# APPENDIX A

## Decision Of The United States Court Of Appeals

## For The Fifth Circuit

# United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 25, 2021
Lyle W. Cayce
Clerk

No. 20-40305

STEPHEN C. SHOCKLEY,

*Petitioner—Appellant*,

*versus*

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

*Respondent—Appellee*.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:17-CV-196

ORDER:

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

/s/ Carl E. Stewart

CARL E. STEWART
*United States Circuit Judge*

# United States Court of Appeals for the Fifth Circuit

No. 20-40305

STEPHEN C. SHOCKLEY,

*Petitioner—Appellant*,

*versus*

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

*Respondent—Appellee*.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:17-CV-196

ORDER:

IT IS ORDERED that Appellant's motion for leave to file out of time, the motion for reconsideration is DENIED.

/s/ CARL E. STEWART
CARL E. STEWART
*United States Circuit Judge*

# *United States Court of Appeals*

**FIFTH CIRCUIT**
**OFFICE OF THE CLERK**

**LYLE W. CAYCE**
**CLERK**

**TEL. 504-310-7700**
**600 S. MAESTRI PLACE,**
**Suite 115**
**NEW ORLEANS, LA 70130**

May 05, 2021

#1793928
Mr. Stephen C. Shockley
CID Coffield Prison
2661 FM 2054
Tennessee Colony, TX 75884-0000

No. 20-40305 Shockley v. Lumpkin
USDC No. 4:17-CV-196

Dear Mr. Shockley,

We received your April 27, 2021 inquiry regarding the timeliness of your petition for rehearing. On April 26, 2021, your "Notice of Timely Filing and Motion to Request Withdrawal of Mandate, Etc." was received. This motion was viewed as a motion for leave to file out of time, a *motion for reconsideration* of the court's March 25, 2021 order. This motion remains pending before the court at this time. Once a ruling is made, notice will be issued accordingly.

As a matter of information, a petition for panel rehearing of an administrative order is not allowed. Should out of time filing be allowed, the petition for panel rehearing will be filed as a motion for reconsideration of the court's order denying your motion for certificate of appealability.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Donna L. Mendez, Deputy Clerk
504-310-7677

cc: Mr. Nathan Tadema

# APPENDIX B

## Decision Of The United States Federal District Court For The Eastern District Of Texas

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

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|---|---|---|
| STEPHEN C. SHOCKLEY, #1793928 | § | |
| | § | |
| VS. | § | CIVIL ACTION NO. 4:17cv196 |
| | § | |
| DIRECTOR, TDCJ-CID | § | |

**ORDER OF DISMISSAL**

The above-entitled and numbered civil action was referred to United States Magistrate Judge Christine A. Nowak. The Report and Recommendation of the Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. Petitioner filed objections.

In his objections, Petitioner first complains that the Magistrate Judge wrongly rejected his claim that his right to due process was violated during closing argument, when the state asked the jury to convict on both his indicted offense and an unadjudicated, extraneous offense. The Magistrate Judge correctly found that this claim is procedurally barred. Petitioner also argues that he never raised this claim. He contends he claimed that the state focused the attention of the jury on the third party rebuttal witness during closing argument. However, a close review of his petition shows that he claim addressed in the Report is the claim Petitioner raised.

Petitioner next objects to the finding that his claim that trial counsel was ineffective for failing to challenge the constitutionality of Texas Penal Code section 21.02 is procedurally barred. However, he cites to page ten of the Report. On that page, the Magistrate Judge correctly found that Petitioner's claim that his right to due process and/or equal protection was denied because Texas



Cf pg 7 of Magistrate's Recommendation, This Appendix.

Penal Code section 21.02 is unconstitutional is procedurally barred. The Magistrate Judge discussed the ineffective assistance of counsel claim for failing to challenge the constitutionality of Texas Penal Code section 21.02 on pages twenty-six and twenty seven of the Report, which is addressed below.

Petitioner objects to the rejection of his claim that Texas Penal Code section 21.02 is unconstitutionally vague because it does not require jurors to unanimously agree on which predicate offenses he committed. As noted in the Report, however, this issue lacks merit as both federal and state law have rejected this claim. Therefore, Petitioner's objection that the Magistrate Judge erred in rejecting his claim that his counsel was ineffective for failing to investigate Texas Penal Code section 21.02 also does not entitle him to relief.

Petitioner next argues that the Magistrate Judge erred in finding that trial counsel was not ineffective for not objecting to the state's constructive amendment of the indictment. The Report appropriately addressed the issue and Petitioner's objections do not persuade the Court otherwise.

Lastly, Petitioner objects to the finding that counsel was not ineffective for failing to investigate or call witnesses during the punishment phase. First, as noted in the Report, Petitioner failed to attach any affidavits to his federal petition. Second, Petitioner simply disagrees with the Report, and fails to provides any further information than what he originally provided in his § 2254 petition. The Report appropriately addressed this issue and determined it did not entitle Petitioner to relief.

In sum, Petitioner fails to provide a valid basis for his objections, or demonstrate how the Magistrate Judge's Report is incorrect. After reviewing the Report and Recommendations and conducting a *de novo* review of Petitioner's objections, the Court concludes the findings and

conclusions of the Magistrate Judge are correct, and adopts the same as the findings and conclusions of the Court.

Accordingly, it is **ORDERED** the petition for writ of habeas corpus is **DENIED**, and the case is **DISMISSED** with prejudice. A certificate of appealability is **DENIED**. It is further **ORDERED** all motions by either party not previously ruled on are hereby **DENIED**.

**SIGNED this 30th day of March, 2020.**

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

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

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| STEPHEN C. SHOCKLEY, #1793928 | § | |
| | § | |
| VS. | § | CIVIL ACTION NO. 4:17cv196 |
| | § | |
| DIRECTOR, TDCJ-CID | § | |

**FINAL JUDGMENT**

Having considered the petition and rendered its decision by opinion and order of dismissal issued this same date, the Court **ORDERS** that the case is **DISMISSED** with prejudice.

**SIGNED this 30th day of March, 2020.**

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

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

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|---|---|---|
| STEPHEN C. SHOCKLEY, #1793928 | § | |
| | § | |
| VS. | § | CIVIL ACTION NO. 4:17cv196 |
| | § | |
| DIRECTOR, TDCJ-CID | § | |

**REPORT AND RECOMMENDATION**
**OF UNITED STATES MAGISTRATE JUDGE**

*Pro se* Petitioner Stephen C. Shockley, an inmate confined in the Texas prison system, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred to the United States Magistrate Judge Christine A. Nowak for findings of fact, conclusions of law, and recommendations for the disposition of the case pursuant to 28 U.S.C. § 636, and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

## PROCEDURAL BACKGROUND

Petitioner is challenging his Collin County conviction. Petitioner was convicted of continuous sexual abuse of a child, Cause No. 366-82727-09. A jury found him guilty, and sentenced him to ninety-nine years.

Petitioner appealed his conviction, which was affirmed in July 2014. *Shockley v. State*, No. 05-12-01018-CR, 2014 WL 3756301 (Tex. App. - Dallas 2014, pet. ref'd.). He filed a petition for discretionary review with Texas Court of Criminal Appeals (TCCA), which it refused on January 14, 2015. *Shockley v. State*, PDR No. 1093-14 (Tex. Crim. App. 2014).

Petitioner filed a state habeas application, which was denied with a written order. The TCCA

denied relief based on both an independent review of the record, and the trial court's findings of fact and conclusions of law. *Ex parte Shockley*, No. WR-84,823-02, 2016 WL 8603711 (Tex. Crim. App. 2016). Petitioner filed the instant petition on March 16, 2017. Petitioner alleges:

1. he was denied his right to due process when the state constructively amended his indictment by presenting evidence of an unadjudicated, extraneous offense;
2. Texas Penal Code section 21.02 is unconstitutionally vague because it does not require jurors to unanimously agree on which predicate offenses Petitioner committed; and
2. he was denied his right to effective counsel because his attorney: (a) failed to request a contemporaneous limiting instruction to the state's introduction of evidence of an extraneous offense, (b) failed to object to the state's constructive amendment of the indictment, (c) failed to object to the publication of a video of the complainant's interview recorded prior to her live testimony, (d) failed to object to the state's expert witness's testimony about the truthfulness of the complainant, (e) failed to investigate witness Deleta Brindley, (f) failed to investigate or call witnesses during the punishment phase, and (g) failed to investigate Texas Penal Code section 21.02.

**FACTUAL BACKGROUND**

The state appellate court set out the facts as follows:

Appellant's niece, E.B., accused him of sexually assaulting her when she stayed with his family on vacations and holidays. E.B. was approximately five years old when

the abuse began and fourteen when she testified at trial.

During voir dire, defense counsel predicted that he might question E.B.'s truthfulness. He asked the venire to articulate the circumstances under which a child might make a false allegation of sexual abuse. After the panel identified several circumstances, defense counsel also suggested that a child might fabricate such allegations when the child "hears about someone else this has happened to, and . . . they add it into their own reality." Counsel then told the jury an anecdote about his niece fabricating things about her deceased father that could not have actually happened.

In opening statement, defense counsel described appellant as a twenty-year veteran, decorated soldier, good father, and a good husband. He told the jury that E.B. had a troubled early life, and characterized her version of events as "a strange set of facts," because she alleged she was molested while others were present. Counsel told the jury that the allegations had come to light during a period of family turmoil, and hypothesized that E.B.'s father and grandmother had suggested the abuse to her. E.B. testified that the abuse first occurred on a camping trip with fathers, daughters, and nieces during the time appellant lived in Kansas. While E.B.'s cousins were sleeping on the bunk bed above her, appellant slid his hand under E.B.'s pants and touched her "private parts." On other occasions, appellant would lie on the bed between E.B. and appellant's daughter and tell them a bedtime story. Appellant would rub E.B.'s private parts when his daughter fell asleep.

Appellant moved to Alabama, and E.B. and her family visited him there. Appellant again touched E.B.'s private parts under her clothes. Then, appellant moved to McKinney, Texas. Between March and December 2008 in McKinney, the abuse happened repeatedly. Sometimes, they would watch a movie and appellant would wait for his daughter to fall asleep and then put his hand under E.B.'s clothes and rub her "tee tee." On other occasions, appellant would get in the middle of the children on the bed and read them a story. When appellant's daughter fell asleep appellant would rub E.B.'s private parts.

E.B. finally disclosed the abuse when her father asked if anyone had touched her. During a forensic and sexual assault exam, E.B. told the sexual assault nurse that appellant had touched her on and inside her "front part" with his hands and that it had occurred more than once at appellant's house in McKinney.

On cross-examination, defense counsel asked E.B. how many times her father had asked if someone had touched her, and she agreed it had probably been more than five times. He also asked E.B. if her grandmother had told E.B. that she had been molested when she was a child. E.B. testified that she did not remember any such conversation with her grandmother.

