NO. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

JERRY LEE CANFIELD - PETITIONER

Vs.

BOBBY LUMPKIN, DIRECTOR - RESPONDENT

_____

On Petition For a Writ Of Certiorari To

The United States Court of Appeals For The Fifth Circuit

THE APPENDIX VOLUME

APPENDIX A: Petition for Rehearing Denied on August 06, 2021, by Owen, Chief Justice, and Higginbotham and Willett.

APPENDIX B: Opinion Affirming district court's denial of habeas relief, by Owen, Chief Justice, Higginbotham, dissenting, and Willett, Opining Justice, on May 24, 2021.

APPENDIX C: District Judge Terry R. Means denied habeas relief on March 28, 2018 within the United States District Court for the Northern District, Fort Worth Division.

APPENDIX D: Texas Court of Criminal Appeals denied States Habeas relief on September 09, 2016.

APPENDIX E: The Seventh District Court of Appeals at Amarillo Affirmed the trial court's judgment on February 19, 2015.

APPENDIX F: Judgment Sheet of the 213th District Court of Tarrant County, Jury finding guilt and sentenced to 50 years in prison without parole on April 03, 2013.

United States Court of Appeals for the Fifth Circuit

No. 18-10431

JERRY LEE CANFIELD,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:16-CV-1000

ON PETITION FOR REHEARING

Before OWEN, *Chief Judge*, and HIGGINBOTHAM and WILLETT, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

Appendix A

Revised 5/24/2021

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
May 21, 2021
Lyle W. Cayce
Clerk

No. 18-10431

JERRY LEE CANFIELD,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:16-CV-1000

Before OWEN, *Chief Judge*, and HIGGINBOTHAM and WILLETT, *Circuit Judges*.

DON R. WILLETT, *Circuit Judge*:

Jerry Lee Canfield was convicted of continuous sexual abuse of a child—his daughter—and sentenced to 50 years' imprisonment. In seeking habeas relief, Canfield argues that his trial counsel was constitutionally ineffective because he failed to investigate and challenge a juror who demonstrated partiality during voir dire. The district court affirmed the Texas Court of Criminal Appeals' denial of Canfield's habeas claims, and we affirm the district court.

Appendix B

I

A

In July 2011, Canfield sent his then-seven-year-old daughter, M.C., and five-year-old son, C.C., to stay with his aunt and uncle—Ronda and Michael Canfield—in Bedford, Texas. About six months later, Canfield called to say he would be returning to pick up his children. At that time, Ronda and her adult daughter decided they needed to address M.C.'s poor hygiene before she returned to her father and was no longer in the care of a woman. They instructed M.C. on self-care and advised her to tell an adult if anyone touches her body in a way that makes her uncomfortable. M.C. then told her aunt and cousin that her father had touched her "private parts" and made her touch his. M.C. then told Michael the same thing. Michael and Ronda called child protective services.

The police arrested Canfield, charging him with continuous sexual abuse of a child under the age of fourteen. The State alleged that Canfield engaged in at least two sex acts with M.C. over a period of at least 30 days between May 1, 2010 and August 31, 2010. Canfield took his case to trial.

During voir dire, the prosecutor asked all 60 potential jurors—who knew the case involved sexual abuse of a child—whether they already believed Canfield was guilty. After juror M.T. raised her hand, she and the prosecutor had the following exchange:

> PROSECUTOR: . . . Tell me why.
>
> [M.T.]: I don't know. I have an autistic grandson who cannot talk, and we'll never know, but we think something might have happened at the last autism program that he was in. My grandson cannot talk. We will never know. I'm sorry. This is just creeping me out really, really bad, being here. And just—I'm freaking out.

> PROSECUTOR: Okay. Let me ask you this: If we don't prove him guilty, if we don't prove it beyond a reasonable doubt guilty to you, are you going to find him guilty anyway?
>
> [M.T.]: I probably will just because of where I am right now. I mean, I just—this is not a good—.

When it was his turn, defense counsel asked all 60 potential jurors questions regarding their ability to hold the prosecution to its burden of proof:

> [I]f you have any reasonable doubt as to someone's guilt, you must find them not guilty. . . . You're affecting someone's freedom. Someone could go to prison for life. . . . And before we do that, before we want to say to someone, We're going to send you away for X amount of years, we want to be really sure, really sure.
>
> Does anyone have a problem? Does anyone think that's too high, too onerous a burden to place on someone?

There was no response, including from M.T.

> Can everybody agree to hold the government to that burden, that before we find someone guilty, if you say to yourself, I had a reasonable doubt, I will find them not guilty? Can everybody agree to that? Does anyone have any reservations about that?

Again, no response.

Counsel then discussed the importance of a fair trial and asked if anyone felt they would be unable to find the defendant not guilty if he declined to testify or put on any witnesses of his own. One potential juror raised his hand; M.T. did not raise hers.

Next, defense counsel asked whether anyone believed that if a person has been accused of committing a crime more than once, "that makes him more likely to be guilty." Numerous potential jurors raised their hands; M.T. did not. Counsel pressed those who raised their hands for a definitive answer

as to whether or not they could "give him a fair trial." After some venire members answered that they could not, defense counsel noted his appreciation for their honesty and stated, "that's why we have all of you here and only 12 seats up there. So if you have something you want to say, let's talk about it. Anybody else?" M.T. did not raise her hand.

Finally, with respect to the guilt/innocence phase of trial, defense counsel asked whether "there [is] anything about this particular offense, for whatever reason, any act that for this particular type of offense that you'd say, I just don't know if I could be the right kind of person for this jury?" One venire member noted that "[a]s a grandmother of two young children . . . it makes [her] look at someone perhaps with a more negative eye that, if they've been accused, what could have occurred that cause[d] someone to accuse them?" In response, defense counsel asked the venire member whether she believed she could "give Jerry a fair trial," noting "if you can't, it's okay." The woman confirmed that, despite her feelings, she could give Canfield a fair trial. Defense counsel followed up with, "Anybody else before we move on? I just don't know if this is the right kind of case for me." No one else, including M.T., raised a hand.

With respect to sentencing, defense counsel asked whether anyone believed a 25-year sentence (the bottom end of the sentencing range) would be too low, such that they would not be able to consider that sentence as a punishment. While some potential jurors noted that 25 years is "a lot" and they'd need to have "100 percent proof" of guilt to impose such a sentence, no one raised a hand to indicate a belief that a 25-year sentence would be an insufficient punishment.

Neither defense counsel nor the trial court addressed M.T. personally, nor did defense counsel challenge M.T. for cause or use a peremptory strike to remove her from the pool. M.T. ultimately served on

the jury, which found Canfield guilty and imposed a sentence of 50 years' imprisonment.

B

Canfield first raised his ineffective assistance of counsel claim in his state habeas petition, arguing that his trial counsel's assistance "fell below an objective standard of reasonableness"[1] when he failed to investigate or challenge M.T. despite her obvious bias against Canfield.

In response, Canfield's trial counsel submitted an affidavit. First, counsel noted that "[o]f the ten challenges for cause, a decision had to be made on which of these prospective jurors we would exercise challenges."[2] He then acknowledged M.T.'s statements, but claimed that she "at no point committed herself to finding [Canfield] guilty regardless of the evidence." In his view, "[t]o say that you would probably find someone guilty regardless of the evidence is not a committal response." And because of M.T.'s equivocal statements, defense counsel claims, he posed "follow up questions . . . regarding that very issue." Defense counsel noted that, during the follow-up questioning, M.T. did not indicate that she could not give Canfield a fair trial.

The state court denied Canfield's petition, making the following findings:

---

[1] *Strickland*, 466 U.S. at 688.

[2] It appears counsel may have been mistaken in believing he only had "ten challenges for cause." *See* Tex. Code Crim. Proc. Ann. art. 35.15(b) & 35.16 (limiting *peremptory* strikes to ten but not mentioning a limit on for-cause strikes). However, Canfield did not challenge the propriety of counsel's belief on appeal, nor did the State address it; therefore, any argument related to the correctness of counsel's understanding is forfeited. *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) ("An appellant abandons all issues not raised and argued in its initial brief on appeal." (emphasis omitted)).

> 10. Venire persons are rehabilitated by remaining silent when they do not affirmatively state that they cannot follow the law. *See Leadon v. State*, 332 S.W.3d 600, 616 (Tex. App.—Houston 188 [14th Dist.] 2010, no pet.); *Cubit v. State*, No. 03-99-00342-CR, 189 2000 WL 373821, *1 (Tex. App.—Austin Apr. 13, 2000, no pet.) 190 (mem. op., not designated for publication).
>
> 11. Juror [M.T.] was rehabilitated by her silence.
>
> 12. Applicant has failed to prove that counsel's representation was deficient because counsel failed to ask Juror [M.T.] more questions.
>
> 13. Applicant has failed to prove that Juror [M.T.] was biased.
>
> 14. Counsel's decision to not challenge Juror [M.T.] for cause was the result of reasonable trial strategy.
>
> 15. Counsel's decision to not strike Juror [M.T.] was the result of reasonable trial strategy. . . .
>
> 44. Applicant has failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel challenged [M.T.] for cause.
>
> 45. Applicant has failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel struck [M.T.].

