No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAMOND DEAN - PETITIONER

VS.

BOBBY LUMPKIN, DIRECTOR - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

THE APPENDIX VOLUME

DAMOND DEAN - TDCJ NO. 2058851

2661 FM 2054

TENNESSEE COLONY, TEXAS 75884

NO PHONE

APPENDIX A

DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS

DENYING COA ON APRIL 12, 2021

APPENDIX A

United States Court of Appeals
for the Fifth Circuit

No. 20-10211

United States Court of Appeals
Fifth Circuit
FILED
April 12, 2021
Lyle W. Cayce
Clerk

DAMOND DEAN,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CV-2623

ORDER:

Damond Dean, Texas prisoner # 2058851, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application challenging his conviction for sexual assault of a child younger than 17 years of age. In his COA application, he contends that his trial counsel was ineffective when he failed to object to certain testimony by a prosecution witness and failed to investigate and call various witnesses at trial.

In his COA application, Dean does not raise many of the claims that he raised in the district court, including claims that (1) he was actually

innocent; (2) his counsel rendered ineffective assistance when he failed to (a) generally investigate and adequately prepare for trial; (b) object to the admission of various records regarding the treatment of the victim; (c) object to certain purported hearsay testimony by the victim; and (d) make an opening statement; (3) the trial court violated his due process rights when it admitted into evidence certain jailhouse telephone calls; and (4) the prosecutor engaged in misconduct when he knowingly elicited perjured testimony. Accordingly, Dean has abandoned these claims. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999); *see also Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004).

As to Dean's remaining claims, a COA may issue if the applicant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). An applicant satisfies this standard by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Dean has not met this standard.

Accordingly, his motion for a COA is DENIED.

Patrick E. Higginbotham

PATRICK E. HIGGINBOTHAM
United States Circuit Judge

APPENDIX B

DECISION OF A. JOE FISH, SENIOR DISTRICT JUDGE IN THE U.S.D.C. NORTHERN DISTRICT DENYING FEDERAL HABEAS CORPUS AND ADOPTING THE MAGISTRATE'S FINDINGS ON MARCH 4, 2020

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DAMOND DEAN (TDCJ No. 2058851), Petitioner, VS. LORIE DAVIS, Director Texas Department of Criminal Justice Correctional Institutions Division, Respondent.	)	No. 3:18-CV-2623-G

ORDER

After allowing ample time for objections to the magistrate judge's findings, conclusions, and recommendation entered December 4, 2019 (docket entry 22) (the "FCR"), during which time no objections were filed, the Court accepted the FCR and entered judgment, denying Petitioner's habeas application on February 7, 2020, *see* docket entries 24 & 25. The same day, the Court docketed Petitioner's objections to the FCR. *See* docket entries 27, 28, & 29.

After reviewing *de novo* those portions of the FCR to which objection was made, the Court remains of the opinion that the FCR is correct. In sum, the objections have no impact on the Court's judgment that the habeas petition should be denied.

The Court therefore **GRANTS** both Petitioner's motion to file a single copy of the objections (docket entry 29) and, only to the extent that the Court has reviewed Petitioner's objections, his motion for reconsideration (docket entry 32).

The Court also GRANTS Petitioner's motion for leave to proceed *in forma pauperis* on appeal. *See* docket entry 33.

SO ORDERED.

March 4, 2020.

A. Joe Fish

A. JOE FISH
Senior United States District Judge

APPENDIX C

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE U.S. MAGISTRATE FILED ON DECEMBER 04, 2019

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DAMOND DEAN, (TDCJ # 2058851), Petitioner, V. LORIE DAVIS, Director Texas Department Correctional Institutions Division, Respondent.	§ § § § § § § § § § § §	No. 3:18-cv-2623-G-BN

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Damond Dean, a Texas inmate, filed a *pro se* application for writ of habeas corpus under 28 U.S.C. § 2254, in which he also requests an evidentiary hearing. *See* Dkt. No. 3. This resulting action has been referred to the undersigned United States magistrate judge for pretrial management under 28 U.S.C. § 636(b) and a standing order of reference from Senior United States District Judge A. Joe Fish. The State filed a response opposing relief, *see* Dkt. No. 16, to which Dean filed a reply, *see* Dkt. No. 20. For the reasons explained below, the Court should deny Dean's federal habeas petition and his motion for an evidentiary hearing.

Applicable Background

A jury found Dean guilty of sexual assault of a child. *See State of Texas v. Damond Dean*, No. F1575244 (3rd Crim. Dist. Ct. Dallas County, Tex., 2016); Dkt. No. 17-33 at 15. The trial court found two enhancement paragraphs to be true and

sentenced Dean to forty years of imprisonment. *See id.* On April 4, 2017, the Fifth District Court of Appeals affirmed the judgment. *See Dean v. State*, No. 05-16-00168-CR (Tex. App. – Dallas, 2016, no pet.); Dkt. No. 17-3. Dean did not file a petition for discretionary review. *See* Dkt. No. 3 at 3.

Dean filed an application for state writ of habeas corpus claiming actual innocence, constitutionally ineffective assistance of trial counsel on numerous grounds, trial court error by admitting evidence into trial without giving fair notice, and prosecutorial misconduct. *See* Dkt. No. 17-33 at 20-39. On June 6, 2018, the CCA denied Dean's application without a written order. *See* Dkt. No. 17-27.

In his timely-filed federal habeas application, Dean raises the following grounds for relief:

(1) Ineffective assistance of counsel by:

a. failing to investigate/prepare for trial;

b. failing to call witnesses;

c. failing to object to witness testimony; and

d. failing to make an opening statement;

(2) The trial court violated his due process rights by admitting evidence of jail calls without giving him fair notice;

(3) The prosecutor committed misconduct by introducing false and misleading testimony; and

(4) He is actually innocent.

See Dkt. No. 3 at 6-10; Dkt. No. 13.

Legal Standards and Analysis

I. Claims

Where a state court has already rejected a claim on the merits, a federal court may grant habeas relief on that claim only if the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court adjudication on direct appeal is due the same deference under Section 2254(d) as an adjudication in a state post-conviction proceeding. *See, e.g., Dowthitt v. Johnson*, 230 F.3d 733, 756-57 (5th Cir. 2000) (a finding made by the CCA on direct appeal was an "issue ... adjudicated on the merits in state proceedings," to be "examine[d] ... with the deference demanded by [the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA")]" under "28 U.S.C. § 2254(d)").

A state court decision is "contrary" to clearly established federal law if "it relies on legal rules that directly conflict with prior holdings of the Supreme Court or if it reaches a different conclusion than the Supreme Court on materially indistinguishable facts." *Busby v. Dretke*, 359 F.3d 708, 713 (5th Cir. 2004); *see also Lopez v. Smith*, 574 U.S. ___, 135 S. Ct. 1, 2 (2014) (per curiam) ("We have emphasized, time and time again, that the AEDPA prohibits the federal courts of appeals from relying on their own precedent to conclude that a particular constitutional principle is 'clearly

established.'" (citation omitted)).

A decision constitutes an "unreasonable application" of clearly established federal law if "the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 413 (2000); *see also Pierre v. Vannoy*, 891 F.3d 224, 227 (5th Cir. 2018) (a petitioner's lack of "Supreme Court precedent to support" a ground for habeas relief "ends [his] case" as to that ground).

