No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Joseph Peter Garbarini,

Petitioner

v.

Lorie Davis,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE FIFTH CIRCUIT COURT OF APPEALS

APPENDIX TO THE PETITION

Joseph Peter Garbarini
TDCJ #1754849
McConnell Unit
3001 S. Emily
Beeville, TX 78102

APPENDIX TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

JOSEPH PETER GARBARINI, III, #1754849	§	
VS.	§	CIVIL ACTION NO. 4:16cv198
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Joseph Peter Garbarini, III, an inmate confined in the Texas prison system, proceeding *pro se*, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred for findings of fact, conclusions of law and recommendations for the disposition of the case.

Procedural Background of the Case

Petitioner is challenging his Collin County convictions for continuous sexual abuse of a young child and sexual performance by a child, Cause Number 296-80759-2011. On October 20, 2011, after a jury trial, Petitioner was sentenced to 52 years of imprisonment for continuous sexual abuse of a young child and 10 years of imprisonment for sexual performance by a child, with the sentences running consecutively. The conviction was affirmed. *Garbarini v. State*, No. 05-12-00029-CR, 2013 WL 3947154 (Tex. App. - Dallas July 29, 2013, pet. ref'd). The Texas Court of Criminal Appeals refused his petition for discretionary review on January 15, 2014. He did not file a petition for a writ of certiorari.

Petitioner filed an application for a writ of habeas corpus in state court on February 15, 2015. Petitioner's trial counsel, Theodore Paul Steinke, Jr., filed an affidavit in response to allegations of ineffective assistance of counsel. SHCR at 204-214.[1] The trial court issued findings of fact and

[1] "SHCR" refers to the Clerk's Record of pleadings and documents filed with the trial court during the State habeas corpus proceedings.

conclusions of law on September 2, 2015. *Id.* at 251-66. On February 24, 2016, the Texas Court of Criminal Appeals denied the application without written order on findings of the trial court without a hearing.

The present petition was filed on March 21, 2016. The petition contains the following grounds for relief:

1. Petitioner received multiple punishments for a single offense, a double jeopardy violation;

2. Petitioner's due process rights were violated by a jury charge that allowed a non-unanimous verdict;

3. Petitioner received ineffective assistance of counsel;

4. Petitioner was denied due process when alterations were made to the Discovery Agreement after he had signed it; and

5. Petitioner was denied due process when the prosecution made improper statements to the jury during closing arguments.

Petitioner also submitted a memorandum of law in support of the petition. The Director has filed an answer (Dkt. #22). Petitioner has filed a traverse in reply (Dkt. #27).

Facts of the Case

The Fifth Court of Appeals discussed the facts of the case as follows:

> [Petitioner] was a kindergarten teacher in the Plano Independent School District. The grand jury alleged, in a two-count indictment, that [Petitioner] committed the offenses of continuous sexual abuse of a child and sexual performance by a child. The victims of the offenses were two of [Petitioner's] female kindergarten students.
>
> At trial, the State presented evidence that at the end of the 2009–10 school year, on May 19, 2010, S.T. made an outcry [Petitioner] had improperly touched her during a game they played called the mommy/baby game. The improper touching occurred when [Petitioner] was pretending to change S.T.'s diaper. S.T. was interviewed the day of her outcry at the Child Advocacy Center. A videotape of her interview was admitted into evidence. During her interview, S.T. stated that [Petitioner] "plays house" with her and pretends to change her diaper. She said [Petitioner] would put his hand inside her pants, but not inside her panties, when he was pretending to wipe her. She said [Petitioner] had done this a "bunch of times," and more than five times. She said sometimes [Petitioner] touched her "privacy bone" so hard that it hurt.
>
> When [Petitioner] was confronted with S.T.'s allegations, he immediately resigned. After his resignation, the other kindergarteners in his class, including M.P., were interviewed about [Petitioner]. M.P. initially denied any inappropriate behavior. However, the evening after she was first interviewed, M.P. told her mother that she had not told the truth about [Petitioner] and the "baby game" and that [Petitioner] had

> touched her inappropriately. M.P. told her mother that [Petitioner] had started touching her after Christmas and that it happened "a lot ... almost every day." M.P. was subsequently interviewed again at the Child Advocacy Center. M.P.'s interview was recorded and admitted into evidence. In her interview, M.P. stated [Petitioner] would pick them up and "grab on" their "wrong spot ... where you pee." She said he used his hand. M.P. displayed how [Petitioner] touched her and others with his hand and fingers. She said it happened more than five times.
>
> Police subsequently obtained a search warrant of [Petitioner's] residence and discovered numerous items of evidence establishing that [Petitioner] has an infantilism fetish, and particularly a fetish about diapers. Police found thousands of diapers made for adults with such fetishes, both clean and soiled, throughout his residence. [Petitioner] also had a cage in the residence where he would lock himself up as part of a sex game that included wearing diapers. The only bed in the house was a toddler princess bed with bondage restraints on each corner where [Petitioner] would restrain himself with a time lock. A videotape [Petitioner] took of himself playing this "game" showed him lying on the toddler bed in diapers.
>
> [Petitioner's] defense at trial was he did not touch the children, he was not a pedophile, and his sexual disorders did not involve children. The jury nevertheless found [Petitioner] guilty of continuous sexual abuse and sexual performance by a child.

Garbarini, 2013 WL 3947154 at *1-2.

Failure to Exhaust

The Director initially argues that the first, second and fifth grounds for relief should be dismissed for failure to exhaust. Stated differently, Petitioner failed to present his double jeopardy, non-unanimous verdict jury charge, and prosecutorial misconduct claims to the Texas Court of Criminal Appeals. In response, Petitioner argues that he presented the exact same points of error in his State application for a writ of habeas corpus, except for a few minor word changes. He observes that he presented the grounds for relief in grounds one, two and sixteen of his State application, although he added a claim of ineffective assistance of counsel with respect to the claims. He argues that the Director is fixated on the additional verbiage.

A state prisoner must exhaust all remedies available in state court before proceeding in federal court unless there is an absence of an available state corrective process or circumstances exist which render the state corrective process ineffective to protect the prisoner's rights. 28 U.S.C. § 2254(b). In order to exhaust properly, he must "fairly present" all of his claims to the state court. *Picard v. Connor*, 404 U.S. 270 (1981). In Texas, all claims must be presented to and ruled on by the Texas

Court of Criminal Appeals. *Richardson v. Procunier*, 762 F.2d 429, 431-32 (5th Cir. 1985); *Tipton v. Thaler*, 354 F. App'x. 138, 140 n.1 (5th Cir. 2009).

In the present case, Petitioner presented his claims to the Texas Court of Criminal Appeals, although the claims as presented in his state application included additional ineffective assistance of counsel verbiage. The Director correctly observed that the appropriate inquiry is whether the claims as presented in federal court "in a significantly different and stronger evidentiary posture than it was before the state courts." *Dowthitt v. Johnson*, 230 F.3d 733, 746 (5th Cir. 2000) (citations omitted). Petitioner's claims were presented in the State application, discussed by the trial court, and rejected by the Texas Court of Criminal Appeals. Petitioner sufficiently exhausted his claims. If anything, his presentation in the present petition diluted his claims, as opposed to presenting them in a significantly different and stronger evidentiary posture. The failure to exhaust argument is understandable in light of the changes made in the present petition, but it ultimately lacks merit.