The TCCA adopted these findings and likewise denied relief.

II

Strickland v. Washington[3] imposes a high bar on those alleging ineffective assistance of counsel. But 28 U.S.C. § 2254(d), which applies when reviewing a state prisoner's federal habeas appeal, raises the bar even higher. To prevail, Canfield must demonstrate that his counsel's

[3] 466 U.S. 668 (1984).

performance was *both* deficient *and* prejudicial to his defense (*Strickland*),[4] and he must show that the state habeas court's decision otherwise was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence" (§ 2254(d)).[5]

We review state-court adjudications for errors "so obviously wrong" as to lie "beyond any possibility for fairminded disagreement,"[6] and we presume findings of fact to be correct.[7] Keeping in mind the enhanced deference federal habeas courts must apply when evaluating *Strickland* claims,[8] we first address counsel's performance and then turn to prejudice.

---

[4] *Id.* at 687.

[5] 28 U.S.C. § 2254(d).

[6] *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). *Shinn* is the first of two recent per curiam opinions in which the Supreme Court reversed federal appellate courts for failure to apply appropriate deference. In the second, *Mays v. Hines*, the Court framed the inquiry succinctly: "All that matter[s] [i]s whether the [state] court, notwithstanding its substantial 'latitude to reasonably determine that a defendant has not shown prejudice' still managed to blunder so badly that every fairminded jurist would disagree." 141 S. Ct. 1145, 1149 (2021) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)) (original alterations omitted).

[7] 28 U.S.C. § 2254(e)(1). That presumption may only be overcome by "clear and convincing evidence" otherwise.

[8] In *Shinn*, the Court emphasized "the special importance of the AEDPA framework in cases involving *Strickland* claims." 141 S. Ct. 523. While habeas relief is never available as to state-court decisions that are "'merely wrong' or 'even clear error,'" the general nature of the *Strickland* standard gives state courts "even more latitude to reasonably determine that a defendant has not satisfied that standard." *Id.* (first quoting *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728 (2017), and then quoting *Knowles*, 556 U.S. at 123).

A

First, deficient performance. Counsel's performance is deficient if his behavior "fell below an objective level of reasonableness."[9] But there's "a strong presumption that counsel's representation was within the wide range of reasonable professional assistance."[10] Counsel is not expected to be a "flawless strategist or tactician" and he "may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities."[11]

Canfield points us primarily to *Virgil v. Dretke*, where we determined that counsel's failure to challenge two jurors—who "expressly stat[ed] an inability to serve as fair and impartial jurors"—was constitutionally deficient and that the state court's contrary conclusion was an objectively unreasonable application of Supreme Court precedent.[12] There, similar to this case, the jurors used language such as "I would say no" and "Yeah, I believe so" in expressing, respectively, whether they would be able to serve as an impartial juror and whether their personal experiences would prevent them from being impartial.[13] We held these potential jurors' statements, "that they could not be fair and impartial[,] obligated Virgil's counsel to use

---

[9] *Strickland*, 466 U.S. at 688.

[10] *Richter*, 562 U.S. at 104 (internal quotation omitted).

[11] *Id.* at 110.

[12] 446 F.3d 598 (5th Cir. 2008). The Supreme Court has explained that "an appellate panel may, in accordance with its usual law-of-the-circuit procedures, look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent." *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013).

[13] *Id.* at 604.

a peremptory or for-cause challenge on these jurors."[14] And "not doing so was deficient performance under *Strickland*."[15]

But even assuming that counsel's performance here was deficient, *Virgil* does not demonstrate that the TCCA was unreasonable in finding otherwise. In *Virgil*, unlike in this case, counsel's post-trial affidavit spoke "only of peremptory challenges and fail[ed] to indicate why for-cause challenges were not used against [the potential jurors]," and "fail[ed] to explain why the answers given by [the potential jurors] did not indicate prejudice or bias."[16] Here, counsel explained that he had to make strategic decisions about how to use his for-cause challenges. And even if he was incorrect about the number of for-cause challenges he was allotted, he also explained that he believed M.T.'s silence at additional questioning served to rehabilitate her testimony. Counsel's purposeful, strategic reasoning alone distinguishes *Virgil* from the case at bar.

The TCCA also found that counsel's performance was not deficient because M.T. was not in fact biased, a factual determination that this court may only reject with clear and convincing evidence.[17] Specifically, the TCCA pointed to Texas law to highlight that "[v]enire persons are rehabilitated by remaining silent when they do not affirmatively state that they cannot follow the law." The court then determined that M.T. "was rehabilitated by her silence" and that Canfield "failed to prove that [M.T.] was biased." The TCCA reasonably pointed to good law in Texas and made a sensible factual assessment regarding M.T.'s silence during defense counsel's questioning.

---

[14] *Id.* at 610.

[15] *Id.*

[16] *Id.* (internal quotations omitted).

[17] *See Patton v. Yount*, 467 U.S. 1025, 1036 (1984).

This "does not come close to showing the sort of 'extreme malfunction in the state criminal justice system' that would permit federal court intervention."[18] Therefore, the TCCA was not *unreasonable* in concluding that M.T. was not biased and counsel's performance was not deficient.

B

Second, prejudice. Though we could end our inquiry with the deficient-performance analysis, the most persuasive reason to deny habeas relief comes with the prejudice prong. Prejudice is demonstrated where a petitioner shows "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[19] "A reasonable probability means a " 'substantial,' not just 'conceivable,' likelihood of a different result."[20] In this inquiry, the Supreme Court has recently reminded us that, in carrying out our deferential review, we may not "'substitute[] [our] own judgment for that of the state court."[21]

Here, there can be no doubt that, even if M.T. were biased, the state court did not unreasonably conclude that her presence on the jury did not change the outcome of the trial.[22] The evidence of Canfield's guilt is overwhelming. The jury heard (1) testimony from the eight-year-old victim; (2) testimony from five outcry witnesses; and (3) testimony from an expert who personally interviewed the victim and noted that a coached child would

---

[18] *Shinn*, 141 S. Ct. at 526 (quoting *Richter*, 562 U.S. at 102) (alterations omitted).

[19] *Strickland*, 466 U.S. at 687.

[20] *Shinn*, 141 S. Ct. at 523 (quoting *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011)).

[21] *Id.* at 524 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002)).

[22] *See Virgil*, 446 F.3d at 612 ("Prejudice is presumed in a narrow category of cases, none of which is present here.").

not be able to provide the detailed information that the victim provided.[23] The defense did not impeach the State's witnesses or otherwise cast doubt on the veracity of their testimony, and it did not offer any witnesses of its own. Based on this overwhelmingly one-sided evidence, there is no "reasonable probability" that, but for M.T.'s presence, the jury—who deliberated Canfield's guilt for less than an hour—would have acquitted.[24]

But, if any doubt remains about our assessment of prejudice to Canfield, the TCCA's assessment controls. The TCCA correctly identified the proper prejudice standard under *Strickland*: a reasonable probability that the result of the proceeding would have been different absent counsel's errors.[25] And, based on its conclusion that M.T. was not biased, and lacking

---

[23] The expert was a forensic investigator with Child Protective Services who specialized in sexual-abuse investigations. During her direct examination, the State also introduced, and published to the jury, pictures that the victim drew during her interview with the expert, which depicted specific details relating to the abuse.

[24] *See, e.g.*, *Sanchez v. Davis*, 936 F.3d 300, 306–07 (5th Cir. 2019) (finding no reasonable possibility of different outcome where the state offered four witnesses to the crime, the defense offered no mitigating evidence, and the jury returned its guilty verdict "swift[ly]").

Canfield does not argue that his sentence, separate from the jury's finding of guilt, would have been different but for counsel's error. Therefore, he has forfeited any argument regarding prejudice in sentencing. *Cinel*, 15 F.3d at 1345. But, even if the argument were not forfeited, Canfield has not provided any evidence to suggest M.T. maintained any biases with respect to sentencing, and the jury deliberated the appropriate sentence for a mere 30 minutes. Taken together, there can be no reasonable suggestion that M.T.'s presence on the jury changed the outcome of Canfield's sentence.

