APPENDIX

A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
April 9, 2020
Lyle W. Cayce
Clerk

No. 19-50404

MARCUS TYLER SHEFFIELD,

Petitioner-Appellant

v.

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

Respondent-Appellee

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:18-CV-385

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:*

Marcus Tyler Sheffield, Texas prisoner # 2034529, was convicted in 2015 by a jury of two counts of sexual assault of a child and was sentenced to 10 years of imprisonment on both counts to run concurrently. He now moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application.

Sheffield argues that his statement to police during an interview was obtained in violation of *Miranda v. Arizona,* 384 U.S. 436 (1966). He also

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

argues that his trial counsel was ineffective for failing to investigate and to call Dr. William Rogers as a witness about his treatment of Sheffield for a disorder that affected Sheffield's mental and physical development.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court rejects constitutional claims on their merits, a COA should issue only if the petitioner "demonstrate[es] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *see Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

Sheffield has not made the requisite showing. Accordingly, his request for a COA is DENIED. His motion to proceed in forma pauperis on appeal is also DENIED.

To the extent Sheffield argues that the district court erred in denying him appointed counsel, an order denying a motion for appointment of counsel in a habeas proceeding is not a "final order" that disposes of the merits of a habeas corpus proceeding for purposes of § 2253(c), and therefore is not subject to the COA requirement. *Harbison v. Bell*, 556 U.S. 180, 183 (2009). Because Sheffield has not shown that the district court erred in denying his request for appointment of counsel, we AFFIRM in part. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Schwander v. Blackburn*, 750 F.2d 494, 502 (5th Cir. 1985).

APPENDIX

B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MARCUS TYLER SHEFFIELD,	§	
TDCJ No. 02034529,	§	
	§	
Petitioner,	§	
	§	
v.	§	**Civil No. SA-18-CA-0385-FB**
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are *pro se* petitioner Marcus Tyler Sheffield's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1), respondent's Answer (ECF No. 8), and petitioner's Reply thereto (ECF No. 14). Having reviewed the record and pleadings submitted by both parties, the Court concludes petitioner is not entitled to relief under the standards prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See* 28 U.S.C. § 2254(d). Petitioner is also denied a certificate of appealability.

I. Background

In November 2011, petitioner was charged by indictment with two counts of sexual abuse of a child. (ECF No. 23-5 at 12-13). Prior to trial, a suppression hearing was held to determine the admissibility of statements petitioner made to police admitting his guilt for the charged offenses. A police report and a copy of petitioner's video-recorded interview were submitted as evidence at the hearing. On October 1, 2012, the trial court granted petitioner's motion to suppress and issued written findings of fact and conclusions of law to support its ruling. (ECF No. 11-2 at 70, 112-16). The state filed an interlocutory appeal arguing the trial court erred in finding a violation of petitioner's rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), because

petitioner was not in custody at the time of his interview with police and thus his interview did not rise to the level of a custodial interrogation. (ECF No. 9-9). In an opinion dated December 30, 2014, the Third Court of Appeals agreed with the state, reversed the trial court's order of suppression, and remanded for further proceedings. *State v. Sheffield*, No. 03-12-00669-CR, 2014 WL 7474211 (Tex. App.–Austin, Dec. 30, 2014, no pet.) (ECF No. 9-14).

A jury subsequently convicted petitioner of both counts alleged in the indictment and assessed punishment at ten years of imprisonment for each offense, with the sentences to run concurrently. *State v. Sheffield*, No. CR2011-575 (207th Dist. Ct., Comal Cnty., Tex. Oct. 21, 2015) (ECF No. 11-2 at 200-05). On appeal, petitioner's court-appointed counsel filed an uncontested *Anders* brief stating that the record presented no arguably meritorious grounds for review. (ECF No. 11-19). Following an independent review of the record, the court of appeals agreed with counsel that the appeal was frivolous and affirmed the judgment of the trial court. *Sheffield v. State*, No. 03-15-00627-CR, 2016 WL 6408005 (Tex. App.–Austin, Oct. 27, 2016, no pet.) (ECF No. 11-21). Petitioner did not attempt to appeal this decision by filing a petition for discretionary review with the Texas Court of Criminal Appeals (TCCA).

Instead, petitioner filed a state habeas corpus application challenging the constitutionality of his state court conviction and sentence on August 8, 2017. *Ex parte Sheffield*, No. 87,449-01 (Tex. Crim. App. Aug. 8, 2017) (ECF No. 11-31 at 23). The state habeas application contained the following allegations: (1) petitioner's statement was taken despite having invoked his right to counsel, which police ignored, (2) petitioner was coerced into being a witness against himself, as he did not voluntarily, knowingly, and intelligently waive his rights prior to making his statement, (3) the interview with police constituted a custodial interrogation because he was not free to move around or use the restroom without a police escort, and (4) petitioner's trial counsel

rendered ineffective assistance by failing to properly investigate the case or object to the admission of petitioner's statement to police. The TCCA denied petitioner's state habeas application without written order on January 24, 2018. (ECF No. 11-26).

Petitioner indicates he placed the instant federal habeas petition in the prison mail system on April 27, 2018. (ECF No. 1 at 10). In the petition, petitioner raises two grounds for relief: (1) his self-incriminating statement to police was obtained unlawfully and should not have been admitted at trial, and (2) his counsel rendered ineffective assistance by failing to investigate and call his doctor as a witness. On June 29, 2018, respondent filed an answer to petitioner's federal habeas petition, to which petitioner responded on October 9, 2018. (ECF Nos. 8, 14).

II. Standard of Review

Petitioner's federal habeas petition is governed by the heightened standard of review provided by the AEDPA. 28 U.S.C.A. § 2254. Under § 2254(d), a petitioner may not obtain federal habeas corpus relief on any claim that was adjudicated on the merits in state court proceedings unless the adjudication of that claim either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Brown v. Payton*, 544 U.S. 133, 141 (2005). This intentionally difficult standard stops just short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (citing *Felker v. Turpin*, 518 U.S. 651, 664 (1996)).

A federal habeas court's inquiry into unreasonableness should always be objective rather than subjective, with a focus on whether the state court's application of clearly established

federal law was "objectively unreasonable" and not whether it was incorrect or erroneous. *McDaniel v. Brown*, 558 U.S. 120 (2010); *Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003). Even a strong case for relief does not mean the state court's contrary conclusion was unreasonable, regardless of whether the federal habeas court would have reached a different conclusion itself. *Richter*, 562 U.S. at 102. Instead, a petitioner must show that the decision was objectively unreasonable, which is a "substantially higher threshold." *Schriro v. Landrigan,* 550 U.S. 465, 473 (2007); *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). So long as "fairminded jurists could disagree" on the correctness of the state court's decision, a state court's determination that a claim lacks merit precludes federal habeas relief. *Richter*, 562 U.S. at 101 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). In other words, to obtain federal habeas relief on a claim previously adjudicated on the merits in state court, petitioner must show that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103; *see also Bobby v. Dixon*, 565 U.S. 23, 24 (2011).