> During cross-examination of the forensic examiner, defense counsel elicited the examiner's agreement that E.B. had probably had a troubled early life because her birth mother had not been stable and let E.B. wander away. As a result, her father sought and obtained custody of her. Defense counsel also asked a series of questions about children who make false allegations of sexual abuse, and whether a child with a troubled past would be more inclined to fabricate such allegations. Counsel also asked whether a child sometimes gives a positive response to a parent's inquiry about abuse just to please the parent. The examiner agreed with counsel that a child in a troubled environment might make false allegations of sexual abuse.
>
> E.B.'s grandmother also testified. She described a trip to Kansas when E.B. was almost nine. The family was at a water park, and she observed E.B. in appellant's lap sitting unusually still. This gave her a "funny feeling." Later, she saw appellant stroking E.B.'s back and buttocks after a bath. She confronted appellant about what she had seen, and appellant expressed surprise that his behavior might be considered inappropriate.
>
> When the State rested, appellant called his daughter to testify. She testified that she had never seen her father do anything to E.B. when E.B. was at their house. Appellant's daughter further testified that she and E.B. would argue over the fact that she had a father who loved her but E.B. did not.
>
> After the defense rested, the State called appellant's former foster daughter, Kristen Chandler, to testify. Defense counsel objected to the testimony on several grounds, including relevance, rule 403, and rule 404(b). These objections were overruled.
>
> Chandler was thirty years old at the time of trial. Chandler testified that she was placed in the foster care of appellant and his former wife when she was thirteen years old. During that time, appellant came into her bedroom while she was sleeping and touched the front part of her genitals with his hand. The abuse progressed to oral sex and intercourse until she was sixteen or seventeen years old. Chandler never reported the abuse because she had made friends in the area and did not want to be removed from foster care.

(Dkt. #10-15, pp. 1-4); *Alfaro v. State*, No. 05-12-01018-CR, 2014 WL 3756301 (Tex. App. - Dallas 2014, pet. ref'd).

**STANDARD FOR FEDERAL HABEAS CORPUS RELIEF**

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 1354, 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 appellate court. *Dillard v. Blackburn*, 780 F.2d 509, 513 (5th Cir. 1986).

The prospect of federal courts granting habeas corpus relief to state prisoners has been further limited by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The new provisions of Section 2254(d) provide that an application for a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) was contrary to federal law then clearly established in the holdings of the Supreme Court; (2) involved an unreasonable application of clearly established Supreme Court precedent; or (3) was based on an unreasonable determination of the facts in light of the record before the state court. *See Harrington v. Richter*, 562 U.S. 86, 97-98 (2011). The statutory provision requires federal courts to be deferential to habeas corpus decisions on the merits by state courts. *Moore v. Cockrell*, 313 F.3d 880, 881 (5th Cir. 2002).

A decision by a state court is "contrary to" the Supreme Court's clearly established law if it "applies a rule that contradicts the law set forth in" the Supreme Court's cases. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A federal court's review of a decision based on the "unreasonable

application" test should only review the "state court's 'decision' and not the written opinion explaining that decision." *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*). "Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas corpus court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams*, 529 U.S. at 411. Rather, that application must be objectively unreasonable. *Id.* at 409. The standard is satisfied only if "reasonable jurists considering the question would be of one view that the state court ruling was incorrect." *Davis v. Johnson*, 158 F.3d 806, 812 (5th Cir 1998) (internal quotation marks and citations omitted). On federal habeas review of a claim that was fully adjudicated in state court, the state court's determination is granted "a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Richter*, 526 U.S. at 101.

"In Texas writ jurisprudence, usually a denial of relief rather than a "dismissal" of the claim by the Court of Criminal Appeals disposes of the merits of a claim." *Singleton v. Johnson*, 178 F.3d 381, 384 (5th Cir. 1999); *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) (holding a "denial" signifies an adjudication on the merits while a "dismissal" means the claim was declined on grounds other than the merits). Additionally, federal habeas relief is foreclosed if a claim: (1) is procedurally barred as a consequence of a failure to comply with state procedural rules, *Coleman v. Thompson*, 501 U.S. 722 (1991); (2) seeks retroactive application of a new rule of law to a conviction that was final before the rule was announced, *Teague v. Lane*, 489 U.S. 288 (1989); or (3) asserts trial error that, although of constitutional magnitude, did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

## ANALYSIS

### 1. Petitioner's Right to Due Process was Violated Because the State Constructively Amended His Indictment

Petitioner first argues that his right to due process was violated during closing argument when the state asked the jury to convict on both his indicted offense and an unadjudicated, extraneous offense. (Dkt. # 1, p. 6). Petitioner argues that this constituted a constructive amendment of his indictment. Respondent asserts that this issue is foreclosed from federal habeas review because it was presented to the TCCA and denied. (Dkt. # 9, pp. 8-9).

The TCCA denied relief based on both an independent review of the record, and the trial court's findings of fact and conclusions of law. (Dkt. # 11-21). Regarding Petitioner's due process argument, the state habeas court made the following findings and determinations:

> 5. Applicant alleges that the prosecutor engaged in misconduct by introducing improper evidence of an extraneous offense;
>
> 6. The admissibility of the extraneous offense was raised on direct appeal;
>
> 7. Claims that are raised and addressed on direct appeal cannot be relitigated in habeas corpus.

(Dkt. # 11-18, pp. 31-32). By adopting the findings and conclusions of the trial court, the TCCA expressly and unambiguously relied on a state procedural bar determination. *Coleman*, 501 U.S. at 729.

Petitioner's argument is procedurally defaulted. It is well-settled that federal review of a claim is procedurally barred if the last state to consider the claim expressly and unambiguously based its denial of relief on a state procedural default. *Coleman*, 501 U.S. at 729. Additionally, if the state court explicitly invokes a procedural bar and alternatively reaches the merits of a defendant's claims,

a federal court is still bound by the state procedural default. *Harris v. Reed*, 489 U.S. 255, 264 n. 10 (1989). Where a state court has explicitly relied on a procedural bar, a petitioner may not obtain federal habeas corpus relief absent a showing of cause for the default and actual prejudice that is attributable to the default, or that the federal court's failure to consider the claim will result in a miscarriage of justice. *Coleman*, 501 U.S. at 750. A miscarriage of justice in this context means that the petitioner is actually innocent of the crime for which he was convicted. *Sawyer v. Whitley*, 505 U.S. 333, 339-40 (1992).

Petitioner does not demonstrate, or even allege cause and prejudice, or that the failure to consider the claim would result in a fundamental miscarriage of justice. Instead, Petitioner acknowledges that this issue may be barred. (Dkt. # 1, p. 8). This issue is barred from federal habeas review, and should be denied. *See Coleman*, 501 U.S. at 750.[1]

**2. Petitioner's Right to Due Process and/or Equal Protection Was Denied Because Texas Penal Code Section 21.02 is Unconstitutional**

Petitioner next claims that Texas Penal Code section 21.02 is unconstitutional. Respondent contends that this issue is also barred. The TCCA denied relief based on both an independent review of the record, and the trial court's findings of fact and conclusions of law. Regarding Petitioner's claim that Section 21.02 is unconstitutional, the state habeas court made the following findings and determinations:

> 1. Section 21.02 of the Texas Penal Code has not been declared facially unconstitutional;
>
> 2. Applicant cannot raise his argument for the first time in his writ of habeas corpus;

[1] Even if this issue was not barred, Petitioner's jury charge did not include an additional crime that was not presented in Petitioner's indictment.

3. Applicant did not raise a claim that § 21.02 was unconstitutional as applied to him at trial;

4. Applicant cannot raise this argument in his writ of habeas corpus;

* * * *

65. Applicant alleges that trial counsel was ineffective for failing to challenge the constitutionality of section 21.02 of the Texas Penal Code because it lessens the burden of proof for the State and because it allows the State to pick how it consolidates cases;

66. Counsel states that there were no valid constitutional challenges to the statute at the time of Applicant's trial;

67. Applicant has not directed this Court to any case law or statute that shows that the State's burden of proof is anything less than beyond a reasonable doubt under section 21.02;

68. The argument Applicant alleges trial counsel should have raised has been rejected by *Reckart v. State,* 323 S.W.3d 588, 600-01 (Tex. App.-Corpus Christi-Edinburg 2010, pet. ref'd) and *Render v. State,* 316 S. W.3d 846, 856-57 (Tex. App.-Dallas 2010, pet. ref'd);

69. Likewise, Applicant has not directed this Court to any case law supporting the claim that the statute is unconstitutional because the State can choose to consolidate the offenses under section 3.02 or 21.02 of the Texas Penal Code;

70. Contrary to Applicant's assertions, these two statutes are completely different;

7l. Section 3.02 allows for the consolidation of multiple offenses into one trial;

72. Section 21.02, on the other hand, IS an offense that encompasses several different acts;

73. Neither of the constitutional arguments that Applicant alleges trial counsel should have made have any merit;

74. Applicant has not shown by a preponderance of the evidence that counsel was deficient for not raising these arguments;

75. Applicant has not shown that these arguments would have been sustained; and

> 76. Applicant has not established by a preponderance of the evidence that the outcome of trial would have been different had counsel raised these meritless challenges to the constitutionality of the statute.

(Dkt. # 11–18, pp. 31, 39-41). By adopting the findings and conclusions of the trial court, the TCCA expressly and unambiguously relied on a state procedural bar determination. *Coleman,* 501 U.S. at 750.

Petitioner claims he can show cause for the default because counsel's failure to object prevented this issue from being preserved for review. He claims that he adequately raised this claim in his state habeas petition by arguing that his counsel failed to investigate Texas Penal Code section 21.02. However, a claim of ineffective assistance of counsel is reviewed under a different standard than a claim of equal protection and/or due process. Therefore, the state court was not given an opportunity to properly review this issue. Petitioner has not shown a cause for the default and actual prejudice that is attributable to the default, or that the federal court's failure to consider the claim will result in a miscarriage of justice. Therefore, this claim is procedurally barred. *Coleman*, 501 U.S. at 750.

Even if not barred, this claim lacks merit. Petitioner argues that Texas Penal Code section 21.02 is unconstitutionally vague because it does not require jurors to unanimously agree on which predicate offenses he committed. However, this argument is without merit. First, Petitioner fails to rebut the presumption of correctness to which the state findings are entitled. *Valdez v. Cockrell*, 274 F.3d 941, 947 (5th Cir. 2001). Additionally, this issue has already been decided by both state and federal courts. "The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Uresti v. Davis*, No. 3:16-CV-802-G (BH), 2018 WL 2075837, at *4 (N.D. Tex. Mar. 19, 2018),

(quoting *Springer v. Cockrell*, 998 F.2d 320, 322 (5th Cir. 1993)). "A conviction may be unconstitutional if it is obtained under a statute so vague that it does not provide adequate notice of what conduct will be deemed criminal." *Id.* As a Texas court has explained, "[s]ection 21.02 clearly prohibits an individual from continuously sexually abusing a child under the age of 14 for a period of more than 30 days." *Id.*, (citing *McMillan v. State,* 388 S.W.3d 866, 874 (Tex. App.—Houston [14th Dist.] 2012)).

**3. Ineffective Assistance of Counsel**

Finally, Petitioner argues that his counsel was ineffective because he: (a) failed to request a contemporaneous limiting instruction to the state's introduction of evidence of an extraneous offense, (b) failed to object to the state's constructive amendment of the indictment, (c) failed to object to the publication of a video of the complainant's interview recorded prior to her live testimony, (d) failed to object to the expert witness's testimony about the truthfulness of the complainant, (e) failed to investigate witness Deleta Brindley, (f) failed to investigate or call witnesses during the punishment phase, and (g) failed to investigate Texas Penal Code section 21.02.

A petitioner who seeks to overturn his conviction on the grounds of ineffective assistance of counsel must prove entitlement to relief by a preponderance of the evidence. *James v. Cain*, 56 F.3d 662, 667 (5th Cir. 1995). To succeed on a claim of ineffective assistance of counsel, a petitioner must show "counsel's representation fell below an objective standard of reasonableness," with reasonableness judged under professional norms prevailing at the time counsel rendered assistance. *Strickland v. Washington,* 466 U.S. 668, 688 (1984). This requires the reviewing court to give great deference to counsel's performance, strongly presuming counsel exercised reasonable professional judgment. *Id.* at 688 - 690. The right to counsel does not require errorless counsel; instead, a

criminal defendant is entitled to reasonably effective assistance. *Boyd v. Estelle*, 661 F.2d 388, 389 (5th Cir. 1981); *see also Rubio v. Estelle*, 689 F.2d 533, 535 (5th Cir. 1982); *Murray v. Maggio, Jr.*, 736 F.2d 279, 282 (5th Cir. 1984). Additionally, 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Petitioner must "affirmatively prove," not just allege, prejudice. *Id.* at 693. If petitioner fails to prove the prejudice component, the court need not address the question of counsel's performance. *Id.* at 697.