Standard of Review

The focus of the remainder of the Report and Recommendation is on the merits of Petitioner's claims. The role of federal courts in reviewing habeas corpus petitions by prisoners in state custody is exceedingly narrow. A person seeking federal habeas corpus review must assert a violation of a federal constitutional right. *Lowery v. Collins*, 988 F.2d 1364, 1367 (5th Cir. 1993). Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also present. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *West v. Johnson*, 92 F.3d 1385, 1404 (5th Cir. 1996). In the course of reviewing state proceedings, a federal court does "not sit as a super state supreme court to review error under state law." *Wood v. Quarterman*, 503 F.3d 408, 414 (5th Cir. 2007) (citations omitted); *Porter v. Estelle*, 709 F.2d 944, 957 (5th Cir. 1983).

The petition was filed in 2016, thus review is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997). Under AEDPA, a petitioner who is in custody "pursuant to the judgment of a State court" is not entitled to federal habeas corpus relief 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). "By its terms § 2254 bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*, 562 U.S. 86, 98 (2011). AEDPA imposes a "highly deferential standard for evaluating state-court rulings, and demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citation and internal quotation marks omitted). With respect to the first provision, a "state court decision is 'contrary to' clearly established federal law if (1) the state court 'applies a rule that contradicts the governing law' announced in Supreme Court cases, or (2) the state court decides a case differently than the Supreme Court did on a set of materially indistinguishable facts." *Nelson v. Quarterman*, 472 F.3d 287, 292 (5th Cir. 2006) (en banc) (quoting *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003)). "[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 180-81 (2011). As such, "evidence later introduced in federal court is irrelevant." *Id.* at 184. "The same rule necessarily applies to a federal court's review of purely factual determinations under § 2254(d)(2), as all nine Justices acknowledged." *Blue v. Thaler*, 665 F.3d 647, 656 (5th Cir. 2011). With respect to § 2254(d)(2), a Texas court's factual findings are presumed to be sound unless a petitioner rebuts the "presumption of correctness by clear and convincing evidence." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (citing § 2254(e)(1)). The "standard is demanding but not insatiable; . . . [d]eference does not by definition preclude relief." *Id.* (citation and internal quotation marks omitted). More recently, the Supreme Court held that 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." *Richter*, 562 U.S. at 101 (citation omitted). The Supreme Court has explained that the provisions of AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect

to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). Federal habeas corpus relief is not available just because a state court decision may have been incorrect; instead, a petitioner must show that a state court decision was unreasonable. *Id.* at 694.

Discussion and Analysis

1. Petitioner's claim that he received multiple punishments for a single offense, a double jeopardy violation

Petitioner notes that the State alleged that he committed acts of sexual misconduct against S.T. and M.P. from January 1, 2010 through May 19, 2010. He argues that the second count of sexual performance of a child is included in the first count of continuous sexual abuse of a young child.

The double jeopardy bar protects against a second prosecution after acquittal, against a second prosecution for the same offense after conviction and against multiple punishments for the same offense. *Ohio v. Johnson*, 467 U.S. 493, 498 (1984); *U.S. v. Nichols*, 741 F.2d 767 (5th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1984). The most common question for the Court's consideration when there are two convictions out of the same incident is whether the two convictions represent multiple punishments for the same offense. The test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *United States v. Marden*, 872 F.2d 123, 126 (5th Cir. 1989).

In the present case, trial counsel fully explained why there is no double jeopardy violation:

> 15. I did not object to count two (2) of the indictment on the grounds of double jeopardy, as I did not believe that it was.
>
> 16. Count one (1) of the indictment alleged "continuous sexual abuse of a child" under Section 21.02 of the Penal Code, and count two (2) alleged "sexual performance of a child" under Section 43.25 of the Penal Code. They are two completely different offenses with different elements of proof. In my opinion, double jeopardy did not apply, and I am not in the habit of filing motions that I believe to be frivolous and not in good faith.
>
> In addition, the Writ Application states that count two (2) was a lesser included offense under Section 21.02. However, the offense of "sexual performance of a child" is simply one of the possible predicate offenses of "continuous sexual abuse of a child," and it was not used as such in count one (1) of the indictment. As a result, double jeopardy was not an issue.

SHCR at 207. The explanation provided by counsel sufficiently explained why there was no double jeopardy violation in this case - the two offenses have different elements of proof. Each requires proof of an additional fact which the other does not. Petitioner's double jeopardy claim lacks merit.

2. Petitioner's claim that his due process rights were violated by a jury charge that allowed a non-unanimous verdict

Petitioner next alleges that his due process rights were violated by a jury charge that allowed a non-unanimous verdict. He explains that the jury charge lists two victims, S.T. and M.P., using the disjunctive phrase "and/or" and it was possible for the jury to convict without unanimous agreement on who was a victim. In his memorandum, Petitioner observed that the prosecutor stated during closing arguments that "[a]s long as you each agree that there are two acts, it doesn't matter which child. As long as there are two acts 30 days or more apart, then we have proven that part of our case." 8 RR 12.[2]

Counsel appropriately discussed Petitioner's faulty reasoning as follows:

> 17. I did not object to the Jury charge listing both victims as "and/or."
>
> 18. First of all, the charge tracked the language of the indictment. Second, as stated in the charge, the jury would have been justified in returning a verdict of guilty if they believed that [Petitioner] committed two (2) acts against either S.T. or M.P., or both, so the "and/or" language was appropriate.

The jury had to unanimously find that Petitioner committed two acts as long as they were 30 days or more apart. Petitioner's assertion that he somehow could have been convicted on less than a unanimous verdict lacks merit.

3. Petitioner's claim that he received ineffective assistance of counsel

Ineffective assistance of counsel claims are governed by the Supreme Court's standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* provides a two-pronged standard, and the petitioner bears the burden of proving both prongs. *Id.* at 687. Under the first prong, he must show that counsel's performance was deficient. *Id.* To establish deficient performance, he must show that "counsel's representation fell below an objective standard of reasonableness," with

[2] "RR" refers to the court reporter's record of the transcribed testimony during the trial, preceded by the volume number and followed by the page number.

reasonableness judged under professional norms prevailing at the time counsel rendered assistance. *Id.* at 688. The standard requires the reviewing court to give great deference to counsel's performance, strongly presuming counsel exercised reasonable professional judgment. *Id.* at 690. Under the second prong, the petitioner must show that his attorney's deficient performance resulted in actual prejudice. *Id.* at 687. To satisfy the prejudice prong, the habeas 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. An ineffective assistance of counsel claim fails if a petitioner cannot satisfy either the deficient performance or prejudice prong; a court need not evaluate both if he makes an insufficient showing as to either. *Id.* at 697.

