United States Court of Appeals for the Fifth Circuit

No. 19-40699

SHAHRAM SHAKOURI,

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. 4:15-CV-447

Before DENNIS, SOUTHWICK, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

Shahram Shakouri, Texas Prisoner # 1558021, was convicted by a jury of aggravated sexual assault and sentenced to 23 years in prison. After the United States District Court denied his federal *habeas* petition brought under 28 U.S.C. § 2254, he filed what he claimed was a post-judgment motion under Rule 60(b) of the Federal Rules of Civil Procedure. The district court determined that the motion instead was an unauthorized successive petition and dismissed it for lack of jurisdiction. Shakouri then sought a certificate of appealability (COA) in this court, which was denied.

Exhibit "A"

Shakouri now moves to file a motion for reconsideration out of time, and then to have the court reconsider its denial of a COA. We GRANT the motion to allow the late filing, but we DENY reconsideration.

First, Shakouri argues that the panel erred by finding that he raised some of his ineffective-assistance-of-counsel claims for the first time on appeal. He claims to have raised those claims in his post-judgment motion in district court. Regardless of whether his post-judgment motion is characterized as a motion under Rule 59(e) or under Rule 60(b), these claims were raised for the first time in the post-judgment motion. Rule 59(e) cannot be used to raise arguments presented for the first time in that motion. *Banister v. Davis*, 140 S. C.t 1698, 1708 (2020). A Rule 60(b) motion that presents new claims is an unauthorized successive petition, which must be rejected absent exception that are not relevant here. *Gonzalez v. Crosby*, 545 U.S. 524, 529–30, 532 (2005). Accordingly, Shakouri did not show that he was entitled to a COA on these late-raised claims.

Second, Shakouri argues that the panel erred by failing to consider his claims for relief under *Brady v. Maryland*, 373 U.S. 83 (1963). He contends that the State withheld the testimony of two witnesses, Manteghinezad and Hutchinson. Shakouri was not entitled to a COA on these claims because he presented no credible evidence that the State suppressed favorable and material evidence during either the trial or the *habeas* proceedings. *See Canales v. Stephens*, 765 F.3d 551, 574 (5th Cir. 2014).

Third, Shakouri argues that the panel erred by denying him a COA on his claim that the State allowed the victim to present false testimony. This argument is without merit because the Due Process Clause of the United States Constitution is violated only when the prosecution *knowingly* uses false testimony to obtain a conviction. *Kinsel v. Cain*, 647 F.3d 265, 271 (5th Cir.

2011). Shakouri was not entitled to a COA because there is no credible indication that the State knew that the victim's testimony was false.

Fourth, Shakouri argues he was entitled to a COA based on his claim that his trial counsel was ineffective by failing to request a lesser-included-offense instruction. He contends that his counsel had no strategic reason for failing to do so. Shakouri, though, has not shown that reasonable jurists could disagree that the district court was correct in determining that he was not entitled to *habeas* relief on this claim. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Fifth, Shakouri contends that he is actually innocent of his crime of conviction. However, such a claim is not a basis for *habeas* relief absent an independent constitutional violation. *See Herrera v. Collins*, 506 U.S. 390, 400–01 (1993). Because he has not shown an independent constitutional violation, his actual innocence claim is not a basis for a COA.

Sixth, Shakouri did not show that his allegations related to defects in the integrity of the state and federal *habeas* proceedings were entitled to further review because he has not shown a corollary constitutional violation. *See Norman v. Stephens*, 817 F.3d 226, 233–34 (5th Cir. 2016).

Shakouri's motion for leave to file out of time the motion for reconsideration is GRANTED. Shakouri's motion for reconsideration is DENIED.

Exhibit – 'B'

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
May 18, 2021
Lyle W. Cayce
Clerk

No. 19-40699

SHAHRAM SHAKOURI,

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. 4:15-CV-447

Before DENNIS, SOUTHWICK, and ENGELHARDT, Circuit Judges.

PER CURIAM:

Shahram Shakouri, Texas prisoner # 1558021, was convicted by a jury of aggravated sexual assault and received a sentence of 23 years in prison. He now seeks a certificate of appealability (COA) to challenge the district court's denial of his 28 U.S.C. § 2254 petition challenging this conviction, along with the denial of his postjudgment motion. Shakouri maintains that the district court should not have applied a presumption of correctness to the state court's findings pursuant to § 2254(e) because the habeas judge did not preside over his trial and there was no "full and fair" evidentiary hearing. He

Exhibit "B"

contends that the prosecution violated his due process rights by failing to turn over exculpatory evidence, by allowing the victim to present perjured testimony without correction, and by relying on planted evidence. Shakouri asserts that his trial counsel rendered ineffective assistance by failing to seek suppression of evidence of pornography, by failing to object to the admission of the pornographic evidence at trial, by failing to request a lesser included offense instruction, and by failing to require the State to elect the specific offense; he also contends that one of his appellate attorneys rendered ineffective assistance by failing to withdraw after accepting a job with the State. He maintains that he is actually innocent of the charges against him and may therefore obtain relief. Shakouri alleges, as he did in his postjudgment motion, that the State perpetrated fraud on the court at his trial, during the state postconviction proceedings, and in the § 2254 proceedings. Although Shakouri presented other claims in the district court, he does not brief them here, and they are deemed abandoned. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999). We decline to address Shakouri's assertions that trial counsel rendered ineffective assistance by failing to investigate prior accusations of abuse by the victim and by failing to challenge a motion in limine barring evidence of the victim's sexual conduct, which were presented for the first time in this court. *See Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003).

To obtain a COA, Shakouri must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). He will satisfy this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To the extent the district court rejected Shakouri's claims on their merits, he "must demonstrate that reasonable

jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484; *see also Miller-El*, 537 U.S. at 338.

With respect to Shakouri's claims regarding the deference to the state court's findings, prosecutorial misconduct, ineffective assistance, and actual innocence, he has not made the requisite showing. *See Slack*, 529 U.S. at 484. As for Shakouri's challenge to the denial of his postjudgment motion, reasonable jurists could debate whether the district court erred in concluding that the motion, purportedly filed pursuant to Federal Rule of Civil Procedure 60(b) within 28 days of the entry of final judgment, constituted an unauthorized successive § 2254 proceeding. *See id.*; *see also Banister v. Davis*, 140 S. Ct. 1698, 1705-11 (2020) (holding that postjudgment motions filed pursuant to Federal Rule of Civil Procedure 59(e) did not constitute successive applications). However, to the extent that the district court considered and rejected the merits of Shakouri's claims of fraud and his challenges to the denial of relief on the merits of his constitutional claims, he has not shown that his claims are "adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327; *see Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011) (stating that to obtain a COA to challenge the denial of a postjudgment motion, a habeas petitioner must show that reasonable jurists would conclude that the district court abused its discretion in denying relief).

Accordingly, the motion for a COA is DENIED. His motion for leave to file a supplemental brief before this court is GRANTED. As Shakouri fails to make the required showing for a COA on his constitutional claims, we do not reach whether the district court erred by denying an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020), *petition for cert. filed* (U.S. Mar. 18, 2021) (No. 20-7553).

Exhibit – 'C'

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

SHAHRAM SHAKOURI, #1558021	§	
	§	
	§	
VS.	§	CIVIL ACTION NO. 4:15cv447
	§	
	§	
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 disposition of such action, has been presented for consideration. Petitioner filed objections.

After reviewing the Report and Recommendation and conducting a *de novo* review of the 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. It is accordingly

ORDERED the petition for a 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 **DENIED**.

SIGNED this the 24th day of September, 2018.

Richard A. Schell
RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

Exhibit "C"

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

SHAHRAM SHAKOURI, #1558021	§	
	§	
VS.	§	CIVIL ACTION NO. 4:15cv447
	§	
	§	
DIRECTOR, TDCJ-CID	§	

FINAL JUDGMENT

Having considered the petition for writ of habeas corpus and rendered its decision by opinion and order of dismissal issued this same date, the court **ORDERS** the case is **DISMISSED** with prejudice.

SIGNED this the 24th day of September, 2018.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

Exhibit – 'D'

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

SHAHRAM SHAKOURI, #1558021	§	
	§	
VS.	§	CIVIL ACTION NO. 4:15cv447
	§	
	§	
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Shahram Shakouri, an inmate confined in the Texas prison system, filed the above-styled and numbered petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, with the assistance of counsel. The petition was referred to the undersigned United States Magistrate Judge 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 for aggravated sexual assault, Cause No. 21980595-07 (Dkt. #1). A jury found Petitioner guilty and sentenced him to twenty-three years' confinement (Dkt. #21-6 at 19). On August 30, 2010, the Fifth Court of Appeals affirmed judgment, Shakouri v. State, No. 05-09-00158-CR, 2010 WL 3386598 (Tex. App.–Dallas 2010). The Texas Court of Criminal Appeals refused Petitioner's petition for discretionary review ("PDR") on May 13, 2011, Shakouri v. State, PDR No. PD-0122-11. Petitioner then filed a state writ of habeas corpus on June 29, 2012 (Dkt. #22-20 at 15), which was denied without written order based on findings of

the trial court without a hearing, on August 19, 2015 (Dkt. #22-16). Petitioner filed the instant Section 2254 petition on June 29, 2015, prior to the decision of the state habeas court (Dkt. #1). Petitioner asserts the following:

1. Trial counsel was ineffective by:
    a. failing to file a motion to suppress evidence;
    b. failing to object to the admission of certain evidence;
    c. failing to object to improper voir dire;
    d. failing to request a jury instruction on a lesser-included offense;
    e. failing to object or request a limiting instruction; and
    f. failing to force prosecution to state the specific offense on which it would rely for conviction;
2. Petitioner was denied due process when the State planted evidence, presented perjured testimony, and failed to disclose evidence favorable to the defense; and
3. Petitioner is actually innocent.

The Government filed a response (Dkt. #16), stating Petitioner is not entitled to relief. Petitioner filed a reply (Dkt. #24).

FACTUAL BACKGROUND

The state court of appeals described the facts as follows:

> [Petitioner], who had lived in the United States for nearly 30 years, married Afsaneh Marous in Iran in January 2006. After the wedding, [Petitioner] returned to the United States, while Marous and her twelve-year-old son awaited their visas.
>
> In May 2006, Marous and her son arrived in Dallas. That night, Marous alleged [Petitioner] threw her onto the bed, handcuffed her arms above her head and raped her. Marous stated the violence continued during sex, in that [Petitioner] would slap, bite and punch her. Marous also testified that the first time [Petitioner] anally raped

her, he put his elbow into her back, pressed her head sideways onto the mattress with his hand and forced his penis into her backside with such force that it displaced the mattress.

She also stated that during anal sex, he would clutch her hair and pull her head back toward him, yanking out her hair and ignoring her complaints. Marous explained that he would press his weight against her so he could bind her ankles to the bed with straps that left marks on her legs. He also used sex toys in her vagina and anus. Marous testified that [Petitioner] seemed to derive pleasure from her pain and explained when [Petitioner] failed to use lubrication for the sex toys, she would bleed.

She complained that if she said "no," he would hit and bite her. Marous testified that [Petitioner] claimed if she said anything to anybody, "[he] would kill [her] and [her] child." She stated she was scared of him and for her son, and tried to appease him to calm him down.

Beth Lyons, a member of the Baha'i church that both [Petitioner] and Marous attended, testified [Petitioner] "was controlling about what [Marous] did, who she got to see, who she got to interact with, [and] who she was allowed to talk to on the phone." Marous testified [Petitioner] would not let her go anywhere by herself. She explained:

I was like a prisoner in that house. If anybody would want to come to our house, he had to know. If my mom wanted to call me, she has to call during the time he was at home. If I would speak more than ten minutes, he would ask me-be suspicious of me. He would tell me just call on Saturdays or Sunday, that way [he] would be home. He didn't want me to have any contact with my family. He took advantage of me being alone, not having anybody, not having money. I didn't have nothing. No job. I couldn't speak any English. He took advantage of all of this.

After Marous and her son had been in the United States a few months, [Petitioner] moved them to a house in Prosper, but Marous testified [Petitioner] continued to rape and sodomize her with the sex toys. She stated, at one point, she took a home pregnancy test and discovered she was pregnant. She knew [Petitioner] did not want any more children and testified she was scared to tell him. When she did, [Petitioner] was angry and for two "bad days," he raped and punched her on the side. She explained she eventually began to bleed and was no longer pregnant.

Lyons testified that, over the course of several months, the women in the Baha'i church noticed a change in both Marous and her son. Her son appeared more withdrawn and would sit with his mother at church gatherings instead of playing with

the other children. During church gatherings, Marous cried frequently during prayer time and one church member thought she appeared to be losing her hair, especially at the crown of her head.

Her son spent several hours in front of the computer webcam with Marous's sister, Ahdieh, who lived in Italy. Ahdieh testified her nephew did not want her to leave her computer, so she kept it on, even when she slept, so her nephew would have someone in his presence.

Marous testified that, one night after [Petitioner] raped her, she was in pain and called Akram Gheisar, a church member who spoke Farsi. She asked Gheisar to speak to the church's Assembly on her behalf. Gheisar told Lyons, who chaired the Assembly, that [Petitioner] was abusing Marous. The Assembly wrote a letter to Marous in Farsi, advising her that, for her own safety and that of her son, she should go to a women's shelter in Plano. Lyons explained Marous was too afraid to have the letter in her possession, so Gheisar kept the letter until several weeks later.

Around that time, Ahdieh came for a visit at her nephew's insistence. Ahdieh took the entire family on a trip to California and Las Vegas. Near the end of the trip, while [Petitioner] was taking a shower in the adjoining hotel room, Marous told Ahdieh that [Petitioner] was beating her and that she was losing her hair because [Petitioner] was pulling it out. Marous showed her sister black marks on her wrists and ankles, which Ahdieh, a medical doctor, thought resembled marks left behind by handcuffs.