On habeas review, federal courts do not second-guess an attorney's decision through the distorting lens of hindsight; rather, the court presumes counsel's conduct falls within the wide range of reasonable assistance and, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689. "[S]econd-guessing is not the test for ineffective assistance of counsel." *King v. Lynaugh,* 868 F.2d 1400, 1405 (5th Cir. 1989). "No particular set of rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to present a criminal defendant." *Strickland*, 466 U.S. at 688-89. "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Richter,* 562 U.S. at 88.

Reviewing Petitioner's ineffective-assistance-of-counsel claim through the lens of AEDPA, however, means that he has a higher bar to exceed in order to prevail. "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult"

because "[t]he standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. at 105 (citations omitted). Moreover, unreasonableness under *Strickland* and under § 2254(d) are not the same. First, "[t]he *Strickland* standard is a general one, so the range of reasonable applications is substantial." *Id.* Second, "[w]hen § 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.*

**a. His Counsel Failed to Request a Limiting Instruction**

Petitioner first contends that his counsel was ineffective because he failed to seek a contemporaneous limiting instruction when the state introduced "third-party rebuttal testimony that counsel classified on-the-record as a 'tidal wave' of prejudice akin to a 'skunk in the jury box.'" (Dkt. # 3, pp. 25-26). The testimony Petitioner refers to is that of rebuttal witness Kristen Chandler.

The TCCA denied relief based on both an independent review of the record, and the trial court's findings of fact and conclusions of law. Regarding Petitioner's claim that counsel failed to request a limiting instruction, the state habeas court made the following findings and determinations:

> 18. Applicant alleges that his trial counsel was ineffective because he did not request that a limiting instruction on the consideration of the extraneous offense be placed in the jury charge;
>
> 19. Such a limiting instruction was in the jury charge;
>
> 20. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient or that the outcome of the trial would have been different had counsel requested an instruction that was already in the jury charge. . .

(Dkt. # 11-18, p. 33). Petitioner fails to rebut the presumption of correctness to which the state findings are entitled. *Valdez*, 274 F.3d at 947.

First, the court noted that an instruction was given. Petitioner contends that this instruction was insufficient, and that counsel should have secured an instruction at the time of the testimony. However, Petitioner fails to show that an instruction given at the time of testimony would have changed the outcome of the trial. Petitioner has not shown that there is a reasonable probability that, but for counsel's failure to request a limiting instruction, the result of the proceeding would have been different. He has not met his burden of affirmatively proving prejudice and, therefore, is not entitled to relief on this issue.

**b. His Counsel Failed to Object to the State's Constructive Amendment of the Indictment**

Petitioner contends that his counsel was ineffective because he did not object to "prosecutorial misconduct that resulted in constructive amendment of the indictment." The misconduct he refers to is the state's jury argument regarding the testimony of Kristen Chandler. The TCCA denied relief based on both an independent review of the record, and the trial court's findings of fact and conclusions of law. Regarding Petitioner's claim that counsel failed to object to the state's jury argument, the state habeas court made the following findings and determinations:

> 10. Applicant alleges that trial counsel was ineffective for opening the door to the admission of evidence of an extraneous offense;
>
> 11. In its opinion, the Dallas Court of Appeals held that the extraneous victim's testimony was admissible because trial counsel had challenged the indicted victim's credibility;
>
> 12. Counsel discussed the defensive theories with Applicant prior to trial, and that the strategy would be to argue the lack of physical evidence and to draw attention to the lack of evidence and inconsistent testimony;
>
> 13. Counsel knew that the State planned to call the extraneous victim and he made efforts to walk the line between presenting a defense and not opening the door to extraneous evidence;

> 14. When the State offered the extraneous evidence, he [counsel] vigorously objected and preserved the argument for appellate review;
>
> 15. Counsel presented a viable defense and attempted to assert that defense while keeping out extraneous evidence;
>
> 16. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient for presenting the defense of fabrication;
>
> 17. Applicant has not shown that the outcome of the trial would have been different had counsel not offered the defense of fabrication;
>
> 21. Applicant alleges that counsel was ineffective for failing to object to the portions of the State's closing arguments that referenced the extraneous offense;
>
> 22. Counsel stated he had already received a running objection to the extraneous evidence and did not want to "over-object," pursuant his typical strategy in trial;
>
> 23. Counsel had a valid trial strategy for not wanting to continuously object when he had already been granted a running objection;
>
> 24. Applicant has not shown that the State's arguments regarding admissible evidence were improper;
>
> 25. Applicant has not met his burden of proof by a preponderance of the evidence that the outcome of the trial would have been different had counsel objected to the State's proper arguments. . . .

(Dkt. # 11-18, pp. 32-34). Petitioner fails to rebut the presumption of correctness to which the state findings are entitled. *Valdez*, 274 F.3d at 947. Counsel also addressed this issue in his affidavit presented to the state habeas court.

> Our defensive theory centered on the lack of corroborating evidence to support the child's version of events. There was little or no physical evidence to support the allegation. There were also no witnesses to support the child's version of events. Our defensive goal was to draw attention to this lack of evidence and other inconsistencies in testimony. This trial was a classic "he said, she said" sexual assault case, however, complicated by the state's use of prior alleged victim of the Defendant.
>
> (Issues 7-11)

> Defense counsel was aware from the outset of Kristen Chandler's likely testimony. This matter was discussed extensively with Mr. Shockley. Defense counsel walked as fine a line as possible to avoid opening the door to Chandler's testimony. However, to put on any defense whatsoever required some attack on the credibility of the evidence. Counsel did not feel he opened the door to Chandler's testimony, though it may have been admissible on other grounds. To not do so would have essentially meant providing no defense in this type of sexual assault case. Efforts were made to exclude Chandler's testimony. A hearing was held outside the presence of the jury wherein counsel made 404 objections, relevancy objections, and probative/prejudice objections. These objections were denied and counsel was granted a running bill. I chose a running bill so as to avoid having to repeatedly object in front of the jury. This is a common trial strategy employed by counsel. There was no question on appeal regarding whether error was properly preserved.
>
> (Issues 12-14)
>
> Defense counsel cannot recall whether a limiting instruction was requested, however, it appears a limiting instruction was included in the Court's Charge.
>
> (Issue 15)
>
> Defense counsel cannot recall a specific objection to the extraneous offense during closing argument, however, a running bill had been granted and the testimony had previously been objected to and preserved. Again, trial counsel employs the strategy of not over objecting in front of the jury so as to avoid jury alienation and drawing further attention to undesirable evidence.

(Dkt. # 11-18, pp. 12-13). Counsel made an objection to the extraneous offense, but it was overruled. Kristen Chandler was allowed to testified as a rebuttal witness to rebut the defensive theory of fabrication. Counsel did anticipate her testimony, but felt the risk was worth taking in order to present "any defense." This was a reasonable strategic decision. *See Richter*, 562 U.S. 86 at 107 (citing *Strickland*, 466 U.S. at 691). Further, the jury charge did not include an additional crime that was not presented in Petitioner's indictment.

Petitioner has not shown there is a reasonable probability that, had counsel objected to the state's jury argument rather then allow a running bill on his objection, the result of the proceeding

would have been different. He has not met his burden of affirmatively proving prejudice. Therefore, this claim should be denied.

**c. His Counsel Failed to Object to the Publication of a Video of the Complainant**

Petitioner next argues that his counsel performed ineffectively because he failed to object to the publication of the complainant's forensic video-interview, which was conducted prior to trial. The TCCA denied relief based on both an independent review of the record, and the trial court's findings of fact and conclusions of law. Regarding Petitioner's claim that counsel failed to object to the publication of a video of the complainant, the state habeas court made the following findings and determinations:

> 26. Applicant alleges that trial counsel was ineffective for failing to object to the admission of the video of the victim's forensic interview under article 38.071 of the Texas Code of Criminal Procedure and the Confrontation Clause;
>
> 27. Both article 38.071 and the Confrontation Clause apply in cases where the child victim or other witness does not testify at trial or otherwise not subject to cross-examination;
>
> 28. Only two people are in the video- the victim and the forensic interviewer;
>
> 29. Both of these witnesses testified at trial and were cross-examined by trial counsel;
>
> 30. Any objection that the video violated article 38.071 or the Confrontation Clause would lack merit;
>
> 31. Counsel should not be held ineffective for failing to raise a meritless argument;
>
> 32. Applicant has not shown by a preponderance of the evidence that counsel was deficient;
>
> 33. Counsel used the video to draw point out inconsistencies between statements made during the interview and the trial testimony;
>
> 34. Counsel also used the video to argue that coercive interview techniques were

> used with the victim;
>
> 35. Counsel used the video to advance his defensive theories;
>
> 36. Applicant has not shown by a preponderance of the evidence that the outcome of the trial would have been different had counsel objected to the admission of the video. . . .

(Dkt. # 11-18, pp. 34-35). Petitioner fails to rebut the presumption of correctness to which the state findings are entitled. *Valdez*, 274 F.3d at 947. Counsel also addressed this issue in his affidavit he presented to the state habeas court:

> Both the victim and the forensic interviewer testified at trial. To my recollection, they were the only two people on the video. Both witnesses were also cross examined at trial to the best I can recall. There was strategy employed here to draw out discrepancies in the video statement and the child's live testimony. Additionally, efforts were made to point out coercive techniques used with the child.

(Dkt. 11-18, p. 13). As the state habeas court notes, an objection would have been futile, and counsel is not required to raise futile objections. *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994). Counsel also had a strategy to use the video to draw out discrepancies between the video and the complainant's live testimony, and point out coercive techniques used in the interview. This was reasonable trial strategy. *Richter*, 562 U.S. 86 at 107 (citing *Strickland*, 466 U.S. at 691). Additionally, counsel cross-examined both persons shown on the video at trial.

Petitioner has not shown that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. This claim should be denied.

**d. Counsel Failed to Object to Expert Testimony About the Truthfulness of the Complainant**

Petitioner contends that his counsel was ineffective because he failed to object to the testimony of the state's forensic expert. The particular statement was that "[u]sually, the

investigation doesn't come to court if the child isn't telling the truth." To understand this allegation, it is necessary to place the statement in context. Counsel elicited the following testimony from the witness:

Q You've done about 1300 interviews?

A Yes. A little bit more than that probably.

Q How many times out of 1300 have you found a child's story to be not believable?

A Out of 1300, I can't really tell you how many offhand but it's very little.

Q How many times have you come to court and said I don't believe a child is telling the truth?

A Typically if the child is not --

Q Ma'am, that's a single word answer. How many times --

A None.

Q -- have you come to court --

A None.

Q You've never come to court and said I don't believe the child?

A No.

Q You did make mention earlier that you were unbiased and neutral in interviews.

A Yes.

Q However, you always find fault or guilt, correct?

A By the time it comes to court, yes.

Q So you're not really that unbiased and neutral. Would you agree with that statement?

A Oh, I am unbiased and neutral.

Q Even though you are 100 percent of the time finding a child to be true?

A No, not 100 percent of the time.