In the context of § 2254(d), the deferential standard that must be accorded to counsel's representation must also be considered in tandem with the deference that must be accorded state court decisions, which has been referred to as "doubly" deferential. *Harrington v. Richter*, 562 U.S. 86, 105 (2011). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* "If the standard is difficult to meet, that is because it was meant to be." *Id.* at 102. *Also see Morales v. Thaler*, 714 F.3d 295, 302 (5th Cir. 2013).

a. Petitioner's claim that his counsel was ineffective by not requesting the mandatory hearing to designate outcry witnesses

b. Petitioner's claim that his counsel was ineffective by not objecting to hearsay testimony

Petitioner observes that several witnesses gave hearsay testimony regarding the statements allegedly made by S.T. and M.P. In the first ineffective assistance of counsel claim, Petitioner observes that Clarissa Turner, the mother of S.T., reported to Detective Kyle Kucauskas that she had a dream that her child had been molested. 5 RR 44. Principal Linda Engelking testified the mother told her she had seen S.T. "standing naked in front of her brother and she was touching herself." 3 RR 215-16. S.T.'s mother also testified that her daughter told her "Mr. Garbarini has touched my puff," and she told me about the games they were playing in the classroom. 5 RR 24.

In the second ineffective assistance of counsel claim, Petitioner argues that his attorney was ineffective for failing to object to hearsay testimony by Clarissa Turner and Linda Engelking. They testified about a time in January 2010 when there was a mention of a "tickling" incident. Ms. Turner testified she heard from S.T.'s grandmother that S.T. had said something about tickling her thigh. 5 RR 17-18. Ms. Engelking gave similar testimony, only she heard it from teacher Michele Allen who had heard it from the grandmother. 3 RR 206.

Counsel provided the following reason for not objecting to the testimony:

19. I did not request a hearing to designate outcry witnesses.

20. I had been informed by the prosecution that Clarissa Turner (S.T.'s mother) was the outcry witness for S.T., and Robyn Miller (M.P.'s mother) was the outcry witness for M.P.

21. I did not object to the testimony of Linda Engelking, Robyn Miller, or Clarissa Turner as improper outcry witnesses.

22. Robyn Miller and Clarissa Turner were proper outcry witnesses. I allowed Linda Engelking, the school principal, to testify. about what M.P. told her because it was different than what M.P had told her mother. I thought that would be important for the jury to hear.

23. I did not object to the testimony of Linda Engelking, Robyn Miller, or Clarissa Turner as improper hearsay, when testifying about information the victims told them.

24. Same answer as No. 22. In addition, the Writ Application on page 9 states that "the statements of S.T. and M.P. were not reliable." That is exactly what I was trying to demonstrate. Each time the complainants told their story, the facts changed a little. The only way to point that out was to get each version in front of the jury. And bear in mind, one (1) of my two (2) defensive theories was that the complainants were not credible, and the more versions of what their stories were, the better chance I had of showing that to the jury.

SHCR at 206-7.

After considering all of the evidence, including counsel's affidavit, the trial court made the following findings on this issue:

15) The State informed counsel of who the outcry witnesses were prior to trial;

16) Counsel acknowledges that both of the victims' mothers were proper outcry witnesses;

17) Counsel did not object to Linda Engelking's testimony about what one the victims told her because what the victim told her differed from what she told her mother;

18) One of [Petitioner's] defensive theories was that the victims were not truthful;

19) Counsel wanted the jury to hear that the victim had given Engelking a different story than she gave to her mother;

20) Counsel had a valid legal strategy for not objecting to the testimony or requesting a hearing;

21) [Petitioner] has not shown by a preponderance of the evidence that counsel's failure to object or request a hearing was deficient;

22) Engelking's testimony supported a defensive theory;

23) Any objections to the victims' mothers' testimony would have been overruled;

24) [Petitioner] has not shown by a preponderance of the evidence that the outcome of the trial would have been different had counsel objected to the mothers' or Engelking's testimonies or requested a hearing.

SHCR at 253-54. The Texas Court of Criminal Appeals subsequently denied the application without written order on findings of the trial court without a hearing.

Petitioner argues that his attorney was ineffective because he failed to demand a hearing under Article 38.072 of the Texas Code of Criminal Procedure. The Texas Court of Criminal Appeals discussed Article 38.072 hearings in *Sanchez v. State*, 354 S.W.3d 476 (Tex. Crim. App. 2011). The Court noted that hearsay evidence is inadmissible unless it falls into one of the exceptions provided by the Rules of Evidence or statutory authority. *Id.* at 484. Article 38.072 is one such exception. "When a defendant is charged with certain offenses against a child under the age of 14 or a disabled individual, Article 38.072 allows into evidence the complainant's out-of-court statement so long as that statement is a description of the offense and is offered into evidence by the first adult the complainant told of the offense. Though the terms do not appear in the statute, the victim's out-of-court statement is commonly known as an 'outcry,' and an adult who testifies about the outcry is commonly known as an 'outcry witness.'" *Id.* The Court further observed that the statutory provision comports with the guarantees of the Sixth Amendment because the child declarant is available for cross-examination at trial. *Id.* at 486 n.26.

In the present case, counsel was aware of the outcry witnesses prior to trial, and he found that they were proper outcry witnesses. The State habeas court likewise found that they were proper outcry witnesses and objections to the mothers' testimony would have been overruled. Counsel was not required to make frivolous or futile motions or objections. *Johnson v. Cockrell*, 306 F.3d 249, 255 (5th Cir. 2002); *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990).

In addition to the foregoing, counsel developed a strategy of having as many versions of the children's stories in front of the jury as possible to show that their stories changed each time they told it and to show the jury that they were not reliable. The Supreme Court explained in *Strickland* that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *See Strickland,* 466 U.S. at 690-91. Federal courts "will not question a counsel's reasonable strategic decisions." *Bower v. Quarterman*, 497 F.3d 459, 470 (5th Cir. 2007), *cert. denied*, 553 U.S. 1006 (2008). Habeas corpus relief is unavailable if a petitioner fails to overcome the presumption that counsel made sound strategic decisions. *Del Toro v. Quarterman*, 498 F.3d 486, 491 (5th Cir. 2007), *cert. denied*, 552 U.S. 1245 (2008). Counsel developed a strategy based on the evidence, and Petitioner has not overcome the presumption that it was a sound strategy.

Finally, the first two ineffective assistance of counsel claims should be denied because Petitioner has not shown, as required by 28 U.S.C. § 2254(d), that the State court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. Moreover, the ineffective assistance of counsel claims must be rejected because he failed to overcome the "doubly" deferential standard that must be accorded to counsel's representation in tandem with the deference that must be accorded state court decisions under § 2254(d). *Richter*, 562 U.S. at 105. Relief on Petitioner's first two ineffective assistance of counsel claims lack merit.

c. Petitioner's claim that counsel provided ineffective assistance by not objecting to the unsworn statement by Benjamin Turner

Petitioner observes that Detective Kucauskas read from an unsworn statement by Benjamin Turner, S.T.'s father. 7 RR 191. In the statement, Benjamin Turner writes that S.T. said, "Mr. [Garbarini] touched my puff" and that it happened "on the first day of school." Petitioner complains that Mr. Turner did not testify at trial, was not subject to cross-examination, and did not verify that the statement was written by him. He stresses that without the statement, the State had no evidence that any abuse occurred over a period of thirty days or more. Nonetheless, counsel did not object to the statement.