Marous testified she suspected [Petitioner] knew of her disclosure to her sister, because, on their trip home, he called her on her cell phone (even though she was in his line of sight) and threatened to rape and kill her. Ahdieh heard [Petitioner] tell Marous, "I will rape you as soon as your sister will go back to Italy in a way that you will not be able to sit up." Marous testified that, when they returned home, [Petitioner] called his brother and told him he would kill Marous, her son, and Ahdieh.

Frightened by what she overheard, Marous went into the room her sister was staying in and the two women hid in the closet. Her son testified he overheard [Petitioner] say, "I'm going to set them on fire; I'm going to kill them."

The next morning, after [Petitioner] left for work, Marous and Ahdieh spoke with some of the Baha'i church members, who read Marous the letter they had prepared, recommending a particular women's shelter that had a counselor who spoke Farsi.

That same morning, Marous, her son and Ahdieh gathered their things and were loading them into the cars of church members when [Petitioner] arrived. To keep the peace, church members called the Prosper police. Officer Baxter testified that, when

he arrived, Marous and her son were scared and Ahdieh started translating what Marous was saying. At that point, Baxter heard information suggesting a crime had occurred, specifically, [Petitioner's] threat to kill Marous, her son and Ahdieh. The police investigation began.

After Marous moved into a shelter, she met again with Officer Baxter and told him about the sexual abuse through the Farsi-speaking counselor at the shelter. Officer Baxter took photographs of the marks on Marous's ankles that corroborated her statements about the abuse. He applied for an arrest warrant for [Petitioner] and a search warrant for his home.

When officers executed the search warrant, they found a bag in the closet of the master bedroom that held various sex toys: (1) dildos; (2) a penis sheath; (3) a fake vagina; (4) a penis pump; (5) vibrators; and (6) a nylon restraining device. Officers also seized a laptop computer, along with a few flash drives.

FBI computer forensic expert Jesse Basham testified he reviewed the flash drives and found more than 150 pornographic movies, mostly involving anal sex and bondage. At trial, a copy of all the electronic files Basham reviewed was admitted. Still shots from the movies were also admitted over [Petitioner's] objection.

At trial, [Petitioner] called a medical doctor who had reviewed Marous's medical records and explained that her records did not reflect the kind of trauma to the anal cavity he would expect to see if someone had forced a large dildo into her anal cavity without lubricant or on a regular basis. [Petitioner] also called an immigration attorney, who explained that a non-citizen spouse could gain legal status in the United States through a claim that her citizen-spouse was abusing her.

[Petitioner] also testified on his own behalf and claimed that it was Marous, not he, who had the huge sexual appetite. He alleged the sex toys were hers and she brought them with her from Iran. He claimed to have never used the objects, though he admitted to watching an anal sex pornographic movie that he claimed Marous had sent him. He also contended it was Marous who downloaded the pornographic movies of women in dog chains and women being anally raped.

Although Marous had moved out by the time the police executed the search warrant and found the flash drives, [Petitioner] testified it was possible that Marous or her son could have planted the drive in his computer bag. Officer Baxter, however, testified Marous's house key no longer worked by the time the police executed the search warrant.

Shakouri v. State, No. 05-09-00158-CR, 2010 WL 3386598, at *1-3 (Tex. App. - Forth Worth 2010).

FEDERAL HABEAS CORPUS PROCEEDINGS

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). When 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).

Federal habeas corpus relief for state prisoners has been further limited by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The 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) 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." Williams v. Taylor, 529 U.S. 362, 402-03 (2000); see Childress v. Johnson, 103 F.3d 1221, 1224-25 (5th Cir. 1997). "As 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." Harrington v. Richter, 562 U.S. 86, 105 (2011). A petitioner must show that there was no reasonable basis for the state court to deny relief. Id., 562 U.S. at 98.

A federal district court must be deferential to state court findings supported by the record. See Pondexter v. Dretke, 346 F.3d 142, 149-152 (5th Cir. 2003). The AEDPA has modified a federal habeas court's role in reviewing state prisoner applications to prevent federal habeas "retrials" and to ensure that state court convictions are given effect to the extent possible under law. Beel v. Cone, 535 U.S. 685, 693 (2002); see Williams, 529 U.S. at 404. A state application that is denied without written order by the Texas Court of Criminal Appeals is an adjudication on the merits. 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).

A state court's factual findings "shall be presumed to be correct" unless petitioner carries "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). This presumption of correctness also applies to unarticulated findings that 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).

Also, the evidence upon which a petitioner would challenge a state court fact finding must have been presented to the state court, except for the narrow exceptions contained in § 2254(e)(2). Because a federal habeas court is prohibited from granting relief unless a decision was based on "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, 'it follows that demonstrating the incorrectness of a state court fact finding based upon evidence not presented to the state court would not be helpful to a federal habeas petitioner.'" 28 U.S.C. § 2254(d); Cullen v. Pinholster, 563 U.S. 170 (2011).

INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

A. Legal Standard

Petitioner claims trial counsel was ineffective in numerous respects. 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, 736 F.2d 279 (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.

B. Failure to File Motion

Petitioner claims counsel was ineffective for failing to file a motion to suppress evidence gathered from a computer and flash drive seized by the police without probable cause (Dkt. #1, p.6).

A determination of ineffectiveness "depends on whether either a suppression motion or an objection would have been granted or sustained had it been made." United States v. Oakley, 827 F.2d 1023, 1025 (5th Cir. 1987). 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.

Petitioner fails to provide evidence from the record to demonstrate the search warrant relied on to seize the computer and flash drive from his home was not based on probable cause. Petitioner simply makes a bald claim that the affidavit in support of the warrant "contained no asserted facts to support probable cause to believe that any computer would be found in the house nor did it contain any facts to establish probable cause to believe that any of Petitioner's computer equipment was evidence of the offense, an instrumentality of crime, contraband, or in any other manner subject to seizure." (Dkt. #1-1 at 2). 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).

Furthermore, the affidavit in support of the search warrant alleged Petitioner had sodomized and sexually assaulted the victim with various objects. (Dkt. #21-13, p. 19-22). The victim attested Petitioner had threatened her with bodily harm and had threatened to send to the victim's son an email with "uncensored pictures" of the victim (Id. at p. 19). The victim additionally stated Petitioner had taken photographs of her during and after the assaults. (Id. at p. 20). The search warrant authorized police to seize various sex toys and restraints; various computer equipment; the electronic contents of external and internal computer drives; and cameras and video equipment, and

photographs. (Id. at 18-27.) Texas law permits magistrates to issue a search warrant upon finding "probable cause that a particular item will be found in a particular location." Rodriguez v. State, 232 S.W. 3d 55, 60 (Tex. Crim. App. 2007). Counsel was not ineffective for not objecting to, or moving to suppress evidence gathered pursuant to the search warrant. See Garland v. Maggio, 717 F.2d 199, 204-06 (5th Cir. 1983) (stating counsel is not ineffective for failing to file frivolous a motion to suppress evidence obtained through a search warrant); see also Green v. Johnson, 160 F.3d 1029, 1037 (5th Cir. 1998) (stating failure to make a frivolous objection does not demonstrate ineffective assistance of counsel).

Even if a basis for the objection exists, an attorney may render effective assistance despite a failure to object when the failure is a matter of trial strategy. See Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993) (noting a failure to object may be a matter of trial strategy to which courts will not second guess counsel). Petitioner simply states, without citing support from the record that, "[t]rial counsel's failure to move to suppress the warrant is inconceivable. There was, and could be, no strategic purpose for allowing the highly prejudicial computer materials to come in without objection." Dkt. 1-1 at 2. In counsel's affidavit to the habeas court, counsel stated the following:

> In completely rejecting [a consent defense], [Petitioner] informed me that his religion rejected this behavior and he insisted on going to trial with the conspiracy theory. The second major problem we faced was to keep [Petitioner] off of the witness stand, if possible. [Petitioner] had testified a number of times in his divorce case and in all occasions he came off as a nasty, abrasive, overbearing and insensitive individual who had little or no respect for women. [Petitioner] also rejected this approach.
>
> In my opinion the State over played their hand. As time passed the story seem to grow like topsy with every new revision, the story seemed to change for the worse. [Petitioner] agreed that if we could make the story sound so wild and fan[t]a[s]tic no one would believe the story, and we could poke holes in various places to raise reasonable doubt. This strategy had worked for me in the past.

> [Petitioner] is correct to assert that I failed to file a Motion to Suppress evidence in this case. [Petitioner's] position was this evidence was planted by either the Complainant, her teenage son or the police. Some of the worst images were kept from the jury, by agreement with the State. [Petitioner] seems to overlook the fact that the victim also lived in the same house as [Petitioner], although she at one time said she was at the women shelter, and she had told the police about the computer and the contents. I seriously doubted if the Judge would grant a Motion to Suppress.
>
> More importantly, this does sound another embellishment of the second wife's outlandish claims. The record would reflect we called a considerable number of well dressed, sophisticated, professional people who knew [Petitioner] and who testified [Petitioner] never did anything, at work or socially, that would indicate he was incline to pornography or abuse of women as pointed out by applicant. His former wife also testified during her lengthy marriage she never saw any pornography in the possession of [Petitioner] or engaged in deviant behavior with him.
>
> In addition the Defense produced by video tape deposition the testimony of the complaint's neighbor in Tehren, Iran, that the victim possessed a dildo of the same description as the one seized in the search, as hers prior to her marriage to [Petitioner]. . . .

(Dkt. #22-20 at 139-141). Petitioner fails to demonstrate counsel's decision not to file a motion to suppress was not reasoned trial strategy. Burnett, 982 F.2d at 930.

Furthermore, the habeas court made the following findings and conclusions:

> 1. Applicant was represented at trial by Bill Burdock.
>
> . . . .
>
> 3. Burdock previously represented Applicant in a family violence matter and a divorce in Tarrant County. Burdock also represented Applicant in his divorce from the victim in this case. Burdock Affidavit at 1.
>
> . . . .
>
> 5. Applicant claimed Burdock was ineffective for failing to file a motion to suppress a computer and flash drives in Ground One (A). Application at 6; Memorandum in Support at 3-7.
>
> 6. The search warrant, admitted at trial as State's Exhibit 1, was issued by visiting judge James Fry in response to a five-page affidavit by a detective. The affidavit

specifically requests authority to search and seize computers and computer media, and contains information that Applicant sent threatening emails with attached pictures to the victim's son. The affidavit also mentions information about the son's computer being taken by Applicant. Finally, the affidavit notes that the victim and her son lived with Applicant in the home that was the subject of the search warrant.

7. Judge Fry could reasonably infer that Applicant possessed a computer and associated media in his home that could have sent the email and/or contained the photos attached to the email.

8. Trial counsel did not believe that the trial court would grant a motion to suppress. Burdock affidavit at 2.
9. Counsel's Strategy was to argue the victim's claims were unbelievable because they changed for the worse as the case developed. Although counsel suggested a consent defense, Applicant rejected that approach. Burdock Affidavit at 1.

10. Applicant maintained at trial that the victim planted evidence on his computer and the flash drive and that her outcries were the result of a conspiracy against him. Burdock Affidavit at 1-2.

. . . .

12. Trial counsel noted in his affidavit that he called multiple witnesses to testify that Applicant was not inclined to abuse women, view pornography, or engage in deviant behavior. Burdock Affidavit at 2.

13. Applicant cites no fact-specific authority supporting his claim that the warrant affidavit did not contain sufficient facts to allow a finding of probable cause to search the computer and flash drive.

14. Applicant has adduced no evidence that trial counsel's strategic decision to forego challenging the warrant and instead act to prove Applicant did not commit the acts alleged against him was unreasonable.

. . .

23. Counsel's trial strategy was to make the victim's account "seem so wild and fantastic" that no one would believe it. Affidavit of Burdock at 2.

. . .

> 41. Applicant has failed to prove by a preponderance of the evidence that the actions challenged in Ground One were not sound trial strategy based upon reasonable investigation in the case.
>
> 42. Applicant has failed to prove by a preponderance of the evidence that trial counsel was deficient.
>
> 43. Applicant has failed to prove by a preponderance of the evidence that he was prejudiced by counsel's representation.

(Dkt. #22-21 at 72-74; 76; 79).

Petitioner fails to demonstrate the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law, or was based on an unreasonable determination of facts. Williams, 529 U.S. at 402-03 (2000).

C. Failure to Make Specific Objections

Next, Petitioner claims counsel was ineffective for failing to properly object to the admission of certain pornographic movies and photos into evidence (Dkt. #1 at 6; #1-1 at 4). Failure to object when the failure is a matter of trial strategy is not ineffective. See Burnett, 982 F.2d at 930.

Counsel stated in his affidavit, "I thought any pornographic pictures were not relevant to the issue being tried. However, the more disturbing the pictures, if they were put into evidence, was just another example of an embellishment of the facts by the State. No one connected the pictures to [Petitioner], except to say they were found near his property." (Dkt. #22-20 at 140-41). Again, Petitioner fails to demonstrate counsel's decision not to object was not reasoned trial strategy. See Burnett, 982 F.2d at 930.

Additionally, Petitioner alleges, but fails to "affirmatively prove" prejudice regarding this claim. Strickland, 466 U.S. at 693. Petitioner simply alleges an appropriate objection would have allowed Petitioner to request a limiting instruction as to the material, and would have preserved the

issue for direct appeal (Dkt. #1-1 at 5). Petitioner does not, however, demonstrate a reasonable probability that, but for counsel's alleged failure to properly object, the result of the proceeding would have been different. Id. at 694.

Furthermore, the state habeas court made the following findings:

15. In Ground One (B), Applicant claims counsel was ineffective for failing to object to evidence of pornography pursuant to Rule of Evidence 404(b).