"For purposes of § 2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law.... A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citations and internal quotation marks omitted). "Under § 2254(d), a habeas court must determine what arguments or theories supported or ... could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* at 102 (internal quotation marks omitted); *see Evans v. Davis*, 875 F.3d 210, 216 (5th Cir. 2017) (recognizing that Section 2254(d) tasks courts "with considering not only the arguments and theories the state habeas court actually relied upon to reach its ultimate decision but also all the arguments and theories it could have relied upon" (citation omitted)).

The Supreme Court has further explained that "[e]valuating whether a rule

application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Richter*, 562 U.S. at 101 (internal quotation marks omitted). And "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102. The Supreme Court has explained that, "[i]f this standard is difficult to meet, that is because it was meant to be," where, "[a]s amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings," but "[i]t preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents," and "[i]t goes no further." *Id.* Thus, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103; *accord Burt v. Titlow*, 571 U.S. 12, 20 (2013) ("If this standard is difficult to meet – and it is – that is because it was meant to be. We will not lightly conclude that a State's criminal justice system has experienced the extreme malfunction for which federal habeas relief is the remedy." (internal quotation marks, brackets, and citations omitted)).

As to Section 2254(d)(2)'s requirement that a petitioner show that the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," the

Supreme Court has explained that "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance" and that federal habeas relief is precluded even where the state court's factual determination is debatable. *Wood v. Allen*, 558 U.S. 290, 301, 303 (2010). Under this standard, "it is not enough to show that a state court's decision was incorrect or erroneous. Rather, a petitioner must show that the decision was objectively unreasonable, a substantially higher threshold requiring the petitioner to show that a reasonable factfinder must conclude that the state court's determination of the facts was unreasonable." *Batchelor v. Cain*, 682 F.3d 400, 405 (5th Cir. 2012) (brackets and internal quotation marks omitted).

The Court must presume that a state court's factual determinations are correct and can find those factual findings unreasonable only where the petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir. 2001). This presumption applies not only to explicit findings of fact but also "to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact." *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001); *see also Richter*, 562 U.S. at 98 ("[D]etermining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning."); *Pondexter v. Dretke*, 346 F.3d 142, 148 (5th Cir. 2003) ("a federal habeas court is authorized by Section 2254(d) to review only a

state court's 'decision,' and not the written opinion explaining that decision" (quoting *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc) (per curiam))); *cf. Evans*, 875 F.3d at 216 n.4 (even where "[t]he state habeas court's analysis [is] far from thorough," a federal court "may not review [that] decision de novo simply because [it finds the state court's] written opinion 'unsatisfactory'" (quoting *Neal*, 286 F.3d at 246)).

Section 2254 thus creates a "highly deferential standard for evaluating state court rulings, which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). To overcome this standard, a petitioner must show that "there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98.

That is, a Section 2254 petitioner must, in sum, "show, based on the state-court record alone, that any argument or theory the state habeas court could have relied on to deny [him] relief would have either been contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court." *Evans*, 875 F.3d at 217.

A. Ineffective Assistance of Counsel

Dean makes numerous claims of ineffective assistance of trial counsel. The Court reviews claims concerning the alleged ineffective assistance of counsel ("IAC"), whether at trial or on direct appeal, under the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a habeas petitioner must

demonstrate that the performance of his attorney fell below an objective standard of reasonableness. *See id.* at 687-88. A petitioner must prove entitlement to relief by a preponderance of the evidence. *James v. Cain*, 56 F.3d 662, 667 (5th Cir. 1995). To be cognizable under *Strickland*, trial counsel's error must be "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687; *see also Buck v. Davis*, 580 U.S. ____, 137 S. Ct. 759, 775 (2017) (reaffirming that "[i]t is only when the lawyer's errors were 'so serious that counsel was not functioning as the "counsel" guaranteed ... by the Sixth Amendment' that *Strickland*'s first prong is satisfied" (citation omitted)).

The petitioner also must prove that he was prejudiced by his attorney's substandard performance. *See Strickland*, 466 U.S. at 687, 692. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

> [B]ecause of the risk that hindsight bias will cloud a court's review of counsel's trial strategy, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."

Feldman v. Thaler, 695 F.3d 372, 378 (5th Cir. 2012) (quoting *Strickland*, 466 U.S. at 689).

"A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Cotton v. Cockrell*, 343 F.3d 746,

752-53 (5th Cir. 2003). Moreover, "[j]ust as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Richter*, 562 U.S. at 110. "The Supreme Court has admonished courts reviewing a state court's denial of habeas relief under AEDPA that they are required not simply to give [the] attorney's the benefit of the doubt, ... but to affirmatively entertain the range of possible reasons [petitioner's] counsel may have had for proceeding as they did." *Clark v. Thaler*, 673 F.3d 410, 421 (5th Cir. 2012) (internal quotation marks omitted).

Therefore, on habeas review under AEDPA, "if there is any 'reasonable argument that counsel satisfied *Strickland*'s deferential standard,' the state court's denial must be upheld." *Rhoades v. Davis*, 852 F.3d 422, 432 (5th Cir. 2017) (quoting *Richter*, 562 U.S. at 105).

To demonstrate prejudice, a habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Thus, "the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." *Richter*, 562 U.S. at 111. "Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different," which "does

not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case." *Id.* at 111-12 (quoting *Strickland*, 466 U.S. at 693, 696, 697). "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112.

IAC claims are considered mixed questions of law and fact and are therefore analyzed under the "unreasonable application" standard of 28 U.S.C. § 2254(d)(1). *See Gregory v. Thaler*, 601 F.3d 347, 351 (5th Cir. 2010). Where the state court adjudicated ineffective-assistance claims on the merits, this Court must review a habeas petitioner's claims under the "doubly deferential" standards of both *Strickland* and Section 2254(d). *Cullen v. Pinholster*, 563 U.S. 170, 190, 202 (2011); *see also Rhoades*, 852 F.3d at 434 ("Our federal habeas review of a state court's denial of an ineffective-assistance-of-counsel claim is 'doubly deferential' because we take a highly deferential look at counsel's performance through the deferential lens of § 2254(d)." (citation omitted)).

In such cases, the "pivotal question" for this Court is not "whether defense counsel's performance fell below *Strickland*'s standard"; it is "whether the state court's application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S. at 101; *see also id.* at 105 ("Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in

tandem, review is 'doubly' so." (internal quotation marks and citations omitted)).

In other words, AEDPA does not permit a de novo review of state counsel's conduct in these claims under *Strickland*. *See id.* at 101-02. Instead, 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." *Id.* at 101; *see also Woods v. Etherton*, 578 U.S. ____, 136 S. Ct. 1149, 1151 (2016) (per curiam) (explaining that federal habeas review of ineffective-assistance-of-counsel claims is "doubly deferential" "because counsel is 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment'"; therefore, "federal courts are to afford 'both the state court and the defense attorney the benefit of the doubt'" (quoting *Burt*, 571 U.S. at 22, 15)); *Johnson v. Sec'y, DOC*, 643 F.3d 907, 910-11 (11th Cir. 2011) ("Double deference is doubly difficult for a petitioner to overcome, and it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding.").