Counsel provided the following explanation for not objecting to Detective Kucauskas reading from the statement:

> 25. I did not object to the admission of Benjamin Turner's written statement. In fact, I introduced it as Defense Exhibit No. 101 during the testimony of Detective Kyle Kucauska of the Murphy Police Department, whom I called as a witness during the presentation of the defense case.
>
> 26. I actually addressed the statement during my direct examination of Detective Kucauska.
>
> 27. I did in fact use the statement to advance one of my defensive theories, to wit, that S.T. was not a credible witness. Her mother, Clarissa Turner, had testified earlier that S.T. did NOT talk to her father, Benjamin Turner, about the incidents in question. However, in an interview with Detective Kucauska, Benjamin said that he DID in fact question S.T. about her allegations. I thought this was an important point, since Dr. Gottlieb had testified that the more times a young child was questioned prior to the forensic interview, the greater the chance that her outcry might be tainted.
>
> The problem was that Benjamin Turner was not available to testify. I argued to the Court that I had a right to show the jury what S.T. had said to her father. The Court agreed, and allowed me to introduce the written statement in lieu of Benjamin's live testimony. That statement contained S.T.'s allegations, which were different than what she had told her mother. This was another fact that I believed cast doubt on the credibility of S.T.

SHCR at 208.

After considering all of the evidence, including counsel's affidavit, the trial court made the following findings on this issue:

25) Counsel wanted to use Benjamin Turner's statement because he believed it contradicted S.T.'s mother's testimony and because it supported the testimony of the defense expert;

26) Counsel is mistaken that regarding which party offered the statement into evidence;

27) This mistake does not affect the credibility of counsel's statements that he believed Turner's statements were necessary to support defensive theories in this case;

28) [Petitioner] has not shown by a preponderance of the evidence that counsel was ineffective for failing to object to Turner's statement;

29) There was evidence of [Petitioner's] guilt other than Turner's statement;

30) [Petitioner] has not shown by a preponderance of the evidence that the outcome of the trial would have been different had counsel objected to Turner's statement.

SHCR at 254-55. The Texas Court of Criminal Appeals subsequently denied the application without written order on findings of the trial court without a hearing.

As with the two previous ineffective assistance of counsel claims, counsel wanted the evidence presented to the jury. Again, he developed a strategy of having as many versions of the children's stories in front of the jury as possible to show that their stories changed each time they told it and to show the jury that they were not reliable. As with the previous two ineffective assistance of counsel claims, Petitioner failed to overcome the presumption that counsel made a sound strategic decision.

Finally, the ineffective assistance of counsel claim should be denied because Petitioner has not shown, as required by 28 U.S.C. § 2254(d), that the State court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. Moreover, the ineffective assistance of counsel claim must be rejected because he failed to overcome the "doubly" deferential standard that must be accorded to counsel's representation in tandem with the deference that must be accorded state court decisions under § 2254(d). *Richter*, 562 U.S. at 105. Petitioner's third ineffective assistance of counsel claim lacks merit.

d. Petitioner's claim that counsel provided ineffective assistance by not objecting to the video interviews of S.T. and M.P.

Petitioner notes that the State showed the jury three video interviews: one of S.T. conducted by Vanessa Gill on May 19, 2010; one of M.P. conducted by Erica Stanley on May 24, 2010; and a second one of M.P. conducted by Ms. Gill on May 26, 2010. He further notes that Sergeant Gerald Burke, of the Collin County Rural Child Abuse Task Force, was present at the interview of S.T. He participated in the interview by suggesting questions for Ms. Gill. 4 RR 197; 6 RR 30. Clarissa Turner testified that she arrived at the Child Advocacy Center with S.T. and waited more than an hour for the interview to begin. 5 RR 50. The video of this interview did not begin until five hours later, and Ms. Turner testified that she and S.T. "were there for a long time." 5 RR 51. Vanessa Gill testified that she hoped her questions would validate in the minds of each child that they were victims of abuse. 4 RR 193-94.

Petitioner observes that the legislature created Tex. Code Crim Proc. art. 38.071 § 5(a) to allow a recording of an oral statement of the child victim to be admitted at trial. Before a video can be admitted, the court must find the following:

1. No attorney or peace officer was present when the statement was made;
2. Only one continuous recording of the child was made; and
3. The statement was not made in response to questioning calculated to lead the child to make a particular statement.

Tex. Code Crim. Proc. art. 38.071 § 5(a)(1, 4, 12). Petitioner argues that all three requirements were violated. More specifically, S.T. was interviewed for five hours before the video began. The interview was not continuous. A peace officer, Sgt. Burke, was present. He finally asserts that both interviews were conducted by Ms. Gill, who used questioning calculated to lead the children to make particular statements. Petitioner argues that his attorney provided ineffective assistance of counsel by not objecting to the video interviews of S.T. and M.P.

Counsel provided the following reasons for not objecting to the video interviews of S.T. and M.P.:

> 28. I did not object to the admission of the videotaped interviews of the two (2) complainants.
>
> 29/30. M.P. was interviewed twice at the Collin County CAC. During her first recorded interview, she denied being fondled or touched inappropriately by [Petitioner]. Then, two (2) days later, she was re-interviewed at the CAC, and told a much different story. I thought it was important for the jury to see both interviews.
>
> S.T. was also interviewed at the CAC, and I wanted the jury to see this videotape as well.
>
> Dr. Michael Gottlieb, one of my experts, viewed all three videotapes, and testified that he was "troubled" by some of the questions and techniques used by Vanessa Gill, the CAC interviewer. I believed this would, once again, cast doubt on the credibility of the complainants.
>
> In addition, I did not want the jury to hear from the complainants in the courtroom. I was worried that, now a couple of years older, they would make better witnesses than I thought they appeared during the interviews.
>
> And, tactically, I believed that by agreeing to let the jury watch the videotapes, the State would not call the complainants to the stand. I was correct. And then, in final argument, I was able to tell the jury that the State could have called them as witnesses, but did not do so. This, I argued, denied them the ability to judge the credibility of the complainants for themselves, instead having to rely on videotapes more than two (2) year old. I also speculated that the State did not call them to the stand because their stories might have changed again, and the State did not want the jury to know that.
>
> I believed then, as I do today, that I made the correct decision in agreeing to let the jury see the videotapes, in lieu of live testimony from the complainants.

SHCR at 208-09.

After considering all of the evidence, including counsel's affidavit, the trial court made the following findings on this issue:

> 31) Counsel wanted the jury to see the interviews so that he could argue to the jury that the victims were not credible;
>
> 32) Counsel wanted the jury to see the interviews because his expert had viewed the interviews and was troubled by some of the techniques and questions used by the interviewer;
>
> 33) Counsel believed that by agreeing to let the jury watch the taped interviews, the State would not call the victims to testify at trial;
>
> 34) The State did not call the victims to testify at trial;

35) Counsel was able to attack the victims' credibility when they did not testify;

36) [Petitioner] had a valid strategy for not objecting the videotaped interviews of the victims;

37) [Petitioner] has not shown by a preponderance of the evidence that counsel's failure to object to the interviews was deficient;

38) There was evidence of [Petitioner's] other than the interviews;

39) [Petitioner] has not shown by a preponderance of the evidence that the outcome of the trial would have been different had counsel objected to the interviews.

SHCR at 255-56. The Texas Court of Criminal Appeals subsequently denied the application without written order on findings of the trial court without a hearing.

As with the three previous ineffective assistance of counsel claims, counsel wanted the evidence presented to the jury. Again, he developed a strategy of having as many versions of the children's stories in front of the jury as possible to show that their stories changed each time they told it and to show the jury that they were not reliable. As with the previous three ineffective assistance of counsel claims, Petitioner failed to overcome the presumption that counsel made a sound strategic decision.