16. At trial and in this proceeding, Applicant claimed that the victim was the sexual aggressor and that the victim owned sexual devices that were used in the assaults. 7 RR 73; Application Exhibit B ¶ 16; Application Exhibit C; Supplemental Application at Exhibit A ¶ 9.

17. The sexual images actually admitted into evidence at trial corroborated the victim's account of the assaults and demonstrated that Applicant, not the victim, owned the items in question. Thus, the sexual images were admissible under Rule 404(b).

18. Trial counsel chose not to request a limiting instruction because he did not want to highlight the evidence in question. Burdock Affidavit at 3. Counsel also believed he could better counter this evidence by arguing that the victim was embellishing and had no injuries consistent with her claims. Burdock Affidavit at 3.

19. Applicant has adduced no evidence to show that counsel's strategic decisions regarding this evidence were unreasonable.

. . .

41. Applicant has failed to prove by a preponderance of the evidence that the actions challenged in Ground One were not sound trial strategy based upon reasonable investigation in the case.

42. Applicant has failed to prove by a preponderance of the evidence that trial counsel was deficient.

43. Applicant has failed to prove by a preponderance of the evidence that he was prejudiced by counsel's representation.

(Dkt. 22-21 at 75; 79). Petitioner fails to demonstrate the state court decision was improper. See Williams, 529 U.S. at 402-03 (2000).

D. Failure to Object at Voir Dire

Petitioner also claims counsel was ineffective for failing to object to improper questioning by the prosecution at voir dire. Petitioner specifically claims counsel failed to object when the prosecution elicited "unsworn and unqualified opinions [at voir dire] regarding effects of long-term abuse, battered women's syndrome, and forensic testing." (Dkt. #1 at 7). As previously stated, an attorney may render effective assistance despite a failure to object when the failure is a matter of trial strategy. See Burnett, 982 F.2d at 930.

In his affidavit, counsel stated, "It is true that I could object to many statements made by the Prosecutor. I made a number of objections, which were sustained by the Court. The prosecutor was very personable young man who was liked by the jury. Whatever the prosecutor said to the jury would not hurt us as much as the complainant's testimony. It is always my theory that you can often object too many times and the jury panel gets angry at you. Therefore unless the statements would hurt us, I did not object." (Dkt. #22-20 at 143). Petitioner fails to demonstrate counsel's decision not to object at voir dire was not reasoned trial strategy. See Burnett, 982 F.2d at 930. He fails to demonstrate counsel was ineffective. Strickland, 466 U.S. at 688.

Furthermore, in addressing the issue, the state habeas court stated:

> 34. In Ground One(F) Applicant complains that trial counsel was ineffective for failing to object during voir dire. Application at 6; Memorandum at 23-25.
>
> 35. Trial counsel agreed that he could have objected to some portions of the State's voir dire, but stated that objecting too often can make a jury angry at a party. Affidavit of Burdock at 5.

36. Trial counsel objected when he thought the statements would hurt the defense. Affidavit of Burdock at 5.

37. Trial counsel discussed objections during voir dire and question the venire whether they thought lawyers who objected were hiding something. 2 RR 70-72.

38. Trial counsel objected to a portion of the prosecutor's voir dire but was overruled by the trial judge. 2 RR 44.

39. Applicant has cited no fact specific authority demonstrating that the prosecutor's voir dire questions were objectionable.

40. Applicant has adduced no evidence demonstrating that counsel's strategic choices not to object during voir dire were unreasonable.

41. Applicant has failed to prove by a preponderance of the evidence that the actions challenged in Ground One were not sound trial strategy based upon reasonable investigation in the case.

42. Applicant has failed to prove by a preponderance of the evidence that trial counsel was deficient.

43. Applicant has failed to prove by a preponderance of the evidence that he was prejudiced by counsel's representation.

44. Applicant's Ground 1 should be denied.

(Dkt. 22-21 at 78-79). Petitioner fails to demonstrate the state court decision was improper. See Williams, 529 U.S. at 402-03 (2000).

E. Failure to Request Jury Instruction on a Lesser-Included Offense

Petitioner claims his counsel was ineffective for not requesting an instruction on the lesser-included offense of sexual assault (Dkt. #1 at 6). Petitioner argues the decision by the state habeas court was based on an unreasonable determination of the facts in light of the evidence presented and that there is no evidence that counsel's decision not to request the lesser-included instruction was a "strategic decision." (Dkt. #24 at 13).

A decision not to request an instruction on a lesser-included offense may be the result of reasonable trial strategy. United States v. Gonzales, 189 F.3d 469, n. 1 (5th Cir.1999). "Generally, counsel's strategic decisions are afforded deference so long as they are based on counsel's professional judgment." Escamilla v. Stephens, 749 F.3d 380, 391 (5th Cir. 2014). The Fifth Circuit has determined that forgoing a lesser-included offense instruction, in cases such as this, is not ineffective assistance. See e.g. Druery v. Thaler, 647 F.3d 535, 539-540 (5th Cir. 2014) (finding counsel was not ineffective for refusing to request a lesser-included instruction when counsel's valid strategy was to "obtain a full acquittal.").[1]

In his affidavit, counsel stated, "[Petitioner] would not admit [the offense] occurred and neither did anyone else. It was either aggravated sexual assault or not guilty. To the defense, it was just one in another embellishment of the facts." (Dkt. #22-20 at 142). Petitioner fails to demonstrate counsel's decision not to request a jury instruction of lesser-included offense was not reasoned trial strategy. See Burnett, 982 F.2d at 930. Furthermore, Petitioner provides no evidence to demonstrate that had the jury been given the instruction, it would have chosen to convict him of the lesser-included offense; thus, Petitioner fails to "affirmatively prove" prejudice. Strickland, 466 U.S. at 693.

The state habeas court addressed the issue stating:

> 24. Applicant claims in Ground One(D) that trial counsel was ineffective for failing to request an instruction on the lesser included offense of sexual assault. Application at 6; Memorandum at 15-21.

[1] The Fifth Circuit additionally found that refusing a lesser-included instruction did not constitute ineffective assistance even though counsel "may have been mistaken in part of his legal reasoning" because "the ultimate strategic choice was reasonable." Druery, 647 F.3d at 540.

> 25. Trial counsel stated in his affidavit that Applicant categorically denied that any sexual assault occurred. Affidavit of Burdock at 1, 4.
>
> 26. Applicant refused to admit that the behavior in question occurred because it was contrary to his religion. Affidavit of Burdock at 1.
>
> 27. Applicant's denial that any sexual assault occurred did not raise the lesser included offense of sexual assault.
>
> 28. Applicant dictated an all or nothing defense. Affidavit of Burdock at 4.
>
> 29. Applicant has offered no evidence or fact specific authority that counsel's strategic decision was unreasonable or that no reasonable attorney could have made, the same decision.

(Dkt. 22-21 at 76-77). As stated above, counsel attested that Petitioner "testified no type of rape ever occurred." (Dkt. #22-20 at 142) and that Petitioner "insisted on going to trial with [a] conspiracy theory." (Id. at 139). Counsel stated Petitioner "completely rejected" the defense strategy that the sexual activity was consensual to a point until the victim wished to discontinue the practice. (Id. at 139). Counsel determined "[i]t was either aggravated sexual assault or not guilty." (Id. at 142). Indeed, Petitioner testified in numerous instances that he did not sexually assault the victim at all, but that she was actually the sexual aggressor (See Dkt. #20-5 at 34-36; # 20-7 at 1, 9-15; Dkt. #20-8 at 16-20, 27-28), and that the charges against him were a conspiracy by the victim (Dkt. #20-8 at 11-16, Dkt. #20-7 at 21-22, 27-28). Considering the evidence in the record, Counsel's strategy to get a full acquittal for Petitioner was not unreasonable. Petitioner fails to demonstrate the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law, or was based on an unreasonable determination of facts. Williams, 529 U.S. at 402-03 (2000).

F. Failure to Object or Request a Limiting Instruction

Petitioner claims counsel was ineffective for "not attempt[ing] to limit admission of evidence that Petitioner threatened to kill the complainant on November 28, 2006, which was an extraneous offense but which the State offered to prove an element of the charged offense." (Dkt. #1-1 at 11). However, Petitioner fails to "affirmatively prove," prejudice. Strickland, 466 U.S. at 693. He states only that "[w]ithout an instruction limiting the use of this evidence, [it] could, conceivably, be seen as showing the violence toward [the victim] and the aggravation element of the offense." (Dkt. 1-1, at 12). Petitioner's vague claim is insufficient to demonstrate counsel provided ineffective assistance. Strickland, 466 U.S. at 688.

Additionally, counsel stated in his affidavit:

> [Complainant's] conduct during the marriage did not in any way act like an abused woman. I certainly did not want a limiting instruction . . . Rather than draw additional attention to this material by having it in the charge, the decision was made to add this to our list in argument about overkill and embellishment of the story promulgated by the witness.
>
> . . .
>
> The limiting instruction argument under "B" above is incorporated herein. This is one of the wild allegations of the allegations of the complaints; which were elicited at about the same time complainant testified of hair pulling. We countered this statement by showing the jury many family photos, none of which reflected any loss of complainant's hair and all of which reflected the witness enjoying the opportunity to visit her in laws.

(Dkt. 22-20 at 141-142). Petitioner fails to provide any evidence to demonstrate counsel's decision not to object to, or request a limiting instruction regarding the evidence that Petitioner threatened to kill his wife, was not reasoned trial strategy. See Burnett, 982 F.2d at 930.

> Furthermore, the state habeas court made the following findings:
>
> 30. In Ground One(E), Applicant claims trial counsel was ineffective for failing to request a limiting instruction regarding a threat by Applicant to kill the victim. Application at 6; Memorandum at 21-22.
>
> 31. Trial counsel believed a limiting instruction would simply draw additional attention to the evidence so he did not request a limiting instruction. Affidavit of Burdock at 4, 3.
>
> 32. Otherwise, counsel characterized the threat as simply a "wild allegation" of the victim similar to others that he attempted to rebut with medical, photographic, and character testimony. Affidavit of Burdock at 4.
>
> 33. Applicant has adduced no evidence that counsel's strategic decision in this regard was unreasonable or that no reasonable attorney would have made the same choice.

(Dkt. 22-21 at 77). Petitioner fails to demonstrate the state court decision was improper. See Williams, 529 U.S. at 402-03 (2000).

G. Failure to Force Prosecution to State the Specific Offense for Conviction

Petitioner claims counsel was ineffective for "fail[ing] to demand that the State make an election as to the specific offense upon which it would rely for conviction." (Dkt. #1-1 at 7). Counsel stated in his affidavit, "There was no belief on counsel's part that evidence of the events testified by the victim would get before jury by anyone of several ways, [it] would be to our advantage to argue the whole story was too exaggerated and greatly embellished to be believable." (Dkt. # 22-20 at 142). Petitioner fails to provide any evidence to show counsel's decision not to force the State to specify the offense it would rely on, and instead to attack the State's entire story as "too exaggerated" to be believed, was not reasoned trial strategy. See Pape v. Thaler, 645 F.3d 281, 290-91 (5th Cir. 2014) (stating a counsel's reasoned strategy to "let everything in" at trial is not ineffective assistance of counsel); see also Burnett, 982 F.2d at 930.

The state habeas court stated:

> 20. Applicant claims in Ground One(C) that his trial counsel was ineffective for failing to request an election by the State. Application at 6; Memorandum at 13-15.
>
> 21. Whether to request an election by the State is a matter of trial strategy.
>
> 22. Counsel stated in his affidavit that evidence of the other assaults committed by Applicant against the victim would have been admitted in one of several ways. Affidavit of Burdock at 3-4.
>
> 23. Counsel's trial strategy was to make the victim's account "seem so wild and fantastic" that no one would believe it. Affidavit of Burdock at 2.
>
> . . .
>
> 41. Applicant has failed to prove by a preponderance of the evidence that the actions challenged in Ground One were not sound trial strategy based upon reasonable investigation in the case.
>
> 42. Applicant has failed to prove by a preponderance of the evidence that trial counsel was deficient.
>
> 43. Applicant has failed to prove by a preponderance of the evidence that he was prejudiced by counsel's representation.

(Dkt 22-21 pgs. 76; 79). Petitioner fails to demonstrate the state court decision was improper. See Williams, 529 U.S. at 402-03 (2000).

In summary, 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; Childress, 103 F.3d at 1224-25. Petitioner fails to show there was no reasonable basis for the state court to deny relief. Richter, 562 U.S. at 98.

DUE PROCESS VIOLATIONS

Petitioner claims he was denied due process because the prosecution introduced evidence that had been planted and subsequently discovered pursuant to a search warrant, the prosecution used perjured testimony, and the prosecution failed to disclose evidence favorable to Petitioner.

A. State Planted Evidence

Petitioner specifically alleges the State, the complainant, or the complainant's son planted "sex toys [in his home]. . . with the foreknowledge of the State," which were later discovered and used against Petitioner at trial (Dkt. #1 at 6). As evidence, Petitioner states that in prison he met an inmate named Gale Corbett Hutchinson (Hutchinson) who claimed to have information regarding Petitioner's case. Petitioner did not submit an affidavit to the state habeas court from Hutchinson. Instead, Petitioner submitted statements from two other inmates (David Hernandez and Walter Cornet). Mr. Hernandez's statement states he overheard Hutchinson outline a conspiracy against Petitioner by the victim, her boyfriend, a friend of the victim (Deanna DeYoung), a Collin County District Attorney, an investigator, members of the Prosper, Texas police force, and a pornography movie actor (Dkt. #1-3). Hernandez claims he heard Hutchinson tell Petitioner these people were all involved in an elaborate scheme that involved "plac[ing] evidence, some sex toys, rope, and a flash drive in [Petitioner's] house, in Prosper, Texas, so a search warrant could be obtained and [Petitioner] could be arrested." (Id.). Similarly, Cornet's statement relates information allegedly told to him by an unnamed third party regarding an alleged plan by the victim and her friend to plant incriminating evidence in Petitioner's home and car (Dkt. #1-4).