III. Analysis

A. Petitioner's Statement (Claim 1).

In his first allegation, petitioner contends the admission of his self-incriminating statements to police violated his *Miranda* rights. According to petitioner, his confession is the result of a coercive custodial interrogation wherein his request for an attorney was ignored. Petitioner's argument was rejected by the Third Court of Appeals during the interlocutory appeal proceeding and again by the TCCA during petitioner's state habeas proceedings. As discussed below, petitioner fails to show that either court's determination was contrary to, or involved an

unreasonable application of, federal law, or that it was an unreasonable determination of the facts based on the evidence in the record.

1. Relevant Facts

The relevant facts surrounding petitioner's statement to police were accurately summarized by the Third Court of Appeals during the interlocutory appeal proceeding:

> According to the evidence presented at the suppression hearing, [petitioner] gave his friend, Steven Villarreal, a ride to meet "Valerie" and her friend, "Maria," both aged fourteen.[1] [Petitioner] was nineteen years old at the time. One week after this gathering, Valerie gave a forensic interview in which she admitted to having sexual intercourse with Villarreal. Valerie also told the forensic interviewer that she saw Maria performing oral sex on [petitioner].
>
> On August 3, 2011, Detective Schroeder of the New Braunfels Police Department (NBPD) met with [petitioner] at [petitioner]'s house and told him that he was investigating a case involving [petitioner]. The detective asked [petitioner] to come to the police station to make a voluntary statement, and [petitioner] agreed. In the video-recorded interview, [petitioner] conceded that he drove himself to the police station and was there voluntarily. He was told that he could leave at any time.
>
> During his interview, [petitioner] told Detective Schroeder his side of the story, explaining that Valerie and Maria appeared to be underage and that he believed that Villarreal had sex with Valerie. However, [petitioner] insisted that he did not have any sexual contact with Maria. Detective Schroeder said that [petitioner]'s version of events differed from what the detective was told by others. Approximately forty minutes into the interview, Detective Schroeder played a video of Valerie saying that she saw Maria performing oral sex on [petitioner]. [Petitioner] again denied this happened. Detective Schroeder said that Villarreal confirmed everything that Valerie said and told [petitioner], "Just so you know, you can hear it for yourself." Before Detective Schroeder could start the video recording of Villarreal's interview, [petitioner] asked to go to the restroom. Schroeder responded "You want to listen to this real quick?" and started playing the video interview of Villarreal. Detective Schroeder is heard on the video saying that the interview pertained to an investigation of [petitioner]. [Petitioner] again requested to go to the restroom, and Detective Schroeder escorted him to and from the restroom.
>
> When [petitioner] returned to the interview room, he asked if he was a witness or a suspect. Detective Schroeder told [petitioner] that he was both and

[1] To protect their privacy, the Third Court of Appeals referred to the underage victims by fictitious names. This Court will do the same.

that he was trying to get [petitioner]'s side of the story. The following exchange then occurred:

> [PETITIONER]: As much as I want to continue this interview and to be honest, with my little knowledge of specifically the law, I'm not sure that I want to continue this interview right now without an attorney, just because I don't know what the police department's intentions are or the county's in terms of charges or whatnot and I believe that I need someone who can tell me what to do or not to do. So, as much as I would love to continue and to be honest I don't know how much . . . basically I don't know whether I'm going to be looking at charges or not, and if that's the case, then regardless of whether I'm being honest or not.
>
> [DETECTIVE]: That's what I'm telling you right now. I'm telling you exactly what it is. I understand your hesitance on you not knowing if you want to continue or not.
>
> [PETITIONER]: So you are saying that you are looking at charges against me?
>
> [DETECTIVE]: Let me show you . . . this is your evidence jacket; this is your folder. O.K. This is where it's already at, Marcus. So, this is your opportunity to tell me exactly what happened.
>
> [PETITIONER]: And then what?
>
> [DETECTIVE]: If you're honest with me, I'm taking it straight to [the prosecutor]. I'm gonna give it to him. It's already going this far anyhow. I know you've already been deceptive with me. I already know that. And you already know that I know that too. Cause I've already got this [pointing to something on desk], I've already got this [pointing to photographic evidence on the wall], I've got Maria's interview, I've got everything. I've got it all. You were the last piece of the puzzle. So I want you to be honest with me. [The prosecutor] wants you to be honest because he's going to be watching this right now. . . .
>
> [PETITIONER]: I know what your job is and your job is to put people away, and as much as I want to be honest, I don't want to nail my own coffin shut.
>
> [DETECTIVE]: My job is not to put people away. My job is to find the evidence in the case, and I've already found it. My job is to give you the opportunity, Marcus, to tell the truth, so when people do have the decision to put you away or not, they can say, 'Hey, was Marcus honest with me?'. . .

> [PETITIONER]: If I'm honest with you will I be leaving here today?
>
> [DETECTIVE]: Yes you are. When you walked in here and I told you, you can come in here and I'll let you walk out that door, you're darn right I am. That's my word. But you got to tell me the truth. Tell me the truth and tell [the prosecutor] the truth.
>
> [Petitioner] sat silently for a moment, looking at the floor, and then said, "It's true." He confirmed that he received oral sex from, and had intercourse with, Maria. After another minute-and-a-half of being questioned and providing admissions, [petitioner] told Detective Schroeder, "I don't think I can keep going right this second. I'm going to come back tomorrow and finish." Detective Schroeder reiterated that [petitioner] "can walk right out this door at any time," but continued questioning [petitioner] for another minute or so. Detective Schroeder then said, "All right, well, instead of going through the whole thing, you asked to leave, I can't stop you from leaving, and that's your wishes, so I'm gonna let you go." As he was leaving [petitioner] asked, "Do you need me to come back tomorrow or anything?" Detective Schroeder said he would like for [petitioner] to return and tell him everything that happened. [Petitioner] left the station and did not return the next day. The interview lasted just over one hour.
>
> On August 18—fifteen days after [petitioner]'s station-house interview—an arrest warrant was issued for [petitioner]. He was then arrested for two counts of sexual assault of a child.

State v. Sheffield, 2014 WL 7474211, *1-2 (ECF No. 9-14 at 1-5).

2. Reviewing Claims Under *Miranda*

The Fifth Amendment's prohibition against compelled self-incrimination requires that an accused be advised of his right to remain silent and his right to the presence of an attorney prior to custodial interrogation. *Miranda*, 384 U.S. at 479; *Dickerson v. United States*, 530 U.S. 428, 435 (2000) (explaining that *Miranda* protections are constitutionally required). Absent these warnings or their "fully effective equivalent," the state may not offer a defendant's resulting custodial statements as evidence of his guilt. *Miranda*, 384 U.S. at 476.