Finally, the ineffective assistance of counsel claim should be denied because Petitioner has not shown, as required by 28 U.S.C. § 2254(d), that the State court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. Moreover, the ineffective assistance of counsel claim must be rejected because he failed to overcome the "doubly" deferential standard that must be accorded to counsel's representation in tandem with the deference that must be accorded state court decisions under § 2254(d). *Richter*, 562 U.S. at 105. Petitioner's fourth ineffective assistance of counsel claim lacks merit.

e. Petitioner's claim that counsel provided ineffective assistance by not objecting to the irrelevant testimony

Petitioner notes that Linda Engelking, Michele Allen, Leslie Hendrix, and Jennifer Dahl gave testimony relating to several "acts" involving students other than S.T. and M.P. They were asked

about a bag in Petitioner's classroom which contained a change of clothes for students (3 RR 25-28, 109-10, 112-13, 164-65), about the time he held the hand of a student (3 RR 23, 107, 138, 185, 208), about when he had a student sitting on his lap (3 RR 24, 106, 133, 138, 156-59, 210), about when he took pictures of the students for the yearbook (3 RR 10, 132, 136), and other incidental contacts with children (3 RR 211). Petitioner stresses that none of these acts describe any incidents involving S.T. and M.P. He argues that his attorney was ineffective by not objecting to this irrelevant testimony.

Counsel provided the following reasons for not objecting to the testimony:

43. No, I did not object to testimony concerning [Petitioner's] other physical and non-physical contact with his students.

44. I wanted the jury to see that contact with his students was common, and not out-of-the-ordinary and suspicious, as the State was trying to infer.

Holding Hands: Even though teacher Michelle Allen testified that it was inappropriate for male teachers to hold the hands of their female students, Allen testified on cross that SHE would hold the hands of male students, thus creating a double standard that I wanted the jury to note. And Principal Linda Engleking testified on cross that it was "common" for [Petitioner] to walk on the playground holding hands with his students, and it was "not at all" inappropriate. By allowing this testimony, I wanted the jury to get comfortable with the idea that [Petitioner's] physical contact was appropriate and non-sexual.

Sitting in his Lap: Again, I wanted the jury to get comfortable with the idea that physical contact with his students was the "norm", and not the exception. And I got Linda Engleking to admit on cross that "lots of kids" sat on her lap, and that there was nothing wrong or inappropriate about that.

Yearbook Photographs: Because of what Jennifer Edwards wrote in her statement that was incorporated into the search warrant affidavit (that officers would most likely find photos of young children in [Petitioner's] residence), I wanted to establish that had any photos been found, it was because [Petitioner] took them for school purposes. And I got Michelle Allen to admit on cross that [Petitioner] was a professional photographer on the side, whose services were used by teachers and parents alike. I wanted the jury to understand that there was nothing wrong with [Petitioner] taking photos of the girls.

Contact in General: Just as with the sitting in the lap and holding of hands, I wanted the jury to get comfortable with the idea that physical contact with his students was the "norm", and not the exception.

Teaching Non-Verbal Children: I honestly do not remember this testimony, but I would have to assume that I wanted it in to once again get the jury comfortable with the idea that [Petitioner's] physical contact with his students was not inappropriate.

45. Yes, as noted in 44 above, I did cross-examine witnesses about this contact.

> 46. As noted in above, my theory was that any physical contact that [Petitioner] might have had with M.P. and S.T. was completely appropriate, and that in general, physical contact with his students was the norm, and not the exception.

SHCR at 210-11.

After considering all of the evidence, including counsel's affidavit, the trial court made the following findings on this issue:

> 56) Counsel did not object to evidence that [Petitioner] held hands with a student, had a student sit on his lap, photographed children for the yearbook, and had previously taught non-verbal children because he wanted the jury to see that [Petitioner's] contact with children was common and not suspicious;
>
> 57) In some portions of his affidavit responding to [Petitioner's] ground for relief, counsel confuses the facts, such as which party was asking questions, whether certain testimony was elicited, and which witness gave specific testimony;
>
> 58) None of counsel's confusion affects the credibility of his assertions that evidence of [Petitioner's] contact with other children supported a defensive theory;
>
> 59) Counsel had a valid strategy for not objecting to the testimony;
>
> 60) [Petitioner] has not shown by a preponderance of the evidence that counsel was deficient for failing to object to evidence of his contact with other children;
>
> 61) There was strong evidence of [Petitioner's] guilt in this case;
>
> 62) [Petitioner] has not shown by a preponderance of the evidence that he would not have been convicted had counsel objected to the admission of evidence of [Petitioner's] contact with other children;

SHCR at 258-59. The Texas Court of Criminal Appeals subsequently denied the application without written order on findings of the trial court without a hearing.

As with the four previous ineffective assistance of counsel claims, counsel wanted the evidence presented to the jury. Again, he developed a strategy of wanting the jury to see that Petitioner's behavior was normal and not inappropriate. As with the previous four ineffective assistance of counsel claims, Petitioner failed to overcome the presumption that counsel made sound strategic decisions.

Finally, the ineffective assistance of counsel claim should be denied because Petitioner has not shown, as required by 28 U.S.C. § 2254(d), that the State court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable

determination of the facts in light of the evidence presented in the State court proceedings. Moreover, the ineffective assistance of counsel claim must be rejected because he failed to overcome the "doubly" deferential standard that must be accorded to counsel's representation in tandem with the deference that must be accorded state court decisions under § 2254(d). *Richter*, 562 U.S. at 105. Petitioner's fifth ineffective assistance of counsel claims should be rejected.

f. Petitioner's claim that counsel provided ineffective assistance by not objecting to evidence regarding acts involving BDSM

g. Petitioner's claim that counsel provided ineffective assistance by not requiring a single limiting instruction

Petitioner complains that the State introduced several pieces of evidence and testimony detailing his interest in BDSM - bondage restraints, ball-gags, adult sex toys, a cage, etc. 4 RR 14, 21, 25-35, 39-40. The State also described in graphic detail the websites owned by the BDSM oriented company Kink.com. 7 RR 146-49. Petitioner stresses that the BDSM had absolutely nothing to do with the charges and was completely irrelevant. He argues that counsel was ineffective by not objecting to the evidence regarding acts involving BDSM. He further argues that counsel was ineffective by not asking for a limiting instruction with respect to the evidence.

Counsel provided the following reasons for not objecting to the testimony:

47. No, I did not object to the introduction of the "plethora of evidence" regarding [Petitioner's] sexual obsessions.

48. One of my defensive theories was that "while [Petitioner] had a number of serious sexual issues, pedophilia was not one of them," so I made the tactical decision NOT to challenge the evidence in front of the jury, because every single item corroborated that theme. In addition, there was absolutely no evidence of child pornography found during the search, even though an affidavit attached to the probable cause affidavit predicted that it would be. I thought this would be important to the jury, and my fear was that if I objected to the items that I was, in essence, relying on, the jury would believe me to be disingenuous. So I did not object to them. Specifically:

[Petitioner's] Interest in BDSM and Infantilism: this corroborated my theory.

Bag of Clothes: I wanted to establish that there was a legitimate purpose for the bag of clothes in [Petitioner's] classroom, and that it had nothing to do with the allegations of S.T and M.P.