Q *But you've never come to court and said that you didn't believe a child.*

A *Usually the investigation doesn't come to court if the child is not telling the truth.*

(Dkt. # 10-5, pp. 77-79) (emphasis added). The TCCA denied relief based on both an independent review of the record, and the trial court's findings of fact and conclusions of law. Regarding Petitioner's claim that counsel failed to object to this testimony, the state habeas court made the following findings and determinations:

> 37. Applicant alleges that counsel was ineffective for failing to object when the forensic interviewer testified that "it's the actual story of what happened" and that the investigation does not go to trial unless the child is telling the truth;
>
> 38. During direct examination, the forensic interviewer testified that it is important that victim corrected her when the interviewer gave a timeline of events, because it showed that the victim was not letting the interviewer suggest or lead her, and that the interview reflect the actual story of what happened;
>
> 39. During cross-examination, trial counsel asked the forensic interviewer if she had ever come to trial and testified that she did not believe a child; the interviewer responded that an investigation does not go to trial if the child is not telling the truth;
>
> 40. Counsel does not remember these statements;
>
> 41. An expert may not offer a direct opinion on the truthfulness of a child complainant's allegations;
>
> 42. When taken in context with the question asked and the forensic interviewer's entire response, it is clear that the forensic interviewer was not commenting on the victim's truthfulness, but was informing the jury why it was important that the victim correct her in her assessment of the timeline of assaults-so that the story is the victim's, not the interviewer's;

43. This statement was not a direct comment on the victim's truthfulness;

44. Any objection to the forensic interviewer's testimony would have been meritless;

45. Applicant also alleges that the forensic interviewer's statement that an investigation does not go to trial if the child is not telling the truth was a direct comment on the victim's truthfulness;

46. This statement was, however, in response to trial counsel's question of whether she had ever testified that a victim was not truthful;

47. Trial counsel elicited the testimony and the testimony was in direct response to his question;

48. Applicant has not shown how counsel could have successfully challenged the forensic interviewer's testimony;

49. Applicant has failed to show that any objection regarding the forensic interviewer's testimony would have been successful;

50. Applicant has failed to establish by a preponderance of the evidence that trial counsel was deficient for not raising these objections to the forensic interviewer's testimony;

51. Applicant has failed to establish by a preponderance of the evidence that the outcome of the trial would have been different had counsel made these objections;

(Dkt. # 11-18, pp. 35-37). Petitioner fails to rebut the presumption of correctness to which the state findings are entitled. *Valdez*, 274 F.3d at 947.

As the state habeas court found, the statement Petitioner complains about was elicited by counsel. It was not a comment on the truthfulness of the complainant, but a response to counsel asking the witness if she had ever testified that a complainant was not truthful. As the state habeas court notes, an objection would have been futile, and counsel is not required to raise futile objections. *Clark*, 19 F.3d at 966. Counsel's trial strategy was to attack the credibility of the evidence. As part of that strategy, he elicited testimony from the forensic witness that she had never

testified that she did not believe a child. This put her credibility in issue.

Petitioner has not shown that there is a reasonable probability that, had counsel objected to the witness' statement, the result of the proceeding would have been different. This claim should be denied.

**e. Counsel Failed to Investigate Deleta Brindley**

Petitioner next contends that his counsel was ineffective because he did not investigate Deleta Brindley, complainant's grandmother. Brindley testified that the complainant's father was known to have molested a family member. The TCCA denied relief based on both an independent review of the record, and the trial court's findings of fact and conclusions of law. Regarding Petitioner's claim that counsel failed to investigate this witness, the state habeas court made the following findings and determinations:

> 52. Applicant alleges that counsel was ineffective for failing to interview the victim's grandmother prior to trial because counsel was "surprised" by her testimony that the victim's father had been accused of molestation;
>
> 53. Counsel admits that he was surprised when the victim's grandmother admitted during cross-examination that the victim's father had been accused of molestation;
>
> 54. The admission helped Applicant's defensive theory and prevented the victim's father from taking the stand, improving Applicant's situation with the jury;
>
> 55. Counsel considers the victim's grandmother's admission as "one of the better defensive moments of the trial offering a possible other explanation for the victim's allegations.;"
>
> 56. The testimony was beneficial to Applicant's defensive theory;
>
> 57. Applicant has adduced no evidence that deciding not to interview a peripheral witness was an unreasonable strategic choice;
>
> 58. Applicant has not shown by a preponderance of the evidence that trial counsel was deficient for not seeking to interview the victim's grandmother prior to trial;

> 59. Applicant has not shown by a preponderance of the evidence that the outcome of the trial would have been different had counsel interviewed the victim's grandmother prior to trial. . . .

(Dkt. # 11-18, pp. 38-39). Petitioner fails to rebut the presumption of correctness to which the state findings are entitled. *Valdez*, 274 F.3d at 947. Petitioner contends that counsel's failure "left uninvestigated" a viable explanation for the complainant's claims. (Dkt. # 3-2, p. 20). However, the record belies this claim. This claim lacks merit because the testimony *was* elicited at trial. As the state habeas court notes, the admission by Brindley aided Petitioner's defensive theory, offering an explanation for the complainant's allegations. It also prevented the complainant's father from testifying. Counsel thoroughly cross-examined this witness as to her son's alleged abuse.

Petitioner has not shown that counsel was ineffective for failing to interview the peripheral witness, or what any additional investigation would have been of benefit to the defense. Thus, Petitioner has not shown that there is a reasonable probability that, had counsel contacted this witness prior to trial, the result of the proceeding would have been different. This claim should be denied.

**f. Counsel Failed to Investigate or Call Witnesses During the Punishment Phase**

Petitioner next claims that counsel was ineffective for his failure to investigate or call witnesses during the punishment phase of the trial. He argues that, because there was no testimony at the punishment phase, the jury returned a maximum sentence of ninety-nine years. *Id.* Petitioner states that he attaches the affidavits of sixteen "men and women who, as young boys and girls spent years in close relationship with Mr. Shockley as teacher and mentor." The Court has not located those affidavits in any of Petitioner's pleadings filed in this action. They are located only in his state

habeas proceedings that Respondent filed with this Court. Therefore, Petitioner has not met his burden and shown that these witnesses were available, and would have been willing to testify on his behalf. *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009) (petitioner seeking to show ineffective assistance of counsel for failure to call witnesses must "demonstrate that the witness was available to testify and would have done so.").

Even if those affidavits were properly before this Court, Petitioner would not be entitled to relief. The TCCA denied relief based on both an independent review of the record, and the trial court's findings of fact and conclusions of law. Regarding Petitioner's claim that counsel failed to investigate or call witnesses at the punishment phase, the state habeas court made the following findings and determinations:

> 60. Applicant alleges that trial counsel was ineffective for not calling 16 witnesses at punishment;
>
> 61. Applicant has attached affidavits from all of these witnesses to his application. The general theme of the affidavits is that Applicant is a nice guy and each witness would have offered testimony about how he was nice to them and people around them;
>
> 62. Applicant affirmatively stated on the record that he did not want to call any witnesses at punishment and did not want to testify himself;
>
> 63. Applicant has not shown that by a preponderance of the evidence that counsel was deficient for failing to call witnesses after Applicant told him that he did not want such witnesses called;
>
> 64. Applicant has not shown by a preponderance of the evidence that the outcome of the trial would have been different had counsel called witnesses after Applicant told him that he did not want such witnesses called.

(Dkt. # 11-18, p. 39). Petitioner fails to rebut the presumption of correctness to which the state findings are entitled. *Valdez*, 274 F.3d at 947. Petitioner has not overcome the fact that he stated

on the record that he did not want to testify or call any witnesses at the punishment phase.

"[C]omplaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative." *Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir.1978). Further, the presentation of witness testimony is essentially strategy and, thus, within the trial counsel's domain. *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir.1985). A petitioner must overcome a strong presumption that his counsel's decision in not calling a particular witness was a strategic one. *Murray*, 736 F2d at 282. "Defense counsel is not required 'to investigate everyone whose name happens to be mentioned by the defendant.'" *Schwander v. Blackburn*, 750 F.2d 494, 500 (5th Cir. 1985) (quoting *Cockrell*, 720 F.2d 1423, 1428 (1983)). Where "the only evidence of a missing witness's testimony is from the defendant," claims of ineffective assistance are viewed with great caution. *United States v. Cockrell*, 720 F.2d 1423, 1427 (5th Cir.1983). Conclusory claims are insufficient to entitle a habeas corpus petitioner to relief. *United States v. Woods*, 870 F.2d. 285, 287-288; *Schlang v. Heard*, 691 F.2d 796, 799 (5th Cir. 1982); *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

Defense counsel also has the obligation to conduct a "reasonably substantial, independent investigation." *Neal*, 239 F.3d at 688 (quoting *Baldwin v. Maggio*, 704 F.2d 1325, 1332–33 (5th Cir. 1983). The Supreme Court has explained the governing standard:

> 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. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness

> in all the circumstances, applying a heavy measure of deference to counsel's judgments.

*Strickland*, 466 U.S. at 690–91. There are no "strict rules" for counsel's conduct beyond "the general requirement of reasonableness." *Cullen v. Pinholster*, 563 U.S. 170, 195-196 (2011). "An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense." *Richter*, 562 U.S. 86 at 108 (citing *Strickland*, 466 U.S. at 691). Trial counsel is "entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Id.* at 107. Moreover, "a defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." *Druery v. Thaler*, 647 F.3d 535, 541 (5th Cir. 2011) (quoting *Nelson v. Hargett*, 989 F.2d 847, 850 (5th Cir. 1993)). Upon a reasonable investigation, defense counsel also has an obligation to make reasonable strategic decisions regarding which witnesses and evidence he will present. *Strickland*, 466 U.S. at 690–91. "[T]he failure to present a particular line of argument or evidence is presumed to have been the result of strategic choice." *Taylor v. Maggio*, 727 F.2d 341, 347 (5th Cir. 1984).

Petitioner fails to overcome that he stated, on the record, that he did not want to call any witnesses. Petitioner also fails to show that, had these witnesses been called, there is a reasonable probability that the result of the proceeding would have been different. He has only made conclusory allegations, and has not met his burden of affirmatively proving prejudice. This claim should be denied.

**g. Counsel Failed to Investigate Texas Penal Code Section 21.02**

Finally, Petitioner argues that his counsel was ineffective for failing to investigate Texas

Penal Code section 21.02, claiming that it is unconstitutional. The TCCA denied relief based on both an independent review of the record, and the trial court's findings of fact and conclusions of law. As shown above, Texas Penal Code section 21.02 is not unconstitutional.

Petitioner fails to rebut the presumption of correctness to which the state findings are entitled. *Valdez*, 274 F.3d at 947. He fails to rebut the state habeas court's conclusion that this issue has been rejected. Petitioner has not shown that there is a reasonable probability that, had his counsel raised this issue, the result of the proceeding would have been different. This claim should be denied.

## CONCLUSION

Petitioner's first two claims that: (1) he was denied his right to due process when the state constructively amended his indictment, and (2) Texas Penal Code section 21.02 is unconstitutionally vague, are procedurally defaulted.

In each claim of ineffective assistance of counsel, Petitioner fails to demonstrate the state habeas court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; 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 proceeding. *See Williams*, 529 U.S. at 402-03. Petitioner fails to show there was no reasonable basis for the state court to deny relief. *Richter*, 562 U.S. at 98. Additionally, Petitioner fails to prove prejudice, or show that his counsel's representation amounted to incompetence under prevailing professional norms.

## CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the Court of Appeals from a final order in a proceeding under § 2254 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. §

2253(c)(1)(B). Although Petitioner has not yet filed a notice of appeal, it is respectfully recommended that this court, nonetheless, address whether Petitioner 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). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected 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." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). When a district court denies a motion on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue when the Petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.*

In this case, it is respectfully recommended that reasonable jurists could not debate the denial of Petitioner's § 2254 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, it is respectfully recommended that the court

find that Petitioner is not entitled to a certificate of appealability.

**RECOMMENDATION**

It is recommended that the above-styled petition filed under 28 U.S.C. § 2254 be denied and that the case be dismissed with prejudice. It is further recommended that a certificate of appealability be denied.

Within fourteen 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). 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, 1430 (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 28th day of February, 2020.**

Christine A. Nowak
UNITED STATES MAGISTRATE JUDGE

# APPENDIX C

## Decision Of The Texas Court Of Criminal Appeals

(24)

# IN THE COURT OF CRIMINAL APPEALS OF TEXAS

**NO. WR-84,823-02**

**EX PARTE STEPHEN COLEMAN SHOCKLEY, Applicant**

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. W366-82727-09-HC IN THE 366TH DISTRICT COURT
FROM COLLIN COUNTY**

## O R D E R

Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for a writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of continuous sexual abuse of a child and sentenced to ninety-nine years' imprisonment. The Fifth Court of Appeals affirmed his conviction. *Shockley v. State*, No. 05-12-01018-CR (Tex. App.—Dallas July 30, 2014).

On September 21, 2016, this Court issued an order, remanding the instant application back to the 366th District Court of Collin County for an affidavit from counsel and findings of fact and conclusions of law from the trial court. It has now been brought to our attention that the Collin County District Clerk filed counsel's affidavit and the trial court's findings of fact and conclusions of law with this Court on August 4, 2016, prior to the issuance of the remand order. Therefore, the

State has filed a motion requesting reconsideration of our remand order issued on September 21, 2016. Because this Court has already received the documents ordered, the request is granted.

We now withdraw the order dated September 21, 2016. Based on the trial court's findings of fact and conclusions of law, as well as this Court's independent review of the record, we find that Applicant's claims are without merit. Therefore, we deny relief.

Filed: November 9, 2016
Do not publish

**APPLICANT** STEPHEN COLEMAN SHOCKLEY **APPLICATION NO.** WR-84,823-02

# APPLICATION FOR 11.07 WRIT OF HABEAS CORPUS

**ACTION TAKEN**

**DENIED WITH WRITTEN ORDER.**

Nov. 9, 2016

**JUDGE** **DATE**

# APPENDIX D

Decision Of The Court Of Appeals,

Fifth District Of Texas at Dallas

**Affirmed and Opinion Filed July 30, 2014**

**In The**
# Court of Appeals
# Fifth District of Texas at Dallas

**No. 05-12-01018-CR**

**STEPHEN COLEMAN SHOCKLEY, Appellant**
**V.**
**THE STATE OF TEXAS, Appellee**

**On Appeal from the 366th Judicial District Court**
**Collin County, Texas**
**Trial Court Cause No. 366-82727-09**

## OPINION

Before Justices Moseley, O'Neill, and FitzGerald
Opinion by Justice FitzGerald

A jury convicted appellant of continuous sexual abuse of a child under fourteen years of age and sentenced him to ninety-nine years' imprisonment. In three issues on appeal, appellant complains the trial court erred in admitting extraneous offense testimony. Concluding appellant's arguments are without merit, we affirm the trial court's judgment.

### BACKGROUND

Appellant's niece, E.B., accused him of sexually assaulting her when she stayed with his family on vacations and holidays. E.B. was approximately five years old when the abuse began and fourteen when she testified at trial.

During voir dire, defense counsel predicted that he might question E.B.'s truthfulness. He asked the venire to articulate the circumstances under which a child might make a false allegation of sexual abuse. After the panel identified several circumstances, defense counsel also

suggested that a child might fabricate such allegations when the child "hears about someone else this has happened to, and . . . they add it into their own reality." Counsel then told the jury an anecdote about his niece fabricating things about her deceased father that could not have actually happened.

In opening statement, defense counsel described appellant as a twenty-year veteran, decorated soldier, good father, and a good husband. He told the jury that E.B. had a troubled early life, and characterized her version of events as "a strange set of facts," because she alleged she was molested while others were present. Counsel told the jury that the allegations had come to light during a period of family turmoil, and hypothesized that E.B.'s father and grandmother had suggested the abuse to her.

E.B. testified that the abuse first occurred on a camping trip with fathers, daughters, and nieces during the time appellant lived in Kansas. While E.B.'s cousins were sleeping on the bunk bed above her, appellant slid his hand under E.B.'s pants and touched her "private parts." On other occasions, appellant would lie on the bed between E.B. and appellant's daughter and tell them a bedtime story. Appellant would rub E.B.'s private parts when his daughter fell asleep.

Appellant moved to Alabama, and E.B. and her family visited him there. Appellant again touched E.B.'s private parts under her clothes. Then, appellant moved to McKinney, Texas. Between March and December 2008 in McKinney, the abuse happened repeatedly. Sometimes, they would watch a movie and appellant would wait for his daughter to fall asleep and then put his hand under E.B.'s clothes and rub her "tee tee." On other occasions, appellant would get in the middle of the children on the bed and read them a story. When appellant's daughter fell asleep appellant would rub E.B.'s private parts.

E.B. finally disclosed the abuse when her father asked if anyone had touched her. During a forensic and sexual assault exam, E.B. told the sexual assault nurse that appellant had touched

her on and inside her "front part" with his hands and that it had occurred more than once at appellant's house in McKinney.

On cross-examination, defense counsel asked E.B. how many times her father had asked if someone had touched her, and she agreed it had probably been more than five times. He also asked E.B. if her grandmother had told E.B. that she had been molested when she was a child. E.B. testified that she did not remember any such conversation with her grandmother.

During cross-examination of the forensic examiner, defense counsel elicited the examiner's agreement that E.B. had probably had a troubled early life because her birth mother had not been stable and let E.B. wander away. As a result, her father sought and obtained custody of her. Defense counsel also asked a series of questions about children who make false allegations of sexual abuse, and whether a child with a troubled past would be more inclined to fabricate such allegations. Counsel also asked whether a child sometimes gives a positive response to a parent's inquiry about abuse just to please the parent. The examiner agreed with counsel that a child in a troubled environment might make false allegations of sexual abuse.

E.B.'s grandmother also testified. She described a trip to Kansas when E.B. was almost nine. The family was at a water park, and she observed E.B. in appellant's lap sitting unusually still. This gave her a "funny feeling." Later, she saw appellant stroking E.B.'s back and buttocks after a bath. She confronted appellant about what she had seen, and appellant expressed surprise that his behavior might be considered inappropriate.

When the State rested, appellant called his daughter to testify. She testified that she had never seen her father do anything to E.B. when E.B. was at their house. Appellant's daughter further testified that she and E.B. would argue over the fact that she had a father who loved her but E.B. did not.

After the defense rested, the State called appellant's former foster daughter, Kristen Chandler, to testify. Defense counsel objected to the testimony on several grounds, including relevance, rule 403, and rule 404(b). These objections were overruled.

Chandler was thirty years old at the time of trial. Chandler testified that she was placed in the foster care of appellant and his former wife when she was thirteen years old. During that time, appellant came into her bedroom while she was sleeping and touched the front part of her genitals with his hand. The abuse progressed to oral sex and intercourse until she was sixteen or seventeen years old. Chandler never reported the abuse because she had made friends in the area and did not want to be removed from foster care.

**DISCUSSION**

Appellant asserts the trial court erred in admitting Chandler's extraneous offense testimony because it was not relevant or admissible under Rule 404(b) and the prejudicial effect of the testimony outweighed any probative value. We review a trial court's decision to admit evidence under Rules 404(b) and 403 for an abuse of discretion.[1] "As long as the trial court's ruling is within the 'zone of reasonable disagreement,' there is no abuse of discretion, and the trial court's ruling will be upheld."[2] If the trial court's decision is correct on any theory of law applicable to the case, we will uphold the decision.[3]

***Relevance and Admissibility Under Rule 404(b).***

Rule 404(b) expressly provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of the defendant in order to show he acted in conformity therewith.[4] Rule 404(b) codifies the common law principle that a defendant should be tried only

[1] *See De La Paz v. State*, 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009).

[2] *Id.*

[3] *Id.*

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

for the offense for which he is charged and not for being a criminal generally.[5] But the rule provides a list of exceptions to the general rule of inadmissibility, and states that extraneous offense evidence may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[6] The list of exceptions providing for the admission of such evidence, however, is nonexhaustive.[7]

Here, the trial court allowed the extraneous offense testimony to rebut a defensive theory of fabrication. The court of criminal appeals has stated that rebuttal of a defensive theory is one of the permissible purposes for which relevant evidence may be admitted under rule 404(b).[8] A defendant's presentation of a defensive theory in an opening statement, for example, may open the door to the admission of extraneous offense evidence to rebut the defensive theory.[9] Extraneous offenses are admissible to rebut defensive theories raised by the testimony of a defense witness during direct examination or a State's witness during cross-examination.[10] Furthermore, evidence of extraneous offenses in sexual assault cases is properly admitted under rule 404(b) to rebut a defensive theory of retaliation or fabrication or that the defendant is "the innocent victim of a 'frame-up' by the complainant or others."[11] "In such a situation, the extraneous misconduct must be at least similar to the charged one and an instance in which the 'frame-up' motive does not apply."[12]

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[5] *Rogers v. State*, 853 S.W.2d 29, 32 n.3 (Tex. Crim. App. 1993); *see also Segundo v. State*, 270 S.W.3d 79, 87 (Tex. Crim. App. 2008) (explaining defendant is generally to be tried only for the offense charged, not for any other crimes).

[6] TEX. R. EVID. 404(b).

[7] *See Prible v. State*, 175 S.W.3d 724, 731 (Tex. Crim. App. 2005).

[8] *See Moses v. State*, 105 S.W.3d 622, 626 (Tex. Crim. App. 2003).

[9] *See Bass v. State*, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008).

[10] *See Daggett v. State*, 187 S.W.3d 444, 451 (Tex. Crim. App. 2005); *Ransom v. State*, 920 S.W.2d 288, 301 (Tex. Crim. App. 1996).

[11] *Wheeler v. State*, 67 S.W.3d 879, 885 (Tex. Crim. App. 2002); *see also Bass*, 270 S.W.3d at 563 & n.8.

[12] *Wheeler*, 67 S.W.3d at 888 n.22; *see also Dennis v. State*, 178 S.W3d 172, 179 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd).

Appellant asserts that nothing about the extraneous offense testimony refutes the defense's contention that E.B. was not truthful. He further asserts that Chandler's testimony about "substantially different" events that occurred seventeen years ago served only to sully the character of appellant and persuade the jury that he was acting in conformity with a particularized character trait. We disagree.

There is no question that the defensive theory of the case centered on the veracity of E.B.'s allegations. Indeed, appellant describes the "sum and substance" of the case as involving the "truthful nature of the victim's allegations." Counsel suggested that E.B. fabricated the allegations, and that such fabrication resulted from a troubled past, from suggestive comments made by her father and grandmother, and from E.B.'s need for acceptance in the family. This defensive theory was introduced during voir dire, repeated throughout trial, and argued in closing argument. During closing argument, defense counsel argued that it was implausible that E.B. had been molested while appellant's daughter was present. Counsel further argued that if someone tells a child something repeatedly, they begin to believe it "and then it becomes not so hard to repeat the story back."

Under these circumstances, we cannot conclude the evidence was not relevant. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[13] This definition is necessarily broad.[14] Even evidence that is inadmissible character evidence may be relevant.[15] Extraneous offense evidence is admissible if

[13] TEX. R. EVID. 401.