The relevant question in this case is whether petitioner's interview with police at the police station amounted to a custodial interview which triggered petitioner's *Miranda* rights. The Supreme Court has held that *Miranda* warnings are not required "simply because the

questioning takes place in the station house, or because the questioned person is one whom the police suspect." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). Rather, a suspect is "in custody" for purposes of *Miranda* "when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." *United States v. Bengivenga*, 845 F.2d 593, 596 (5th Cir. 1988) (en banc) (quoting *Miranda*, 384 U.S. at 479).

Petitioner was not formally arrested at the time he was questioned by police; as such, the only relevant inquiry "is how a reasonable man in the suspect's position would have understood his situation." *Stansbury v. California*, 511 U.S. 318, 324 (1994); *United States v. Courtney*, 463 F.3d 333, 337 (5th Cir. 2006). This reasonable-person standard "is an objective inquiry" that depends on the "totality of circumstances." *J.D.B. v. North Carolina*, 564 U.S. 261, 131 (2011); *United States v. Cavazos*, 668 F.3d 190, 193 (5th Cir. 2012) (quoting *Beheler*, 463 U.S. at 1125). To aid in this custody inquiry, the Fifth Circuit has identified several relevant factors. *United States v. Wright*, 777 F.3d 769 (5th Cir. 2015); *see also United States v. Coleman*, 610 F. App'x. 347, 353 (5th Cir. 2015) (unpublished). These factors include: (1) the length of the questioning; (2) the location of the questioning; (3) the accusatory, or non-accusatory nature of the questioning; (4) the amount of restraint on the individual's physical movement; and (5) statements made by officers regarding the individual's freedom to move or leave. *Wright*, 777 F.3d at 775. No one fact is determinative. *Id.*

3. Application of the *Miranda* Standard

Petitioner raised this allegation during his state habeas proceedings, but the TCCA denied relief without written order. (ECF No. 11-26). Thus, this Court "should 'look through' the

unexplained decision to the last related state-court decision providing" particular reasons, both legal and factual, "presume that the unexplained decision adopted the same reasoning," and give appropriate deference to that decision. *Wilson v. Sellers*, 138 S. Ct. 1188, 1191-92 (2018); *Uranga v. Davis*, 82 F.3d 282, 287 n.33 (5th Cir. 2018). In other words, because the TCCA summarily rejected petitioner's claim without explanation, this Court should look through to the last clear state decision on the matter when reviewing the claim under AEDPA's deferential standard. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991); *Bledsue v. Johnson*, 188 F.3d 250, 256 (5th Cir. 1999).

In this case, the last reasoned state court decision was issued by the intermediate court of appeals following the state's interlocutory appeal.[2] After setting forth the relevant standard for determining whether an individual is in custody for *Miranda* purposes, the court concluded that petitioner's interview with police did not constitute a custodial interrogation:

> [Petitioner] was not physically deprived of his freedom of action in any significant way. The record shows that [petitioner] came to the police station voluntarily in his own vehicle. He was told twice during his video-recorded interview that he did not have to answer any questions and that he could leave at any time. [Petitioner] was never physically restrained. He was allowed to go to the restroom shortly after requesting to do so. And when [petitioner] said that he did not want to continue with the interview and wanted to finish it the next day, he was allowed to leave the station. The questioning lasted just over an hour. Detective Schroeder did not create a situation that would lead a reasonable person to believe that his freedom of movement was significantly restricted. [Petitioner]'s freedom of movement was not restricted to a degree associated with an arrest.
>
> Although Detective Schroeder did indicate to [petitioner] that there was probable cause to arrest him by showing him the investigation file and telling him that he has "got it all" (referring to evidence against [petitioner]), afterward Detective Schroeder told [petitioner] he could leave and allowed him to do so. Based on the totality of the circumstances, we cannot conclude that Detective

[2] In its Order Recommending the Denial of Art. 11.07 Application, the state habeas trial court rejected petitioner's claim by adopting the state's answer as its findings of fact and conclusions of law. (ECF No. 11-31 at 53). In its answer, the state relied, in part, on the fact that this issue had already been raised and rejected in the interlocutory appeal. Thus, to the extent the trial court's recommendation is the last reasoned state court decision on the issue and not the interlocutory appeal opinion, the result is the same.

> Schroeder's statement about the evidence he had compiled "would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest."
>
> Reviewing the interview in its totality, we conclude that the objective circumstances of the questioning were non-custodial in nature. The case at hand is similar to many cases considered by the United States Supreme Court, the court of criminal appeals, and this Court—all of which have come to the conclusion that the accused was not in custody during questioning, and thus not entitled to *Miranda* or article 38.22 warnings.[3] In these cases, the accused voluntarily came to the police station, was either told he or she was not under arrest or was free to leave, was told he or she did not have to answer any questions, and then the accused was allowed to leave the station house after making incriminating statements.

State v. Sheffield, 2014 WL 7474211, *3 (ECF No. 9-14 at 8-9).

Petitioner fails to show that the state court's determination was contrary to, or involved an unreasonable application of, federal law, or that it was an unreasonable determination of the facts based on the evidence in the record. A state appellate court's determination is entitled to great deference when, as was done in this case, the court conducted a thorough and thoughtful review of the evidence. *Callins v. Collins*, 998 F.2d 269, 276 (5th Cir. 1993). Petitioner has not shown that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

Moreover, this Court has independently reviewed the video recording and record of these proceedings and finds the statement in question was not obtained through a custodial interrogation. The record reveals petitioner voluntarily drove to the police station at the request of Detective Schroeder and voluntarily spoke with the detective for about an hour, during which time petitioner was repeatedly informed he was free to leave at any time. Although the nature of

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[3] *See, e.g., California v. Beheler*, 463 U.S. 1121 (1983); *Oregon v. Mathiason*, 429 U.S. 492, 493-95 (1977); *Estrada v. State*, 313 S.W.3d 274, 288-95 (Tex. Crim. App. 2010); *Gardner v. State*, 306 S.W.3d 274, 293-95 (Tex. Crim. App. 2009); *Meek v. State*, 790 S.W.2d 618, 620 (Tex. Crim. App. 1990); *State v. Dickerson*, No. 03-10-00536-CR, 2012 WL 3055526, at *7–8 (Tex. App.—Austin July 27, 2012, pet. ref'd) (mem. op., not designated for publication).

the conversation became accusatory toward the end, Detective Schroeder reiterated that petitioner could "walk right out this door at any time," which petitioner did moments later. This is not a situation where a reasonable person would have thought they were under arrest and unable to terminate the interview or leave. *Stansbury*, 511 U.S. at 324 (holding "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."). Thus, viewing all of the evidence under the deferential standard that applies on federal habeas review, petitioner has not shown that the state court's decision was objectively unreasonable or that he is entitled to relief on his *Miranda* allegation.