1. Failure to investigate or call witnesses

Dean argues that his trial counsel "failed to investigate and adequately prepare for trial," Dkt. No. 3 at 9, and failed to call "material witnesses," Dkt. No. 13 at 5.

A petitioner "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." *Trevino v. Davis*, 829 F.3d 328, 338 (5th Cir.

2016) (internal quotations omitted). And complaints of uncalled witness are not favored in federal habeas corpus review because the presentation of testimonial evidence is a matter of trial strategy and because assertions about what a witness would have stated are speculative. *See Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009). To prevail on such a claim, a petitioner must name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the proposed testimony of the witness, and show that the testimony would have been favorable to a particular defense. *See id.*

Here, regarding his allegation that his counsel was unprepared, Dean relies on an exchange between his counsel and the trial court at a pretrial hearing in which the trial court admonished counsel for requesting a continuance due to the inability to procure a defense witness. *See* Dkt. No. 3 at 9; Dkt. No. 13 at 2-4. But the exchange between counsel and the court, which took place on December 14, 2015, *see* Dkt. No. 17-16, does not demonstrate that counsel failed to investigate or was unprepared for trial, which began on February 8, 2016, *see* Dkt. No. 17-17. Dean fails to show how the trial court's grant of counsel's request for a continuance altered the outcome of the trial. *See Trevino,* 829 F.3d at 338.

Dean also offers further general speculations regarding what he believes his attorney would have discovered through further investigation. For example, he avers that, had his counsel properly investigated the case, he would have discovered the following: the victim was bisexual, engaged in orgies, lied to get what she wanted, did

not like to follow rules at her school, did not like Dean, wanted her mother and father to reunite, and made an outcry about the assault on the day of the assault. *See* Dkt. No. 13 at 7-10. Much of this information was in fact brought out at trial. *See* Dkt. No. 17-19 at 70-71 (testimony of victim acting out at school), at 65 (victim wanted her mother and father to reunite); Dkt. No. 17-18 at 196 (testimony that victim told mother of the assault on the day of the assault). And Dean fails to show how any of this evidence would have altered the outcome of the trial and instead states only that "this alleged sexual assault never happened." Dkt. No. 13 at 8. His general speculations are insufficient. *See Trevino,* 829 F.3d at 338.

And the exhibits from his state habeas petition that Dean cites in support of this argument are of no benefit. The affidavit of Cassandra Taylor, a substitute teacher, describes the victim as "disruptive," and "talkative" in class, and generally a poor student. Dkt. No. 17-35 at 5. The affidavit of Kelvis Mims states that, in 2013, he and the victim would have sex, that she "does a lot of lying," and that she lied about him getting her pregnant. *Id.* at 35. Mims also stated that the victim is bisexual and that they would occasionally "have threesomes." *Id.* Finally, Dean cites to text messages purportedly from Cassandra Taylor to Dean's counsel, expressing an interest in speaking with counsel's investigator. *See id.* at 52-54. These texts provide no support for Dean's argument, as they do not demonstrate whether his counsel ultimately did or did not contact Taylor. *See id.* Also, in Taylor's affidavit, she acknowledges that she was contacted by the investigator, though she does not provide a date. *See id.* at 5.

As to Dean's claim of uncalled witnesses, he appears to allege that his counsel provided ineffective assistance by failing to also call as witnesses Mims, and Taylor. *See* Dkt. No. 13 at 7.

A petitioner who alleges ineffective assistance of counsel for failing to call a witness must "name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense." *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009). While Dean cites to the affidavits of Mims and Taylor, submitted with his state habeas application, *see* Dkt. No. 13 at 7, he does not show that either Mims or Taylor were available to testify, or would have done so, *see id.* at 5-7; Dkt. No. 17-35 at 5-6, 35-36. This is insufficient to demonstrate counsel provided ineffective assistance. *See Day*, 566 F.3d at 538.

2. Failure to object

Dean avers that his counsel provided ineffective assistance by failing to object to the victim's therapist's testimony, when she stated that "I would say most of the time if not the majority of the time that children come into our center, it is very rare that we see a child come in that is lying." Dkt. No. 3 at 9 (citing Dkt. No. 17-19 at 125-26). Dean argues that his counsel should have objected because "an expert who testifies that a class of persons to which the victim belongs is truthful is essentially telling the jury that they can believe the victim's testimony." Dkt. No. 3 at 9-10. But Dean fails to demonstrate or even allege prejudice. *See id.* And Dean's counsel cured any possible

harm by eliciting from the therapist testimony that she does not conduct investigations and does not know with certainty whether any victims, including the victim in this case, are telling the truth. *See* Dkt. No. 17-19 at 124-25, 129. Thus, this claim fails. *See Strickland*, 466 U.S. at 694.

Dean also argues that his counsel should have objected to the victim's "hearsay testimony about Kelvis Mims Jr. agreeing to lie about him having impregnated her should her mom call and ask him questions." Dkt. No. 3 at 10 (citing Dkt. 17-18 at 100-101). The United States Court of Appeals for the Fifth Circuit has explained that "[f]ailure to raise meritless objections is not ineffective lawyering; it is the very opposite." *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994); *see also Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998) (failure to make frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness).

The Court first notes that the testimony that Dean cites to is not hearsay testimony under Texas Rules of Evidence. Texas Rule of Evidence 801(d) states: "Hearsay" means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." TEX. R. EVID. 801(d).

At trial, the following exchange took place between the prosecution and the victim:

> A. Yes. After that had happened, I missed periods, my menstruals, and I was going months without having them; and, so, me and my mama established a relationship at that time, a close relationship, and I had told her -- well, at first I called somebody that I used to date. His name was Kelvis

Mims. And I told him, I said if my mama calls you, I need you to tell her that we were sexually active. And he said that's fine; I'll tell her that. And when I talked to my mom, I told her that I'm not sure but I might be pregnant because I haven't had a menstrual.

Q. Now, [ ], why did you tell Kelvis what you told him?

A. Because I trusted him and he's been there through a lot, so I told him I need you to say what I tell you to say. I need you to say that me and you were sexually active, even though we weren't together at that time.

Q. Were you and Kelvis sexually active?

A. No, sir. We didn't -- we hadn't seen each other for years at that point, but I knew whenever I texted him or whenever I needed him, he was there.

Q. Why would you create a story like that, in case your mom called?

A. So he would be able to back me up, because I know once I called her to tell her that, she was gonna ask with who. My mother, she's gonna ask who you been sexually active with, why was it unprotected, why did you do it, period. And, so, I needed him to back me up when she asked all those questions.

Q. Why didn't you want to tell your mom the truth?

A. Still ashamed. And I didn't want nobody to know that. I didn't want anybody to know that.

Dkt. No. 17-18 at 100-01. Nothing in this portion of the victim's testimony could be construed as hearsay testimony under Texas law, and any objection by Dean's counsel would have been meritless. Counsel was not ineffective for not objecting. *See Clark*, 19 F.3d at 966.

Further, Dean fails to allege prejudice, other than to contend generally that

"there is a reasonable probability that, but for [his counsel's] unprofessional error, that of the proceeding would have been different." Dkt. No. 3 at 10. This general statement fails to "affirmatively prove prejudice," which is fatal to Dean's claim. *See Strickland*, 466 U.S. at 693.