[25] To the extent Canfield suggests that the presence of a biased juror amounts to a structural error, *compare Virgil*, 446 F.3d at 607, *with Austin v. Davis*, 876 F.3d 757, 803 (5th Cir. 2017) (Owen, J., concurring) ("The Supreme Court has never held that juror bias is structural error requiring automatic reversal."), such that we must presume prejudice without going through a reasonable-probability analysis, *Weaver v. Massachusetts* closes the door on this argument. 137 S. Ct. 1899, 1910–12 (2017). *Weaver*, which was decided after *Virgil*, expressly left an open question regarding whether, when a structural error is first identified through an ineffective-assistance-of-counsel claim instead of on direct appeal,

any materially indistinguishable Supreme Court precedent necessitating a different conclusion, the court reasonably concluded that the result of the trial would not have been different if counsel had challenged or struck M.T. from the jury. As such, the TCCA's conclusion was not contrary to or an unreasonable application of clearly established Federal law, and, thus, habeas relief must be denied.

III

Strickland sets a high bar, which AEDPA raises higher still. Even assuming Canfield clears the former, he falters at the latter. The judgment of the district court is AFFIRMED.

---

petitioner is required to show a reasonable probability of a different outcome or if he may rely on a showing of fundamental unfairness. 137 S. Ct. at 1911. If there is an open question, the law is not clearly established. So even assuming, for the sake of argument, that a biased juror does pose a structural error, the TCCA's reliance on the reasonable-probability standard, one of the two possible standards recognized in *Weaver*, could not have been contrary to or an unreasonable application of Supreme Court precedent.

PATRICK E. HIGGINBOTHAM, *Circuit Judge*, dissenting:

Today we return to critical issues attending the difficulties of jury selection. A cornerstone of the fair trial, it is the last chance for the court to expose prejudice and bias before the jurors repair to a virtual vault where deliberations are sealed, not to be opened except in the most egregious cases.[1] This "no-impeachment rule" grew out of our common-law heritage and is now codified in the Federal Rules of Evidence and entrenched in the laws of every state.[2] Shielding the jury's deliberations from scrutiny protects the finality of the process, enables jurors to deliberate honestly, and ensures, as best can be done, their willingness to return a true, if unpopular, verdict.[3] But this sealing canon comes at a cost: we cannot probe the effects of a juror's bias in the jury room, and in those rare cases when we can and do, remedies for the unfairness are elusive.

As jury selection is the lynchpin of an impartial jury, it ought never be a hasty minuet or check-the-boxes exercise; it must always be as exacting and careful a process as the case demands. As in the case now before us, potential jurors often come with personal experiences and grasping emotions bottled in memory and easily set off. These realities bind the trial judge in the interest of true verdicts and bind the attorneys in meeting their adversarial duty to identify and exclude biased jurors. When a juror evidences a potential bias, the selection process must root it out with specific and direct questioning, with the judge resolving uncertainty in favor of exclusion. These demands on

---

[1] *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868, 871 (2017) (characterizing voir dire as a "safeguard[] to protect the right to an impartial jury" and highlighting the "advantages of careful voir dire" in preventing bias in jury deliberations).

[2] *See* FED. R. EVID. 606(b); *Pena-Rodriguez*, 137 S. Ct. at 865 ("Some version of the no-impeachment rule is followed in every State and the District of Columbia.").

[3] *Pena-Rodriguez*, 137 S. Ct. at 867.

the court and counsel advance bedrock principles of procedural fairness crafted to deliver the right to trial by jury. Yet they only ask that the court and counsel do their job.

Here, the trial judge and counsel were acutely aware of the necessary care that must attend jury selection and the challenges of this case. Our question is whether they succeeded in protecting the jury room. Unlike the majority, I conclude that they did not. During voir dire, a prospective juror volunteered that she felt the defendant was guilty and would probably vote to convict him even if the State failed to prove his guilt beyond a reasonable doubt. Neither counsel nor the judge followed up with her. So, she served on the jury that first convicted Jerry Lee Canfield and, then, free to choose from a menu of sentences from 25 years to life imprisonment, sentenced him to 50 years in prison without the possibility of parole. I would hold that defense counsel's failure to challenge this biased juror deprived Canfield of his Sixth Amendment right to effective assistance of counsel, rendering his sentence unreliable, and that the state court's decision to the contrary was an unreasonable application of clearly established law.

I

A

As an initial matter, the facts of Canfield's sentencing require further inspection. At sentencing, the State and Petitioner each called a witness. Testifying for the State, Canfield's aunt, Ronda, described how Canfield's abuse impacted his daughter, M.C., explaining that as a result of the sexual assault, M.C. developed emotional problems, boundary problems with adult men, and troubling sexual behavior. On cross-examination, she testified that Petitioner had a "rough upbringing." She also testified that Petitioner and his children, M.C. and C.C., were homeless at times and that she heard they

were living in his car at one point. And she said that M.C. and C.C.'s mother had no relationship with the children.

Petitioner called an expert witness, Dr. William Flynn, a clinical and forensic psychologist. Flynn testified that he had interviewed Petitioner and assessed his recidivism risk using Static 99, a form with ten objective risk factors indicative of a person's risk of committing another sexual crime. Flynn explained that Static 99 is well-established, highly regarded by the scientific community, and used by the State to determine whether violent sexual offenders set for release from prison need to be civilly committed due to their high risk of recidivating.[4] He found that Petitioner had eight protective factors and two risk factors: his age (30 years) and his prior convictions for petty offenses. Canfield had no felony convictions or charges of sex offenses beyond those charged in this prosecution.[5] With only two risk factors, Petitioner had a low risk of recidivism—a 1% to 7% probability of reoffending after 10 years of opportunity and almost no chance of reoffending after age 60. The State contested the accuracy and utility of the survey instrument. Free to choose a sentence from 25 years to life imprisonment, the jury sentenced Jerry Lee Canfield to 50 years in prison—effectively a life sentence, as the 30-year-old is not eligible for parole.

B

In his state habeas corpus application, Canfield, proceeding pro se, asserted for the first time that his counsel had been ineffective for failing to challenge juror M.T, despite her assertion of actual bias and lack of

---

[4] *See* TEX. CODE CRIM. PROC. ANN. art. 62.007(c).

[5] His record includes several minor offenses, such as possession of marijuana of consumable amounts, bad checks and misuse of prescriptions, all suggesting he was a drug user but had never been jailed.

rehabilitation. During voir dire, M.T. revealed that she believed her grandson might have been sexually abused, and because of that experience, she would probably find Canfield guilty of abusing his daughter, even if the State failed to prove his guilt beyond a reasonable doubt. The State opposed Canfield's petition and submitted a twenty-page memorandum setting out proposed findings of fact and conclusions of law. The state habeas trial court adopted the State's memorandum verbatim, thereby recommending the denial of relief. Adopting the habeas trial court's findings, the TCCA also denied relief.

II

To prevail on his ineffective-assistance claim, Canfield must meet *Strickland v. Washington*'s two-part test.[6] He must show that his counsel's performance was deficient and prejudicial to his defense. Since this matter comes to us as a petition for habeas relief under § 2254, Canfield must also show that the state court's decision was contrary to or an unreasonable application of *Strickland*.[7] A merely "incorrect" state court decision, one we might have decided differently, will not suffice.[8]

A

Counsel's performance is deficient under *Strickland* if the petitioner shows that it "fell below an objective standard of reasonableness."[9] We "apply a strong presumption that counsel's representation was within the

---

[6] 466 U.S. 668, 687 (1984).

[7] *Virgil v. Dretke*, 446 F.3d 598, 611 (5th Cir. 2006).

[8] *Id.* at 604.

[9] *Strickland*, 466 U.S. at 688.

wide range of reasonable professional assistance."[10] Counsel's "conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness."[11]

This case closely resembles *Virgil v. Dretke*. There, we held that counsel's failure to challenge two jurors rendered his performance constitutionally deficient and that the state court's contrary conclusion was an objectively unreasonable application of clearly established law.[12] The first juror, Sumlin, stated that because some of his relatives are police officers, he could "[p]erhaps not" be an impartial juror.[13] Asked to clarify whether his answer to that question was yes or no, Sumlin responded, "I would say no."[14] The second juror, Sims, stated that his mother had been mugged, and when asked whether that would prevent him from being impartial, he replied, "Yeah, I believe so."[15] This Court found that Sumlin's and Sims's unchallenged voir dire comments "obligated Virgil's counsel to use a

---

[10] *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (internal quotation marks and citation omitted)

[11] *Ward v. Dretke*, 420 F.3d 479, 491 (5th Cir. 2005) (internal quotation marks and citation omitted).