In response, the State submitted affidavits from the victim, Deanna DeYoung, complainant's son, a Collin County assistant district attorney, the trial prosecutor, and a detective with the Prosper Police Department. Each affiant denied the allegations made by Hernandez and Cornet. The victim, victim's son, DeYoung, and the prosecutor specifically denied planting evidence, as alleged by Petitioner. This issue was presented to the state habeas court, which stated:

> 45. In Ground 2, Applicant claims that inculpatory evidence was planted by agents of the State.
>
> 46. Applicant's claims in Ground 2 are based on the affidavits of two inmates, David Lightfoot Hernandez and Walter Bruce Cornet. Applicant's writ exhibits B and C.
>
> 47. The Hernandez and Cornet affidavits, in turn, relate statements purported to be from a third inmate, Gale Corbett Hutchinson. Applicant's writ exhibits B and C.
>
> 48. Applicant did not submit an affidavit from Hutchinson.
>
> 49. The victim A.M., her son S.R., the woman who helped them move from Applicant' s home, D.T., the lead prosecutor, and another prosecutor mentioned in the Hernandez and Cornet affidavits, have all filed affidavits in this case. State's Writ Exhibits 1, 2, 3, 4, and 5.
>
> 50. A.M.'s affidavit addresses the claims in the Hernandez and Cornet affidavits and denies them.
>
> 51. A.M. denied knowing Hutchinson.
>
> 52. A.M. specifically denied conspiring with D.T., whom she knew as D. D., to plant evidence, and indeed she stated that she could not communicate with D.T. at the time of the alleged conspiracy because A.M. could not speak English and D.T. could not speak Farsi.
>
> 53. A.M. denied any improper relationship with lead prosecutor C.H.
>
> 54. A.M.'s statements are consistent with the trial record and consistent with the affidavits of D.T. and the prosecutors, C.F. and C.H.
>
> 55. A.M. was previously determined to be credible by the trial jury.

56. A.M.'s statements in her affidavit are credible.

57. D.T.'s affidavit addresses the claims in the Hernandez and Cornet affidavits and denies them.

58. D.T. denied conspiring with A.M. to plant evidence and noted that she and A.M. did not share a common language at the time and could only speak with the assistance of a translator.

59. D.T. recognized Hutchinson as someone who lived in her neighborhood, but she denied all allegations attributed to Hutchinson by Hernandez and Cornet.

60. D.T.'s statements are consistent with the statements of A.M. and C.H. and are credible.

61. S.R., A.M.'s son, gave an affidavit affirming that his trial testimony was true and correct.

62. S.R. denied placing a flash drive or any other item into Applicant's computer bag.

63. The jury's verdict at trial is consistent with the jury determining him to be credible.

64. S.R.'s statements are credible.

65. C.F., an assistant district attorney in Collin County, filed an affidavit denying the statements in the Hernandez and Cortez affidavits.

66. C.F. investigated Hutchinson for multiple fraud-like offenses.

67. Hutchinson ultimately pleaded guilty to five felony counts and was sentenced to the penitentiary.

68. C.F. specifically denied Hutchinson's claims of an improper relationship with a witness.

69. C.F. opined that Hutchinson was not a credible witness.

70. C.F. is an officer of the Court and well known to the Court.

71. C.F.'s statements are credible.

72. C.H., the lead prosecutor in the underlying case, filed an affidavit denying the allegations in the Hernandez and Cornet affidavits.

73. C.H. could only communicate with A.M. with the assistance of a translator or through her son, S.R.

74. C.H. was unaware of any information showing that Hutchinson worked as an informant for the DA's office.

75. A.M. never asked C.H. to drop the case.

76. C.H. denied any improper relationship with A.M.

77. C. H. is an officer of the Court and is well known to the Court.

78. C. H.'s statements are credible.

79. Detective Sam Owens of the Prosper Police Department filed an affidavit in this case. State's Writ Exhibit 6.

80. Detective Owens reviewed the records of the Prosper Police Department and found no record that Hutchinson served as a confidential informant in the underlying case.

81. Hernandez and Cornet are convicted felons.

82. Hutchinson is a convicted felon.

83. Hutchinson was investigated and prosecuted by C.F.

84. Applicant testified at trial that A.M. brought the sex-toys with her from Iran that he now claims were obtained after the fact and planted in his home. 7 RR 73-75, 79, 158-59.

85. In the statements attributed to Hutchinson in Hernandez's affidavit, Hutchinson claims he met with D.T. and A.M. in December 2007 with regard to planting evidence. In fact, the offense was reported in December 2006 and Applicant was indicted in March of 2007.

86. Hernandez is not credible.

87. Cornet is not credible.

88. Hutchinson is not credible.

89. Applicant has failed to prove by a preponderance of the evidence that any evidence was planted by anyone in this case.

90. Applicant's Ground 2 should be denied.

(Dkt. 22-21 at 79-83).

The state habeas court found Hernandez, Cornet, and Hutchinson not credible, and denied the claim. Credibility determinations by state habeas courts are given deference. Coleman v. Quarterman, 456 F.3d 537 (5th Cir. 2006). Petitioner now simply re-asserts the same argument in his § 2254 petition that he made to the state habeas court. However, Petitioner fails to show that 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. Williams, 529 U.S. at 402-03; Childless, 103 F.3d at1224-25. Petitioner fails to show there was no reasonable basis for the state court to deny relief. Richter, 526 U.S. at 98.

B. Perjured Testimony

Petitioner alleges the victim committed perjury while testifying against him (Dkt. #1 at 8). In support, Petitioner submitted an affidavit from Mohammad Manteghinezhad, who stated he was an interpreter for the prosecutor and victim (Dkt. #1-2). Manteghinezhad's affidavit alleges the victim told him she had lied to the prosecutor and at trial regarding key facts of the case (Id.). Specifically, Manteghinezhad attests the victim lied to the trial court and prosecutor regarding planting evidence incriminating Petitioner, details regarding the sexual assault by Petitioner, and an

extra-marital relationship with a man living in California (Id.). Even assuming the allegations in the affidavit are true, Manteghinezhad makes no attestation that the victim told the prosecutor the statements were false, nor that the prosecutor knew that victim's statements were false. Petitioner fails to demonstrate a due process violation. See Kinsel v. Cain, 647 F.3d 265, 272 n. 26 (5th Cir. 2011) (stating that "clearly established Supreme Court precedent demands proof that the prosecution made knowing use of perjured testimony.") (emphasis added); Kutzner v. Cockrell, 303 F.3d 333, 337 (5th Cir. 2002) ("[D]ue process is not implicated by the prosecution's introduction or allowance of false or perjured testimony unless the prosecution actually knows or believes the testimony to be false or perjured."); see also Kutzner v. Johnson, 242 F.3d 605, 609 (5th Cir. 2001).

Although Petitioner presents this issue as "newly available evidence," he presented the same issue and affidavit to the state habeas court. That court made the following findings and conclusions:

> 97. In his sole Supplemental Ground, Applicant claims that the State used false testimony at trial. Supplemental Application at 6; Memorandum in Support of Supplemental Application at 2-6.
>
> 98. Applicant's Supplemental Ground is based on the affidavit of Mohammed Manteghinezad. Supplemental Writ Exhibit A.
>
> 99. A.M. responded to Manteghinezad's allegations in her affidavit.
>
> 100. A.M. denied Manteghinezad's allegations in detail.
>
> 101. A.M. stated that, after trial, she rejected a romantic overture from Manteghinezad.
>
> 102. C. H., the lead prosecutor, stated that Manteghinezad never communicated to him that A.M.'s statements were misrepresented or miscommunicated.
>
> . . . .
>
> 104. Manteghinezad's affidavit does not state whether he prepared his affidavit himself or whether he signed a pre-prepared affidavit.

105. Manteghinezad's affidavit appears to have been prepared by another person because it contains a blank for him to fill-in the last four digits of his social security number.

106. Applicant's supplemental writ application does not state who provided Manteghinezad's signed affidavit to writ counsel.

107. Manteghinezad's statements are unsupported by other evidence.

108. The allegations in Manteghinezad's [affidavit] were previously, generally raised at trial and rejected by the jury.

109. Consistent with the Court's findings as to Ground 2, the statements of A.M. and C.H. are credible.

110. Manteghinezad's statements are not credible.

111. Applicant has failed to prove by a preponderance of the evidence that the State used false testimony at trial or that there is a reasonable likelihood that false testimony affected the judgment of the jury.

112. Applicant's Supplemental Ground should be denied.

(Dkt. 22-21 at 85-86).

Petitioner 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. Williams, 529 U.S. at 402-03; Childless, 103 F.3d at1224-25. Petitioner fails to show there was no reasonable basis for the state court to deny relief. Richter, 526 U.S. at 98. Although Petitioner claims the state habeas court decision was based on an unreasonable determination of the facts in light of the evidence (Dkt. #24 at 21), he fails to present clear and convincing evidence in support of this allegation. See 28 U.S.C. § 2254(d)(2); 28 U.S.C.§ 2254(e)(1) (stating factual findings by state habeas court are presumed to

be correct and "the applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). In fact, Petitioner concedes this theory was presented at Petitioner's trial. (Dkt. #24 at 22). Furthermore, Petitioner fails to meet his burden of demonstrating the prosecution knowingly used perjured testimony. See Kinsel, 647 F.3d at 272. Therefore, this claim must fail.

C. Failure to Disclose Favorable Evidence

Finally, Petitioner alleges the police violated his due process rights when, upon arrest, the police confiscated his cell phone and did not return it to either him or his attorney (Dkt. #1 at 8). Petitioner claims the phone contains text messages favorable to his defense.

Petitioner does nothing more than make a conclusory claim. He does not direct the Court to any evidence in the record to demonstrate the police confiscated his phone, or that the phone had information favorable to his defense. Even assuming the police confiscated his phone, Petitioner fails to demonstrate a reasonable probability that any information contained on the phone would have changed the outcome of his proceeding. Petitioner's argument is insufficient. See Derden v. McNeel, 938 F.2d 605, 617 (5th Cir. 1991). Petitioner simply makes an unsupported assertion of a violation. "Absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his pro se petition (in state and federal court), unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value." Ross v. Estelle, 694 F.2d 1008, 1011–12 (5th Cir. 1983) (citing Woodard v. Beto, 447 F.2d 103, 104 (5th Cir. 1971)); see also Woods v. Cockrell, 307 F.3d 353, 357 (5th Cir. 2002) (issues that are inadequately briefed are waived).

Moreover, the state habeas court considered and rejected this claim. It stated:

> 91. In Ground 3 Applicant claims that the police seized his cell phone and never returned it to him. Applicant claims his phone contained exculpatory evidence of an extortion plot against him. Application at 8; Memorandum at 29-32.
>
> 92. Applicant adduced no evidence showing that law enforcement authorities retained his cell phone.
>
> 93. The State attached records to its writ response showing that no cell phone was seized during the search of Applicant's home and that his cell phone was returned to him after two pretrial arrests. State's Writ Exhibits 7, 8, and 9.
>
> 94. Applicant has failed to prove by a preponderance of the evidence that the State suppressed favorable evidence in the form of his cell phone.
>
> 95. Applicant has failed to prove by a preponderance of the evidence that his cell phone contained favorable evidence that was material to issues of his guilt or punishment.
>
> 96. Applicant's Ground 3 should be denied.

(Dkt. 22-21 at 84). In each due process claim, Petitioner 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. Williams, 529 U.S. at 402-03; Childless, 103 F.3d at1224-25. Petitioner fails to show there was no reasonable basis for the state court to deny relief. Richter, 526 U.S. at 98.

ACTUAL INNOCENCE

Petitioner makes a general, unsupported claim that he is actually innocent (Dkt. #1 at 8). A claim of actual innocence does not state an independent, substantive constitutional claim and is not a basis for federal habeas corpus relief. Herrera v. Collins, 506 U.S. 390 (1993). Claims of actual innocence are not cognizable on federal habeas review. 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. Dowthitt v. Johnson, 230 F.3d 733, 741 (5th Cir. 2000).

Petitioner has not shown an independent federal constitutional violation; thus his actual innocence claim is not cognizable on federal habeas appeal.

CONCLUSION

In Petitioner's ineffective assistance of counsel claims, Petitioner shows neither deficient performance nor prejudice. Strickland, 466 U.S. at 694. Petitioner fails to rebut the presumption of correctness owed to the trial court's factual findings with clear and convincing evidence to the contrary. Valdez, 274 F.3d at 947. Petitioner additionally fails to show the state planted evidence, refused to turn over exculpatory evidence, or knowingly presented perjured evidence at trial. He fails to demonstrate he was denied due process. Petitioner's actual innocence claim is not cognizable on federal habeas appeal. Finally, Petitioner 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. Williams, 529 U.S. at 402-03; Childress, 103 F.3d at 1224-25. He fails to show there was no reasonable basis for the state court to deny relief. Richter, 562 U.S. at 98. Thus, Petitioner's habeas petition should be denied.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. §2253(c)(1)(A). Although Petitioner has not yet filed a notice of appeal, it is respectfully recommended the 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 a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id.; Henry v. Cockrell, 327 F.3d 429, 431 (5th Cir. 2003). "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's 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." Slack, 529 U.S. at 484.

It is respectfully recommended reasonable jurists could not debate the denial of Petitioner's § 2254 petition, nor find the issues presented are adequate to deserve encouragement to proceed. Miller-El v. Cockrell, 537 U.S. 322, 327 (2003) (citing Slack, 529 U.S. at 484). Accordingly, it is recommended the Court find Petitioner is not entitled to a certificate of appealability.