3. Failure to make an opening statement at trial

Dean makes a singular statement, without further argument, that his counsel "made no opening statement to the jury for [his] defense." Dkt. No. 13 at 9. Federal courts do not "consider a habeas petitioner's bald assertions on a critical issue in his pro se petition ... [and] mere conclusory allegations do not raise a constitutional issue in a habeas proceeding." *Smallwood v. Johnson*, 73 F.3d 1343, 1351 (5th Cir. 1996) (quoting *Ross v. Estelle*, 694 F.2d 1008, 1011-12 (5th Cir. 1983)); *see also Lookingbill v. Cockrell*, 293 F.3d 256, 263 (5th Cir. 2002) (stating that where a habeas petitioner fails to brief an argument adequately, it is considered waived). Furthermore, this claim also fails because Dean fails to demonstrate any prejudice from his counsel's supposed deficient performance. *Strickland*, 466 U.S. at 693.

And the state habeas court denied Dean's IAC claims when it denied his state habeas application. Because the state habeas court's decision to deny relief did not involve an unreasonable application of *Strickland*, Dean's § 2254 petition should be denied, and Dean fails to show that his counsel's performance was ineffective.

Dean also fails to show that the state-court decision was unreasonable by showing "that there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Dean fails to show there was no reasonable basis for the state court to deny relief. *See Richter*, 526 U.S. at 98.

B. Trial Court Erred in Admitting Evidence

Dean avers that the trial court violated his right to due process by failing to give fair notice prior to admitting evidence of Dean's phone calls from jail. *See* Dkt. No. 3 at 7.

With regard to state court evidentiary rulings, federal courts "do not sit as a super state supreme court to review error under state law." *Bailey v. Procunier*, 744 F.2d 1166, 1168 (5th Cir. 1984). The Due Process clause "does not afford relief where the challenged evidence was not the principal focus at trial and the errors were not so pronounced and persistent that it permeates the entire atmosphere of the trial." *Gonzales v. Thaler*, 643 F.3d 425, 431 (5th Cir. 2011). Federal habeas corpus relief is warranted "only when the trial judge's error is so extreme that it constitutes a denial of fundamental fairness under the Due Process Clause.... [T]he erroneous admission of prejudicial evidence justifies federal habeas corpus relief only when it is "material in the sense of a crucial, critical, highly significant factor." *Bailey*, 744 F.2d at 1168. (citations omitted).

Here, Dean argues that the trial court violated his right to due process by admitting evidence of his recorded calls from jail to his son as rebuttal evidence to his

son's prior testimony. *See* Dkt. No. 3 at 7; *see also* Dkt. No. 17-20 at 5-22 (hearing on the admissibility of the jail calls). Dean summarizes the hearing and contends only that "he was harmed by the State's failure to provide him with adequate notice of intent to use the jail calls, thus depriving him of his ability to contest the admissibility of the jail calls, rebut it, or offer evidence or arguments to mitigate it," and that "it would be impossible to find that error in the admission of this evidence did not effect his due process substantial rights." Dkt. No. 3 at 7. In his memorandum in support of his Section 2254 petition, Dean argues that the admission of the calls was a violation of Texas Rule of Evidence 404(b). *See* Dkt. No. 13 at 18. Rule 404(b) concerns the prohibited and permitted uses as well as the notice requirements of "crimes, wrongs, or other acts" to demonstrate character in the prosecution's case-in-chief. TEX. R. EVID. 404(b). The rule does not apply in Dean's case because the prosecution introduced the jail calls to impeach and rebut Dean's son's testimony, not to demonstrate character. *See* Dkt. 17-20 at 10.

Further, the United States Supreme Court has made clear that "federal habeas corpus relief does not lie for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Dean has failed to show that the trial court erred, much less that any alleged error was so extreme as to constitute a denial of fundamental fairness under the Due Process Clause. This argument fails. *See Gonzales*, 643 F.3d at 430.

And the state habeas court denied this claim when it denied Dean's state habeas application. Dean fails to show the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly-established federal

law, as determined by the Supreme Court of the United States, or that the decision 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; *Childress v. Johnson*, 103 F. 3d 1221, 1224-25 (5th Cir. 1997). As such, Dean fails to show there was no reasonable basis for the state court to deny relief. *See Richter*, 526 U.S. at 98.

C. Prosecutor Presented False/Misleading Testimony

Dean alleges the prosecutor violated his right to due process by "knowingly us[ing] false testimony" at trial Dkt. No. 3 at 7. Specifically, he alleges that, at trial, "the State knew that the testimony of [the victim] regarding her irregular menstrual cycle was false." *Id.* Dean also alleges the State elicited false testimony from Dr. Krystal Castle regarding the cause of the victim's irregular cycles and that the State knew the victim's mother's testimony regarding when she became aware of the sexual assault was false. *See id.*

Prosecutorial misconduct may "so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). "To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial." *Greer v. Miller*, 483 U.S. 756, 765 (1987) (citation and internal citation omitted). To demonstrate a due process violation in allegations of a prosecutor's use of perjured testimony, a petitioner must prove (1) the testimony in question was actually false, (2) the prosecutor was aware of the perjury, and (3) the testimony was material. *See*

Faulder v. Johnson, 81 F.3d 515, 519 (5th Cir. 1996).

But perjury is not established by mere contradictory testimony from witnesses, inconsistencies within a witness' testimony, and conflicts between reports, written statements, and the trial testimony of prosecution witnesses. *See Koch v. Puckett*, 907 F.2d 524, 531 (5th Cir. 1990). Rather, it "merely go[es] to the credibility of the witnesses, an area within the province of the jury." *United States v. Martinez-Mercado*, 888 F.2d 1484, 1492 (5th Cir. 1989).

Dean fails to demonstrate a due process violation. He avers that the victims trial testimony (at Dkt. No. 17-18 at 100-05), regarding the cessation of her menstrual cycle, was meant to demonstrate that the sexual assault "was the sole cause" of the cessation. Dkt. 3 at 7. He argues that, because separate trial testimony demonstrated that the victim had a history of irregular menstrual cycles due to her medications, the victim committed perjury, and the State was aware but did not correct the perjured testimony. *See id.*; Dkt. No. 13 at 12-13.

The victim testified as follows: "After [the sexual assault], I missed periods, my menstruals, and I was going months without having them." Dkt. 17-18 at 100. She further stated that she feared she might be pregnant. *See id.* The victim's testimony relates to the timing of her missed menstrual cycle and does not, as Dean alleges, attempt to demonstrate that he was the "sole cause" of them. And Dean fails to demonstrate how this testimony was material to the case. Therefore, this claim fails. *See Faulder*, 81 F.3d at 519.

Similarly, although Dean asserts that the prosecution knowingly elicited misleading testimony from Dr. Castle regarding the victim's irregular cycles, *see* Dkt. No. 3 at 8, and that the victim's mother falsely testified that she was not aware of the assault for approximately five months, *see id.* at 7, he again fails to show that this allegedly misleading testimony was material to the case, *see id.* at 7-8; Dkt. No. 13 at12-17. With regard to testimony about the victim's cycles, Dean simply alleges that "the State was well aware of [the victim's] relationship with [Kelvis Mims, Jr.], which may have caused her medical and psychological problems." Dkt. No. 13 at 15. And, regarding the victim's mother's testimony, Dean posits that the victim's mother "was told the same night of the alleged assault and that she wanted to call the police but [the victim] told her not to ... because [the victim] knew if they called the police they would [have] taken her to the hospital and run tests and would [have] proved nothing happened." Dkt. No. 13 at 12. Dean provided no support for this theory and has failed to demonstrate how Dr. Castle's or the victim's mother's testimony was material to the case. Thus, the claim can provide no relief. *See Faulder*, 81 F.3d at 519.