[12] *Virgil*, 446 F.3d at 601. To determine whether a state court has unreasonably applied "clearly established Federal law, as determined by the Supreme Court of the United States" under § 2254(d)(1), the Supreme Court has explained, "an appellate panel may, in accordance with its usual law-of-the-circuit procedures, look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent[.]" *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (citing *Tolliver v. Sheets*, 594 F.3d 900, 916, n.6 (6th Cir. 2010) ("We are bound by prior Sixth Circuit determinations that a rule has been clearly established[.]")).

[13] *Virgil*, 446 F.3d at 603.

[14] *Id.*

[15] *Id.* at 604.

peremptory or for-cause challenge on these jurors" and that "[n]ot doing so was deficient performance under *Strickland.*"[16]

M.T., like Sumlin and Sims, demonstrated that she was biased.[17] When the State asked whether any of the jurors would "think [Canfield]'s guilty before we even start testimony," she answered, "I do," and, "I feel that way." And when asked whether she would find Canfield guilty even if the State's evidence was insufficient, M.T.'s response was straightforward: "I probably will just because of where I am right now." She indicated not just the "mere existence" of a preconception of Canfield's guilt but a likelihood that she would vote to convict Canfield even if the State failed to prove his guilt beyond a reasonable doubt.[18] Her statements amounted to an admission that her "views would prevent or substantially impair the performance of h[er] duties as a juror in accordance with h[er] instructions and h[er] oath."[19] At no point did she clearly express that she could "lay aside h[er] impression or opinion and render a verdict based on the evidence presented in court."[20] As a result, Canfield's counsel was obligated to use a peremptory or for-cause challenge on M.T. Because he failed to do so, his performance was deficient.

The State argues that even if there was initial bias, it was not unreasonable for the state court to find that M.T. was rehabilitated by her silence in response to defense counsel's questions to the venire about holding

---

[16] *Id.* at 610.

[17] Because juror bias is a factual finding, *Patton v. Yount*, 467 U.S. 1025, 1036 (1984), the state court's determination is entitled to a "presumption of correctness" unless it can be rebutted by "clear and convincing evidence," 28 U.S.C. § 2254(e)(1).

[18] *See Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

[19] *Soria v. Johnson*, 207 F.3d 232, 242 (5th Cir. 2000) (internal quotation marks and citation omitted) (defining "bias").

[20] *Irvin*, 366 U.S. at 723.

the State to its burden. The State primarily argues that there is no Supreme Court precedent clearly establishing that a juror cannot be rehabilitated by silence. But juror bias presents a "question . . . of historical fact," not a question of law or a mixed question of fact and law.[21] We therefore must determine whether the state court's finding was "based on an unreasonable determination of the facts."[22]

Once a venire member has indicated bias, courts have looked for persuasive evidence of disavowal before finding rehabilitation, such as a simple follow up by judge or counsel: "We need a yes or no, please?" In *Virgil*, we favorably discussed our decision in *United States v. Nell*, which ordered a new trial while noting that "[d]oubts about the existence of actual bias should be resolved against permitting the juror to serve, unless the prospective panelist's protestation of a purge of preconception is positive, not pallid."[23] *Virgil* also cited with approval the Sixth Circuit's decision in *Hughes v. United States*[24] and quoted its reasoning that an "express admission

---

[21] *Patton*, 467 U.S. at 1036; *see also Thompson v. Keohane*, 516 U.S. 99, 111 (1995) ("In several cases, the Court has classified as 'factual issues' within § 2254(d)'s compass questions extending beyond the determination of 'what happened.' This category notably includes . . . juror impartiality."); *Wainwright v. Witt*, 469 U.S. 412, 429 (1985) (holding that juror bias determination is a question of fact, even though "[t]he trial judge is of course applying some kind of legal standard to what he sees and hears"). Of course, the trial court never addressed the issue directly. Judge Posner put it aptly: "Our review of the trial judge's ruling with respect to a challenge for cause is deferential but not completely supine, and it is pertinent to note that no issue of credibility is presented. . . . The issue is interpretive: did what [the juror] say manifest a degree of bias such that the judge abused his discretion in failing to strike her for cause?" *Thompson v. Altheimer & Gray*, 248 F.3d 621, 624–25 (7th Cir. 2001) (internal citations omitted).

[22] 28 U.S.C. § 2254(d)(2).

[23] *See United States v. Nell*, 526 F.2d 1223, 1230 (5th Cir. 1976); *see also Virgil*, 446 F.3d at 606–07.

[24] *See Virgil*, 446 F.3d at 606–07 & nn.30, 33 (citing *Hughes v. United States*, 258 F.3d 453 (6th Cir. 2001)).

of bias, with no subsequent assurance of impartiality and no rehabilitation by counsel or the court by way of clarification through follow-up questions directed to the potential juror," supports a finding of actual bias.[25] *Hughes* further found that a juror's "silence in the face of generalized questioning of venirepersons by counsel and the court did not constitute an assurance of impartiality."[26] And in several other cases, after a juror indicated her actual bias, the entire venire's silent response to a group question was not enough to establish the juror's impartiality.[27]

While in some cases the venire's silence can support a finding of rehabilitation,[28] this is not such a case. Here, M.T. demonstrated actual bias when she admitted that she felt Canfield was guilty without hearing any

---

[25] *Id.* at 607 n.33 (quoting *Hughes*, 258 F.3d at 460).

[26] *Hughes*, 258 F.3d at 461.

[27] *See, e.g.*, *United States v. Kechedzian*, 902 F.3d 1023, 1031 (9th Cir. 2018) (finding on direct appeal that after a juror indicated bias, the silence of the panel in response to a question to the group "d[id] not indicate that [the juror] could be impartial"); *Altheimer & Gray*, 248 F.3d at 626 (finding juror bias on direct appeal where, after a juror indicated actual bias, the district court judge did not follow up with the juror individually, instead "ask[ing] the jury *en masse*, whether [they] would follow his instructions on the law and suspend judgment until [they] had heard all the evidence"); *Johnson v. Armontrout*, 961 F.2d 748, 754 (8th Cir. 1992) (granting § 2254 relief and holding that the court "cannot say that an ambiguous silence by a large group of venire persons to a general question about bias is sufficient to support a finding of fact in the circumstances of this case"); *see also United States v. Corey*, 625 F.2d 704, 707 (5th Cir. 1980) (noting that "[b]road, vague questions of the venire" are not enough to prove the impartiality of a juror indicating actual prejudice); *United States v. Davis*, 583 F.2d 190, 196, 198 (5th Cir. 1978) (holding, "[w]ithout establishing an inflexible rule" for voir dire, that because of significant pre-trial publicity, the trial court's inquiry was insufficient when the court merely "asked that any panel member raise his hand if he felt the publicity impaired his ability to render an impartial decision" and no juror responded).

[28] *See, e.g.*, *Torres v. Thaler*, 395 F. App'x 101, 108 (5th Cir. 2010) (per curiam) (unpublished) (finding that the juror was not biased for several reasons, including the juror's ambiguous statements, his silent response to a group question, and defense counsel's strategic reasons for keeping him as a juror).

testimony and that she would probably vote to convict him regardless of the strength of the evidence. Later, counsel asked the 60-person venire as a group, "Can everybody agree to hold the government to that burden, that before we find someone guilty, if you say to yourself, I had a reasonable doubt, I will find them not guilty? Can everybody agree to that? Does anyone have any reservations about that?" Neither M.T. nor any of the other 59 members of the venire responded. Silence, the State urges, demonstrated her impartiality. Yet, between her initial statement and absence of any response to the question put to the entire venire, there were no intervening events suggesting that M.T. had a change of heart. Indeed, after her colloquy with the prosecutor, M.T. did not speak for the remainder of the voir dire. She made no "protestation of a purge of preconception," let alone a "positive" or even a "pallid" one.[29] Without something more, the silence of the entire venire is not enough to overcome her open statements when directly addressed. And there is no other footing for a finding of rehabilitation.

Defense counsel's state-habeas affidavit makes plain that the failure to strike was not a conscious and informed decision on trial strategy.[30] Counsel's affidavit explained, incorrectly, that "[o]f the *ten challenges for cause*, a decision had to be made on which of these prospective jurors we would exercise challenges." But Texas law limited counsel to ten *peremptory* challenges;[31] it placed no limits on the number of for-cause challenges that he could have exercised.[32] Counsel's failure to challenge M.T. for cause was the

---

[29] *Nell*, 526 F.2d at 1230.

[30] *See Virgil*, 446 F.3d at 610 (concluding defense counsel's affidavit did not justify his performance, as it failed to explain why he did not challenge the jurors for cause or why he allowed them to serve on the jury).

[31] TEX. CODE CRIM. PROC. ANN. art. 35.15(b).