RECOMMENDATION

It is therefore recommended the petition be DENIED and DISMISSED with prejudice. It is further recommended a certificate of appealability be DENIED.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). 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 (10) to fourteen (14) days.

SIGNED this 2nd day of August, 2018.

Christine A. Nowak
UNITED STATES MAGISTRATE JUDGE

Exhibit – 'E'

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SHAHRAM SHAKOURI,	)	**CIVIL ACTION NO.**
	)	
Petitioner,	)	**4:15-CV-00447-ALM-KPG**
	)	
v.	)	
	)	
LORIE DAVIS, Director Texas Department of Criminal Justice, Institutional Division	)	
	)	
Respondent.	)	

OBJECTIONS TO REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

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Exhibit "E"

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

Cases

Other Authorities

OBJECTIONS TO REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner, Shahram Shakouri, hereby objects, in part, to the Report and Recommendation of the United States Magistrate Judge (the "RR") filed in the above-referenced action on August 2, 2018. As set forth below, Mr. Shakouri believes that Magistrate Judge Nowak's Report and Recommendation is incorrect with regard to whether trial counsel was ineffective for not requesting a lesser-included instruction and requests that this Court conduct a *de novo* review. *See* 28 U.S.C. § 636(b)(1); *Louis v. Blackburn,* 630 F.2d 1105 (5th Cir. 1980).

With regard to whether Mr. Shakouri's trial counsel was ineffective for not requesting a jury instruction on the lesser-included offense of sexual assault, the Magistrate Judge found that trial counsel had a "strategic reason" for not requesting such an instruction and, in any event, that Mr. Shakouri was not prejudiced by the lack of instruction because there was "no evidence to demonstrate that, had the jury been given the instruction, it would have chosen to convict him of the lesser-included offense." RR at 16-17.

The Magistrate Judge's first finding is not supported by the record. As discussed below, it is clear from the record that trial counsel's failure to request a lesser-included instruction was based upon his incorrect belief that the defense was

not entitled to such an instruction and *not* because of "strategic" reasons.

With regard to the prejudice finding, the case law makes it clear that Mr. Shakouri did not, as the Magistrate Judge concludes, have to "demonstrate that had the jury been given the instruction, it would have chosen to convict him of the lesser-included offense." Indeed, both state and federal law are clearly to the contrary. *See, Beck v. Alabama*, 447 U.S. 625, 634 (1980); *Keeble v. United States*, 412 U.S. 205, 208 (1973); *Crace v. Herzon*, 798 F.3d 840 (9th Cir. 2015); *Breakiron v. Horn*, 642 F.3d 126, 136 (3rd Cir. 2011); *Saunders v. State*, 913 S.W.2d 564, 571 (Tex .Crim. App.1995).

I. CONTRARY TO THE MAGISTRATE JUDGE'S FINDINGS, THE RECORD DOES NOT SUPPORT THE CONCLUSION THAT MR. SHAKOURI'S TRIAL COUNSEL FAILED TO REQUEST A LESSER-INCLUDED INSTRUCTION FOR "STRATEGIC REASONS." INSTEAD, THE RECORD SHOWS ONLY THAT TRIAL COUNSEL MISUNDERSTOOD TEXAS LAW WITH REGARD TO BEING ENTITLED TO A LESSER-INCLUDED INSTRUCTION.

The Magistrate Judge suggests that Mr. Shakouri's trial counsel failed to ask for a lesser-included instruction for "strategic reasons." In fact, the record makes clear that trial counsel did not request such an instruction because he *incorrectly* believed the defense was not entitled to one under Texas law. Indeed, in his affidavit submitted to the state habeas court, Mr. Shakouri's trial counsel explained: "I do not believe we were entitled to a lesser included charge of sexual assault unless there was

some evidence that the offense occurred." *See* Attachment A at 4. He then goes on to claim that no such evidence existed because "Mr. Shakouri would not admit [the sexual assault] occurred and neither did anybody else." *Id*

A. "Strategy Cannot Be Based upon a Misunderstanding of the Law

From trial counsel's affidavit, it is clear that counsel believed that Mr. Shakouri was required to "admit" the underlying sexual assault in order to be entitled to a lesser-included instruction on sexual assault. That belief demonstrates a fundamental misunderstanding of Texas law. Moreover, it is clear that a decision based on a misunderstanding of the law is cannot be excused as "trial strategy."

For example, in *Richards v. Quarterman*, 566 F.3d 553, 569 (5th Cir. 2009), the Fifth Circuit upheld the grant of habeas relied where it appeared from trial counsel's affidavit that he did not request a lesser-included instruction because he "misunderstood the law governing lesser-included offenses."). *See also, e.g., United States v. Span*, 75 F.3d 1383, 1387 (9th Cir. 1996) ("A trial attorney's failure to request a jury instruction receives no deference, however, when it is based on a misunderstanding of the law...."); *White v. Ryan*, 895 F.3d 641,666 (9th Cir. 2018) ("A decision based on a misunderstanding of the law is not sound trial strategy."); *Vinyard v. United States*, 804 F.3d 1218, 1225 (7th Cir. 2015) ("A strategic choice based on a misunderstanding of law or fact, however, can amount to ineffective

assistance."); *Hardwick v. Crosby*, 320 F.3d 1127, (11th Cir. 2003) ("[A] tactical or strategic decision is unreasonable if it is based on a failure to understand the law."); *Mejia v. Stephens*, 289 F.Supp. 2d 799, 810 (S.D. Tex. 2017) ("Luna's statement of strategy in his affidavit appears to assume that, if he had requested a manslaughter instruction, he would have precluded from pursuing his self-defense theory. This assumption is based on a misunderstanding of, and insufficient investigation into, the law. Under Texas law, self-defense is a justification for manslaughter as well as murder. "[W]here a defendant disclaims intent to kill or injure by alleging accident, he is not prevented from obtaining an instruction on self-defense where it is otherwise appropriate." (citation omitted)).[1]

In sum, trial counsel makes clear in his affidavit that he did not believe the defense was "entitled to a lesser included charge of sexual assault. As Mr. Shakouri demonstrates below, trial counsel's very premise for not requesting a lesser-included instruction because he believed the evidence "dictated" all-or-nothing, was incorrect. Consequently, the law makes clear that the Magistrate Judge erred when she excused the failure to request the lesser-included instruction as "strategy."

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[1]These legion of cases are consistent with clearly decided Supreme Court law. *See Wiggins v. Smith*, 539 U.S. 510, 526,(2003) (Finding ineffective assistance when counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment"); *Strickland v. Washington*, 466 U.S. 668, 690 (1984) ("Strategic" choices must be "made after thorough investigation of law and facts.).

B. Texas Law on Lesser-Included Instructions

Under Texas law, there is a two-step process to determine if a defendant is entitled to a lesser-included offense instruction upon request. *Ex parte Watson*, 306 S.W.3d 259, 273 (Tex. Crim. App. 2009). Without question, sexual assault is included in the proof necessary to establish the offense of aggravated sexual assault.[2] Thus, the question in this case would have been whether there was even a scintilla of evidence introduced at trial that would indicate that, if Mr. Shakouri was guilty, he was only guilty of non-aggravated sexual assault and not aggravated sexual assault.

The Texas Court of Criminal Appeals explained how courts in Texas should analyze the second prong of the test:

> This Court analyzes the issue of lesser included offenses in terms of determining whether there is any evidence in the record from any source to indicate if appellant was guilty, he was guilty only of the lesser included offense. "Anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge." *Bignall*, 887 S.W.2d at 23; and cases cited therein. If there is evidence within a defendant's testimony which raises the lesser included offense, it is not dispositive that this evidence does not fit in with the larger theme of that defendant's testimony. *Id.* Whether there is evidence, within or without the defendant's testimony, which raised the lesser included offense controls the issue of whether an instruction on the lesser included offense should be given.

It does not matter whether the evidence was admitted by the State or the

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[2]*See, e.g., Curtis v. State*, 89 S.W.3d 163, 178-79 (Tex. App.– Ft. Worth 2002); *Chavis v. State*, 807 S.W.2d 375, 377 (Tex. App.-Houston [14th Dist.] 1991).

> defense. It does not matter if the evidence was strong or weak, unimpeached or contradicted. *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993); and *Bell v. State*, 693 S.W.2d 434, 442 (Tex. Crim. App. 1985). The trier of fact is always free to selectively believe all or part of the testimony proffered and introduced by either side. *Bignall,* 887 S.W.2d at 24; and cases cited therein. So long as there is some evidence which is "directly germane" to a lesser included offense for the factfinder to consider, then an instruction on the lesser included offense is warranted. *Bignall, Id.*; and *Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997).

Jones v. State, 984 S.W.2d 254, 257 (Tex. Crim. App. 1998).

For example, in *Jones*, the Court of Criminal Appeals was confronted with an allegation that Mr. Jones stole items from a grocery store and fought with store employees when they attempted to detain him. *Id.* at 255. As a result, he was put on trial for robbery. *Id.* Mr. Jones testified at trial in his own defense and denied *both* the theft and the assault. *Id.* Nevertheless, the Court of Criminal Appeals held that, based on Mr. Jones's testimony, Mr. Jones *was* entitled to an assault instruction as a lesser-included offense to the offense of robbery.

> [W]hen appellant testified that he did not commit a theft at Fiesta, the jury was free to believe his testimony that he did not intend to steal anything and never left the store with property which he had not paid for. A "lesser included offense may be raised if evidence either affirmatively refutes or negates an element establishing the greater offense." *Schweinle v. State*, 915 S.W.2d 17, 19 (Tex. Crim. App. 1996). Here, appellant's testimony that he did not steal or intend to steal negated the theft element of the robbery charge. If the jury believed appellant's testimony that he did not steal and believed the State's evidence that he struck Michelle Yancey, they could rationally conclude

> that appellant committed assault and not theft. *When appellant denied he committed the theft, even though it was in the context of denying all criminal intent, the trial court should have instructed the jury on the lesser included offense of assault.* We conclude the trial court erred when it denied appellant's request for instructions on the lesser included offense of misdemeanor assault.

Id. at 257 (emphasis added).

In sum, Texas law is clear that, if there is even a scintilla of evidence in the record and regardless of the strength of the evidence, a defendant is entitled to a lesser-included instruction. Moreover, it does not matter if the defendant denies both the lesser-included offense and the greater offense.

C. Even Assuming a Sexual Assault, Without an "Imminent" and Non-conditional Threat to Cause a Complainant Death or Serious Bodily Harm a Defendant is Guilty of Only Non-aggravated Sexual Assault and *Not* Aggravated Sexual Assault.

The indictment in this case charged Mr. Shakouri with the aggravated sexual assault of the Complainant because he allegedly placed her "in fear that death or serious bodily injury would be imminently inflicted [on her]."[3] Without proof that the Complainant was placed in imminent fear of death or serious bodily injury, Mr. Shakouri would, at most, be guilty of non-aggravated sexual assault.

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[3]Under Texas law, "serious bodily injury" means "bodily injury that creates a substantial risk of death or that causes death, *serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.*" Tex. Penal Code § 1.07(46) (emphasis added).

The Texas Court of Criminal Appeals has interpreted an "imminent" threat to mean a present, not a future, threat of bodily injury or death. *Devine v. State*, 786 S.W.2d 268, 270 (Tex. Crim. App. 1989). The Court of Criminal Appeals has also made clear that a conditional threat of death, *if* a rape victim tells anyone about a sexual assault, is insufficient to satisfy the requirement of the aggravated rape statute that the threat be imminent. *Blount v. State*, 542 S.W.2d 164, 166 (Tex. Crim. App. 1976). Likewise, another Texas court found that a defendant's statement to a victim (after a rape), that she was a "dead duck" if she called the police, was *not* considered to be an "imminent" threat. *Douglas v. State*, 740 S.W. 2d 890, 892 (Tex. App.–El Paso 1987).

D. Contrary to Trial Counsel's Belief, Mr. Shakouri Was Entitled to the Lesser-included Instruction for Non-aggravated Sexual Assault Under Texas Law.

Trial counsel's own affidavit avers: "While the complainant testified, she did not testify she believed the threat was of eminent [sic.] harm or fear of injury." *See* Attachment A at 4. Thus, it is truly bizarre that trial counsel did not believe that the defense was "entitled to a lesser-included charge of sexual assault."

1. *Jones*

To have been entitled to the lesser-included instruction for non-aggravated sexual assault, there simply had to be a scintilla of evidence that Mr. Shakouri did not

anybody, I will kill you and your child." (RR IV:170 (emphasis added)).[5]

In sum, there was certainly a scintilla of evidence in the record that any threat of death or serious bodily injury that Mr. Shakouri allegedly made to the Complainant was a conditional threat to kill her *if* she informed the police or others about the alleged sexual abuse. Clearly, under *Blount* and *Douglas*, this evidence would support a conviction for non-aggravated sexual assault and "so long as there is some evidence which is 'directly germane' to a lesser included offense for the factfinder to consider, then an instruction on the lesser included offense is warranted." *Jones*, 984 S.W.2d at 257 (citations omitted).