And, although Dean attempts to bolster his claim by citing to the testimony of another witness which, he argues, contradicts Dr. Castle's testimony, *see* Dkt. No. 13 at 16, this is insufficient to provide Dean with relief, *see Koch*, 907 F.2d at 531; *Martinez-Mercado*, 888 F.2d at 1492.

Dean appears to also claim that the prosecution elicited false or misleading testimony from Desiree Teague, the victim's counselor, regarding the victim's

truthfulness and that she was suffering from post-traumatic stress disorder. *See* Dkt. No. 13 at 13, 15. Dean has failed to adequately brief the issue, and so the claim fails. *See Schlang v. Heard*, 691 F.2d 796, 799 (5th Cir. 1982) (stating that conclusory claims are insufficient to entitle a habeas corpus petitioner to relief). Federal courts do not "consider a habeas petitioner's bald assertions on a critical issue in his pro se petition ... [and] mere conclusory allegations do not raise a constitutional issue in a habeas proceeding." *Smallwood*, 73 F.3d at 1351 (quoting *Ross*, 694 F.2d at 1011-12); *see also Lookingbill*, 293 F.3d at 263 (stating that where a habeas petitioner fails to brief an argument adequately, it is considered waived).

Further, Dean raised the claim of false testimony in his state habeas application, *see* Dkt. No. 17-33 at 35, which the CCA denied, *see* Dkt. No. 17-27. And Dean fails to show the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly-established federal law, as determined by the Supreme Court of the United States, or that the decision 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; *Childress*, 103 F.3d at 1224-25.

D. Actual Innocence

Dean claims he is actually innocent. *See* Dkt. No. 3 at 6. A claim of actual innocence does not state an independent, substantive constitutional claim and is not a basis for federal habeas corpus relief. *See Herrera v. Collins*, 506 U.S. 390 (1993).

Claims of actual innocence are not cognizable on federal habeas review. *See United States v. Fields*, 761 F.3d 443, 479 (5th Cir. 2014) ("[Fifth Circuit] caselaw does not recognize freestanding actual innocence claims."). A claim of actual innocence may not be a basis for federal habeas corpus relief absent an independent federal constitutional violation. *See Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000).

As explained above, Dean has not shown an independent federal constitutional violation, and so his actual innocence claim is not cognizable on federal habeas appeal.

II. Evidentiary Hearing

Finally, Dean requests an evidentiary hearing. *See* Dkt. No. 3 at 10. But "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011); *see also Blue v. Thaler*, 665 F.3d 647, 656 (5th Cir. 2011) (same as to factual determinations under section 2254(d)(2)). Here, Dean only alleges non-defaulted claims under section 2254(d) that were adjudicated on the merits in state court. As such, he cannot overcome the limitation of section 2254(d)(1) on the record that was before the state court and is not entitled to an evidentiary hearing.

Recommendation

The Court should deny the application for a writ of habeas corpus.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within

14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b).

In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, 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 aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: December 4, 2019

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

DECISION OF THE COURT OF CRIMINAL APPEALS, DENYING STATE HABEAS CORPUS WITHOUT WRITTEN ORDER ON JUNE 06, 2018

APPENDIX D

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

OFFICIAL BUSINESS
STATE OF TEXAS
PENALTY FOR
PRIVATE USE

PRESORTED
FIRST CLASS

U.S. POSTAGE PITNEY BOWES

ZIP 78701
02 1W
0001401503 JUN 07 2018
$ 000.26[8]

6/6/2018

DEAN, DAMOND **Tr. Ct. No. W15-75244-J (A)** **WR-88,076-01**

This is to advise that the Court has denied without written order the application for writ of habeas corpus.

Deana Williamson, Clerk

194011

DAMOND DEAN
MCCONNELL UNIT - TDC # 2058851
3001 S. EMILY DR.
BEEVILLE, TX 78102

EMIWNAB 78102

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APPENDIX E

DECISION OF THE FIFTH DISTRICT COURT OF APPEALS, AFFIRMING THE TRIAL COURT'S DECISION ON APRIL 14, 2017

APPENDIX E

Affirmed and Opinion Filed April 14, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00168-CR

DAMOND DEAN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 3
Dallas County, Texas
Trial Court Cause No. F-1575244-J

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Lang

Damond Dean appeals the trial court's judgment convicting him of sexual assault of a child younger than seventeen years of age, enhanced by two prior convictions. The jury found Dean guilty. The trial court found the enhancements true and assessed Dean's punishment at forty years of imprisonment.

Dean raises two issues on appeal, arguing the trial court erred when it: (1) overruled his objection to State's Exhibit No. 3, which contained the notes of the complainant's licensed professional counselor intern at the Child Advocacy Center and associated information; and (2) overruled his objection to the State's amended special plea of enhancement paragraphs. We conclude that even if the trial court erred when it overruled Dean's objection to State's Exhibit No. 3, Dean was not harmed. Also, we conclude the trial court did not err when it overruled

Dean's objection to the State's amended special plea of enhancement paragraphs. The trial court's judgment is affirmed.

I. PROCEDURAL CONTEXT

Dean was indicted for sexual assault of a child younger than seventeen years of age. *See* TEX. PENAL CODE ANN. § 22.011(a)(2), (c)(1) (West 2011). After Dean was indicted, the State filed a special plea of enhancement, alleging that Dean had a prior conviction. On the first day of trial, before voir dire, the State filed an amended special plea of enhancement, alleging an additional prior conviction. As a result, the State alleged two prior convictions for the purposes of enhancing Dean's punishment. After a trial, the jury found Dean guilty. During the punishment hearing, Dean pleaded true to the enhancements, and the trial court found the enhancements true and assessed Dean's punishment at forty years of imprisonment.

II. OBJECTION TO STATE'S EXHIBIT NO. 3

In issue one, Dean argues the trial court erred when it overruled his objection to State's Exhibit No. 3, which contained the notes of the complainant's licensed professional counselor intern at the Child Advocacy Center and associated information. He claims the exhibit contains improper opinion testimony, irrelevant evidence, inadmissible hearsay, and improper victim impact evidence. Dean contends that he was harmed by the admission of this evidence because it "served only to confuse the jury and encourage them to act on aroused passion and sympathy" and was a "successful attempt to bolster [the complainant's] trial testimony." The State responds that the exhibit was not hearsay because it was not admitted for the truth of the matter, but to show the complainant had serious trauma issues and underwent lengthy treatment for these issues. Also, the State argues any error was harmless because State's Exhibit No. 2, the report of the complainant's pediatric doctor of osteopathy, contained the same evidence and was admitted without objection.