4. Harmless Error

Even assuming that the trial court erred in admitting the recorded statement, petitioner would still not be entitled to relief because the error was harmless. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (holding that the admission of an involuntary confession is subject to harmless error analysis); *Hopkins v. Cockrell*, 325 F.3d 579, 585 (5th Cir. 2003) (same). In order to be entitled to federal habeas relief, the error must have had "substantial and injurious effect or influence in determining the jury's verdict." *Hopkins*, 325 F.3d at 585 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993)). Petitioner does not make this showing.

As noted by respondent, petitioner's conviction rested on compelling testimony from Maria, the victim, and by petitioner's friend, Steven Villarreal. Maria testified that petitioner grabbed her by the hair, took her clothes off, and forced her to perform oral sex on him before forcing her to turn around so he could have vaginal intercourse with her. (ECF No. 11-8 at 48-50). Steven Villarreal, who pleaded guilty to a sex offense committed the same night involving Maria's friend, Valerie, corroborated Maria's testimony and testified that petitioner told him on the way home that he had a good time and plenty of sex with Maria, including both oral and

penetration. *Id.* at 78. Detective Schroeder also testified that Valerie had stated that she had seen an offense involving Maria and petitioner. *Id.* at 100. Thus, in light of the strong amount of evidence presented in this case demonstrating petitioner's guilt other than his videotaped confession, any error in admitting the confession is harmless and had no prejudicial effect on the jury's ultimate guilty verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Federal habeas relief is therefore denied.

B. Trial Counsel (Claim 2).

Petitioner next alleges that his trial counsel was ineffective for failing to obtain his medical records or call his doctor, Dr. William Rogers, to testify on his behalf. According to petitioner, both he and his grandmother informed counsel that he suffered from a disorder that affected both his mental and physical development but counsel failed to further investigate. Petitioner raised a similar, albeit watered-down version of this claim during his state habeas proceedings by generically asserting that counsel failed to interview several witnesses, including Dr. Rogers. In considering the totality of counsel's representation, the state habeas trial court found that counsel was not deficient but rather "zealously advocated for his client," and determined petitioner's writ was frivolous. Thereafter, the TCCA denied petitioner state habeas relief without written order. Petitioner fails to demonstrate the state court's rejection of the claim was contrary to, or an unreasonable application of, Supreme Court precedent.

1. The *Strickland* Standard

Sixth Amendment claims concerning the alleged ineffective assistance of trial counsel (IATC) are reviewed under the familiar two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner cannot establish a violation of his Sixth Amendment right to counsel unless he demonstrates (1) counsel's performance was deficient and

(2) this deficiency prejudiced his defense. 466 U.S. at 687-88, 690. According to the Supreme Court, "[s]urmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

When determining whether counsel performed deficiently, courts "must be highly deferential" to counsel's conduct, and a petitioner must show that counsel's performance fell beyond the bounds of prevailing objective professional standards. *Strickland,* 466 U.S. at 687-89. Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Burt v. Titlow*, 571 U.S. 12, 22 (2013) (quoting *Strickland*, 466 U.S. at 690). To demonstrate prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Under this prong, the "likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. A habeas petitioner has the burden of proving both prongs of the *Strickland* test. *Wong v. Belmontes*, 558 U.S. 15, 27 (2009).

Finally, IATC claims are considered mixed questions of law and fact and are analyzed under the "unreasonable application" standard of 28 U.S.C. § 2254(d)(1). *See Gregory v. Thaler*, 601 F.3d 347, 351 (5th Cir. 2010). Where, as here, the state court adjudicated the IATC claims on the merits, a court must review a petitioner's claims under the "doubly deferential" standards of both *Strickland* and Section 2254(d). *See Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (citing *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)); *Knowles v. Mirzayance*, 556 U.S. 111, 112 (2009)). In such cases, the "pivotal question" is not "whether defense counsel's performance fell below *Strickland*'s standards," but whether "the state court's application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S at 101. That is to say, the question to

be asked in this case is not whether counsel's actions were reasonable, but whether "there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* at 105.

2. Application of the *Strickland* Standard

Petitioner contends counsel was ineffective for failing to investigate and call Dr. Rogers as a witness on his behalf to help the jury better understand petitioner's mental state at the time of the offense. Indeed, *Strickland* requires counsel to undertake a reasonable investigation. *Strickland*, 466 U.S. at 690-91; *Charles v. Stephens*, 736 F.3d 380, 389 (5th Cir. 2013). Counsel must, at minimum, interview potential witnesses and make an independent investigation of the facts and circumstances of the case. *Kately v. Cain*, 704 F.3d 356, 361 (5th Cir. 2013). But in assessing the reasonableness of counsel's investigation, a heavy measure of deference is applied to counsel's judgments. *Strickland*, 466 U.S. at 691.

In particular, complaints of uncalled witnesses are not favored in federal habeas corpus review because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what the witness would have testified are largely speculative. *Sayre v. Anderson*, 238 F.3d 631, 635-36 (5th Cir. 2001) (citing *Lockhart v. McCotter*, 782 F.2d 1275, 1282 (5th Cir. 1986)). Thus, to prevail on an IATC claim based on counsel's failure to call a witness, the petitioner must name the witness, demonstrate the witness was available to testify, delineate the content of the witness's proposed testimony, and show the testimony would have been favorable to the defense. *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009); *Evans v. Cockrell*, 285 F.3d 370, 377 (5th Cir. 2002) (providing petitioner must "bring forth" evidence, such as affidavits, from uncalled witnesses, including expert witnesses, in support of an IATC claim).

In this case, although petitioner names Dr. Rogers as the uncalled witness, he fails to demonstrate that Dr. Rogers was available to testify or that he would have testified about

petitioner's unspecified medical condition. Moreover, petitioner offers nothing but conclusory assertions regarding the favorability of having Dr. Rogers testify on his behalf about this condition. Such "conclusory statements regarding the content of the uncalled witnesses testimony are insufficient to demonstrate ineffective assistance." *Gregory v. Thaler*, 601 F.3d 347, 353 (5th Cir. 2010); *see also Del Toro v. Quarterman*, 498 F.3d 486, 490-91 (5th Cir. 2007) (finding counsel's choice to not hire an expert reasonable under the circumstances). As a result, petitioner has not shown counsel's performance was deficient or that the state court's denial of this claim was an unreasonable application of *Strickland.*

Regardless, even if petitioner could establish that counsel's performance in this case constituted deficient performance, he still fails to demonstrate that the alleged error was prejudicial to his defense. Again, to demonstrate prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "[A] court assessing prejudice must consider the totality of the evidence before the judge or jury." *Mejia v. Davis*, 906 F.3d 307, 315 (5th Cir. 2018) (quoting *Strickland*, 466 U.S. at 696) (internal quotation marks omitted).