Web Searches: I believed that the web searches for "pedophile" and "child molestation" were going to be admitted by the Court, so rather than object and draw

attention to it, I decided to try to explain it. In fact, I did so during cross examination testimony related to a movie that [Petitioner] had ordered.

Computer Game: Once again, this corroborated my defensive theory, and I was able to establish on cross that it had NOTHING to do with pedophilia. It had everything to do with [Petitioner's] adult fetishes.

Websites: Like everything else, this corroborated my defensive theory, since every one of the websites he visited were related to ADULT porn.

Anime: Since the State's position was that the anime WAS child pornography, I wanted to establish that it legally was not, thereby undermining the State's case. So I did not object to it. And as I thought, Chris Meehan testified that it did not satisfy the legal definition of child pornography.

49. Yes, I did cross examine several witnesses about this evidence during the trial, including Chris Meehan and Gerald Burk.

50. My theory on cross examination was that these items corroborated my defensive theory that "while [Petitioner] had a number of serious sexual issues, pedophilia was not one of them."

51. I did not request a limiting instruction on any of the evidence.

52. I intended to argue (and did so) that those items corroborated [Petitioner's] adult sexual fetishes and obsessions, and I wanted the ability to do so without running afoul of those instructions. I also wanted the ability to argue that NOTHING found on his computers was illegal, which is why I wanted the jury to know about all of it.

SHCR at 211-12.

After considering all of the evidence, including counsel's affidavit, the trial court made the following findings on this issue:

63) One of the main defensive theories was that while [Petitioner] had sexual fetishes, none of his sexual behavior was illegal or involved children;

64) Counsel did not object to the admission of evidence regarding [Petitioner's] interest in bondage and infantalism, a bag of children's clothing from [Petitioner's] classroom, web searches, computer games, adult pornography, and computer anime because he feared if he objected to them, he would lose the jury's confidence in his argument that [Petitioner's]s sexual fetishes were not illegal and were adult;

65) Counsel had a valid legal strategy for not objecting to the admission of evidence regarding [Petitioner's] interest in bondage and infantalism, a bag of children's clothing from [Petitioner's] classroom, web searches, computer games, adult pornography, and computer anime;

66) [Petitioner] has not shown by a preponderance of the evidence that trial counsel was deficient for failing to object to evidence regarding [Petitioner's] interest in bondage and infantalism, a bag of children's clothing from [Petitioner's] classroom, web searches, computer games, adult pornography, and computer anime;

67) There was other evidence besides regarding [Petitioner's] interest in bondage and infanitalism, a bag of children's clothing from [Petitioner's] classroom, web searches, computer games, adult pornography, and computer anime that support [Petitioner's] guilt;

68) [Petitioner] has not shown that the outcome of the trial would have been different had counsel objected to the admission of evidence regarding [Petitioner's]s interest in bondage and infantalism, a bag of children's clothing from [Petitioner's] classroom, web searches,computer games, adult pornography, and computer anime;

69) Counsel did not request a limiting instruction on the evidence regarding [Petitioner's] interest in bondage and infantalism, a bag of children's clothing from [Petitioner's] classroom, web searches, computer games, adult pornography, and computer anime because he wanted to argue that [Petitioner's] sexual fetishes were adult in nature and not illegal;

70) [Petitioner] had a valid legal strategy for not requesting a limiting instruction on evidence regarding [Petitioner's] interest in bondage and infantalism, a bag of children's clothing from [Petitioner's] classroom, web searches, computer games, adult pornography, and computer anime;

71) [Petitioner] has not shown by a preponderance of the evidence that counsel was deficient for failing to request a limiting instruction on evidence regarding [Petitioner's] interest in bondage and infantalism, a bag of children's clothing from [Petitioner's] classroom, web searches, computer games, adult pornography, and computer anime;

72) There was strong evidence of [Petitioner's] guilt in this case;

73) [Petitioner] has not shown by a preponderance of the evidence that the outcome of the trial would have been different if counsel had requested a limiting instruction on the evidence regarding [Petitioner's] interest in bondage and infantalism, a bag of children's clothing from [Petitioner's] classroom, web searches, computer games, adult pornography, and computer anime;

SHCR at 259-62. The Texas Court of Criminal Appeals subsequently denied the application without written order on findings of the trial court without a hearing.

As with the five previous ineffective assistance of counsel claims, counsel wanted the evidence presented to the jury. He developed a strategy that while Petitioner had a number of serious sexual issues, pedophilia was not one of them, and that Petitioner's sexual fetishes were adult in nature and not illegal. Under these circumstances, counsel did not want limiting instructions. As with the previous five ineffective assistance of counsel claims, Petitioner failed to overcome the presumption that counsel made sound strategic decisions.

Finally, the ineffective assistance of counsel claims should be denied because Petitioner has not shown, as required by 28 U.S.C. § 2254(d), that the State court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. Moreover, the ineffective assistance of counsel claim must be rejected because he failed to overcome the "doubly" deferential standard that must be accorded to counsel's representation in tandem with the deference that must be accorded state court decisions under § 2254(d). *Richter*, 562 U.S. at 105. Petitioner's sixth and seventh ineffective assistance of counsel claims lack merit.

h. Petitioner's claim that counsel provided ineffective assistance by not obtaining the attendance records of S.T.

Petitioner's last ineffective assistance of counsel claim is that counsel was ineffective by not obtaining the attendance records of S.T. He observed that the State gave testimony suggesting S.T. was abused on May 18, 2010. Petitioner states that he informed counsel that this was impossible because S.T. was absent on that day. Counsel informed him that he would have the attendance records admitted into evidence. Instead of getting the records and offering them into evidence, counsel relied on the State to introduce S.T.'s attendance records. The records offered by the State did not, however, include dates prior to May 19, 2010.

Counsel provided the following explanation for not obtaining the attendance records of S.T.:

57. I did review the attendance records offered by the State prior to their introduction in evidence.

59. I did not seek to obtain the records myself.

60. I did not think they would be relevant, primarily because of the legal concept of "on or about." And since neither the children nor their parents could establish any of the exact dates of the alleged fondling, the records would have had no evidentiary value.

61. In my opinion, the records would not have supported any defensive claim.

SHCR at 213.

After considering all of the evidence, including counsel's affidavit, the trial court made the following findings on this issue:

74) Counsel did review the State's copy of the attendance records;

75) The State had alleged that the offenses occurred on or about a certain date;

76) The parents and victims could not establish an exact date that the offenses occurred;

77) Counsel did not seek to obtain his own copy of the attendance records because the records would not have had an evidentiary value;

78) Counsel had a valid legal strategy for not obtaining his own copy of the attendance records;

79) [Petitioner] has not shown by a preponderance of the evidence that trial counsel was deficient for not obtaining his own copy of the attendance records;

80) [Petitioner] has not shown by a preponderance of the evidence that the outcome of the trial would have been different had counsel obtained his own copy of the attendance records;

SHCR at 262-63. The Texas Court of Criminal Appeals subsequently denied the application without written order on findings of the trial court without a hearing.