A. Non-Constitutional Error

Pursuant to rule 44.2(b), "Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b). A substantial right is affected if the error had a substantial and injurious effect or influence in determining the jury's verdict. *See Barshaw v. State*, 342 S.W.3d 91, 93–94 (Tex. Crim. App. 2011); *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010); *Haley v. State*, 173 S.W.3d 510, 518 (Tex. Crim. App. 2005). If the error did not influence the jury or had but a slight effect, the error is harmless. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). An appellate court should examine the record as a whole when conducting a harm analysis. *See Motilla v. State*, 78 S.W.3d 352, 358 (Tex. Crim. App. 2002). In conducting the harm analysis, an appellate court should consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the trial court's instructions to the jury, the State's theory, any defensive theories, closing arguments, and even voir dire, if material to the appellant's claim. *See Motilla*, 78 S.W.3d at 355–56; *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000). In assessing harm, the factors to be considered are the nature of the evidence supporting the verdict, the character of the alleged error, and how the evidence might be considered in connection with the other evidence in the case. *See Motilla*, 78 S.W.3d 355; *Morales*, 32 S.W.3d at 867. Also, an appellate court should consider overwhelming evidence of guilt, but it is only one factor in the harm analysis. *See Motilla*, 78 S.W.3d 357.

However, it is well established that the erroneous admission of evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling. *See Coble*, 330 S.W.3d at 282; *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998); *see also Estrada v. State*, 313 S.W.3d 274, 302 n.29 (Tex. Crim. App. 2010) (noting any error in the admission of evidence was harmless in light of "very similar" evidence

admitted without objection). In other words, error in the admission of evidence may be rendered harmless when substantially the same evidence is admitted elsewhere without objection. *See Mayes v. State*, 816 S.W.2d 79, 88 (Tex. Crim. App. 1991); *Castillo v. State*, 79 S.W.3d 817, 827 (Tex. App.—Dallas 2002, pet. ref'd).

B. Application of the Law to the Facts

Assuming, without deciding, the trial court erred when it denied Dean's objection to State's Exhibit No. 3, we must consider whether that alleged non-constitutional error harmed Dean. *See Werner v. State*, 412 S.W.3d 542, 547 (Tex. Crim. App. 2013) (neither defendant nor State bears burden of demonstrating harm); *Schutz v. State*, 63 S.W.3d 442, 444 (Tex. Crim. App. 2001) (neither the State nor appellant must demonstrate harm when an error has occurred; it is appellate court's duty to assess harm); *Taylor v. State*, 93 S.W.3d 487, 503 (Tex. App.—Texarkana 2002, pet. ref'd) (noting parties may suggest how such harm is shown or not shown). Dean complains that State's Exhibit No. 3 contains material "filled out" by the complainant or her grandmother, a copy of a 2006 court order, and shows that the complainant "successfully completed a course of therapy designed to treat a victim of sexual abuse." He maintains that this allowed the jury to infer that the complainant suffered the reported sexual abuse.

The record shows that State's Exhibit No. 3 consists of 128 pages of notes and associated information generated by the licensed professional counselor intern from the Child Advocacy Center who provided counseling to the complainant over a period of several months. The exhibit contained: (1) a completed consent to release confidential information form; (2) a form containing information about the therapist, and an explanation of confidentiality and the exceptions to it; (3) a copy of a final order in a suit affecting the parent-child relationship appointing the complainant's managing and possessory conservators; (4) a completed initial intake form; (5) a case log; (6) the counselor's progress notes from her sessions with the

complainant; (7) a completed UCLA PTSD Reaction Index for DSM-IV (RI) interview form; (8) a completed relaxation practice log; (9) a report prepared by the counselor; and (10) a signed informed consent for counseling services form. One of the progress reports contains a trauma history checklist and shows the following question and answer: "Has anyone forced you to have intercourse? Damond Dean - June 2013 [Handwritten Answer]." Also, the counselor's report states, in part, "[The complainant] identified details related to vaginal penetration and oral sex. She [illegible] two accounts, within the same day, of oral sex where she expressed feeling upset, unclean, scared, and crying. . . . However, [the complainant] successfully processed trauma [illegible] related to sexual abuse through desensitization."

The record also shows that State's Exhibit No. 2, the report of the complainant's pediatric doctor of osteopathy, was admitted without objection. State's Exhibit No. 2 contains, in part, the following statements:

> (1) "In June 2013, [the complainant] was molested by mother's husband.";
>
> (2) "She no longer has contact with mother's husband. No more molestation since June.";
>
> (3) "I will make CPS case report online. She needs to avoid any contact with the offender. Damond Dean [date of birth and address omitted]. Dallas County[.] 6/2013: full penetration, forced sexual intercourse, no condom use. . . . He requested that they keep this between them[.]"
>
> (4) "He denied it until her mom kept asking then started crying and apologized."
>
> (5) "Cps [sic] took care of report with sexual assault with stepfather."

In his reply brief on appeal, Dean claims that "State's Exhibit [No.] 3 contains more and different information than [State's] [E]xhibit [No.] 2," but he does not identify the specific portions of the exhibit he refers to or provide references to where that may be found in that exhibit.

Even if the trial court erred when it denied Dean's objection to State's Exhibit No. 3, we conclude that Dean was not harmed because substantially similar evidence was admitted without

objection in State's Exhibit No. 2. *See Coble*, 330 S.W.3d at 282; *Mayes*, 816 S.W.2d at 88; *Leday*, 983 S.W.2d at 718. Issue one is decided against Dean.

III. ENHANCEMENT PARAGRAPHS

In issue two, Dean argues the trial court erred when it overruled his objection to the State's amended special plea of enhancement paragraphs. He claims that the State's filing of the amended special plea on the day of trial, but before voir dire, violated his right to due process because he was deprived of (1) sufficient notice of the penalty the State sought to impose and (2) a fair opportunity to evaluate his options, including the merits of accepting a plea agreement. Also, he maintains that the State's amended special plea was deficient because it does not specify the date of commission for the 2003 conviction. The State responds that its amended special plea was timely filed and the trial court explained the range of punishment that applied when there are two prior convictions. Also, the State argues that defense counsel admitted he knew about the existence of Dean's two prior felony convictions.

A. Applicable Law

The State is required to provide notice of its intent to use a defendant's prior conviction for enhancement purposes. *See Brooks v. State*, 957 S.W.2d 30, 33–34 (Tex. Crim. App. 1997). The notice of enhancement requirement is of constitutional origin. *See Villescas v. State*, 189 S.W.3d 290, 294 (Tex. Crim. App. 2006) (citing *Oyler v. Boles*, 368 U.S. 448 (1962) and *Brooks*, 957 S.W.2d 30).

It is well settled that due process does not require pretrial notice that the trial on the substantive offense will be followed by an habitual offender punishment proceeding. *See Oyler*, 368 U.S. at 452; *Pelache v. State*, 324 S.W.3d 568, 576 (Tex. Crim. App. 2010); *Villescas*, 189 S.W.3d at 294. For purposes of conducting a due-process analysis, the determination of whether proper notice of enhancements was given does not require that notice be given within a particular

period of time before trial or before the guilt phase is completed. *See Pelache*, 324 S.W.3d at 577; *Villescas*, 189 S.W.3d at 294.