[14] *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on rehearing).

[15] *Id.* at 386.

it has some logical relevance aside from character conformity.[16] A similar sexual assault against another unrelated child has a tendency to show that E.B.'s allegations were less likely to have been fabricated. Because the extraneous evidence tends to make the defensive claim of fabrication less probable, the evidence has some relevance aside from character conformity.

We are similarly unpersuaded by appellant's assertion that the extraneous offense was not sufficiently similar to the charged offense. An exacting degree of similarity is not required.[17] The similarities between the two offenses must only be such that the evidence is still relevant.[18] Here, the two offenses involved young girls in appellant's home who were inappropriately touched by appellant as they prepared for sleep or while they were asleep. This similarity is sufficient to survive the test of relevance.

Because the extraneous evidence was relevant and admissible to rebut the defensive claim of fabrication, the trial court did not err in refusing to exclude it. Appellant's first two issues are overruled.

***Probative Value and Prejudicial Effect.***

Appellant also contends the trial court erred in admitting the testimony because the prejudicial effect outweighed the probative value. Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."[19] In conducting a Rule 403 balancing test, courts consider factors which include, but are not limited to: (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible, way; (3) the time

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[16] *Bass*, 270 S.W.3d at 557.

[17] *See Dennis*, 178 S.W.3d at 179.

[18] *See Thomas v. State*, 126 S.W.3d 138, 144 (Tex. App.—Houston [1st Dist.] 2003, pet ref'd).

[19] TEX. R. EVID. 403.

needed to develop the evidence; and (4) the proponent's need for the evidence.[20] The rules of evidence favor the admission of relevant evidence and carry a presumption that relevant evidence is more probative than prejudicial.[21] We should reverse the trial court's balancing determination "rarely and only after a clear abuse of discretion."[22] In addition, because rule 403 permits the exclusion of admittedly probative evidence, "it is a remedy that should be used sparingly," particularly in "sexual-molestation cases that must be resolved solely on the basis of the testimony of the complainant and the defendant."[23]

The rule 403 factors weigh in favor of admission. The extraneous offense evidence was probative to rebut appellant's defensive theories that appellant was not the type of person who would sexually abuse a child and that the abuse allegations were fabricated. The testimony was also probative as to the veracity of the complainant's testimony. Moreover, the State's need for such evidence was considerable. There was no physical evidence of abuse to corroborate the complainant's testimony, and the defense painted a picture of a troubled young girl with a motive to fabricate her testimony. The extraneous offense evidence pertained to an incident that was very similar to the charged offense — touching the victim's private parts while she was asleep or preparing for sleep. Thus, the extraneous offense evidence suggests that E.B.'s allegations did not result from a troubled early childhood, suggestions from her grandmother, or prodding by her father. In addition, E.B. and appellant's foster daughter had never met. Their accounts of abuse, however, were too similar to explain by chance or false accusation. Although the extraneous offense testimony had the potential to impress the jury in an indelible way, there is no indication

[20] *Hernandez v. State*, 390 S.W.3d 310, 324 (Tex. Crim. App. 2012); *Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006).

[21] *Jones v. State*, 944 S.W.2d 642, 652 (Tex. Crim. App. 1996).

[22] *Montgomery v. State*, 810 S.W.2d 372, 392 (Tex. Crim. App. 1991) (op. on reh'g).

[23] *Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009).

the jury was confused or distracted from the main issue. The testimony was relatively brief. The trial court gave the jury a limiting instruction. Weighing these considerations, we cannot say the trial court abused its discretion in concluding that the probative value of the extraneous offense evidence was not outweighed by the danger of unfair prejudice. Appellant's third issue is overruled.

Having resolved all of appellant's issues against him, we affirm the trial court's judgment.

/Kerry P. FitzGerald/
KERRY P. FITZGERALD
JUSTICE

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# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

STEPHEN COLEMAN SHOCKLEY,
Appellant

No. 05-12-01018-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 366th Judicial District Court, Collin County, Texas
Trial Court Cause No. 366-82727-09.
Opinion delivered by Justice FitzGerald.
Justices Moseley and O'Neill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered July 30, 2014

# APPENDIX E

State Habeas Corpus Grounds Three and Four

STATE APPLICATION FOR WRIT OF HABEAS CORPUS
TEXAS CODE OF CRIMINAL PROCEDURE, ART. §11.07

GROUND THREE: **Prosecutorial Misconduct Caused Jurors To Convict In-Part For Allegation Of Crime Against A Person, Where Allegation And Person Are Foreign To The Indictment. U.S. Const. Amend. V and XIV.**

E.B. is the instant complainant. K.C. is an extraneous-offense witness proffered by the State who alleged that 15 years prior to trial, when she was 14-16 years of age, she and Mr. Shockley had a sexual relationship.

During closing argument of guilt/innocence, the State engaged in a series of misconduct that resulted in constructive amendment of the indictment to include K.C.'s allegation as a basis for conviction in the instant case. The series included a) the disingenuous claim that "what happened to K.C. is the same thing that happened to E.B.," (RR4:90), though the record does not support this claim (RR4:14 vs RR3:180); b) leading jurors to "focus on what this defendant did to E.B. and...to K.C.," (RR4:93) though during guilt/innocence the focus belongs on the indicted allegation; and c) directly and explicitly asking jurors to convict "because not only did he hurt K.C. so many years ago, he's hurt a second child (RR4:95).

Here, jurors were asked by the State to convict in part on a factual basis different from that alleged in the instant indictment. The State's persistent misconduct cemented the remote extraneous allegations of K.C. to those of the instant complainant and placed both before jurors for remedy. When the State asked jurors to convict in part because "...he hurt K.C. so many years ago..." it unequivocally tasked them to adjudicate a matter that lay beyond the jurisdiction conferred by the Grand Jury in the indictment presented at trial. (RR3:8-11). This was grevious error.

The State's action infected the verdict in this case with the adjudication of an unindicted collateral matter and caused an erroneous conviction. The Shockley Court lacked jurisdiction to adjudicate the matter of K.C.'s complaint in whole or in part. Nonetheless, the State asked jurors to do so. The verdict is therefore tainted and void.

**NOTE:** The above is a true and correct typewritten copy of the ground as it appears in the State Application For Writ of Habeas Corpus.

STATE APPLICATION FOR WRIT OF HABEAS CORPUS
TEXAS CODE OF CRIMINAL PROCEDURE, ART. §11.07

GROUND FOUR: **Mr. Shockley Was Denied Effective Assistance Of Counsel At Trial As A Result of Counsel's Multiple Acts Of Deficient Performance And Their Attendant Prejudice. U.S. Const. Amend. VI and XIV.**

This claim is based on the cumulative effect of counsel's acts of deficient performance and prejudice suffered as a result including (Subground Three) that counsel failed to object to a pattern of prosecutorial misconduct during closing that culminated in a request of jurors to convict on the basis of unindicted allegations (RR4:90, 93, 95).

[Subgrounds 1, 2, 4, 5, 6, 7, 8, 9, and 10 omitted]

But for counsel's deficient performance and its attendant prejudice, the outcome of trial would have been different.

NOTE: The above is a true and correct typewritten copy of the ground as it appears in the State Application For Writ of Habeas Corpus.

APPENDIX F

Petition For Federal Writ Of

Habeas Corpus Under 28 U.S.C. §2254

PETITION FOR WRIT OF HABEAS CORPUS: 28 USC §2254 (Rev. 9/10)
ADOPTED BY ALL FEDERAL COURTS IN TEXAS

# IN THE UNITED STATES DISTRICT COURT

FOR THE Eastern DISTRICT OF TEXAS

Sherman DIVISION

## PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

| | |
|---|---|
| Stephen C. Shockley | Texas Dept. of Crim. Justice Coffield Unit. Tenn. Colony, TX |
| PETITIONER (Full name of Petitioner) | CURRENT PLACE OF CONFINEMENT |
| vs. | TDCJ ID # 1793928 |
| | PRISONER ID NUMBER |
| Lorie Davis | 6:17-CV-167 RWS/KNM |
| RESPONDENT (Name of TDCJ Director, Warden, Jailor, or authorized person having custody of Petitioner) | CASE NUMBER (Supplied by the District Court Clerk) |

INSTRUCTIONS - READ CAREFULLY

1. The petition must be legibly handwritten or typewritten and signed and dated by the petitioner, under penalty of perjury. Any false statement of an important fact may lead to prosecution for perjury. Answer all questions in the proper space on the form.

2. Additional pages are not allowed except in answer to questions 11 and 20. Do not cite legal authorities. Any additional arguments or facts you want to present must be in a separate memorandum. The petition, including attachments, may not exceed 20 pages.

3. Receipt of the $5.00 filing fee or a grant of permission to proceed *in forma pauperis* must occur before the court will consider your petition.

4. If you do not have the necessary filing fee, you may ask permission to proceed *in forma pauperis*. To proceed *in forma pauperis*, (1) you must sign the declaration provided with this petition to show that you cannot prepay the fees and costs, and (2) if you are confined in TDCJ-CID, you must send in a certified *In Forma Pauperis* Data Sheet form from the institution in which you are confined. If you are in an institution other than TDCJ-CID, you must send in a certificate completed by an authorized officer at your institution certifying the amount of money you have on deposit at that institution. If you have access or have had access to enough funds to pay the filing fee, then you must pay the filing fee.

5. Only judgments entered by one court may be challenged in a single petition. A separate petition must be filed to challenge a judgment entered by a different state court.

6. Include all of your grounds for relief and all of the facts that support each ground for relief in this petition.

7. Mail the completed petition and one copy to the U. S. District Clerk. The "Venue List" in your unit law library lists all of the federal courts in Texas, their divisions, and the addresses for the clerk's offices. The proper court will be the federal court in the division and district in which you were convicted (for example, a Dallas County conviction is in the Northern District of Texas, Dallas Division) or where you are now in custody (for example, the Huntsville units are in the Southern District of Texas, Houston Division).

8. Failure to notify the court of your change of address could result in the dismissal of your case.

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## PETITION

**What are you challenging?** (Check all that apply)

- ☒ A judgment of conviction or sentence, probation or deferred-adjudication probation. (Answer Questions 1-4, 5-12 & 20-25)
- ☐ A parole revocation proceeding. (Answer Questions 1-4, 13-14 & 20-25)
- ☐ A disciplinary proceeding. (Answer Questions 1-4, 15-19 & 20-25)
- ☐ Other:_____ (Answer Questions 1-4, 10-11 & 20-25)

**All petitioners must answer questions 1-4:**

**Note:** In answering questions 1-4, you must give information about the conviction for the sentence you are presently serving, even if you are challenging a prison disciplinary action. (Note: If you are challenging a prison disciplinary action, do not answer questions 1-4 with information about the disciplinary case. Answer these questions about the conviction for the sentence you are presently serving.) Failure to follow this instruction may result in a delay in processing your case.