As with the seven previous ineffective assistance of counsel claims, counsel had a valid legal strategy for not obtaining his own copy of the attendance records. The State alleged that the offenses occurred on or about a certain date; thus, the specific date was not an issue. The parents could not establish a specific date. Counsel thus concluded that the records did not have any evidentiary value under the circumstances. As with the previous seven ineffective assistance of counsel claims, Petitioner failed to overcome the presumption that counsel made a sound strategic decision. Moreover, as explained by the State court, Petitioner cannot show prejudice. The claim lacks merit.

Finally, the ineffective assistance of counsel claims should be denied because Petitioner has not shown, as required by 28 U.S.C. § 2254(d), that the State court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. Moreover, the ineffective assistance of counsel claim must be rejected because he failed

to overcome the "doubly" deferential standard that must be accorded to counsel's representation in tandem with the deference that must be accorded state court decisions under § 2254(d). *Richter*, 562 U.S. at 105. Petitioner's eighth ineffective assistance of counsel claims lacks merit.

4. Petitioner's claim that he was denied due process when alterations were made to the Discovery Agreement after he had signed it

Petitioner next argues that he was denied due process when alterations were made to the Discovery Agreement after he had signed it. He states that after he signed the agreement, an unknown party added, handwritten in ink, waivers of 38.072, 37.07, and 38.37 of the Texas Code of Criminal Procedure and § 404(b) of the Texas Rules of Evidence.

The Director persuasively argues that the claim is conclusory. Petitioner has offered nothing other than conclusory allegations and bald assertions, which are insufficient to support a petition for a writ of habeas corpus. *See Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000); *Koch,* 907 F.2d at 530; *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983).

Furthermore, the trial court considered the claim and made the following findings:

95) [Petitioner] has not alleged how the alleged modification of the discovery documents prejudiced him or otherwise affected his rights;

96) [Petitioner] has not alleged facts that, if true, entitle him to relief;

97) [Petitioner's] allegation that the discovery documents were modified can be construed as a violat[ion] of the Texas Code of Criminal Procedure; and

98) Statutory violations are not cognizable on writ of habeas corpus.

SHCR at 265-66. The Texas Court of Criminal Appeals subsequently denied the application without written order on findings of the trial court without a hearing.

The ground for relief should be denied for the additional reason that Petitioner has not shown, as required by 28 U.S.C. § 2254(d), that the State court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. Moreover, the State court properly found that mere statutory violations are not cognizable on a writ of habeas

corpus. A person seeking federal habeas corpus review must assert a violation of a federal constitutional right. *Lowery*, 988 F.2d at 1367. Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also present. *Estelle*, 502 U.S. at 67-68; *West*, 92 F.3d at 1404. In the course of reviewing state proceedings, a federal court does "not sit as a super state supreme court to review error under state law." *Wood*, 503 F.3d at 414; *Porter*, 709 F.2d at 957. Petitioner has not made the requisite showing of a violation of a federal constitutional right. Petitioner has not shown that he is entitled to relief on this ground for relief.

5. Petitioner's claim that he was denied due process when the prosecution made improper statements to the jury during closing arguments

Petitioner finally complains about statements made by the State during closing arguments. He stresses that the State made two claims regarding missing evidence, two statements regarding statements he allegedly made, and claims that S.T. knew about his private life before anyone else. He complains that the State attacked the veracity of his defense and dwelled on his character. He complains that the State went even further using character in closing arguments by reliving some of the witnesses' reactions. He argues that the State tried to bolster the credibility of the victims by referring to them as "heroes."

Under Texas law, the Texas Court of Criminal Appeals has repeatedly held that the following areas are proper for argument: (1) summary of the evidence, (2) reasonable deductions from the evidence, (3) responses to opposing counsel's argument, and (3) pleas for law enforcement. *Borjan v. State*, 787 S.W.2d 53, 55 (Tex. Crim. App. 1990); *Allridge v. State*, 762 S.W.2d 146, 155 (Tex. Crim. App. 1988). The Fifth Circuit has recognized that these four areas are acceptable under Texas law. *Buxton v. Collins*, 925 F.2d 816, 825 (5th Cir.), *cert. denied*, 498 U.S. 1128 (1991). In the present case, the State's closing argument fell within the parameters of a proper jury argument. Petitioner has not shown a constitutional violation by the argument.

The Court would add that counsel addressed Petitioner's claims as follows:

> 67. Yes, I did object to the State referring to evidence not introduced in trial during their final argument, and it was sustained by the Court. That argument had to do with other students corroborating the testimony of S.T and/or M.P.

> I did not object to the other arguments complained about in [Petitioner's] writ.
>
> 68. In my almost 40 years of criminal trial work, I have learned that objections during closing arguments are:
>
> 1. most likely to be overruled (in the Judge's discretion), thereby drawing more attention to that particular argument, and even creating the impression that the Judge APPROVES of the argument; and
>
> 2. are most likely to irritate the jury, especially if they are routinely overruled.
>
> As a result, my trial philosophy is not to object unless, in my opinion, the statement REALLY hurts me. And other than referring to evidence not introduced at trial, I did not believe that any of the arguments complained about did that much damage. Some of the statements (attacking [Petitioner's] veracity, drawing inferences from their failure to call the alleged victims to testify, etc.) were in direct response to arguments that I had made, and I believed that they were proper. Others, which might have been closer to the line, still did not, in my opinion, rise to the level of being objectionable. So as a matter of trial tactics, I remained seated and did not object.

SHCR at 213-14. The trial court, in turn, found that there was strong evidence of Petitioner's guilt and that he has not shown that the outcome of the trial would have been different if counsel had objected. SHCR at 264-65.

It should be noted that Petitioner raised this issue in the context of an ineffective assistance of counsel claim at the State court level, but the basic finding remains the same. To prevail on a claim of prosecutorial misconduct in a state habeas corpus proceeding, a petitioner must show that the prosecutor's actions were so egregious as to render the trial fundamentally unfair. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Cobb v. Wainwright*, 609 F.2d 754, 756 (5th Cir.), *cert. denied*, 447 U.S. 907 (1980). Petitioner has not made the requisite showing. Moreover, as found by the State habeas court, he has not shown that the outcome of the trial would have been different. Stated differently, he has not shown prejudice. Consequently, relief should be denied on Petitioner's last ground for relief.

Certificate of Appealability

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, under 28 U.S.C. § 2253(c)(1), he must first obtain a certificate of appealability ("COA") from a circuit justice

or judge. *Id.* Although Petitioner has not yet filed a notice of appeal, the court may address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner need only show 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). The Supreme Court recently emphasized that the COA inquiry "is not coextensive with merits analysis" and "should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336). Moreover, "[w]hen the district court denied relief on procedural grounds, the petitioner seeking a COA must further show that 'jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Rhoades v. Davis*, 852 F.3d 422, 427 (5th Cir. 2017) (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012)).

In this case, reasonable jurists could not debate the denial of Petitioner's § 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. Accordingly, it is respectfully recommended that the Court find that Petitioner is not entitled to a certificate of appealability as to his claims.

Recommendation

It is accordingly recommended that the above-styled petition for writ of habeas corpus be denied and that the case be dismissed with prejudice. It is further recommended that a certificate of appealability be denied.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superceded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this 6th day of December, 2018.