Under a due process analysis, the issue is whether the appellant received sufficient notice of the enhancements so that he had the opportunity to prepare a defense to them and he was afforded an opportunity to be heard. *See Oyler*, 368 U.S. at 452; *Ex parte Parrott*, 396 S.W.3d 531, 537 (Tex. Crim. App. 2013); *Pelache*, 324 S.W.3d at 577. An appellate court looks to the record to identify whether the defendant's defense was impaired by the timing of the State's notice. *See Pelache*, 324 S.W.3d at 577. When a defendant has no defense to an enhancement allegation and makes no suggestion of the need for a continuance in order to prepare a defense, notice given, even at the beginning of the punishment phase, satisfies the due process requirements of the United States Constitution as well as the due course of law requirements of the Texas Constitution. *See Pelache*, 324 S.W.3d at 577; *Villescas*, 189 S.W.3d at 294.

It is also well settled that it is not necessary to allege prior convictions for the purpose of the enhancement of punishment with the same particularity as must be used in charging the original offense. *See, e.g., Freda v. State*, 704 S.W.2d 41 (Tex. Crim. App. 1986); *Cole v. State*, 611 S.W.2d 79, 80 (Tex. Crim. App. [Panel Op.] 1981); *Coleman v. State*, 577 S.W.2d 486, 488 (Tex. Crim. App. [Panel Op.] 1979); *Hollins v. State*, 571 S.W.2d 873, 875 (Tex. Crim. App. 1978). The defendant is entitled to a description of the judgment of former conviction that will enable him to find the record and make preparation for a trial on the question of whether he is the named convict or that there was no final conviction. *See Villescas*, 189 S.W.3d at 293; *Hollins*, 571 S.W.2d at 875; *see also Garza v. State*, 383 S.W.3d 673, 676 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *Derichweiler v. State*, 359 S.W.3d 342, 349 (Tex. App.—Fort Worth 2012, pet. ref'd). In alleging a prior conviction for the enhancement of punishment, the allegations should include the court in which the conviction was obtained, the time of the conviction, and the

nature of the offense. *See Cole*, 611 S.W.2d at 80; *Hollins*, 571 S.W.2d at 876. It is not necessary to allege the date of the commission of the prior offense or the date on which the prior conviction became final. *See Hollins*, 571 S.W.2d at 876 n.1 (date of commission of prior offense and date on which prior conviction became final); *Derichweiler*, 359 S.W.3d at 349 (date on which prior conviction became final).

B. Application of the Law to the Facts

First, we address Dean's argument that his right to due process was violated because he was deprived of (1) sufficient notice of the penalty the State sought to impose and (2) a fair opportunity to evaluate his options, including the merits of accepting a plea agreement. The record shows that the State filed its amended special plea of enhancement paragraphs on the first day of trial, but before voir dire. *See Palache*, 324 S.W.3d at 577 (determination of whether proper notice of enhancements given does not require notice be given within particular period of time before trial); *Villescas*, 189 S.W.3d at 294 (same). Dean objected, arguing "undue surprise on the Defense as far as trial strategy and also, as far as the way [the defense plans to] have to voir dire." In addition, defense counsel claimed that he had "not had ample time to discuss everything with [] Dean, being that [they] received notice on the day of trial." However, in response to the trial court's questioning, defense counsel admitted that, prior to the State's amended special plea of enhancement paragraphs, he knew Dean had been convicted of two prior felony offenses. Further, Dean did not request a continuance in order to prepare a defense. The trial court overruled Dean's objection, but made clear that it was not ruling on whether those enhancement paragraphs were true. During the hearing on punishment before the trial court, Dean pleaded true to the allegations in the enhancement paragraphs. The penitentiary packs, which included copies of the judgments of conviction, were admitted without objection. We conclude Dean's right to due process was not violated by the State's filing of the amended

special plea on the day of trial, but before voir dire, because: (1) Dean did not request a continuance after receiving notice of the State's intent to enhance his punishment; (2) he did not complain that he was unprepared to contest the enhancement allegations, only that it might affect his trial strategy and voir dire; (3) defense counsel admitted he already knew of Dean's prior convictions; and (4) during the punishment phase of the trial, Dean pleaded true to the enhancement paragraphs and the penitentiary packs were admitted without objection. *See Pelache*, 324 S.W.3d at 577; *Villescas*, 189 S.W.3d at 294.

Next, we address Dean's argument that the trial court erred when it overruled his objection to the State's amended special plea because it was deficient as it did not specify the date of commission for the 2003 conviction. Dean did not object in the trial court on this basis, so his complaint on appeal is not preserved for appellate review. *See* TEX. R. APP. P. 33.1(a). Nevertheless, even if Dean had preserved this complaint for appellate review, it is well settled that it was not necessary for the State to allege his prior convictions for the purpose of the enhancing his punishment with the same particularity as must be used in charging the original offense. *See, e.g., Freda*, 704 S.W.2d at 41; *Cole*, 611 S.W.2d at 80; *Coleman*, 577 S.W.2d at 488; *Hollins*, 571 S.W.2d at 875. Further, it is not necessary to allege the date of the commission of the prior offense. *See Hollins*, 571 S.W.2d at 876 n.1.

We conclude the trial court did not err when it overruled Dena's objection to the State's amended special plea of enhancement paragraphs. Issue two is decided against Dean.

IV. CONCLUSION

Even if the trial court erred when it overruled Dean's objection to State's Exhibit No. 3, Dean was not harmed. Also, the trial court did not err when it overruled Dean's objection to the State's amended special plea of enhancement paragraphs.

The trial court's judgment is affirmed.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

Do Not Publish
TEX. R. APP. P. 47

160168F.U05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAMOND DEAN, Appellant

No. 05-16-00168-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 3, Dallas County, Texas
Trial Court Cause No. F-1575244-J.
Opinion delivered by Justice Lang. Justices Brown and Whitehill participating.

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

Judgment entered April 14, 2017.

APPENDIX F

JUDGMENT OF CONVICTION BY JURY SHEET IN CDC #3 IN DALLAS COUNTY, SENTENCING PETITIONER TO 40 YEARS IN TDCJ-CID

APPENDIX F

THIS CASE IS ON APPEAL

CASE NO. F-1575244-J
INCIDENT NO./TRN: 9176838609

THE STATE OF TEXAS	§	IN THE CRIMINAL DISTRICT
	§	
V.	§	COURT #3
	§	
DAMOND DEAN	§	DALLAS COUNTY, TEXAS
	§	
STATE ID NO.: TX04591169	§	

JUDGMENT OF CONVICTION BY JURY

Judge Presiding:	HON. Gracie Lewis	Date Judgment Entered:	2/12/2016
Attorney for State:	Travis Wiles	Attorney for Defendant:	Nigel Redmond

Offense for which Defendant Convicted:
SEXUAL ASSAULT OF A CHILD/A-V

Charging Instrument: **INDICTMENT**	Statute for Offense: **22.011 Penal Code**
Date of Offense: **6/20/2013**	
Degree of Offense: **2ND DEGREE FELONY**	Plea to Offense: **NOT GUILTY**
Verdict of Jury: **GUILTY**	Findings on Deadly Weapon: **N/A**
Plea to 1st Enhancement Paragraph: **TRUE**	Plea to 2nd Enhancement/Habitual Paragraph: **TRUE**
Findings on 1st Enhancement Paragraph: **TRUE**	Findings on 2nd Enhancement/Habitual Paragraph: **TRUE**

Punishment Assessed by:	Date Sentence Imposed:	Date Sentence to Commence:
COURT	**2/12/2016**	**2/12/2016**

Punishment and Place of Confinement: **40 YEARS INSTITUTIONAL DIVISION, TDCJ**

THIS SENTENCE SHALL RUN **CONCURRENTLY.**

☐ SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR N/A .