II. THE "HARM" ANALYSIS EMPLOYED BY THE MAGISTRATE JUDGE IN REACHING HER CONCLUSION IS CONTRARY TO THE HARM ANALYSIS REQUIRED BY THE UNITED STATES SUPREME COURT

As noted above, the Magistrate Judge found that Mr. Shakouri did not demonstrate any prejudice as a result of trial counsel's failure to request the lesser-included instruction because there was "no evidence to demonstrate that had the jury been given the instruction, it would have chosen to convict him of the lesser-included offense." RR at 17. Indeed, at first blush, it could be said that the failure of trial

[5]The Complainant also testified that, on the final night in the home when she, her son and her sister allegedly hid in a closet, that Mr. Shakouri had a telephone conversation with his brother in which he threatened to "really bother her" and to kill her and her sister. (RR IV:196) Significantly, this alleged threat was not connected with any sexual assault.

make any threat to the Complainant or that any threat he made was not an "imminent threat," but, instead, a conditional threat of death or serious bodily injury. Here, Mr. Shakouri testified that no threat was made and, therefore, he would have been entitled to the lesser included instruction under the rationale set forth by the Texas Court of Criminal Appeals in *Jones*.[4]

2. The Alleged Threat was "Conditional"

Moreover, the Complainant's testimony indicated that most, if not all, of the threats of death or serious bodily injury she alleged that Mr. Shakouri made were *not* imminent but rather conditional threats of death or serious bodily injury *if* she told others about the alleged abuse. For example, the Complainant testified that she believed that Mr. Shakouri knew of the disclosure she made to her sister and that he then, *via telephone*, threatened to rape and kill her *if she told anybody or the police about the alleged abuse*. (RR IV:194) The Complainant also testified that, during an alleged sexual assault, Mr. Shakouri told her "*if you would say anything to*

[4]*Jones* 984 S.W.2d at 257 ("Here, appellant's testimony that he did not steal or intend to steal negated the theft element of the robbery charge. If the jury believed appellant's testimony that he did not steal and believed the State's evidence that he struck Michelle Yancey, they could rationally conclude that appellant committed assault and not theft. When appellant denied he committed the theft, even though it was in the context of denying all criminal intent, the trial court should have instructed the jury on the lesser included offense of assault.").

counsel to request a lesser-included instruction cannot be harmful given that, if the jury did not believe the greater offense had taken place and only believed the lesser offense had taken place, the jury would have acquitted the defendant. Nevertheless, it is clear that this is *not* the law.

For example, in *Breakiron*, the defendant had argued in a post-conviction motion following his state court conviction that trial counsel was ineffective for failing to request a jury instruction on theft, which is a lesser-included offense in the charge of robbery. This argument was rejected by the state habeas court under the theory that the jury necessarily rejected an argument that the defendant was only guilty of theft when it convicted him of robbery and, thus, because the court believed the evidence was legally sufficient on the robbery charge it was not likely that the jury would have returned a verdict only on the theft charge. *Breakiron* 642 F.ed at 139.

The Third Circuit Court of Appeals found that the resolution of the case by the state habeas court was unreasonable in light of Supreme Court precedent in *Beck:*

> Without a theft instruction, the jury was left with only two choices—conviction of robbery or outright acquittal. In such all-or-nothing situations, " '[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.' " *Beck*, 447 U.S. at 634, 100 S.Ct. 2382 (*quoting Keeble*, 412 U.S. at 212–13, 93 S.Ct. 1993). Thus, even though juries are obligated " 'as a

> theoretical matter' " to acquit if they do not find every element of a crime, there is a " 'substantial risk that the jury's practice will diverge from theory' " when it is not presented with the option of convicting of a lesser offense instead of acquitting outright. *Id.* (*quoting Keeble*, 412 U.S. at 212, 93 S.Ct. 1993). By conceding theft but not requesting a theft instruction, Breakiron's counsel exposed him to that "substantial risk," and the record reveals that he had no strategic reason for doing so.

Id. at 138. The Court of Appeals noted that the problem with the state habeas court's *Strickland* prejudice analysis was that:

> it rests solely on the jury's duty " 'as a theoretical matter' " to acquit if it does not find every element of a crime and does not acknowledge the " 'substantial risk that the jury's practice will diverge from theory' " when it is not presented with the option of convicting of a lesser offense instead of acquitting outright. *Beck*, 447 U.S. at 634, 100 S.Ct. 2382 (*quoting Keeble*, 412 U.S. at 212, 93 S.Ct. 1993). The crux of Breakiron's claim of prejudice is that he was exposed to this "substantial risk," but the Pennsylvania Supreme Court did not acknowledge it.

Id. at 139.

The Third Circuit's analysis was more recently affirmed in *Crace* where the United States Court of Appeals for the Ninth Circuit found state trial counsel ineffective for failing to request a lesser-included instruction of unlawful display of a weapon where the defendant had been convicted of assault. The state habeas court believed it was required to presume that the jury would not have convicted the defendant unless the State had met its burden of proof on the greater assault charge and that the availability of a compromise verdict would thus not have changed the

outcome of the trial. *Crace*, 798 F.3d at 845. The Ninth Circuit, like the Third Circuit, rejected such an "ivory tower" analysis:

> As the Supreme Court has recognized in a related context, a jury presented with only two options—convicting on a single charged offense or acquitting the defendant altogether—"is likely to resolve its doubts in favor of conviction" even if it has reservations about one of the elements of the charged offense, on the thinking that "the defendant is plainly guilty of some offense." *Keeble v. United States*, 412 U.S. 205, 212–13, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973) (construing the Major Crimes Act of 1885 not to preclude lesser-included-offense instructions, in order to avoid constitutional concerns); *see also Hopper v. Evans*, 456 U.S. 605, 611, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982). It is therefore perfectly plausible that a jury that convicted on a particular offense at trial did so despite doubts about the proof of that offense—doubts that, with "the availability of a third option," could have led it to convict on a lesser included offense. *See Keeble*, 412 U.S. at 213, 93 S.Ct. 1993. Making this observation does not require us to speculate that the jury would have acted "lawless[ly]" if instructed on an additional, lesser included offense or to question the validity of the actual verdict. Rather, it merely involves acknowledging that the jury could "rationally" have found conviction on a lesser included offense to be the verdict best supported by the evidence. *See id.*

Id. at 848. The Ninth Circuit noted that the state habeas court wrongly "converted *Strickland*'s prejudice inquiry into a sufficiency-of-the-evidence question—an entirely different inquiry separately prescribed by *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). *Crace*, 798 F.3d at 849.

This type of analysis was also adopted by a court in this district and affirmed by the United States Court of Appeals for the Fifth Circuit. *Richards v. Quarterman*,

578 Supp.2d 849 (N.D. Tex. 2008), *aff'd*, 566 F.3d 553 (5th Cir. 2009).

> There is no rational reason why [trial counsel] Davis would not have requested a lesser-included instruction on aggravated assault. The failure to request it was not the result of any trial strategy or reasoned decision. Indeed, the court is satisfied, and finds, that it never occurred to Davis to request such an instruction. Davis's conduct in failing to request such an instruction fell below an objective standard of reasonableness, and was outside even the widest range of reasonable professional assistance. Again, the court has been highly deferential in its evaluation of Davis's conduct, and has made every effort to avoid the distorting effects of hindsight. The presumption that Davis's conduct in failing to request a lesser-included instruction on aggravated assault was within the wide range of reasonable professional assistance has been overcome by the record in this action.
>
> There is a reasonable probability that, but for the unprofessional conduct of Davis in not requesting a lesser-included instruction, the result of Richards's trial would have been different-Davis's error was sufficient to undermine the confidence in Richards's trial. Because of Davis's error, the jury finding of murder against Richards was fundamentally unfair and unreasonable. There is a probability that the jury would not have convicted Richards of murder if it had been given the option of convicting him of aggravated assault.

Id. 867-68.[6]

---

[6]The Texas Court of Criminal Appeals has reached the same conclusion when analyzing whether a defendant was harmed by the failure of his trial counsel to request a lesser-included instruction. *See, Saunders* 913 S.W.2d at 571 ("[W]e have routinely found 'some' harm, and therefore reversed, whenever the trial court has failed to submit a lesser included offense that was requested and raised by the evidence—at least where that failure left the jury with the sole option either to convict the defendant of the greater offense or to acquit him.").

III. FOR THE REASONS SET FORTH ABOVE, THE DECISION BY THE STATE HABEAS COURT INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AND AN UNREASONABLE DETERMINATION OF FACT.

Putting aside the failure of the Magistrate Judge to hold a hearing in this case despite Applicant's request,[7] the decision by the state habeas court involved an unreasonable application of clearly established federal law and an unreasonable determination of fact.

Indeed, as explained above, the record does not support a finding that counsel made a "strategic decision" not to request a lesser-included instruction. Instead, the record demonstrates clearly that the failure to request such an instruction is attributable to trial counsel's failure to understand state law on the availability of lesser-included instructions in these circumstances. *See., e.g., Jones* 984 S.W.2d at 257. Consequently, 28 U.S.C. § 2254(d) does *not* preclude habeas relief. *See Williams v. Taylor*, 529 U.S. 362, 402-03 (2000).

[7]*See Perillo v. Johnson*, 79 F.3d 441 (5th Cir. 1996)

Respectfully submitted,

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Attorney for Petitioner
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CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on August 16, 2018, I caused a copy of the above document to be served via electronic filing on all counsel of record.

/s/ F. Clinton Broden
F. Clinton Broden

Exhibit – 'E'-1

W219-80595-07-HC

EX PARTE SHAHRAM SHAKOURI	§	**IN THE DISTRICT COURT**
	§	
	§	**219TH JUDICIAL DISTRICT**
	§	
	§	**COLLIN COUNTY, TEXAS**

AFFIDAVIT OF BILL BURDOCK

FILED
12 OCT 11 AM 10:47
ANDREA STROTHER THOMPSON
DISTRICT CLERK
COLLIN COUNTY, TEXAS
BY _____ DEPUTY

STATE OF TEXAS	§	
	§	
COUNTY OF TARRANT	§	

Before me, the undersigned notary public, on this day, personally appeared BILL BURDOCK, who after being placed under oath stated as follows:

"I was retained to represent SHAHRAM SHAKOURI in a criminal case in Collin County. I had previously represented Shahram in a family violence case and a Divorce in Tarrant County. At the time of trial, I was representing Shahram in a second Divorce and a civil matter in Collin County.

"The charges against Mr. Shakouri from Collin County were surprising from what I knew of Mr. Shakouri and Mrs. Shakouri's story was a little worse every time I spoke to the State. He maintained that the entire affair was the result of a conspiracy between his second wife and an Iranian dentist who lived in California to achieve some vaguely defined goal in the Untied States. I told Shahram that my experience in these matters in 40 years of law practice was that originally both parties consent to this behavior, but at some time one of the parties withdraws their consent and the other party desires to continue the practice.

"In completely rejecting the above approach, Shahram informed me that his religion rejected this behavior and he insisted on going to trial with the conspiracy theory.

"The second major problem we faced was to keep Mr. Shakouri off of the witness stand, if possible. Mr. Shakouri had testified a number of times in his divorce case and in

Exhibit "E-1"

all occasions he came off as a nasty, abrasive, overbearing and insensitive individual who had little or no respect for women. Mr. Shakouri also rejected this approach.

"In my opinion the State over played their hand. As time passed the story seem to grow like topsy with every new revision, the story seemed to change for the worse.

"Mr. Shakouri agreed that if we could make the story sound so wild and fanatic no one would believe the story, and we could poke holes in various places to raise reasonable doubt. This strategy had worked for me in the past.

A.

"Mr. Shakouri is correct to assert that I failed to file a Motion to Suppress evidence in this case. Mr. Shakouri's position was this evidence was planted by either the Complainant, her teenage son or the police. Some of the worst images were kept from the jury, by agreement with the State.

"Mr. Shakouri seems to overlook the fact that the victim also lived in the same house as Mr. Shakouri, although she at one time said she was at the women shelter, and she had told the police about the computer and the contents.

"I seriously doubted if the Judge would grant a Motion to Suppress. More importantly, this does sound another embellishment of the second wife's outlandish claims. The record would reflect we called a considerable number of well dressed, sophisticated, professional people who knew Shahram and who testified Mr. Shakouri never did anything, at work or socially, that would indicate he was incline to pornography or abuse of women as pointed out by applicant. His former wife also testified during her lengthy marriage she never saw any pornography in the possession of Mr. Shakouri or engaged in deviant behavior with him.

"In addition the Defense produced by video tape deposition the testimony of the complaint's neighbor in Tehren, Iran, that the victim possessed a dildo of the same description as the one seized in the search, as hers prior to her marriage to Mr. Shakouri.

B.

404(b) Objection

"I thought any pornographic pictures were not relevant to the issue being tried. However, the more disturbing the pictures, if they were put into evidence, was just

another example of an embellishment of the facts by the State. No one connected the pictures to Mr. Shakouri, except to say they were found near his property.

"Mrs. Shakouri's conduct during the marriage did not in any way act like an abused woman. I certainly did not want a limiting instruction, which instructed the jury.

Instruction-Limited Use of Evidence-Uncharged "Bad Acts"

Evidence of Wrongful Acts Possibly Committed by Defendant

During the trial, you heard evidence that the defendant may have committed wrongful acts not charged in the indictment. [*If requested by a party, include judge's description of specific acts.]* The state offered the evidence to show that the defendant [*describe purpose]*. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit the wrongful act. Those of you who believe the defendant did the wrongful act may consider it. _____

Even if you do find that the defendant committed a wrongful act, you may consider this evidence only for the limited purpose I have described. You may not consider this evidence to prove that the defendant is a bad person and for this reason was likely to commit the charged offense. In other words, you should consider this evidence only for the specific, limited purpose I have described. To consider this evidence for any other purpose would be improper.

"Rather than draw additional attention to this material by having it in the charge, the decision was made to add this to our list in argument about overkill and embellishment of the story promulgated by the witness.

"In response to her testimony that she was anally raped, repeatedly, after being restrained, with a huge dildo similar to pictures of her holding one in premarital photos taken in Iran, we called a doctor who reviewed medical records prepared by the physician who saw the victim at the hospital where she went after the final "anal rape". The Defendant's expert witness found that no notation of any trauma to the victim's anal cavity was noted on the records. This in contrary to Defendants witness who testified there is usually a great deal of difference in the anal area between people who participate in this activity and those who do not.