Petitioner has not established that the alleged error was prejudicial with regard to his guilt because, as the record demonstrates, the state's case was strong and there was substantial corroborated evidence against petitioner. *See Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) (noting the weight of the evidence of guilt in finding alleged deficient performance of counsel not prejudicial); *Pondexter v. Quarterman*, 537 F.3d 511, 525 (5th Cir. 2008). With regard to his punishment, petitioner also has not established prejudice given the speculative nature of the proposed testimony, the nature of the offense, and the fact that he received only ten years in the face of a possible twenty-year sentence. Because petitioner is unable to establish that counsel's

performance was deficient or that he was prejudiced by counsel's alleged errors, the state court's denial of petitioner's IATC allegation was not an unreasonable application of *Strickland*. Federal habeas relief is therefore denied.

IV. Certificate of Appealability

The Court must now determine whether to issue a certificate of appealability (COA). *See* Rule 11(a) of the Rules Governing § 2254 Proceedings; *Miller–El v. Cockrell,* 537 U.S. 322, 335-36 (2003) (citing 28 U.S.C. § 2253(c)(1)). A COA may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If a district court rejects a petitioner's constitutional claims on the merits, the petitioner must demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). This requires a petitioner to 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.'" *Miller–El,* 537 U.S. at 336 (citation omitted).

A district court may deny a COA *sua sponte* without requiring further briefing or argument. *See Alexander v. Johnson,* 211 F.3d 895, 898 (5th Cir. 2000). For the reasons set forth above, the Court concludes that jurists of reason would not debate the conclusion that petitioner was not entitled to federal habeas relief. As such, a COA will not issue.

V. Conclusion and Order

Petitioner has failed to establish that the state court's rejection of the aforementioned claims on the merits during his state habeas corpus proceeding was either (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or (2) based on an unreasonable determination of the facts

in light of the evidence presented during petitioner's state trial and appellate proceedings. As a result, petitioner's federal habeas corpus petition does not warrant relief.

Accordingly, based on the foregoing reasons, **IT IS HEREBY ORDERED** that:

1. Federal habeas corpus relief is **DENIED** and petitioner Marcus Tyler Sheffield's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1) is **DISMISSED WITH PREJUDICE**;

2. No Certificate of Appealability shall issue in this case; and

3. All other remaining motions, if any, are **DENIED**, and this case is now **CLOSED**.

It is so ORDERED.

SIGNED this 25th day of March, 2019.

FRED BIERY
UNITED STATES DISTRICT JUDGE

APPENDIX

C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19-50404

MARCUS TYLER SHEFFIELD,

Petitioner - Appellant

v.

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

Respondent - Appellee

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

Before JONES, HIGGINSON and OLDHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellant's motion for leave to file petition for rehearing out of time is GRANTED. IT IS FURTHER ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/Edith H. Jones
UNITED STATES CIRCUIT JUDGE

APPENDIX

D

NO. 03-12-00669-CR
TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

State v. Scheffield

Decided Dec 30, 2014

NO. 03-12-00669-CR

12-30-2014

State of Texas, Appellant v. Marcus Tyler Scheffield, Appellee

Scott K. Field, Justice

FROM THE DISTRICT COURT OF COMAL COUNTY, 274TH JUDICIAL DISTRICT
NO. CR2011-575, HONORABLE GARY L. STEEL, JUDGE PRESIDING

MEMORANDUM OPINION

Appellee Marcus Tyler Scheffield has been charged with two counts of sexual assault of a child. *See* Tex. Penal Code § 22.011(a)(2). In this interlocutory appeal, the State challenges the trial court's pretrial order granting Scheffield's motion to suppress statements that he made to a detective during the investigation. The State asserts that Scheffield's statements are admissible because he was not in custody and his interview did not rise to the level of a custodial interrogation. We reverse the trial court's order of suppression and remand this case for further proceedings.

BACKGROUND

According to the evidence presented at the suppression hearing, Scheffield gave his friend, Steven Villarreal, a ride to meet "Valerie" and her friend, "Maria," both aged fourteen.[1] *2 Scheffield was nineteen years old at the time. One week after this gathering, Valerie gave a forensic interview in which she admitted to having sexual intercourse with Villarreal. Valerie also told the forensic interviewer that she saw Maria performing oral sex on Scheffield.

[1] To protect their privacy, we refer to the underage victims by fictitious names.

On August 3, 2011, Detective Schroeder of the New Braunfels Police Department (NBPD) met with Scheffield at Scheffield's house and told him that he was investigating a case involving Scheffield. The detective asked Scheffield to come to the police station to make a voluntary statement, and Scheffield agreed. In the video-recorded interview, Scheffield conceded that he drove himself to the police station and was there voluntarily. He was told that he could leave at any time.

During his interview, Scheffield told Detective Schroeder his side of the story, explaining that Valerie and Maria appeared to be underage and that he believed that Villarreal had sex with Valerie. However, Scheffield insisted that he did not have any sexual contact with Maria. Detective Schroeder said that Scheffield's version of events differed from what the detective was told by others. Approximately forty minutes into the interview, Detective Schroeder played a video of Valerie saying that she saw Maria performing oral sex on Scheffield.

Scheffield again denied this happened. Detective Schroeder said that Villarreal confirmed everything that Valerie said and told Scheffield, "Just so you know, you can hear it for yourself." Before Detective Schroeder could start the video recording of Villarreal's interview, Scheffield asked to go to the restroom. Schroeder responded "You want to listen to this real quick?" and started playing the video interview of Villarreal. Detective Schroeder is heard on the video saying that the interview pertained to an investigation of Marcus Tyler Scheffield. Scheffield again requested to go to the restroom, and Detective Schroeder escorted him to and from the restroom. *3

When Scheffield returned to the interview room, he asked if he was a witness or a suspect. Detective Schroeder told Scheffield that he was both and that he was trying to get Scheffield's side of the story. The following exchange then occurred:

[SCHEFFIELD]: As much as I want to continue this interview and to be honest, with my little knowledge of specifically the law, I'm not sure that I want to continue this interview right now without an attorney, just because I don't know what the police department's intentions are or the county's in terms of charges or whatnot and I believe that I need someone who can tell me what to do or not to do. So, as much as I would love to continue and to be honest I don't know how much . . . basically I don't know whether I'm going to be looking at charges or not, and if that's the case, then regardless of whether I'm being honest or not.

[DETECTIVE]: That's what I'm telling you right now. I'm telling you exactly what it is. I understand your hesitance on you not knowing if you want to continue or not.

[SCHEFFIELD]: So you are saying that you are looking at charges against me?

[DETECTIVE]: Let me show you . . . this is your evidence jacket; this is your folder. O.K. This is where it's already at, Marcus. So, this is your opportunity to tell me exactly what happened.

[SCHEFFIELD]: And then what?

