No. 03-11-00014-CR, 2013 WL 4822878, at *13-14 (Tex. App.—Austin Aug. 29, 2013, no pet.) (mem. op., not designated for publication) (explaining that the defendant's ownership of violent pornography was relevant to sentencing where the defendant violently murdered the victim after having sexual intercourse with her).

53. Counsel was not ineffective for failing to object to admissible evidence. *See Kinnamon*, 791 S.W.2d at 97.

54. Moreover, counsel's decision to not object to the evidence of Applicant's pornography habits was made in accordance with their trial strategy because it supported the opinion of their expert witness. *Rylander*, 101 S.W.3d at 110.

55. Applicant has failed to show that counsel's performance was deficient with respect to this issue. *Salinas*, 163 S.W.3d at 740.

56. Applicant has failed to show that the result of his trial would have been different had his counsel objected to the evidence of Applicant's pornography habits in punishment. *Id.*

Applicant Did Not Receive Ineffective Assistance of Counsel

57. Applicant has failed to show that his counsel's performance was deficient in any respect.

58. Applicant has failed to show that the result of his trial would have been different absent the alleged errors made by his counsel.

59. Applicant has not met his burden to show that his counsel was ineffective. *Salinas*, 163 S.W.3d at 740.

60. Applicant received effective assistance of counsel.

61. This Court recommends that Applicant's first and second grounds for relief be denied.

Wherefore, premises considered, the State prays that the Court adopt its proposed memorandum, findings of fact, and conclusions of law.

Respectfully submitted,

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APPLICANT THOMAS JEFFERSON SMALLWOOD, JR

APPLICATION NO. WR-87,478-01

APPLICATION FOR 11.07 WRIT OF HABEAS CORPUS

ACTION TAKEN

DENIED WITHOUT WRITTEN ORDER ON FINDINGS OF TRIAL COURT WITHOUT HEARING.

Elsa Alcala — JUDGE

Jan 24, 2018 — DATE