"To rebut the Defendant's medical expert, the State offered the testimony of the police rape investigator who testified that she did not need any medical records, she could tell if Mrs. Shakouri was raped by looking at her and talking with her.

C.

Failure to Demand that the State Make an Election

"There was no belief on counsel's part that evidence of the events testified by the victim would get before jury by anyone of several ways, there would be to our advantage to argue the whole story was too exaggerated and greatly embellished to be believable. Regarding the argument of the Applicant that this theory was not argued to the jury, let me say that there were a great deal of things I would have liked to argue, but the Court limited arguments as to time.

D.

Lesser-Included Offense of Second Degree of Sexual Assault

"While the complainant testified, she did not testify she believed the threat was of eminent harm or fear of injury, we had no way of rebutting this statement, except by applicant who testified no type of rape ever occurred.

"I do not believe we were entitled to a lesser included charge of sexual assault unless there was some evidence that the offense occurred.

"Mr. Shakouri would not admit it occurred and neither did anyone else. It was either aggravated sexual assault or not guilty.

"To the defense, it was just one in another embellishment of the facts.

E.

No Limiting Instruction on the Threat to Kill

"The limiting instruction argument under "B" above is incorporated herein. This is one of the wild allegations of the allegations of the complaints, which were elicited at about the same time complainant testified of hair pulling. We countered this statement by showing the jury many family photos, none of which reflected any loss of complainant's hair and all of which reflected the witness enjoying the opportunity to visit her in laws.

F.

Jury Voir Dire

"It is true that I could object to many statements made by the Prosecutor. I made a number of objections, which were sustained by the Court. The prosecutor was very personable young man who was liked by the jury.

"Whatever the prosecutor said to the jury would not hurt us as much as the complainant's testimony. It is always my theory that you can often object too many times and the jury panel gets angry at you. Therefore unless the statements would hurt us, I did not object."

BILL BURDOCK
Attorney At Law

STATE OF TEXAS δ
δ
COUNTY OF TARRANT δ

SUBSCRIBED AND SWORN TO before me on this 8th day of October, 2012, by BILL BURDOCK.

NANCY HARP
Notary Public, State of Texas
My Commission Expires
August 04, 2014

Notary Public for State of Texas

Exhibit – 'F'

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SHAHRAM SHAKOURI,	)	**CIVIL ACTION NO.**
	)	
Petitioner,	)	**4:15-CV-00447-ALM-KPG**
	)	
v.	)	
	)	
LORIE DAVIS, Director	)	
Texas Department of Criminal	)	
Justice, Institutional Division	)	
	)	
Respondent.	)	
	)	

REPLY TO RESPONDENT'S ANSWER

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Exhibit "F"

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

Other Authorities

REPLY TO RESPONDENT DAVIS'S ANSWER[1]

This Reply focuses on two of the issues raised in Petitioner Sharam Shakouri's Petition for Writ of Habeas Corpus:

> Issue I (C): Whether Trial Counsel Provided Ineffective Assistance of Counsel by Failing to Request the Lesser-included Instruction for Sexual Assault.
>
> Issue IV: Whether the State Used False Testimony at Trial.

I. VIOLENCE AGAINST WOMEN ACT

The Violence Against Women Act (VAWA) was enacted for the salutary purpose of protecting women who were victims of violent crimes.

> Congress enacted the Violence Against Women Act of 1994 (hereinafter "VAWA") as a response to increasing nationwide problems with domestic violence, sexual assault, and other forms of violent crimes against women. In enacting said statute, Congress specifically invoked its legislative powers under the Commerce Clause and § 5 of the Fourteenth Amendment, 42 U.S.C. § 13981(a), and created a federal substantive right "to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). Further, Congress provided victims of these crimes with a private cause of action for compensatory and punitive damages, injunctive relief and any other appropriate remedy against any person who commits a crime of violence motivated by gender. 42 U.S.C. § 13981(b) & (c). The VAWA's self-stated purpose is "to protect the civil rights of victims of violence motivated by gender and to promote public safety, health and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender." 42 U.S.C. § 13981(a).

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[1]Mr. Shakouri renews his request for an evidentiary hearing.

Santiago v. Alonso, 96 F.Supp. 58, 60-61 (D. P.R. 2000).

Nevertheless, despite the salutary purpose of the VAWA, it created a preserve incentive for immigrants to falsely claim to be victims of domestic violence in order to obtain legal status in the United States. Indeed, this is a recognized phenomenon.

> Hundreds of American men say their foreign wives exploited a section of the VAWA that helps victims of spousal abuse to remain in the United States even if they exit their marriage. The spurned husbands say their immigrant spouses have lied to police, judges, and women's shelters in their efforts to manufacture evidence of abuse.

"A Husband Spurned," *Slate*, (Nov 8, 2010) As noted by one former enforcement agent for ICE, "This is a tough situation. You want to have the law protect domestic violence victims, *yet the law also creates another vulnerability in our immigration systems that is exploited by fraudsters*." "Immigrants Preying on Americans with False Tales of Abuse to Stay in U.S., Experts Say," *Fox News*, (Sept. 8, 2016) (emphasis added).

At the trial of the instant case, there was, in fact, expert testimony provided by Gary Davis a Texas attorney certified by the Texas Board of Legal Specialization in Immigration and Naturalization law that discussed this vulnerability to the system.

> Q. And then what happens when [immigrants] get to this country and they promptly separate after a few days.
>
> A. It becomes very difficult for the non-U.S. citizen spouse. At that point options are limited because when someone has entered the country

> under a fiancee Visa, they can only become permanent residents, or technically adjust their status to permanent resident, through the marriage relationship that led to the fiancee Visa.
>
> The only alternative to that, that has any reasonable chance to succeed through the relationship would be if the person were abused, they could file under the Violence Against Women Act for a self-petition. If that self-petition were to be approved, then the person would be eligible to seek a Green Card without the sponsorship of the U.S. citizen spouse.
>
> * * * *
>
> Q. And how hard is that to do to persuade – to go that way? It would seem like everybody would say that.
>
> A. *Frankly, it happens quite frequently*; but because of the protections and the sensitive nature of the request itself, there are built into the statute privacy limitations such that the non-U.S. citizen spouse, their – whatever evidence they submit is taken basically at face value....

(RR V:203-04) (emphasis added)

II. FACTUAL BACKGROUND

The bottom line to this case is simple. Either Afsaneh Marous was a sexually abused woman entitled to protection under the VAWA or she, like others have done, has perpetrated a serious fraud upon the state court in order to be able to remain in the United States of American and have a path to citizenship. If it is the latter, Respondent, albeit unknowingly, now assists her in continuing to perpetrate this egregious fraud on *this Court*.

A. Afsaneh Marous

The Court of Appeals described Ms. Marous's testimony as follows:

> In May 2006, Marous and her son arrived in Dallas. That night, Marous alleged appellant threw her onto the bed, handcuffed her arms above her head and raped her. Marous stated the violence continued during sex, in that appellant would slap, bite and punch her. Marous also testified that the first time appellant anally raped her, he put his elbow into her back, pressed her head sideways onto the mattress with his hand and forced his penis into her backside with such force that it displaced the mattress
>
> She also stated that during anal sex, he would clutch her hair and pull her head back toward him, yanking out her hair and ignoring her complaints. Marous explained that he would press his weight against her so he could bind her ankles to the bed with straps that left marks on her legs. He also used sex toys in her vagina and anus. Marous testified that appellant seemed to derive pleasure from her pain and explained when appellant failed to use lubrication for the sex toys, she would bleed.
>
> She complained that if she said "no," he would hit and bite her. Marous testified that appellant claimed if she said anything to anybody, "[he] would kill [her] and [her] child." She stated she was scared of him and for her son, and tried to appease him to calm him down.

Shakouri v. State, 2010 WL 336598, *1 (Tex. Ct. App.–Dallas Aug. 30, 2010)

Notably, Ms. Marous testified that she asked Mr. Shakouri, "why are you doing this?" and Mr. Shakouri told her that this was common place in American and that American women liked these things. (RR IV:165)[2] Ms. Marous also claimed that Mr. Shakouri

[2]This is significant because Mr. Shakouri's first wife testified at sentencing that, during their thirty-years of marriage, Mr. Shakouri never tried to use sexual toys with her, never showed

often used a large purple dildo and other dildos to anally and vaginally rape her. (RR IV:167-69, 180)[3]

In November, Ms. Marous's sister visited from Italy and, when the entire family took a trip to California and Las Vegas, Ms. Marous claimed that she told her sister that Mr. Shakouri was abusing her. (RR VIII:36-48) Ms. Marous testified that she believed that Mr. Shakouri knew of the disclosure she made to her sister and, on the trip home, he called her (Ms. Marous) and threatened to rape and kill her if she told the police about the alleged abuse. (RR IV:194-96)[4] Ms. Marous alleged that, when they arrived home, Mr. Shakouri called his brother and she overheard Mr. Shakouri say that he wanted to kill her and her son and her sister. (RR IV:196) Ms. Marous testified that she then hid in the closet that night with her son and her sister and, with the assistance of church friends, left Mr. Shakouri the following morning and moved into a shelter. (RR IV:198-99)

Ms. Marous admitted that she obtained a Green Card based on her claims of

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her pornographic movies, never tried to force her to have sex, never tied her up and never pulled her hair. (RR IX:56-57)

[3]This is significant because a doctor testified at trial that, based on Ms. Marous's medical records, there was absolutely no evidence of trauma or scarring to her anus and that, had Ms. Marous been raped anally with the dildos she described and which were admitted into evidence, there would have been scar tissue left which would be apparent upon examination. (RR IV:216-21, 226-28)

[4]He allegedly made this call even though Ms. Marous was in his line of vision at the time he made the call. (RR V:194)

abuse by Mr. Shakouri. (RR VI:47-48)

B. Sharam Shakouri

At trial, Mr. Shakouri generally denied ever threatening Ms. Marous or forcing her to have sex against her will. He claimed that Ms. Marous had a huge sexual appetite and often used sex toys on herself. (RR VII:85-87) He alleged that, contrary to Ms. Marous's testimony, she brought several sex toys from Iran including the purple dildo. (RR VIII:73-80)[5]

III. ARGUMENT

As noted above, this Reply focuses on two of the issues raised in Petitioner Sharam Shakouri's Petition for Writ of Habeas Corpus.

A. Trial Counsel Provided Ineffective Assistance of Counsel by Failing to Request the Lesser-included Instruction for Non-Aggravated Sexual Assault.

In recommending denial of relief on this ground the state habeas court made the following findings, *inter alia*:

> 27. Applicant's denial that any sexual assault occurred did not raise the lesser-included offense of sexual assault.
>
> 28. Applicant dictated an all or nothing defense. Affidavit of Burdock at 4.

---

[5]A friend and next-door neighbor of Ms. Marous from Iran testified at trial by deposition that she had seen a purple dildo in Ms. Marous's house when Ms. Marous lived in Iran. (RR VI:121-29) **Ms. Marous also told her friend that she was desperate to come to the United States in order to be a free person**. (RR VI:131-32)

> 29. Applicant has offered no evidence or fact specific authority that counsel's strategic decision was unreasonable or that no reasonable attorney could have made the same decision.

Findings of Fact and Recommendation at 6. Meanwhile, trial counsel's affidavit to the state habeas court stated:

> While the complainant testified, she did not testify she believed the threat was of eminent [sic.] harm or fear of injury we had no way of rebutting this statement, except by applicant, who testified no type of rape ever occurred.
>
> I do not believe we were entitled to a lesser-included charge of sexual assault unless there was some evidence that the offense occurred.
>
> Mr. Shakouri would not admit it occurred and neither did anyone else. It was either aggravated assault or not guilty.
>
> To the defense, it was just one in another embellishment of the facts.

Affidavit of Bull Burdock at 4.

1. The State Habeas Court Decision Is Based on an Unreasonable Determination of the Facts in Light of the Evidence Presented in the State Court Proceeding.

First, while it is true that Mr. Shakouri denied ever assaulting Ms. Marous, there is absolutely no evidence in the record, let alone at the cited page 4 of trial counsel's affidavit, that Mr. Shakouri would not allow his trial counsel to propose a lesser-included instruction or that he "dictated" an "all or nothing defense." In sum, this factual finding by the state habeas court is in no way supported by the evidence

presented in the state court proceeding.

Second, the state habeas court's finding that trial counsel made a "strategic decision" not to request the lesser-included instruction is demonstrably false based on the record. Indeed, trial counsel's affidavit says absolutely nothing about making a "strategic decision" not to seek a lesser-included instruction. Instead, counsel's affidavit states he did not request one because he did not believe he was legally entitled to one. As discussed below, trial counsel was mistaken regarding the law.[6]

Respondent now continues this canard before this Court. Indeed, in Respondent's response she continues to claim that trial counsel's failure to request the lesser-included instruction was the result of trial strategy despite trial counsel's affidavit to the contrary. Response at 29.

2. Trial Counsel Was Ineffective under Texas Law for Not Requesting the Lesser-Included Instruction of Non-Aggravated Sexual Assault

a. Texas Law on Lesser-Included Instructions

Under Texas law there is a two-step process to determine if a defendant is entitled to a lesser-included offense instruction upon request. *Ex parte Watson*, 306 S.W.3d 259, 273 (Tex. Crim. App. 2009). Without question, sexual assault is

[6]This is also further evidence that Mr. Shakouri did not "dictate" that a lesser-included instruction not be requested. Obviously, if trial counsel did not think Mr. Shakouri was entitled to such an instruction, he would not have had any reason to discuss it with Mr. Shakouri in order to even give Mr. Shakouri a chance to "dictate" his position.

included in the proof necessary to establish the offense of aggravated sexual assault.[7] Thus, the question becomes whether there was even a scintilla of evidence introduced at trial that would indicate that, if Mr. Shakouri was guilty, he was only guilty of non-aggravated sexual assault and not aggravated sexual assault.