[32] *Id.* art. 35.16.

product of a misunderstanding of state law, not an "*informed* decision."[33] As evidence of M.T.'s rehabilitation, counsel's affidavit also states that M.T. remained silent when he asked the jurors if they would be more likely to assume a defendant's guilt based on multiple prior accusations. But Canfield's claim is that M.T. was biased by what may have happened to her grandson, not by her views on previous accusations. Counsel's affidavit offers no further strategic reasons for keeping M.T. on the jury.[34]

"When a venireperson expressly admits bias on voir dire, without a court response or follow-up, for counsel not to respond [to the statement of partiality] in turn is simply a failure 'to exercise the customary skill and diligence that a reasonably competent attorney would provide.'"[35] M.T.'s responses "obligated [Canfield's] counsel to use a peremptory or for-cause challenge on [her]," and "[n]ot doing so was deficient performance under *Strickland*."[36] The state court's conclusion "was contrary to, or involved an unreasonable application of, clearly established Federal law."[37]

---

[33] *Ward*, 420 F.3d at 491 (emphasis added).

[34] *See Morales v. Thaler*, 714 F.3d 295, 306 (5th Cir. 2013) ("[T]rial counsel, *making a reasonable tactical decision*, could elect to seat an actually biased juror without rendering [ineffective assistance].") (emphasis added); *cf. Torres*, 395 F. App'x at 107 (holding that counsel was not deficient for not challenging juror where counsel's affidavit "described a trial strategy that involved [the juror's] statements and personality").

[35] *Hughes*, 258 F.3d at 462 (quoting *Armontrout*, 961 F.2d at 754); *see Miller v. Webb*, 385 F.3d 666, 675 (6th Cir. 2004) (quoting *Hughes*).

[36] *Virgil*, 446 F.3d at 610.

[37] *See* 28 U.S.C. § 2254(d)(1).

B

Canfield must also show that counsel's "deficient performance prejudiced [his] defense."[38] To show prejudice, a petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[39] A "reasonable probability" is one "sufficient to undermine confidence in the outcome."[40] "We focus on ferreting out 'unreliable' results caused by 'a breakdown in the adversarial process that our system counts on to produce just results.'"[41] Our inquiry rests "on the assumption that the decisionmaker is reasonably, conscientiously, and *impartially* applying the standards that govern the decision."[42]

In *Virgil*, we found that the same failure Canfield identifies resulted in *Strickland* prejudice and an "unreliable" trial.[43] In particular, counsel's failure to challenge two jurors who "unequivocally expressed that they could not sit as fair and impartial jurors" deprived Virgil of "a jury of persons willing and able to consider fairly the evidence presented."[44] We observed that "[n]o question was put to either Sumlin or Sims as to whether they would be able to set aside their preconceived notions and adjudicate Virgil's matter with an open mind, honestly and competently considering all the

---

[38] *Strickland*, 466 U.S. at 687.

[39] *Id.* at 694.

[40] *Id.*

[41] *Virgil*, 446 F.3d at 612 (quoting *Strickland,* 466 U.S. at 696).

[42] *Id.* (emphasis added in *Virgil*) (quoting *Strickland,* 466 U.S. at 695).

[43] *Id.* at 613 (quoting *Strickland*, 466 U.S. at 696).

[44] *Id.*

relevant evidence."[45] Thus, we could not "know the effect [that] Sumlin's and Sims's bias had on the ability of the remaining ten jurors to consider and deliberate, fairly and impartially, upon the testimony and evidence presented at Virgil's trial."[46] Unable to sustain *Strickland*'s presumption of an impartial jury, we concluded that we "lack[ed] confidence in the adversarial process that resulted in Virgil's felony conviction and 30-year sentence."[47]

The same is true here. As a result of counsel's error, a juror who expressed a preconception of Canfield's guilt and an unwillingness to hold the State to its burden of persuasion, and who was not clearly rehabilitated on either point, sat on the jury that first convicted Canfield and then sentenced him to 50 years' imprisonment without parole.[48] The law, however, mandated that the juror be willing to lay aside her preconceptions.[49] Because M.T. was never asked if she could do so and there is no record evidence that she in fact did so, counsel's failure to challenge her denied Canfield an impartial jury.[50]

---

[45] *Id.*

[46] *Id.*

[47] *Id.*; *see also Biagas v. Valentine*, 265 F. App'x 166, 172 (5th Cir. 2008) (per curiam) (unpublished) (citing *Virgil*) ("[T]he effect that [the biased juror's] presence on the jury had on the ability of the remaining jurors to consider and evaluate the testimony and evidence will never be known. Given this uncertainty, [the habeas petitioner's] conviction is unworthy of confidence and, as such, constitutes a failure in the adversarial process.").

[48] *Cf. Virgil*, 446 F.3d at 612–13.

[49] *See Irvin*, 366 U.S. at 723.

[50] *Virgil*, 446 F.3d at 613.

C

The presence of a biased juror undermines confidence in the reliability of the verdict and thereby establishes prejudice.[51] But when the evidence is overwhelmingly one-sided, even the presence of a biased juror cannot undermine confidence in the verdict. In this important sense, the error is not structural. Here, an eight-year-old girl testified that her father sexually assaulted her on multiple occasions. She provided detailed sensory information that, according to an expert witness, a child who was coached would be unlikely to know. Moreover, five witnesses testified that she had previously made statements to them that were consistent with her testimony. The defense was unable to undermine or cast doubt on the testimony of the State's witnesses and did not call any witnesses of its own.

While the strength of the State's uncountered evidence leaves me unprepared to say that the biased juror rendered the judgment of guilt unreliable, I cannot say the same of the sentence. The jury, empowered to sentence Canfield to between 25 years and life imprisonment, imposed a sentence of 50 years without parole, effectively a life sentence for the 30-year-old defendant. The jury imposed this sentence despite expert testimony that after 30 years' imprisonment, Canfield's probability of reoffending "drops to almost nothing."[52] M.T.'s statements demonstrate a generalized bias against the defendant and a desire to convict (and by extension punish) him, regardless of whether the State met its evidentiary burden. Considering the jury's broad discretion to select Canfield's sentence, "we cannot know the effect [M.T.'s] bias had on the ability of the remaining . . . jurors to consider

---

[51] *See id.* at 613–14; *see also Biagas*, 265 F. App'x at 172–73.

[52] Although the State disputed the accuracy and utility of Static 99, its concern is belied by its own policies and conduct: using the tool in its own civil commitment proceedings and offering Canfield a 25-year plea deal just to avoid three days of trial.

and deliberate, fairly and impartially, upon the testimony and evidence presented at [Canfield's]" sentencing.[53] Thus, the jury's sentence was unreliable and the defense at sentencing was prejudiced under *Strickland*.

The State contends that the state habeas court's decision was not contrary to or an unreasonable application of clearly established law after the Supreme Court's decision in *Weaver v. Massachusetts*.[54] There, the Court considered a claim for ineffective assistance of counsel rooted in the trial court's closure of the courtroom during voir dire. Although denial of a public trial is structural error, the Court held that prejudice is not presumed when it is first raised through an ineffective-assistance claim, as the violation does not necessarily result in a "fundamentally unfair trial" or "always deprive[] the defendant of a reasonable probability of a different outcome."[55] Without a presumption of prejudice, counsel's error is prejudicial if there is a "reasonable probability of a different outcome" in the petitioner's case or, "as the Court has assumed for these purposes," the particular public-trial violation "render[ed] his or her trial fundamentally unfair."[56] Here, the State argues that it is not clearly established that a petitioner may establish prejudice through fundamental unfairness. Perhaps.[57] But my finding of

---

[53] *Virgil*, 446 F.3d at 613.

[54] 137 S. Ct. 1899 (2017) (plurality).

[55] *Id.* at 1911.

[56] *Id.*

[57] Only a handful of circuit courts have considered the meaning of prejudice in light of *Weaver*. One read *Weaver* to hold that a showing of prejudice requires a "reasonable probability of a different outcome." *Johnson v. Raemisch*, 779 F. App'x 507, 513 n.5 (10th Cir. 2019) (unpublished) (internal quotation marks and citation omitted). Most, however, have read *Weaver* to hold that a petitioner may also show prejudice where the particular violation rendered the "trial fundamentally unfair." *Williams v. Burt*, 949 F.3d 966, 978 (6th Cir. 2020); *United States v. Aguiar*, 894 F.3d 351, 356 (D.C. Cir. 2018); *United States*

prejudice turns not on fundamental unfairness but on the lack of reliability.[58] I cannot trace the path of the erroneous seating of M.T. to the jury verdict of 50 years without parole, yet this indeterminacy shadows the reliability of this sentencing verdict, which is the heart of the constitutional protection of trial by jury and the vital trust of jury verdicts.[59] For that reason, a successful challenge to the impartiality of a decisionmaker leaves "a defect in the trial process that 'undermine[s] confidence in the outcome' in violation of *Strickland*" and thus a reasonable probability of a different outcome but for counsel's errors.[60] As a result, the relevant law remains "clearly established . . . as determined by the Supreme Court of the United States."[61]

III

State law provides that when "the court of appeals or the Court of Criminal Appeals awards a new trial . . . only on the basis of an error" at sentencing, the trial court shall "commence the new trial as if a finding of guilt had been returned and proceed to the punishment stage of the trial."[62]

---

v. Thomas, 750 F. App'x 120, 128 (3d Cir. 2018) (unpublished), *cert. denied*, 139 S. Ct. 1218 (2019); *Pirela v. Horn*, 710 F. App'x 66, 83 n.16 (3d Cir. 2017) (unpublished).