1. Name and location of the court (district and county) that entered the judgment of conviction and sentence that you are presently serving or that is under attack: _____

   366th Judicial District Court, Collin County, Texas

2. Date of judgment of conviction: 24 May 2012

3. Length of sentence: 99 Years

4. Identify the docket numbers (if known) and all crimes of which you were convicted that you wish to challenge in this habeas action: 366-82727-09

**Judgment of Conviction or Sentence, Probation or Deferred-Adjudication Probation:**

5. What was your plea? (Check one) ☒ Not Guilty ☐ Guilty ☐ Nolo Contendere

6. Kind of trial: (Check one) ☒ Jury ☐ Judge Only

7. Did you testify at trial? ☒ Yes ☐ No

8. Did you appeal the judgment of conviction? ☒ Yes ☐ No

9. If you did appeal, in what appellate court did you file your direct appeal? 5th Court of Appeal, Dallas, TX Cause Number (if known): 05-12-01018CR

What was the result of your direct appeal (affirmed, modified or reversed)? Affirmed

What was the date of that decision? 30 Jul 2014

If you filed a petition for discretionary review after the decision of the court of appeals, answer the following:

Grounds raised: 1) Incomplete Opinion; 2) Rule 404(b) Error; 3) More-heinous Allegation Used To Prove A Less-heinous Allegation; 4) Limiting Inst. Error

Result: Petition Refused on 14 Jan 2015, Motion for Rehearing Filed 26 Jan 2015

Date of result: Denied 25 Feb 2015 Cause Number (if known): PD-1093-14

If you filed a petition for a *writ of certiorari* with the United States Supreme Court, answer the following:

Result: N/A

Date of result: N/A

10. Other than a direct appeal, have you filed any petitions, applications or motions from this judgment in any court, state or federal? This includes any state applications for a writ of habeas corpus that you may have filed. ☒ Yes ☐ No

11. If your answer to 10 is "Yes," give the following information:

Name of court: 366th Judicial District Ct. / TX Ct. of Criminal Appeals

Nature of proceeding: State Writ of Habeas Corpus

Cause number (if known): W366-82727-09HC / WR-84,823-01

Date (month, day and year) you filed the petition, application or motion as shown by a file-stamped date from the particular court: 31 Dec 2015

Grounds raised: 1) Statute Unconst.--Denies the Pres. of Innocense; 2) Statute Unconst. --Void for Vagueness; 3) Const. Amend. of Indictment; 4) Ineffective Asst. of Counsel

Date of final decision: 9 Nov 2016

What was the decision? Habeas Relief Was Denied

Name of court that issued the final decision: Texas Court of Criminal Appeals

As to any second petition, application or motion, give the same information:

Name of court: N/A

Nature of proceeding: N/A

Cause number (if known): N/A

Date (month, day and year) you filed the petition, application or motion as shown by a file-stamped date from the particular court:
N/A

Grounds raised: N/A

Date of final decision: N/A

What was the decision? N/A

Name of court that issued the final decision: N/A

*If you have filed more than two petitions, applications or motions, please attach an additional sheet of paper and give the same information about each petition, application or motion.*

12. Do you have any future sentence to serve after you finish serving the sentence you are attacking in this petition? ☐ Yes ☒ No

(a) If your answer is "Yes," give the name and location of the court that imposed the sentence to be served in the future: N/A

(b) Give the date and length of the sentence to be served in the future: N/A

(c) Have you filed, or do you intend to file, any petition attacking the judgment for the sentence you must serve in the future? ☐ Yes ☐ No N/A

**Parole Revocation:** N/A

13. Date and location of your parole revocation: _____

14. Have you filed any petitions, applications or motions in any state or federal court challenging your parole revocation? ☐ Yes ☐ No

If your answer is "Yes," complete Question 11 above regarding your parole revocation.

**Disciplinary Proceedings:** N/A

15. For your original conviction, was there a finding that you used or exhibited a deadly weapon? ☐ Yes ☐ No

16. Are you eligible for release on mandatory supervision? ☐ Yes ☐ No

17. Name and location of the TDCJ Unit where you were found guilty of the disciplinary violation:

_____

Disciplinary case number: _____

What was the nature of the disciplinary charge against you? _____

18. Date you were found guilty of the disciplinary violation: _____

Did you lose previously earned good-time days? ☐ Yes ☐ No

If your answer is "Yes," provide the exact number of previously earned good-time days that were forfeited by the disciplinary hearing officer as a result of your disciplinary hearing:

_____

Identify all other punishment imposed, including the length of any punishment, if applicable, and any changes in custody status:

_____

_____

_____

19. Did you appeal the finding of guilty through the prison or TDCJ grievance procedure? ☐ Yes ☐ No

If your answer to Question 19 is "Yes," answer the following:

Step 1 Result: _____

Date of Result: _____

Step 2 Result: _____

Date of Result: _____

**All petitioners must answer the remaining questions:**

20. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting them.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

A. **GROUND ONE:** Mr. Shockley's 14th Amendment right to due process was violated when the state engaged in constructive amendment of the indictment. U.S. Const. Amend. XIV.

Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

During closing, the state over-and-over placed the instant complainant alongside the third-party extraneous complainant, then explicitly asked jurors to convict as remedy for both. Mr. Shockley was not on trial for the extraneous allegation. A summary of facts follows on page 6A; Facts are developed and argued in the supporting memorandum.

B. **GROUND TWO:** Mr. Shockley's 14th Amendment right to due process and/or equal protection was denied when he was tried under constitutionally infirm mechanisms of law in Texas Penal Code §21.02. U.S. Const. Amend. XIV.

Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

During state habeas review, Mr. Shockley argued in two grounds that Texas Penal Code §21.02 is offensive to the 14th Amendment. The state refused to hear the claim because no error was preserved. Mr. Shockley now argues facts sufficient to overcome bar and seeks hearing of his claim. A summary of facts follows on page 6B; Facts are developed and argued in supporting memorandum.

GROUND ONE: Mr. Shockley's 14th Amendment right to due process was violated when the state engaged in constructive amendment of the indictment. U.S. Const. Amend. XIV.

Brief Summary of Supporting Facts
See "Memorandum In Support Of Petition For Writ Of Habeas Corpus"

- This ground was presented as Ground Three during state habeas. See Memorandum Appendix A, pg A-1 and A-18 thru 22.
- Ground Three complained of a jurisdictional defect stemming from prosecutorial misconduct that resulted in constructive amendment of the indictment, i.e. asking jurors to convict in part for an allegation of crime against a person when both the allegation and the person are foreign to the indictment. See Memorandum, pg 5-6.
- The state misunderstood and mischaracterized the claim to be a mere claim of inadmissible-evidence; then errantly adjudicated the claim as previously raised and thus barred from habeas review.* That was not the claim.
- The claim was that over-and-over during closing, the state cemented the rebuttal witness to the instant complainant; told jurors the same thing had happened to both; told jurors it would focus on both; then asked jurors to find Mr. Shockley guilty "not only because [1] he hurt [the rebuttal witness] so many years ago; [2] he's hurt a second child..." (RR4:90-95) See Memorandum pg 5-6; See also Memorandum Appendix A, pg A-1.
- Diligent and repeated attempts to correct the state's misunderstanding failed. See Memorandum pg 7-8.
- Constructive amendment of indictment claim remains unreached; adjudication on the merits cannot be presumed in light of the facts in the record and the state's repeated and written mischaracterizations. See Memorandum pg 7.
- De novo review is required. See Memorandum pg 4 and 10.
- Mr. Shockley seeks reversal with prejudice; reversal with a new trial on the indicted offense alone; or a negotiated outcome. See Memorandum pg 10.

* Reference omitted. See Memorandum pg 7.

**GROUND TWO:** Mr. Shockley's 14th Amendment right to due process and/or equal protection was violated when he was tried under constitutionally infirm mechanisms of law in Texas Penal Code §21.02. U.S. Const. Amend. XIV.

Brief Summary of Supporting Facts
See "Memorandum In Support Of Petition For Writ Of Habeas Corpus"

- State habeas grounds One and Two were not adjudicated on their merits; the state claimed a procedural bar because no error was preserved at trial. See Memorandum Appendicies D and E. See also Memorandum pg 11.

- Claim may be barred in this Court. See Memorandum pg 11.

- "Cause and prejudice" for default exist in counsel's ineffective assistance. See Memorandum pg 12-13; See also Memorandum Appendix B-41 thru 43.

- The miscarriage-of-justice exception to procedural default also applies. The plea of Not-Guilty cannot be defended when law allows jurors to presume upon allegation what need not be proven beyond a reasonable doubt--that Mr. Shockley committed any crime alleged as a basis for the continuing crime. See Memorandum pg 13.

- When heard, Mr. Shockley will demostrate that Texas Penal Code §21.02 is repugnant to the 14th Amendment because:

  •• It consolidates the commission of two or more offenses against penal statutes listed at §21.02(c) under itself; relabels the discrete allegations of crime as the mere means to commit another crime; then abandons the due process right to the presumption of innocence concerning the predicate crimes. See Memorandum pg 13-16; See also Memorandum Appendix D.

  •• Without guidance in law to ensure uniform application, it allows prosecutors to consolidate multiple allegations of crime against identically-situated persons such that one faces higher minimum sentence (min. 4 years vs. min 25 years); One is eligible for parole, the other must serve-all; and one may demand proof beyond a reasonable doubt concerning each allegation of predicate crime--the other cannot because §21.02 was crafted to avoid such burden where young complainants are involved. This subjects those accused thereunder to an arbitrary power of government disallowed by the 14th Amendment. See Memorandum pg 16-17; See also Memorandum Appendix E.

- Mr. Shockley seeks de novo review of state habeas grounds One and Two. He seeks a finding that Texas Penal Code §21.02 is violative of the 14th Amendment. Alternatively, he seeks a Certificate of Appealability to present this claim in the Court of Appeals for the Fifth Circuit.

C. **GROUND THREE:** Mr. Shockley's trial counsel rendered ineffective assistance. U.S. Const. Amend. VI.

Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Mr. Shockley here argues that the determination of factual issues was unreasonable; insufficient facts exist in the record to support any reasonable argument that counsel satisfied the applicable deferential standard. Summary of facts follows on page 7A; Facts are developed and argued in the supporting memorandum.

D. **GROUND FOUR:** N/A

Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

N/A

21. Relief sought in this petition: Mr. Shockley seeks reversal of his conviction, remand for retrial, or a negotiated outcome.

GROUND THREE: Mr. Shockley's trial counsel was ineffective. U.S. Const. Amend. VI.

Brief Summary Of Supporting Facts
See "Memorandum In Support Of Petition For Writ Of Habeas Corpus"

- The court's determination of the facts was unreasonable. See Memorandum pg 18-19.

•• The convicting court's Order Designating Issues was ruled "untimely" and "without effect" by the Court of Criminal Appeals of Texas. See its per curiam order of 15 Jun 2016. See also Memorandum pg 20.

•• The convicting court designated no controversy with any fact alleged or implicated by Mr. Shockley during the statutory period within which it was allowed to do so. See Texas Code of Criminal Procedure, Art. 11.07; See also Memorandum pg 19-21.

•• The convicting court proceeded to mischaracterize issues of fact, then resolved them via a paper-only hearing. See Memorandum, Illustrative Mischaracterization examples one thru three, pg 21-23.

•• Mr. Shockley sought a live-evidenciary hearing to conduct "fair and probative inquiry" lest the paper-only hearing "fail to reach, or provide sound factual basis for [the] court to decide the issues." See Motions For Live Evidenciary Hearing of 12 May 2016 and 23 Sep 2016; See also Memorandum pg. 26-27.

•• The paper-only hearing relied on trial counsel's affidavit where a) he freely admits he did not review the transcript in preparation of his response; and b) counsel over-and-over relies on "I cannot recall" to shut down the fact-finding process concerning the reasonableness of his challenged performance. See Trial Counsel's Affidavit in Memorandum Appendix C.

••• Illustrative of the things yet unknown are a) why counsel took no action when, during cross-examination, the state's witness declared that "Usually, the investigation doesn't come to trial if the child isn't telling the truth;" and b) why counsel felt it best to remain silent when the state encouraged jurors to convict in part for allegations of offense for which Mr. Shockley was not on trial. (RR3:78 and RR4:95) See Memorandum pg 24-26.