The Texas Court of Criminal Appeals explained how courts in Texas should analyze the second prong of the test:

> This Court analyzes the issue of lesser included offenses in terms of determining whether there is any evidence in the record from any source to indicate if appellant was guilty, he was guilty only of the lesser included offense. "Anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge." *Bignall*, 887 S.W.2d at 23; and cases cited therein. If there is evidence within a defendant's testimony which raises the lesser included offense, it is not dispositive that this evidence does not fit in with the larger theme of that defendant's testimony. *Id.* Whether there is evidence, within or without the defendant's testimony, which raised the lesser included offense controls the issue of whether an instruction on the lesser included offense should be given.
>
> It does not matter whether the evidence was admitted by the State or the defense. It does not matter if the evidence was strong or weak, unimpeached or contradicted. *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993); and *Bell v. State*, 693 S.W.2d 434, 442 (Tex. Crim. App. 1985). The trier of fact is always free to selectively believe all or part of the testimony proffered and introduced by either side. *Bignall,* 887 S.W.2d at 24; and cases cited therein. So long as there is some evidence which is "directly germane" to a lesser included offense for the factfinder to consider, then an instruction on the lesser included

---

[7]*See, e.g., Curtis v. State*, 89 S.W.3d 163, 178-79 (Tex. App.– Ft. Worth 2002); *Chavis v. State*, 807 S.W.2d 375, 377 (Tex. App.-Houston [14th Dist.] 1991).

> offense is warranted. *Bignall, Id.*; and *Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997).

Jones v. State, 984 S.W.2d 254, 257 (Tex. Crim. App. 1998).

For example, in *Jones*, the Court of Criminal Appeals was confronted with an allegation the Mr. Jones stole items from a grocery store and fought with store employees when they attempted to detain him. *Id.* at 255. As a result, he was put on trial for robbery. *Id.* Mr. Jones testified at trial in his own defense and denied *both* the theft and the assault. *Id.* Nevertheless, the Court of Criminal Appeals held that, based on Mr. Jones's testimony, Mr. Jones *was* entitled to an assault instruction as a lesser-included offense to the offense of robbery.

> [W]hen appellant testified that he did not commit a theft at Fiesta, the jury was free to believe his testimony that he did not intend to steal anything and never left the store with property which he had not paid for. A "lesser included offense may be raised if evidence either affirmatively refutes or negates an element establishing the greater offense." *Schweinle v. State*, 915 S.W.2d 17, 19 (Tex. Crim. App. 1996). Here, appellant's testimony that he did not steal or intend to steal negated the theft element of the robbery charge. If the jury believed appellant's testimony that he did not steal and believed the State's evidence that he struck Michelle Yancey, they could rationally conclude that appellant committed assault and not theft. *When appellant denied he committed the theft, even though it was in the context of denying all criminal intent, the trial court should have instructed the jury on the lesser included offense of assault.* We conclude the trial court erred when it denied appellant's request for instructions on the lesser included offense of misdemeanor assault.

Id. at 257 (emphasis added).

In sum, Texas law is clear that if there is even a scintilla of evidence in the record and regardless of the strength of the evidence, a defendant is entitled to a lesser-included instruction. Moreover, it does not matter if the defendant denies both the lesser-included offense and the greater offense.

b. Even Assuming a Sexual Assault, Without an "Imminent" and Non-conditional Threat to Cause a Complainant Death or Serious Bodily Harm a Defendant Is Guilty of Only Non-Aggravated Sexual Assault and *Not* Aggravated Sexual Assault.

The indictment in this case charged Mr. Shakouri with the aggravated sexual assault of Ms. Marous because he allegedly placed her "in fear that death or serious bodily injury would be imminently inflicted [on her]."[8] Without proof that Ms. Marous was placed in imminent fear of death or serious bodily injury, Mr. Shakouri would, at most, be guilty of non-aggravated sexual assault.

The Texas Court of Criminal Appeals has interpreted an "imminent" threat to mean a present, not a future, threat of bodily injury or death. *Devine v. State*, 786 S.W.2d 268, 270 (Tex. Crim. App. 1989). The Court of Criminal Appeals has also made clear that a conditional threat of death, *if* a rape victim tells anyone about a

[8]Under Texas law, "serious bodily injury" means "bodily injury that creates a substantial risk of death or that causes death, *serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.*" Tex. Penal Code § 1.07(46) (emphasis added).

sexual assault is insufficient to satisfy the requirement of the aggravated rape statute that the threat be imminent. *Blount v. State*, 542 S.W.2d 164, 166 (Tex. Crim. App. 1976). Likewise, another Texas court found that a defendant's statement to a victim (after a rape), that she was a "dead duck" if she called the police, was *not* considered to be an "imminent" threat. *Douglas v. State*, 740 S.W. 2d 890, 892 (Tex. App.–El Paso 1987).

c. Contrary to Trial Counsel's Belief, Mr. Shakouri Was Entitled to the Lesser-included Instruction for Non-aggravated Sexual Assault.

Trial counsel's own affidavit avers: "While the complainant testified, she did not testify she believed the threat was of eminent [sic.] harm or fear of injury." Thus, it is truly bizarre that trial counsel did not believe that "we were entitled to a lesser-included charge of sexual assault."

To have been entitled to the lesser-included instruction for non-aggravated sexual assault, there simply had to be a scintilla of evidence that Mr. Shakouri did not make any threat to Ms. Marous or that any threat he made was not an "imminent threat," but, instead, a conditional threat of death or serious bodily injury.

Here, Mr. Shakouri testified that no threat was made and, therefore, he would have been entitled to the lesser included instruction under the rationale set forth by

the Texas Court of Criminal Appeals in *Jones*.[9] Moreover, Ms. Marous's testimony indicated that most, if not all, of the threats of death or serious bodily injury she alleged that Mr. Shakouri made were *not* imminent but rather conditional threats of death or serious bodily injury *if* she told others about the alleged abuse. For example, Ms. Marous testified that she believed that Mr. Shakouri knew of the disclosure she made to her sister and that he then, *via telephone*, threatened to rape and kill her *if she told anybody or the police about the alleged abuse.* (RR IV:194) Ms. Marous also testified that, during an alleged sexual assault, Mr. Shakouri told her "*if you would say anything to anybody*, I will kill you and your child." (RR IV:170 (emphasis added)).[10]

In sum, there was certainly a scintilla of evidence in the record that any threat of death or serious bodily injury that Mr. Shakouri allegedly made to Ms. Marous was a conditional threat to kill her *if* she informed the police or others about the alleged sexual abuse. Clearly, under *Blount* and *Douglas*, this evidence would support a

---

[9]*Jones* 984 S.W.2d at 257 ("Here, appellant's testimony that he did not steal or intend to steal negated the theft element of the robbery charge. If the jury believed appellant's testimony that he did not steal and believed the State's evidence that he struck Michelle Yancey, they could rationally conclude that appellant committed assault and not theft. When appellant denied he committed the theft, even though it was in the context of denying all criminal intent, the trial court should have instructed the jury on the lesser included offense of assault.").

[10]Ms. Marous also testified that, on the final night in the home when she, her son and her sister allegedly hid in a closet, that Mr. Shakouri had a telephone conversation with his brother in which he threatened to "really bother her" and to kill her and her sister. (RR IV:196) Significantly, this alleged threat was not connected with any sexual assault.

conviction for non-aggravated sexual assault and "so long as there is some evidence which is 'directly germane' to a lesser included offense for the factfinder to consider, then an instruction on the lesser included offense is warranted." *Jones*, 984 S.W.2d at 257 (citations omitted).

d. Mr. Shakouri Was Prejudiced by the Failure to Request the Lesser-Included Instruction.

In light of the state habeas court's erroneous finding that the failure to request the lesser-included instruction was the result of "trial strategy" despite trial counsel's affidavit that indicates a misunderstanding of the law on this subject, the state habeas court never reached the issue of prejudice.

Under Texas law, if the absence of the lesser-included offense instruction left the jury with the sole option either to convict the defendant of the charged offense or to acquit him, harm exists. *Saunders v. State*, 913 S.W.2d 564, 571 (Tex .Crim. App.1995). Indeed, the United States Supreme Court had noted:

> Moreover, it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the

jury is likely to resolve its doubts in favor of conviction.

Keeble v. United States, 412 U.S. 205, 208 (1973).[11]

Given this case law as well as the fact that most if not all of the evidence regarding threats of death or serious bodily injury involved a conditional threat to kill Ms. Marous *if* she informed the police or others about the alleged sexual abuse, there is certainly at least a reasonable probability that had a lesser-included instruction been given the outcome of the trial may have been different.

B. The State Used False Testimony at Trial.

This ground relates to the discovery after trial of a witness, Mohammad R. Manteghinezhad, who averred that Ms. Marous admitted that she had played the system in order to enter into and remain in the United States. *See* Attachment A. In recommending denial of relief on this ground the state habeas court made the following findings, *inter alia*:

> 104. Manteghinezhad's affidavit does not state whether he prepared his affidavit himself or whether he signed a pre-prepared affidavit.
>
> 105. Manteghinezhad's affidavit appears to have been prepared by another person because it contains a blank for him to fill-in the last four digits of his social security number.

---

[11] *See also Beck v. Alabama*, 447 U.S. 625, 634 (1980) (Also noting that a jury, believing a defendant to have committed some crime, but given only the option to convict him of a greater offense, may choose to find the defendant guilty of the greater offense, rather than to acquit him altogether, even though the jury may have a reasonable doubt the defendant really committed the greater offense);

> 106. Applicant's supplemental writ application does not state who provided Manteghinezhad's signed affidavit to writ counsel.
>
> 107. Manteghinezhad's are unsupported by other evidence.
>
> 108. The allegations in Manteghinezhad's [six.] were previously, generally raised at trial and rejected by the jury.
>
> 109. Consistent with the Court's findings as to Ground 2, the statements of [Ms. Marous in her habeas court affidavit]..are credible.
>
> 110. Manteghinezhad's are not credible.

Findings of Fact and Recommendation at 15. Significantly, despite Mr. Shakouri's request, the state habeas court refused to hold a live evidentiary hearing at which Mr. Manteghinezhad's live testimony could have been presented. It is also significant that the jury handling the state habeas proceeding was not the trial judge.

1. The State Habeas Court Decision Is Based on an Unreasonable Determination of the Facts in Light of the Evidence Presented in the State Court Proceeding

The most glaring problem in the state habeas court's analysis is the fact that the main reason it appears that it found Mr. Manteghinezhad's affidavit *not to be credible* is because the Court suspected it might have been prepared by another and given to Mr. Manteghinezhad to sign. Nevertheless, the state habeas court found Ms. Marous's affidavit *to be credible* despite that fact that she acknowledged that her affidavit was prepared by the Assistant District Attorney representing the state in the

habeas proceedings. *See* Affidavit of Afsaneh Marous at ¶ 1. Indeed, Mr. Marous's affidavit is in prefect English despite the fact that she admittedly had only a limited ability to speak English. *Id.* at ¶ 2. There is no explanation as to why one affidavit is discounted because it *may* have been prepared by somebody other than the affiant, yet another affidavit is credible where it *was* admittedly prepared by a party to the proceeding.

Next, although the state habeas court made a factual finding that "Manteghinezhad's are unsupported by other evidence," the state habeas court points to no other evidence that is inconsistent with Mr. Manteghinezhad's claim that Ms. Marous admitted to him that she had perpetrated a fraud in this case in order to come to and remain in the United States. Moreover, while it is certainly true that this theory was presented at trial, this was direct evidence of the complainant herself admitting to the conduct of which the defense accused her.

2. The New Evidence from Mr. Manteghinezhad Certainly Raises a Reasonable Probability That Ms. Marous Committed Perjury at Trial.

As noted above, either Afsaneh Marous was a sexually abused woman entitled to protection under the VAWA or she, like others have done, has perpetrated a serious fraud upon the state court in order to be able to remain in the United States of American and have a path to citizenship. Undersigned counsel submits that it should

be of paramount concern to the integrity of the court system and the VAWA that every effort be made to determine if Ms. Marous is, in fact, perpetrating a fraud on the courts. Toward that end, undersigned counsel met personally with Mr. Manteghinezhad on October 7, 2016 in order to attempt to assess Mr. Manteghinezhad's credibility. Based on this meeting, it certainly appears that Mr. Manteghinezhad's claims that Ms. Marous is perpetrating a fraud on the courts is worthy of further development.

Indeed, as indicated above, there is certainly some evidence that Ms. Marous's claims of abuse are dubious. First, despite the fact that she claimed that Mr. Shakouri often used a large purple dildo and other dildos to anally and vaginally rape her, a doctor testified at trial that, based on Ms. Marous's medical records, there was absolutely no evidence of trauma or scarring to her anus and that, had Ms. Marous been raped anally with the dildos she described and which were admitted into evidence, there would have been scar tissue left which would be apparent upon examination. Likewise, Ms. Marous's description of Mr. Shakouri's alleged sexual preference was completely at odds with the testimony from Mr. Shakouri's first wife.

In sum, there is a serious possibility that Ms. Marous, like many others have done, is exploiting the "vulnerability" in the VAWA. While that theory was "generally raised" at trial and there was *some* evidence to indicate that this was the

case, Mr. Manteghinezhad's can now provide the direct evidence that Mr. Shakouri was unable to provide at trial. For the state habeas court to say that one affidavit was not credible because the affiant might have received assistance in preparing it but that another affidavit was credible when the affiant admittedly received assistance in preparing it is certainly unreasonable. This is especially so when the state habeas judge was different than the state trial judge and Mr. Shakouri was denied an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on November 21, 2016 I caused a copy of the above document to be served by all parties via electronic filing.

/s/ F. Clinton Broden
F. Clinton Broden