[58] *Virgil*, 446 F.3d at 612 (quoting *Strickland*, 466 U.S. at 696) ("Absent mechanical rules, 'the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.' We focus on ferreting out 'unreliable' results caused by 'a breakdown in the adversarial process that our system counts on to produce just results.'"); *cf. Weaver*, 137 S. Ct. at 1915 (Alito, J., concurring) ("Weaver makes much of the *Strickland* Court's statement that 'the ultimate focus of inquiry must be on the fundamental fairness of the proceeding.' But the very next sentence clarifies what the Court had in mind, namely, the reliability of the proceeding.").

[59] *Strickland*, 466 U.S. at 687 (emphasis added) (Prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable.*").

[60] *Virgil*, 446 F.3d at 614 (quoting *Strickland*, 466 U.S. at 694).

[61] 28 U.S.C. § 2254(d)(1).

[62] TEX. CODE CRIM. PROC. ANN. art. 44.29(b).

It continues: "If the defendant elects, the court shall empanel a jury for the sentencing stage of the trial in the same manner as a jury is empaneled by the court for other trials before the court."[63] The Texas Court of Appeals has read this article to apply to "new punishment hearings awarded through a habeas proceeding in federal court."[64]

In my view, the presence of a biased juror rendered Canfield's sentence unreliable. I would therefore reverse the district court's judgment denying habeas relief and remand to that court with instruction to return this case to the State of Texas for a new sentencing trial with a jury if Canfield elected, or, in the State's discretion under the laws of the State, a new trial. I respectfully dissent.

---

[63] *Id.*

[64] *Johnson v. State*, 995 S.W.2d 926, 928 n.1 (Tex. App. 1999); *cf. Lopez v. State*, 18 S.W.3d 637, 640 (Tex. Crim. App. 2000) (citing *Rent v. State*, 982 S.W.2d 382, 385 (Tex. Crim. App. 1998)) (explaining that art. 44.29(b) was "enacted in order to give an appellate court the authority to remand a case on punishment only"). *But see Johnson*, 995 S.W.2d at 931 (Gray, J., concurring) (concluding that art. 44.29(b) does not apply when the remand is ordered by a federal court).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JERRY LEE CANFIELD,	§	
	§	
Petitioner,	§	
	§	
v.	§	No. 4:16-CV-1000-Y
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal	§	
Justice, Correctional	§	
Institutions Division,	§	
	§	
Respondent.	§	

FINAL JUDGMENT

In accordance with its opinion and order signed this day, the Court DENIES the petition of Jerry Lee Canfield pursuant to 28 U.S.C. § 2254 in the above-captioned action.

SIGNED March 28, 2018.

Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JERRY LEE CANFIELD,	§	
	§	
Petitioner,	§	
	§	
v.	§	No. 4:16-CV-1000-Y
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal	§	
Justice, Correctional	§	
Institutions Division,	§	
	§	
Respondent.	§	

OPINION AND ORDER

Before the Court is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by Petitioner, Jerry Lee Canfield, a state prisoner, against Lorie Davis, director of the Texas Department of Criminal Justice, Correctional Institutions Division, Respondent. After having considered the pleadings and relief sought by Petitioner, the Court has concluded that the petition should be denied.

I. Factual and Procedural History

On April 3, 2013, in the 213th Judicial District Court, Tarrant County, Texas, Case No. 1317398R, a jury found Petitioner guilty of continuous sexual abuse of a child under 14 years of age and assessed his punishment at 50 years' confinement. (State Writ 92, doc. 18-13.) His conviction was affirmed by the Seventh District Court of Appeals of Texas. (Docket Sheet 2, doc. 18-1.) Petitioner did not file a petition for discretionary review in the

Texas Court of Criminal Appeals, but he did file a state habeas-corpus application raising the claims presented in this federal petition, which was denied by the Texas Court of Criminal Appeals without written order on the findings of the trial court. (Action Taken, doc. 18-14.)

The Seventh District Court of Appeals set forth the following background of the case (any spelling, punctuation, and/or grammatical errors are in the original):

> [Petitioner] was charged by indictment of intentionally or knowingly committing two or more acts of sexual abuse of M.C., a child younger than 14 years of age, during the period from May 1, 2010 through August 31, 2010. Specifically, the indictment alleged [Petitioner] committed aggravated sexual assault of M.C. "by causing the sexual organ of [M.C.] to contact the mouth of the defendant, and/or by causing the sexual organ of [M.C.] to contact the sexual organ of the defendant, and/or by causing the anus of [M.C.] to contact the sexual organ of the defendant." The indictment went on to allege [Petitioner] also committed the offense of indecency with a child with intent to arouse or gratify the sexual desire of any person "by touching the genital of [M.C.] and/or by causing [M.C.] to touch the genitals of the defendant, and/or by touching the anus of [M.C.]." The indictment further alleged the statutory requirement that "at the time of the commission of each of these acts of sexual abuse the defendant was 17 years of age or older and [M.C.] was younger than 14 years of age."
>
> On December 3, 2012, the State filed five separate notices, entitled *Notice of Outcry Pursuant to Article 38.072 CCP*, each naming one of the following witnesses: Ronda Canfield, Jessica Canfield, Michael Canfield, Lindsey Dula, and Beth Hobbs. Each notice gave a summary of their proposed testimony concerning statements made by M.C. In April 2013, a jury trial was held during which, among others, each of the following witnesses testified: (1) Ronda Canfield (M.C.'s great aunt), (2) Jessica Canfield (Ronda's daughter), (3) Michael Canfield (M.C.'s

great uncle), and (4) Lindsey Dula (a forensic examiner who interviewed M.C.).

At trial, Jessica was the first to testify. She testified that, in January 2012, while she, M.C. and Jessica were in the kitchen at the Canfield's home in Bedford, Texas, M.C. told her that [Petitioner] had touched her private parts. Jessica further testified that in a conversation that took place the next day, M.C. told her [Petitioner] had touched her private parts with his hands, mouth, and private part and that M.C. stated she "had to touch [Petitioner]'s] private parts with [her] hands and [her] body." During her testimony, [Petitioner]'s counsel never objected to the testimony concerning M.C.'s statements to her.

Ronda was the next witness to testify. During her direct examination, she too testified concerning the conversation that took place in the kitchen of her home. Ronda testified that during that conversation M.C. told her [Petitioner] touched her private parts. She also stated that M.C. told her it happened when she was in the downstairs bedroom in Bedford and that it (also happened in a room in Tennessee.) Ronda testified that, at that point, she asked her husband to come into the kitchen and (she asked M.C. to tell him what she had just told her.) When Michael and M.C. began to talk, she and Jessica left the room to take care of M.C's brother. During Ronda's testimony, [Petitioner]'s counsel never objected to the testimony concerning M.C.'s statements to her.

Michael was the third witness. During both direct and cross-examination, Michael testified that, in January 2012, M.C. told him her father kissed her private parts and touched his private parts to her private parts. As with Jessica and Ronda, during Michael's testimony before the jury, [Petitioner]'s counsel never objected to any testimony concerning M.C.'s statements to him.

After a Bedford Police Department detective testified, the State called Lindsey Dula, the director of program services at Alliance for Children. Lindsey, a child abuse forensic examiner, interviewed M.C. concerning the allegations of abuse she had disclosed to Jessica, Ronda, and Michael. Lindsey described M.C.'s statements to those witnesses as a "rolling outcry." She testified M.C. told her that [Petitioner] touched her private parts and put his private part into her private

part more than once. She also testified that M.C. told her these incidents occurred in an apartment in Tennessee and at Aunt Ronda's house. According to Lindsey's testimony, M.C. also demonstrated the position she would be in when [Petitioner] would enter her anus and that M.C. indicated she and [Petitioner] had vaginal and anal sex multiple times. M.C. also indicated to Lindsey that when [Petitioner] put his mouth on her vagina, he would penetrate her vagina with his tongue. M.C. also told Lindsey [Petitioner] would show her adult sexual organs on his computer.