[DETECTIVE]: If you're honest with me, I'm taking it straight to [the prosecutor]. I'm gonna give it to him. It's already going this far anyhow. I know you've already been deceptive with me. I already know that. And you already know that I know that too. Cause I've already got this [pointing to something on desk], I've already got this [pointing to photographic evidence on the wall], I've got Maria's interview, I've got everything. I've got it all. You were the last piece of the puzzle. So I want you to be honest with me. [The prosecutor] wants you to be honest because he's going to be watching this right now.

. . . .

4 *4

> [SCHEFFIELD]: I know what your job is and your job is to put people away, and as much as I want to be honest, I don't want to nail my own coffin shut.
>
> [DETECTIVE]: My job is not to put people away. My job is to find the evidence in the case, and I've already found it. My job is to give you the opportunity, Marcus, to tell the truth, so when people do have the decision to put you away or not, they can say, 'Hey, was Marcus honest with me?' . . . .
>
> [SCHEFFIELD]: If I'm honest with you will I be leaving here today?
>
> [DETECTIVE]: Yes you are. When you walked in here and I told you, you can come in here and I'll let you walk out that door, you're darn right I am. That's my word. But you got to tell me the truth. Tell me the truth and tell [the prosecutor] the truth.

Scheffield sat silently for a moment, looking at the floor, and then said, "It's true." He confirmed that he received oral sex from, and had intercourse with, Maria. After another minute-and-a-half of being questioned and providing admissions, Scheffield told Detective Schroeder, "I don't think I can keep going right this second. I'm going to come back tomorrow and finish." Detective Schroeder reiterated that Scheffield "can walk right out this door at any time," but continued questioning Scheffield for another minute or so. Detective Schroeder then said, "All right, well, instead of going through the whole thing, you asked to leave, I can't stop you from leaving, and that's your wishes, so I'm gonna let you go." As he was leaving Scheffield asked, "Do you need me to come back tomorrow or anything?" Detective Schroeder said he would like for Scheffield to return and tell him everything that happened. Scheffield left the station and did not return the next day. The interview lasted just over one hour. *5

On August 18—fifteen days after Scheffield's station-house interview—an arrest warrant was issued for Scheffield. He was then arrested for two counts of sexual assault of a child. Prior to trial, Scheffield filed a motion to suppress statements he made to Detective Schroeder. The evidence presented at the suppression hearing consisted of the offense report and a copy of Scheffield's video-recorded interview at the police station. The trial court granted the motion to suppress, noting that Scheffield "invoked right to counsel at time 15:59 on tape." The trial court issued written findings of fact and conclusions of law to support its ruling. The State filed this interlocutory appeal challenging the trial court's order suppressing Scheffield's statements. *See* Tex. Code Crim. Proc. art. 44.01(a)(5) (granting State right to appeal pretrial order suppressing evidence if jeopardy has not attached).

STANDARD OF REVIEW

We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion. *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010). A trial court abuses its discretion if its ruling is arbitrary or unreasonable. *State v. Mechler*, 153 S.W.3d 435, 439 (Tex. Crim. App. 2005). A trial court's ruling on a motion to suppress will be affirmed if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *Young v. State*, 283 S.W.3d 854, 873 (Tex. Crim. App. 2009).

"In reviewing a trial court's ruling on a Miranda-violation claim, an appellate court conducts a bifurcated review." *Alford v. State*, 358 S.W.3d 647, 652 (Tex. Crim. App. 2012); *see also Miranda v. Arizona*, 384 U.S. 436 (1966). We afford almost total deference to a trial court's determination of historical facts, but review pure
6 questions of law de novo. *Alford*, 358 S.W.3d *6 at 652. Likewise, we give almost total deference to a trial court's resolution of a mixed question of law and fact if the question turns on the credibility and demeanor of witnesses. *Id.* However, if credibility and demeanor are not necessary to the resolution of a mixed question of law and fact, we review the question de novo. *See id.*; *Young*, 283 S.W.3d at 873.

"The decision as to whether custodial questioning constitutes 'interrogation' under *Miranda* is a mixed question of law and fact." *Alford*, 358 S.W.3d at 653. When, as here, the custodial questioning has been videotaped and the underlying events are not in dispute, the trial court's ruling is merely an application of uncontested facts to the law. *See Herrera v. State*, 194 S.W.3d 656, 659 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd); *Mayes v. State*, 8 S.W.3d 354, 358 (Tex. App.—Amarillo 1999, no pet.). Thus, we review the trial court's ruling on the suppression motion de novo.

DISCUSSION

In its first point of error, the State asserts that the trial court erred in granting Scheffield's motion to suppress the statements he made to Detective Schroeder. Specifically, the State asserts that Scheffield was not in custody during his station-house questioning and his interview did not rise to the level of a custodial interrogation. As such, the State contends, Scheffield was not entitled to be given *Miranda* warnings, nor was he entitled to have counsel present.

Custodial Interrogation

The threshold issue in this case is whether Scheffield's interview amounted to a custodial interrogation. Both
7 the *Miranda* line of cases and article 38.22 of the Texas Code of *7 Criminal Procedure require that the accused be properly admonished of certain constitutional rights in order for his statements "stemming from custodial interrogation" to be admissible as evidence against him. *See Miranda*, 384 U.S. at 444; Tex. Code Crim. Proc. art. 38.22 §§ 2, 3 (listing required admonishments for written and oral statements of accused). "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. The defendant bears the burden of proving that a statement was the product of a custodial interrogation. *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007).

To determine whether an individual is in custody, a court must first examine all of the circumstances surrounding the interrogation, but "the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Stansbury v. California*, 511 U.S. 318, 322 (1994) (internal citations and quotations omitted). This determination of custody "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Id.* at 323. After the circumstances surrounding the interrogation are considered, the court must determine whether, "given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995); *see also Herrera*, 241 S.W.3d at 525.

8 The court of criminal appeals has identified four general situations that may constitute custody:[2] *8

2 Questioning that begins in a noncustodial environment can become custodial in nature at some later point during the interrogation. "[P]olice conduct during the encounter may cause a consensual inquiry to escalate into custodial interrogation." *Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996) (citing *Ussery v. State*, 651 S.W.2d 767, 770 (Tex. Crim. App. 1983)).

(1) when the suspect is physically deprived of his freedom of action in any significant way;

(2) when a law enforcement officer tells the suspect that he cannot leave;

(3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted; and

(4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave.