Christine A. Nowak
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

JOSEPH PETER GARBARINI, III, #1754849	§	
VS.	§	CIVIL ACTION NO. 4:16cv198
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

Petitioner Joseph Peter Garbarini, III, a prisoner confined in the Texas prison system, filed the above-styled and numbered petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The case was referred to United States Magistrate Judge Christine A. Nowak, who issued a Report and Recommendation concluding that the petition should be denied. Both sides have filed objections.

The Report of the Magistrate Judge, which contains her proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having made a *de novo* review of the objections raised by the parties to the Report, the court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and the objections are without merit. Therefore, the court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the court. It is accordingly

ORDERED that the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 is **DENIED** and the case is **DISMISSED** with prejudice. A certificate of appealability is **DENIED**. All other motions not previously ruled on are hereby **DENIED**.

SIGNED this the 12th day of February, 2019.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19-40226

JOSEPH PETER GARBARINI,

Petitioner-Appellant,

v.

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

Respondent-Appellee.

Order

In May 2010, a kindergarten student complained that her teacher, Joseph Garbarini, had touched her genitals on numerous occasions while playing a "game" in which he pretended to change her diaper. Days later, a second student said that Garbarini had repeatedly touched her genitals while playing a similar "game."

A jury convicted Garbarini of one count of continuous sexual abuse of a child and one count of sexual performance by a child. *See* Tex. Penal Code §§ 21.02, 43.25. Garbarini lost his direct appeal and was denied state habeas relief, so he filed a 28 U.S.C. § 2254 petition in federal district court. The district court denied his petition, and he now asks us to grant him a certificate of appealability (COA) with respect to seven arguments: (1) a double jeopardy violation; (2) a jury instruction that permitted a non-unanimous verdict; (3) ineffective assistance of counsel based on failure to obtain a student's

attendance records; (4) ineffective assistance of counsel based on failure to request limiting instructions; (5) improper remarks by the prosecution during closing argument; (6) improper alteration of a discovery agreement; and (7) the district court's application of a presumption of correctness to state court findings of fact.

To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

The exhaustion requirement provides that a state prisoner must "give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). As the Supreme Court explained:

> Because it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, federal courts apply the doctrine of comity, which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.

Rose v. Lundy, 455 U.S. 509, 518 (1982) (quotation omitted). Today, the exhaustion requirement is codified in 28 U.S.C. § 2254(b)(1). Garbarini failed to exhaust his double-jeopardy claim because he did not present it to the state courts in a procedurally proper way. Therefore, relief on that claim is barred by § 2254(b)(1), and jurists of reason could not debate otherwise. Garbarini also failed to make the requisite COA showing for his other six issues. As such, his motions for a COA and for leave to proceed in forma pauperis are DENIED.

ANDREW S. OLDHAM
UNITED STATES CIRCUIT JUDGE

A True Copy
Certified order issued Dec 13, 2019

Tyke W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-40226

JOSEPH PETER GARBARINI,

Applicant,

v.

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

Respondent.

Application for a Certificate of Appealability
from the United States District Court
for the Eastern District of Texas

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:

A member of this panel previously denied Joseph Garbarini's application for a certificate of appealability ("COA") and motion for leave to proceed in forma pauperis ("IFP"). Garbarini moved for reconsideration. Garbarini failed to show, however, that he properly exhausted his double jeopardy claim. *See* 28 U.S.C. § 2254(b). To exhaust the claim, the prisoner must "give state courts a *fair* opportunity to act on their claims." *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). That means presenting it in a procedurally proper posture. *See, e.g.*, *Castille v. Peoples*, 489 U.S. 346, 351 (1989). "The [exhaustion] rule would

serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts." *Picard v. Connor*, 404 U.S. 270, 276 (1971). Here, however, Garbarini presented an ineffective assistance of counsel claim to the state courts; that is different from the double jeopardy claim he presents to us. The latter is unexhausted.

Even if the double jeopardy claim was exhausted, it would be meritless. *See* 28 U.S.C. § 2254(b)(2). Garbarini argues the State is punishing him two times for one crime. But the record reflects that the State charged Garbarini for committing two different sexual crimes involving two different children.

The COA application is DENIED and the IFP motion is DENIED as moot.

STEPHEN A. HIGGINSON, concurring in part, dissenting in part:

A Texas jury convicted Joseph Garbarini of one count of continuous sexual abuse of a child and one count of sexual performance by a child. *See* Tex. Penal Code §§ 21.02, 43.25. Garbarini was sentenced to 52 years for the first offense and 10 years for the second offense. *Garbarini v. Texas*, No. 05-12-00029, 2013 WL 3947154, at *1 (July 29, 2013 Tex. Ct. App.). Garbarini moved for a certificate of appealability (COA) on seven separate issues and also moved for leave to proceed IFP. We denied the COA on each of the seven issues presented. *Garbarini v. Davis*, No. 19-40226 (5th Cir. Dec. 13, 2019). I would grant Garbarini's reconsideration motion only as to his double-jeopardy claim and grant Garbarini leave to proceed in forma pauperis (IFP) on that claim.

I agree with the magistrate judge and district court judge that Garbarini's double-jeopardy claim is not procedurally barred because he exhausted it before the state habeas court. To exhaust state remedies, the petitioner must "fairly present[]" the "substance" of his claim to the state courts, *Picard v. Conner*, 404 U.S. 270, 275–76 (1971), but the petitioner "need not spell out each syllable of the claim before the state court to satisfy the exhaustion requirement." *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998). Although Garbarini styled his double-jeopardy claim in state court as an ineffective assistance of counsel claim,[1] Garbarini specifically identified the Double Jeopardy Clause and argued that his conviction on the two counts above "resulted in multiple punishments for 1 offense." Throughout, Garbarini has challenged the imposition of "multiple punishments for 1 offense" and argued that this punishment "result[s] in . . . a double jeopardy violation." Indeed, in order to adjudicate Garbarini's claim, the state habeas court stated

[1] Garbarini was proceeding pro se before the state habeas court and filled out his habeas petition on a form provided by the State of Texas.

it was deciding whether there was a "valid legal basis" for a double-jeopardy claim. Thus, "the state court[] [had] the opportunity fully to consider federal-law challenges to [its] custodial judgment." *Duncan v. Walker*, 533 U.S. 167, 178–79 (2001).

Because Garbarini's application for a COA on his double-jeopardy claim is not procedurally barred, I would consider the merits of the application. To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). This court must decide whether to grant a COA "without full consideration of the factual or legal bases adduced in support of the claims" and without deciding the merits of the appeal. *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (internal quotation marks and citation omitted).

Because Garbarini has made the requisite plausibility showing for issuance of a COA with respect to his double-jeopardy claim,[2] *see* Texas Penal Code § 21.02 (2007); *Smallwood v. Johnson*, 73 F.3d 1343, 1350 (5th Cir. 1996); *Soliz v. State*, 353 S.W.3d 850, 852 (Tex. Crim. App. 2011), I would grant his reconsideration motion as to that claim, *see Miller-El*, 537 U.S. at 327, and also grant Garbarini's motion for leave to proceed IFP on appeal.

[2] The majority asserts the State charged Garbarini with "committing two different sexual crimes involving two different children." The majority relies on this assertion to reject Garbarini's double-jeopardy claim on the merits. But the record shows otherwise. The State charged Garbarini with committing one crime against both S.T. and M.P. (continuous sexual abuse of a young child) and one crime against only S.T. (sexual performance by a child).