Prior to this testimony being given, in an article 38.072 hearing conducted outside the presence of the jury, [Petitioner] made the following objection concerning M.C.'s statements to Lindsey:

> My understanding of the outcry statements given by Ms. Dula are duplicative of the outcry statements that have already been elicited from Jessica and from Ronda and also the statements given by Mike, so we would object.

The trial court overruled the objection.

Araceli Desmarais, a Sexual Assault Nurse Examiner, was the next witness. She testified M.C. told her that [Petitioner] touched her private part with his private part. M.C. indicated that, when this took place, she was not wearing her pants or underwear and [Petitioner] had removed his pants and boxers. According to M.C.'s statement, this type of encounter occurred multiple times in Tennessee and in Bedford. M.C. also indicated that her father showed her adult sexual organs on his computer. She told Araceli that [Petitioner] performed oral sex on her and made her touch his private parts more than once at the Canfield home in Bedford. M.C. also indicated there was pain when [Petitioner] penetrated her private part. [Petitioner]'s counsel did not object to Araceli's testimony.

M.C. was the State's final witness. M.C. testified her father touched her private parts when they lived in Tennessee and that he also touched his private part to her private part when she was living in Bedford. She testified that when he touched her with his private part, sometimes she was on her stomach and other times on her

back. She did not have any panties on and her father was not wearing any pants or underwear. She indicated that when her father was on top of her and she was on her tummy, it hurt. She also indicated her father made noises and something came out of his private part.

Following M.C.'s testimony, the State rested. The defense then rested without calling any additional witnesses.

(Mem. Op. 2-6, doc. 18-10 (footnotes omitted).)

II. Issues

Petitioner raises six grounds for relief:

(1) The trial court lacked jurisdiction because "the jury [was allowed] to use extraneous offenses in another state, namely Tennessee, to prove the allegations as alleged in Bedford[], Texas" (ground one);

(2) He received ineffective assistance of trial and appellate counsel (grounds two through five); and

(3) He is actually innocent of the offense for which he was convicted (ground six).

(Pet. 6-7(f), doc. 1.)

III. RULE 5 STATEMENT

Respondent believes that Petitioner's state-court remedies have been exhausted as to the claims raised and that the petition is neither time-barred nor successive. (Resp't's Answer 6, doc. 16.)

IV. LEGAL STANDARD FOR GRANTING HABEAS-CORPUS RELIEF

A § 2254 habeas petition is governed by the heightened

standard of review provided for in the AEDPA. See 28 U.S.C. § 2254. Under the Act, a writ of habeas corpus should be granted only if a state court arrives at a decision that is contrary to or an unreasonable application of clearly established federal law as established by the United States Supreme Court or that is based on an unreasonable determination of the facts in light of the record before the state court. *See* 28 U.S.C. § 2254(d)(1)-(2); *Harrington v. Richter*, 562 U.S. 86, 100 (2011). This standard is difficult to meet but "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings." *Richter*, 562 U.S. at 102.

Additionally, the statute requires that federal courts give great deference to a state court's factual findings. *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000). Section 2254(e)(1) provides that a determination of a factual issue made by a state court shall be presumed to be correct. A petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *Williams v. Taylor*, 529 U.S. 362, 399 (2000). Additionally, when the Texas Court of Criminal Appeals denies relief on a state habeas-corpus application without written order, typically it is an adjudication on the merits, which is likewise entitled to this presumption. *Richter*, 562 U.S. at 100; *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997). In such a

situation, a federal court may assume that the state court applied correct standards of federal law to the facts, unless there is evidence that an incorrect standard was applied. *Townsend v. Sain*, 372 U.S. 293, 314 (1963); *Schartzle v. Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003); *Catalan v. Cockrell*, 315 F.3d 491, 493 n.3 (5th Cir. 2002); *Goodwin v. Johnson*, 132 F.3d 162, 183 (5th Cir. 1997).

V. Discussion

1. Extraneous-Offense Evidence

Under his first ground, Petitioner challenges the trial court's jurisdiction on the basis that "[r]egardless of a limited instruction to the jury, the evidence at trial shows that the State used the Tennessee extraneous offenses to prove the 30-day duration element of the indictment." (Pet. 6-6(a), doc. 1.) According to Petitioner, of the approximately seventeen occurrences of sexual abuse used by the state to prove up the indictment, only three occurred in Bedford, Texas. (Id.) Thus, he argues that the trial court lacked jurisdiction as "there is no fedral [sic] or state law that allows for out-of-state extrensous [sic] offenses to prove beyond a reasonable doubt the allegations alleged in Bedford, Texas (Tarrant County), as presented in their indictment." (Id. at 6(b).)

The jury was charged as follows regarding their use of extraneous offense evidence:

> You are instructed that if there is any testimony before you in the case regarding the Defendant having committed

> offenses other than the offense alleged against him in the Indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the Defendant committed such other offenses, if any, were committed. And even then you may only consider the same in determining motive, intent, opportunity, preparation, knowledge or absence of mistake or accident of the Defendant in connection with the offense, if any alleged against him in the Indictment in this case *and for no other purpose*.

(Clerk's R. 96, doc. 18-2 (emphasis added).)

The state habeas court found that the jury charge "instructed the jury that they must find, beyond a reasonable doubt, that the offense occurred in Tarrant County" and "limited the jury's consideration of the extraneous offense evidence to motive, intent, opportunity, preparation, knowledge, and absence of mistake or accident" and was thus admissible under Texas Rule of Evidence 404(b)(2). (State Writ 71, doc. 71.) Based on its findings, the court concluded that the jury charge properly limited the jury's consideration of extraneous offenses. (Id. at 80.)

Although couched as a "jurisdictional" issue, this claim, can more accurately be said to raise an evidentiary matter. A federal habeas court will disturb state-court evidentiary rulings on habeas review only if they render the trial fundamentally unfair in violation of due process. *Payne v. Tennessee,* 501 U.S. 808, 825 (1991); *Pemberton v. Collins,* 991 F.2d 1218, 1226 (5th Cir. 1993); *Scott v. Maggio,* 695 F.2d 916, 922 (5th Cir. 1983). Absent evidence to the contrary, a jury is presumed to follow the instructions set forth in the trial court's charge. *United States v. Morrow,* 177

F.3d 272, 290 (5th Cir. 1999). Petitioner has not rebutted this presumption. Therefore, the limiting instruction effectively cured any risk of spillover prejudice.

Furthermore, notwithstanding Texas's normal rules of evidence, evidence of extraneous offenses or acts committed by a defendant against the child victim is admissible in a trial where the defendant is accused of the sexual assault of a child under seventeen where it is relevant (1) to the state of mind of the defendant and the child and (2) the previous and subsequent relationship between the two. *See* TEX. CODE. CRIM. PROC. ANN. art. 38.37 (West Supp. 2017). Therefore, extraneous-offense evidence is more often more readily admitted in cases involving sexual assaults of children. *Kessler v. Dretke,* 137 Fed. App'x 710, 2005 WL 1515483, at *1 (5th Cir. June 28, 2005), *cert. denied,* 546 U.S. 1105 (2006). The admission of such evidence does not render a petitioner's trial fundamentally unfair if the state "makes a strong showing that the defendant committed the offense and if the extraneous offense is rationally connected with the offense charged." *Wood v. Quarterman,* 503 F.3d 408, 414 (5th Cir. 2007). The evidence of Petitioner's sexual abuse of M.C. in Tennessee was properly admitted because it bears a rational relationship to the charged offense. Moreover, there is no evidence that admission of the extraneous offense evidence rendered the entire trial fundamentally unfair or that but for the admission of the evidence

the result of Petitioner's trial would have been different. *Brecht v. Abrahamsom,* 507 U.S. 619, 637 (1993). Petitioner is not entitled to relief under his first ground.

2. Ineffective Assistance of Counsel

Under grounds two, four, and five, Petitioner claims that he received ineffective assistance of trial counsel, and, under ground three, he claims that he received ineffective assistance of counsel on appeal. A criminal defendant has a constitutional right to the effective assistance of counsel at trial and on the first appeal as of right. U.S. CONST. amend. VI, XIV; *Evitts v. Lucey,* 469 U.S. 387, 396 (1985); *Strickland v. Washington,* 466 U.S. 668, 688 (1984). To establish ineffective assistance of counsel a petitioner must show (1) that counsel's performance fell below an objective standard of reasonableness and (2) that but for counsel's deficient performance the result of the proceeding would have been different. *Strickland,* 466 U.S. at 688. Both prongs of the *Strickland* test must be met to demonstrate ineffective assistance. *Id.* at 687, 697. In applying this test, a court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Id.* at 668, 688-89. Judicial scrutiny of counsel's performance must be highly deferential and every effort must be made to eliminate the distorting effects of hindsight. *Id.* at 689.