Dowthitt v. State, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996). The first through third situations require that the "restriction upon freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention." *Id.* (citing *Stansbury*). The fourth situation requires the "officers' knowledge of probable cause be manifested to the suspect." *Id.* This can occur either by the officers relating information substantiating probable cause to the suspect or by the suspect to the officers. Situation four does not automatically establish custody, but rather "custody is established if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest." *Id.*

After reviewing the video-recorded questioning of Scheffield, we cannot conclude that it would meet any of the four custodial situations outlined by the court of criminal appeals in *Dowthitt*. Scheffield was not physically deprived of his freedom of action in any significant way. The record shows that Scheffield came to the police station voluntarily in his own vehicle. He was told twice during his video-recorded interview that he did not have to answer any questions and that he could leave at any time. Scheffield was never physically restrained.
9 He was allowed to go to the *9 restroom shortly after requesting to do so. And when Scheffield said that he did not want to continue with the interview and wanted to finish it the next day, he was allowed to leave the station. The questioning lasted just over an hour. Detective Schroeder did not create a situation that would lead a reasonable person to believe that his freedom of movement was significantly restricted. Scheffield's freedom of movement was not restricted to a degree associated with an arrest.

Although Detective Schroeder did indicate to Scheffield that there was probable cause to arrest him by showing him the investigation file and telling him that he has "got it all" (referring to evidence against Scheffield), afterward Detective Schroeder told Scheffield he could leave and allowed him to do so. Based on the totality of the circumstances, we cannot conclude that Detective Schroeder's statement about the evidence he had compiled "would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest."

Reviewing the interview in its totality, we conclude that the objective circumstances of the questioning were non-custodial in nature. The case at hand is similar to many cases considered by the United States Supreme Court, the court of criminal appeals, and this Court—all of which have come to the conclusion that the accused was not in custody during questioning, and thus not entitled to *Miranda* or article 38.22 warnings.[3] In these cases, the accused voluntarily came to the police station, was either told he or she was not under arrest or was free to leave, was told he or she did not have to answer any questions, and then the accused was allowed to
10 leave the station house after making incriminating statements. *10

[3] *See, e.g., California v. Beheler*, 463 U.S. 1121 (1983); *Oregon v. Mathiason*, 429 U.S. 492, 493-95 (1977); *Estrada v. State*, 313 S.W.3d 274, 288-95 (Tex. Crim. App. 2010); *Gardner v. State*, 306 S.W.3d 274, 293-95 (Tex. Crim. App. 2009); *Meek v. State*, 790 S.W.2d 618, 620 (Tex. Crim. App. 1990); *State v. Dickerson*, No. 03-10-00536-CR, 2012 WL 3055526, at *7-8 (Tex. App.—Austin July 27, 2012, pet. ref'd) (mem. op., not designated for publication).

Invocation of Right to Counsel in a Non-Custodial Setting

Having concluded that Scheffield's interview did not constitute custodial interrogation, we next turn to the issue of whether the interview should have ceased once Scheffield attempted to invoke his right to counsel.

The trial court's conclusions of law indicate that the court suppressed Scheffield's statements, in part, based on Scheffield's possible invocation of his right to counsel during questioning. If Scheffield was in custody and invoked his right to counsel, "the interrogation must cease until an attorney is present." *Miranda*, 384 U.S. at 474. The custodial interrogation may not continue "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). Therefore, if Scheffield was in custody and invoked his right to counsel, his post-request "responses to further interrogation may not be used to cast doubt on the clarity of his initial request for counsel." *Smith v. Illinois*, 469 U.S. 91, 91 (1984).

However, as we previously discussed, Detective Schroeder's questioning did not rise to the level of custodial interrogation, and thus Scheffield was not in custody when he possibly invoked his right to counsel. The court of criminal appeals has clearly stated that when an accused is not in custody, the police are not obligated to stop questioning him if he invokes his right to counsel. *See Estrada v. State*, 313 S.W.3d 274, 296 (Tex. Crim. App. 2010). In *Estrada*, the court concluded that Estrada was not in custody when he provided a video-recorded statement and possibly invoked his right to counsel. *Id.* at 294. Shortly after being brought into the interview room, Estrada made some references to a lawyer. *Id.* at 289. The court concluded that "[e]ven if we were to
11 assume that appellant unambiguously invoked his right to counsel and to silence during the noncustodial *11 interrogation setting, we do not agree that the police were required to honor these invocations."[4] *Id.* at 296.

[4] The court went on to adopt the following relevant discussion from its prior unpublished decision in *Davis v. State*:

> Because the appellant was not in custody, law enforcement officials had no obligation under *Miranda* to scrupulously honor a request to terminate questioning . . . . The need to scrupulously honor a defendant's invocation of *Miranda* rights does not arise until created by the pressures of custodial interrogation. Without those pressures, the police are free to attempt to persuade a reluctant suspect to talk, and the immediate termination of the interrogation after the invocation of rights is simply not required.

This Court has also previously considered a case with a similar fact pattern and came to the same conclusion as the court of criminal appeals. In *Rian v. State*, the appellant voluntarily went to the police station to discuss allegations that she sexually assaulted a child. *Rian v. State*, No. 03-07-00599-CR, 2009 WL 2476607, at *1 (Tex. App.—Austin Aug. 11, 2009, pet. ref'd) (mem. op., not designated for publication). Officers began the

interview by telling Rian that the door was unlocked and that she was free to leave at any time. *Id.* After the officers began pressing her for the truth, she made a reference to an attorney and pulled out his business card. *Id.* at *2. At a certain point during the questioning Rian said, "Well then, I need to call the attorney." The officer said, "No," and began to play one of the recorded conversations between Rian and the boy. *Id.* After nearly two hours of questioning, Rian admitted to having sexual relations with the child. *Id.* at *3.

In addressing Rian's argument that the interview became a custodial interrogation when her request for counsel
12 was not honored, this Court explained that: *12

> [T]he officers had no obligation under the Fifth Amendment to honor those requests [for counsel] if appellant was not in custody. Appellant's argument in support of her contention is a form of bootstrapping: she asserts that she was in custody because she was not allowed to speak to the lawyer and that she was entitled to speak to the lawyer because she was in custody. Appellant does not refer us to any authority holding that a person's request to speak to counsel, in and of itself, transforms a noncustodial interrogation into a custodial interrogation under the Fifth Amendment.

Id. at *4 (internal citations omitted). We concluded that "[b]ecause appellant was not in custody, she had no Fifth Amendment right to counsel and the officers were not obligated to stop questioning her when she asked to speak to her attorney." *Id.* at *5.

The same rationale applies in this case. Based on this record, we conclude that Scheffield was not in custody when he was questioned, and as such Detective Schroeder was not obligated to advise Sheffield of his *Miranda* rights. Given that Scheffield was not in custody, the detective also was not obligated to stop questioning Scheffield after he expressed a reluctance to continue the interview without counsel. As such, Scheffield's statements are admissible, regardless of whether he requested to have counsel present.[5]

[5] Because we conclude that Scheffield was not in custody and his statements are admissible, we do not address the State's alternative argument that Scheffield's invocation of his right to counsel was ambiguous.