Fine:	Court Costs:	Restitution:	Restitution Payable to:
$ N/A	$ 619.00	$ N/A	(see below) ☐ AGENCY/AGENT ☐ VICTIM

☐ **Attachment A, Order to Withdraw Funds, is incorporated into this judgment and made a part hereof.**

Sex Offender Registration Requirements apply to the Defendant. TEX. CODE CRIM. PROC. chapter 62.

The age of the victim at the time of the offense was **<17 years.**

Time Credited:
If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.
From **2/28/2015** to **2/12/2016** From to From to
From to From to From to
If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter days credited below.
N/A DAYS NOTES: **N/A**

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

This cause was called for trial in Dallas County, Texas. The State appeared by her District Attorney.

Counsel / Waiver of Counsel (select one)

☒ Defendant appeared in person with Counsel.
☐ Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

It appeared to the Court that Defendant was mentally competent and had pleaded as shown above to the charging instrument. Both parties announced ready for trial. A jury was selected, impaneled, and sworn. The INDICTMENT was read to the jury, and Defendant entered a plea to the charged offense. The Court received the plea and entered it of record.

The jury heard the evidence submitted and argument of counsel. The Court charged the jury as to its duty to determine the guilt or innocence of Defendant, and the jury retired to consider the evidence. Upon returning to open court, the jury delivered its verdict in the presence of Defendant and defense counsel, if any.

The Court received the verdict and ORDERED it entered upon the minutes of the Court.

Punishment Assessed by Jury / Court / No election (select one)

☐ **Jury.** Defendant entered a plea and filed a written election to have the jury assess punishment. The jury heard evidence relative to the question of punishment. The Court charged the jury and it retired to consider the question of punishment. After due deliberation, the jury was brought into Court, and, in open court, it returned its verdict as indicated above.

☒ **Court.** Defendant elected to have the Court assess punishment. After hearing evidence relative to the question of punishment, the Court assessed Defendant's punishment as indicated above.

☐ **No Election.** Defendant did not file a written election as to whether the judge or jury should assess punishment. After hearing evidence relative to the question of punishment, the Court assessed Defendant's punishment as indicated above.

The Court FINDS Defendant committed the above offense and **ORDERS, ADJUDGES AND DECREES** that Defendant is **GUILTY** of the above offense. The Court FINDS the Presentence Investigation, if so ordered, was done according to the applicable provisions of TEX. CODE CRIM. PROC. art. 42.12 § 9.

The Court ORDERS Defendant punished as indicated above. The Court ORDERS Defendant to pay all fines, court costs, and restitution as indicated above.

Punishment Options (select one)

☒ **Confinement in State Jail or Institutional Division.** The Court ORDERS the authorized agent of the State of Texas or the Sheriff of this County to take, safely convey, and deliver Defendant to the **Director, Institutional Division, TDCJ.** The Court ORDERS Defendant to be confined for the period and in the manner indicated above. The Court ORDERS Defendant remanded to the custody of the Sheriff of this county until the Sheriff can obey the directions of this sentence. The Court ORDERS that upon release from confinement, Defendant proceed immediately to the Dallas County District Clerk Felony Collections Department. Once there, the Court ORDERS Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **County Jail—Confinement / Confinement in Lieu of Payment.** The Court ORDERS Defendant immediately committed to the custody of the Sheriff of Dallas County, Texas on the date the sentence is to commence. Defendant shall be confined in the Dallas County Jail for the period indicated above. The Court ORDERS that upon release from confinement, Defendant shall proceed immediately to the Dallas County District Clerk Felony Collections Department. Once there, the Court ORDERS Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **Fine Only Payment.** The punishment assessed against Defendant is for a FINE ONLY. The Court ORDERS Defendant to proceed immediately to the Office of the Dallas County District Clerk Felony Collections Department. Once there, the Court ORDERS Defendant to pay or make arrangements to pay all fines and court costs as ordered by the Court in this cause.

Execution / Suspension of Sentence (select one)

☒ The Court ORDERS Defendant's sentence EXECUTED.

☐ The Court ORDERS Defendant's sentence of confinement SUSPENDED. The Court ORDERS Defendant placed on community supervision for the adjudged period (above) so long as Defendant abides by and does not violate the terms and conditions of community supervision. The order setting forth the terms and conditions of community supervision is incorporated into this judgment by reference.

The Court ORDERS that Defendant is given credit noted above on this sentence for the time spent incarcerated.

Furthermore, the following special findings or orders apply:

The Court ORDERS Defendant to apply for an original or renewed Texas Driver's License or personal identification certificate not later than 30 days after release from confinement or upon receipt of written notice from the Texas Department of Public Safety (DPS). The Court further ORDERS Defendant to annually renew the license or certificate. The DPS shall place an indication on the Defendant's driver's license or personal identification certificate that the Defendant is subject to the sex offender registration requirements. The Court ORDERS the clerk of the Court to send a copy of this order to the DPS and to Defendant. TEX. CODE CRIM. PROC. art. 42.016

DEFENDANT EXCEPTS AND GIVES NOTICE OF APPEAL TO THE COURT OF APPEALS, FIFTH DISTRICT OF TEXAS AT DALLAS

X Gracie H. Lewis

Gracie Lewis
JUDGE PRESIDING

Clerk: C. HAMILL

END OF APPENDIX VOLUME

END OF APPENDIX VOLUME

END OF APPENDIX VOLUME

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DAMOND DEAN, (TDCJ No. 2058851), Petitioner, VS. LORIE DAVIS, Director Texas Department of Criminal Justice Correctional Institutions Division, Respondent.	)	CIVIL ACTION NO. 3:18-CV-2623-G (BN)

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE, AND DENYING A CERTIFICATE OF APPEALABILITY

The United States Magistrate Judge made findings, conclusions, and a recommendation in this case. No objections were filed. The district court reviewed the proposed findings, conclusions, and recommendation for plain error. Finding no error, the court **ACCEPTS** the findings, conclusions, and recommendation of the United States Magistrate Judge.

It is therefore **ORDERED** that the petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 is denied.

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings,

and 28 U.S.C. § 2253(c), the court **DENIES** a certificate of appealability. The court adopts and incorporates by reference the magistrate judge's findings, conclusions, and recommendation filed in this case in support of its finding that the movant has failed to show (1) that reasonable jurists would find this court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).*

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* Rule 11 of the Rules Governing §§ 2254 and 2255 Cases, as amended effective on December 1, 2009, reads as follows:

> **(a) Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.
>
> **(b) Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to

(continued...)

If petitioner files a notice of appeal,

( ) petitioner may proceed *in forma pauperis* on appeal.

(X) petitioner must pay the $505.00 appellate filing fee or submit a motion to proceed *in forma pauperis*.

SO ORDERED.

February 7, 2020.

A. JOE FISH
Senior United States District Judge

*(...continued)

appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.