••• The habeas judge was not the trial judge and had no personal knowledge of pertinent trial events. See Memorandum pg 26.

•• Because facts have not been sufficiently developed to overcome what the record-facts reveal; counsel was ineffective, Mr. Shockley seeks reversal of the conviction and remand for new trial with effective counsel or a negotiated outcome. At minimum, Mr. Shockley seeks a live evidenciary hearing to fully and fairly examine, cross-examine facts at issue.

22. Have you previously filed a federal habeas petition attacking the same conviction, parole revocation or disciplinary proceeding that you are attacking in this petition? ☐ Yes ☒ No
If your answer is "Yes," give the date on which each petition was filed and the federal court in which it was filed. Also state whether the petition was (a) dismissed without prejudice, (b) dismissed with prejudice, or (c) denied.

N/A

If you previously filed a federal petition attacking the same conviction and such petition was denied or dismissed with prejudice, did you receive permission from the Fifth Circuit to file a second petition, as required by 28 U.S.C. § 2244(b)(3) and (4)? ☐ Yes ☐ No

23. Are any of the grounds listed in question 20 above presented for the first time in this petition?
☐ Yes ☒ No

If your answer is "Yes," state briefly what grounds are presented for the first time and give your reasons for not presenting them to any other court, either state or federal.

N/A

24. Do you have any petition or appeal now pending (filed and not yet decided) in any court, either state or federal, for the judgment you are challenging? ☐ Yes ☒ No

If "Yes," identify each type of proceeding that is pending (i.e., direct appeal, art. 11.07 application, or federal habeas petition), the court in which each proceeding is pending, and the date each proceeding was filed.

N/A

25. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: G. Talmadge Nix, III
112 N. Travis St. Suite 100
Sherman, TX 75090

(b) At arraignment and plea: Same

(c) At trial: Same

(d) At sentencing: Same

(e) On appeal: Same

(f) In any post-conviction proceeding: None, Pro-Se

(g) On appeal from any ruling against you in a post-conviction proceeding: None; Pro-Se

**Timeliness of Petition:**

26. If your judgment of conviction, parole revocation or disciplinary proceeding became final over one year ago, you must explain why the one-year statute of limitations contained in 28 U.S.C. § 2244(d) does not bar your petition.[1]

N/A Petition Is Timely Filed.

[1] The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), as contained in 28 U.S.C. § 2244(d), provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Wherefore, petitioner prays that the Court grant him the relief to which he may be entitled.

N/A

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for a Writ of Habeas Corpus was placed in the prison mailing system on

March 15, 2017 (month, day, year).

Executed (signed) on 15 Mar 2017 (date).

Signature of Petitioner (required)

Petitioner's current address: Stephen C. Shockley, #1793928
2661 FM 2054; Coffield Unit
Tennessee Colony, TX 75884

# APPENDIX G

## Terms Of Running Bill Demonstrating Bill's Inapplicability To The Issue Raised.

## TERMS

## Running Bill Of Exception And Objection

At trial, Defense Counsel raised objection to Ms. Kristen Chandler's upcoming extraneous testimony. He argued:

a. That Kristen's third-party allegations were inadmissible because of "relevancy grounds." (RR4:8)

b. That proper notice of Kristen's appearance was not given because "she is not listed on a witness list." (RR4:8)

c. That the allegation of misconduct, "being 17 years in the past is too remote." (RR4:9)

d. That the "evidence that's going to come forth is highly, highly inflammatory and prejudicial. That is--in comparison to its probative value like a tidal wave to a mud puddle." Id.

Each objection was overruled. Counsel next asked for a running bill of objection "to any testimony by this witness so I'm not having to object every time a question is asked." (RR4:10)

The Court responded simply that "any question that is asked of this witness by the State, I will consider the objections made just now as if they were made to eachindividual question." (RR4:10)

**NOTE:** Nowhere in the record is there any indication that the bill was ever intended or extended to cover prosecutorial misconduct via improper jury argument during closing arguments.

# APPENDIX H

## Petitioner's Repeated Efforts To Correct Appellate Court's Misapprehension Of Habeas Claims

## PETITIONER'S REPEATED EFFORT TO CORRECT APPELLATE COURT'S MISAPPREHENSION OF HIS HABEAS CLAIMS

Appellate courts have persistently misapprehended Petitioner's habeas claim to challenge the admissibility of Kristen Chandler's third-party remote extraneous allegation. Such an understanding is gross error.

Mr. Shockley raised no such challenge whatsoever on habeas.

The habeas complaint was that during closing arguments the State told jurors to employ the testimony in an improper manner that denied Mr. Shockley's 14th Amendment due-process right to fair trial. (See paragraphs ___ and ___ on page ___ above)

Over and over Mr. Shockley has warned that courts are misapprehending his claims and thus adjudicating claims he did not raise while his actual claims linger unresolved. For example:

(1) On 25 Jan 2016 Mr. Shockley filed **APPLICANT'S MOTION TO CLARIFY** in the trial court. At Paragraph I, pg 1, he initially advised the court that the State's summary of his claim was "incomplete and may be misleading." He made clear that his complaint was against the State "cementing a collateral matter [that of Kristen Chandler's third-party extraneous complaint] to the indicted allegation and asking jurors to convict first for the collateral matter, then the instant."

(2) Upon seeing the court's official findings and realizing that his actual issue had been avoided, Mr. Shockley filed on 9 Aug 2016 in both the trial court and the Texas Court of Criminal Appeal (TCCA) **APPLICANT'S OBJECTION TO THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW, RECOMMENDATION** where, in Paragraph II, pages 2-3 he made "Objection To The Profound Mischaracterization of Habeas Ground Three." He informed the court that its "understanding of this ground is completely foreign to the ground presented in the habeas application."

Where the trial court reframed his claim to be that "the Prosecutor engaged in misconduct by introducing improper evidence of an extraneous offense," Mr. Shockley reminded the court that "he makes no such allegation in his habeas application." His actual complaint was "that jurors were asked by the State to convict in-part on a factual basis different from that alleged in the indictment...The record shows [(RR4:90-95)] that after repeatedly presenting two complainants during closing arguments, the State transgressed so far as to ask jurors to 'find the defendant guilty because [1] not only did he hurt [third-party extraneous witness] so many years ago, [2] he's hurt a second child' (RR4:95).

"The State clearly presented jurors two reasons to convict; the first was a third-party allegation" for which Mr. Shockley was not on trial. "This is the [due process] claim

that must be reached," and the "trial court has failed to reach the claim presented. This meritorius claim remains unadjudicated."

(3) The TCCA remanded the case back to the trial court with instruction that the court resolve issues of fact. The trial court bamboozled the TCCA by suggesting the TCCA rescind its remand-order because the court had previously resolved issues of fact

The problem was that the trial court had resolved its own version of the claim, not what was actually raised. In his **OBJECTION TO THE 'STATE's SUGGESTION COURT RECONSIDER ON ITS OWN MOTION'** at Paragraph I, Pages 1-2, Mr. Shockley again complained that "the State repeatedly placed the extraneous third-party complainant along-side the instant during closing arguments. The State went so far as to ask jurors to 'find the defendant guilty because [1] not only did he hurt [third-party extraneous witness] so many years ago, [2] he's hurt a second child.' The verdict is therefore infected...this issue must be properly understood and decided. In the State's submission it is neither."

Neither the TCCA nor the trial court moved their focus away from the errorneous notion that Mr. Shockley was relitigating the admissibility of the Chandler testimony, to the actual complaint that he was denied a fair trial when the State asked jurors to convict upon the instant charge using proofs of an extraneous matter.

(4) The TCCA rescinded its remand-order and denied relief. In **APPLICANT'S OBJECTION TO THE RECISSION OF THIS COURT'S 21 SEP 2016 PER CURIAM ORDER** on 16 Nov 2016, at Paragraph II, Page 2, Mr. Shockley raised objection that the State's misapprehension has left his "habeas claims (Ground Three and Ground Four, Subground Three) unreached and unresolved by the trial court." The TCCA offered no response and Mr. Shockley's single-bite at the state habeas apple was spent without the appellate courts ever reaching his complaint.

(5) On 15 Mar 2017, Mr. Shockley filed a timely petition for writ of habeas corpus in the United States Federal District Court For The Eastern District Of Texas under 28 U.S.C. §2254 (4:17-CV-196).

He alleged that in dispatching his 14th Amendment Due-Process (fair trial) claim "the State misunderstood and mischaracterized the claim to be a mere claim of inadmissible evidence...that was not the claim. The claim was that over-and-over during closing, the State cemented the rebuttal witness [Ms. Chandler] to the instant complainant; told jurors the same thing happened to both; told jurors that it would focus on both; then asked jurors to find [him] guilty 'not only because [1] he hurt [the rebuttal witness] so many years ago, [2] he's hurt a second child...' Diligent attempts to correct

the State's misunderstanding have failed." PETITION FOR WRIT OF HABEAS CORPUS, 15 Mar 2017, at page 6A.

(6) In PETITIONER'S REPLY TO RESPONDENT'S ANSWER, page 1, Mr. Shockley drew "particular attention to Ground One (Ground Three during State habeas). The State has near sprained itself from day-one offering mischaracterization and false bars to avoid the claim." The State having introduced "the allegation of a remote third-part isn't the issue--the State having told jurors to convict as remedy for it under the instant indictment, is." Id. at page 3. "Whatever the facts of the third-party extraneous allegation were twenty years ago, The State was not at liberty to urge them as a basis for conviction here." Id. at page 4.

(7) A Federal Magistrate Judge found that the due-process claim was beyond the reach of the Eastern District Court because the State had relied on on a State rule that barred twice raising a claim (once on direct appeal and once on habeas) though the record is clear that Mr. Shockley's claims were both factually and legally distinct.

(8) The Magistrate's findings above, appear in the REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE at page 7. Mr. Shockley objected again to the presence of a fictitious bar being used to derail appellate review. In PETITIONER'S OBJECTION TO THE REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE, 23 Mar 2020 at page 2-3, he Petitioner again warns that the relitigation bar is a contrivance of the State.

On direct appeal Petitioner raised the admissibility of Ms. Chandler's third-party extraneous testimony. He did not relitigate the issue on habeas. "Admissibility of the extraneous allegation is utterly foreign to the Petitioner's complaint... Petitioner's actual complaint remains that the State's prosecutor engaged in misconduct by a) repeatedly (nine times) focusing the attention of jurors on the third-party rebuttal witness during closing arguments; b) openly declaring that the focus of her argument at closing was on the allegation of both the instant complainant and the remote third-party extraneous complainant; and c) by point-blank giving jurors a dual basis for conviction in the instant case, encouraging them to 'find the defendant guilty not only because [1] he hurt [the extraneous witness] so many years ago, [2] he's hurt a second child."

"Admissibility of the extraneous allegation is not a habeas issue. The State's misconduct with the allegation, is." Id.

(9) In the District Court Judge's ORDER OF DISMISSAL, 30 Mar

2020, at page 1, concerning Petitioner's "claim that his right to due-process was violated during closing argument when the state asked the jury to convict upon both his indicted offense and an unindicted extraneous. The Magistrate Judge correctly found that this claimis procedurally barred."

This claim **IS NOT** procedurally barred. The District Court has, despite Petitioner's best-efforts, ignored the record-fact that the due-process claim appeared for the first time during State habeas and relitigates nothing.

Further, even **IF** the claim were a relitigation of a previous state claim, "relitigation" **IS NOT** a bar to federal review by a District Court...So says the United States Supreme Court in **Cone v. Bell**, 566 U.S. 449, 466-67 (2009).