CONCLUSION

We reverse the trial court's order suppressing Scheffield's statements and remand this cause to the trial court for
13 further proceedings. *13

/s/_____

Scott K. Field, Justice

Before Chief Justice Jones, Justices Goodwin and Field Reversed and Remanded Filed: December 30, 2014 Do Not Publish

Estrada, 313 S.W.3d at 296 (quoting *Davis v. State*, No. AP-74393, 2007 WL 1704071, at *5 (Tex. Crim. App. June 13, 2007)).

APPENDIX

E

NO. CR2011-575

STATE OF TEXAS	§	**IN THE DISTRICT COURT**
	§	
vs.	§	**207th JUDICIAL DISTRICT**
	§	
MARCUS TYLER SCHEFFIELD	§	**COMAL COUNTY, TEXAS**

TRIAL COURT'S
FINDINGS OF FACT AND CONCLUSIONS OF LAW
WITH REGARD TO DEFENDANT'S MOTION TO SUPRESS STATEMENTS

Now comes, Judge Gary L. Steel, 274th District Judge, and files his Findings of Fact and Conclusions of Law and shows:

Findings of Fact

(1) Marcus Scheffield, (referred to hereinafter as "Scheffield") was charged by indictment with two counts of sexual abuse of a child, both of which are second-degree felonies. Scheffield was 19 years old at the time of the interview in question. This is Scheffield's first felony indictment.

(2) On August 3, 2011, Scheffield was interviewed at the New Braunfels Police Department by Detective David Schroeder (referred to hereinafter as "Detective"). The room in which the interview took place had a video recorder and the interview was video-recorded. Scheffield was advised by Detective that his participation in the interview was voluntary and that he was free to leave at any time; which was acknowledged by Scheffield.

(3) Detective did not inform Scheffield of his right to remain silent and his right to have an appointed or retained lawyer present.

(4) Scheffield is asked about a prior investigation of an offense by the New Braunfels Police Department in which he had invoked his 5th Amendment right to counsel. Sheffield

advised Detective that he was asked during that prior investigation if he wanted to answer questions without a lawyer. Scheffield advised Detective that in the prior investigation, he had told the investigating officer he would not answer questions without an attorney.

(5) At approximately thirty (30) minutes into the interview, Detective gave the first indication to Scheffield that he was also possibly a suspect implicated in the current investigation involving the sexual assault of a child. Detective begins to show Scheffield some evidence he has gathered as part of his investigation. Scheffield asks Detective if he can use the restroom before watching a video of the co-defendant. Detective asks if he wants to watch the video first. Scheffield responds that he can wait to use the restroom and begins to watch the videotape. About one minute later, Scheffield asks if the video is long and Detective then offers to take Scheffield to the restroom if he cannot wait. Detective and Scheffield then leave the interview room. A few minutes later the video shows Detective and Scheffield re-entering the interview room.

(6) Scheffield then asks Detective if he is a witness or a suspect in the sexual assault investigation. Detective responds that he is a witness and could be a suspect. Detective then tells Scheffield that he wants the truth from Scheffield and he knows that something happened between the alleged victim and Scheffield. At this point Scheffield makes the following statement (approximately 15:59, State's Exhibit #2):

> "As much as I want to continue in this interview and be honest, with my limited knowledge of the law ***I am not sure I want to continue this interview right now without an attorney.*** It's just because I don't know what the New Braunfels Police Department's intentions or the County's with regard to filing charges and I believe I need someone who can tell me what to do and what not to do so as much as I would love to continue and to be honest I don't know whether I am looking at charges and if that's the case, regardless of whether I am being honest or not..." (emphasis added)

(7) After making that statement Scheffield then asks Detective if he is "looking" at filing

charges against him. Detective then tells Scheffield that this is Scheffield's chance to tell him exactly what happened because Detective already knows Scheffield has been deceptive with him. Detective now reveals that he has previously gathered a lot of other evidence and he "has it all." Detective again tells Scheffield this is his opportunity to be truthful. Scheffield further states that he was afraid because he did not want to "nail his own coffin shut." Scheffield then asks Detective if he is honest can he still leave, and Detective responds that he is free to leave but Scheffield has to tell him the truth.

(8) At this point, Scheffield states that the allegations of oral sex and intercourse are true.

(9) None of Scheffield's post request statements were initiated by Scheffield.

(10) Detective next asks Scheffield to start from the beginning of the story. Scheffield states that he needs to get some air and then asks if he can come back to the police department the following day to finish. Scheffield then leaves and does not return. This is the end of the video.

(11) On June 15, 2012, Scheffield filed a Motion to Suppress Statements. Specifically, Scheffield sought to suppress statements made by him to law enforcement during the interview at the New Braunfels Police Department on August 3, 2011. Scheffield argued that he was deprived of his right to counsel, and/or that during the interview he invoked his right to counsel. A hearing on Defendant's Motion to Suppress Statements was held on September 27, 2012, before the Honorable Gary L. Steel, 274th Judicial District Court. The State and Scheffield agreed to allow the Trial Court to rule on the Motion to Suppress based on the submission of State's Exhibit #1 (offense report) and State's Exhibit #2 (copy of Scheffield's interview at the New Braunfels Police Department)

(12) On October 1, 2012, the Honorable Gary L. Steel found that Scheffield was deprived of his right to counsel and that Scheffield did not make an intelligent and knowing waiver of that

right. The Order granting Defendant's Motion to Suppress was entered and filed of record on or about October 1, 2012.

(13) On October 8, 2012, the Criminal District Attorney for Comal County, Texas filed a Certificate of Appeal and Notice of Appeal in the instant cause.

Conclusions of Law

(1) Sheffield articulated his desire to have counsel present at 15:59 of the interview (State's Exhibit 2) unambiguously and sufficiently clearly that Detective Schroeder should have understood the statement to be a request for an attorney. *See Davis v. United States,* 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994).

(2) When a suspect asserts his right to counsel, all interrogation must cease until counsel is provided or until the suspect personally reinitiates the conversation. Neither was done. *Edwards v. Arizona,* 451 U.S. 477, 484–85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Dinkins v. State,* 894 S.W.2d 330, 350 (Tex.Crim.App.1995).

(3) Any post-request statements by Scheffield, "may not be used to cast retrospective doubt on the clarity of the initial request itself." *See Smith v. Illinois,* 469 U.S. 91, 100, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984) ("under the clear logical force of settled precedent, an accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself."). Because Scheffield clearly invoked his right to counsel, no subsequent exchange with Detective Schroeder (unless the suspect has initiated it himself) can serve to undermine the clarity of the invocation. *State v. Gobert,* 275 S.W.3d 888, 894-895 (Tex.Cr.App. 2009).

(4) In failing to honor Scheffield's unambiguous and unqualified condition, and instead continuing to interrogate him in an effort to persuade him to talk, Detective Schroeder violated Scheffield's state and federal constitutional right to counsel.

Signed this 28th day of November, 2012.

Judge Gary L. Steel
274th District Judge