The Supreme Court set out in *Harrington v. Richter* the manner in which a federal court is to consider an ineffective-assistance-

of-counsel claim raised in a habeas petition subject to AEDPA's strictures:

> "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.

562 U.S. at 101 (quoting *Williams v. Taylor,* 529 U.S. 362, 410 (2000)). Accordingly, it is necessary only to determine whether the state courts' rejection of Petitioner's ineffective-assistance claims was contrary to or an objectively unreasonable application of *Strickland. Bell v. Cone,* 535 U.S. 685, 698-99 (2002); *Kittelson v. Dretke,* 426 F.3d 306, 315-17 (5th Cir. 2005); *Schaetzle v. Cockrell,* 343 F.3d 440, 443 (5th Cir. 2003).

Petitioner claims his trial counsel, Barry Alford, was ineffective by failing to-

(1) properly preserve the issue of the Tennessee extraneous offenses;

(2) investigate and challenge juror bias; and

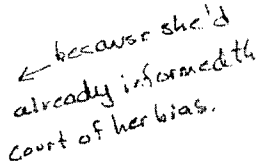
(3) present expert testimony to show the victim's memory "was induced with false information by another source, namely the prosecution and/or other state witnesses.

(Pet. 6-7, 7(b)-(f), doc. 1.)

In an affidavit filed in the state habeas proceedings, counsel responded to the allegations, in relevant part, as follows (any spelling, punctuation, and/or grammatical errors are in the original):

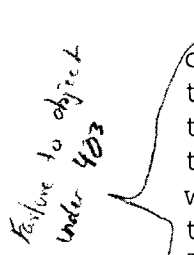
> During voir dire, there were many prospective jurors who had been affected in some form by sexual abuse, either personally or through family members or close friends. However, none of the panel members that were selected for the jury committed themselves at any point during voir dure that they could not be fair because of these experiences. Of the ten challenges for cause, a decision had to be made on which of these prospective jurors we would exercise challenges. Most of those struck for cause expressed strong feelings about the issue of sexual assault and how it affected them personally.
>
> Two prospective jurors were Cathy Fisher and Myla Tarver. Ms. Fisher stated that her daughter's friend was assaulted when she was in junior high school. Her daughter is now 35 years old, which would mean that this incident happened approximately 25 years ago. Ms. Fisher has stated that this incident affected her back then but does not anymore.
>
> Also, Myla Tarver had stated during the state's voir dire that an unknown incident involving her grandson may have occurred at a program that he attended. However, Ms. Tarver at no point committed herself to finding the [Petitioner] guilty regardless of the evidence. To say that you would probably find someone guilty regardless of the evidence is not a committal response. It was for this reason that, during the defense voir dire, follow up questions were later posed to the panel regarding that very issue. "Can everyone agree to hold the government to that burden [beyond a reasonable doubt], that before we find someone guilty, if you say to yourself, I had a reasonable doubt, I will find them not guilty? Can everyone agree to that? Does anyone have any reservations about that?" Ms. Tarver did not indicate that she could not hold the state to that burden. Given that the [Petitioner] was accused of continual sexual abuse of a child, the question was taken further. The following was

asked of the panel: "If you've got a person who's accused of not only one crime, but now they're saying he's been accused of at least twice over a thirty day period of the same thing. So let me ask you this: Do you think that makes him more likely to be guilty if he's accused on multiple occasions?" Again, no response was given by Ms. Tarver to indicate that she could not give the [Petitioner] a fair trial.

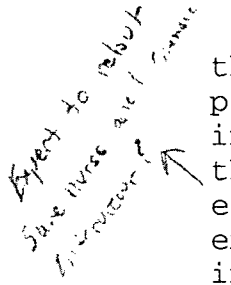


One of the prospective jurors made a statement during the voir dire for counsel for the state that they might hold it against the [Petitioner] and find him guilty if the [Petitioner] or any witness for the defense does not testify. However, the record is silent as to the name of this prospective juror. The last name mentioned prior to the statement was that of Ms. Rivera. It could be inferred that counsel was still engaged in a conversation with her when this statement about not being able to be fair was made. If that is so, Ms. Rivera was not one of the jurors selected for this trial. Otherwise, there is no record made as to the identity of the prospective juror in question. Also, extensive time was spent during the defense voir dire on the very issue of [Petitioner]'s right to remain silent and the presumption of innocence.

. . .



Objection was also made to extraneous statements of offenses that may have occurred in Tennessee as testified to by SANE nurse Araceli Desmarais. The objection was that it was improper extraneous offense testimony during the guilty-innocence portion of the trial. This objection was overruled by the judge and the Tennessee extraneous testimony was allowed to be presented. Further, a limiting instruction was requested and granted for the jury charge since such testimony was allowed to be presented in front of the jury.



An effort was made to have an expert testify as to the reliability of the child's testimony at trial. A potential expert, Dr. Richard Schmidt, Ph.D., was interviewed for that reason. However, after giving him the facts and given the testimony that was hoped to be elicited at trial and the responses elicited from this expert, the decision was made not to use such an expert in this case. Instead, since family members were not able to be secured to testify on [Petitioner]'s behalf at

> punishment, if necessary, it was decided that a mitigation expert would be most helpful to testify on behalf of [Petitioner]. It was for this reason that Dr. William Flynn, Ph.D. was appointed to testify on behalf of [Petitioner] at the punishment phase of the trial.
>
> The allegation that an investigation should have been conducted into prosecutorial misconduct is vague and ambiguous. There was no evidence or testimony in the record that the attorneys for the state had acted improperly or in bad faith in their preparation for trial or during trial that would warrant an investigation to be conducted. As far as inconsistencies in the child's testimony, that was brought out during closing arguments to the jury to show that the state had failed to meet its burden of proof. That was one of the arguments that was made for why the jury should find that there was reasonable doubt and that the jury should find [Petitioner] not guilty.

(State Writ 45-48, doc. 18-13 (record citations omitted).)

The state habeas court found counsel's affidavit credible and supported by the record and entered factual findings consistent with the affidavit—specifically, that counsel objected to the use of the Tennessee offenses both before and during trial, but the objections were overruled; that counsel did not challenge juror Tarver because she had rehabilitated herself by her silence when asked if she could follow the law; and that Petitioner presented no evidence, via affidavit or otherwise, that a memory expert would have benefitted his defense. (State Writ 64-65, 68, doc. 18-13.) Based on its findings, and applying the *Strickland* standard, the state court concluded that counsel's objections to the Tennessee extraneous evidence, counsel's decision not to call a memory expert, and, absent evidence that juror Tarver was biased,

counsel's decision not to challenge her for cause were the result of reasonable trial strategy. (Id. at 73, 75.) Further, the court concluded that Petitioner had failed to show that there was a reasonable probability that the result of his trial would have been different but for counsel's acts or omissions. (Id. at 76-77.) The Texas Court of Criminal Appeals, adopting the state court's findings, denied relief.

Petitioner fails to rebut the state court's findings of fact by clear-and-convincing evidence. *See* 28 U.S.C. § 2254(e)(1). Thus, the findings, including the court's credibility findings, are entitled to a presumption of correctness. *Richards v. Quarterman*, 566 F.3d 553, 563-64 (5th Cir. 2009); *Galvan v. Cockrell*, 293 F.3d 760, 764 (5th Cir. 2002). Applying the appropriate deference, and having independently reviewed Petitioner's claims in conjunction with the state court records, it does not appear that the state courts' application of *Strickland* was objectively unreasonable. Petitioner's claims are largely conclusory, with no legal or evidentiary basis, are refuted by the record, or involve strategic and tactical decisions made by counsel, all of which generally do not entitle a state petitioner to federal habeas relief. *See Strickland*, 460 U.S. at 689 (providing strategic decisions by counsel are "virtually unchallengeable" and generally do not provide a basis for post-conviction relief on the grounds of ineffective assistance of counsel); *Evans v. Cockrell*, 285 F.3d

370, 377 (5th Cir. 2002) (providing petitioner must "bring forth" evidence, such as affidavits, from uncalled witnesses, including expert witnesses, in support of an ineffective-assistance claim); *Green v. Johnson,* 160 F.3d 1029, 1042 (5th Cir. 1998) (providing "[m]ere conclusory allegations in support of a claim of ineffective assistance of counsel are insufficient to raise a constitutional issue"). A petitioner shoulders a heavy burden to overcome a presumption that his counsel's conduct is strategically motivated, and to refute the premise that "an attorney's actions are strongly presumed to have fallen within the wide range of reasonable professional assistance." *Messer v. Kemp,* 760 F.2d 1080, 1090 (11th Cir. 1985). Petitioner has presented no evidentiary, factual, or legal basis in this federal habeas action that could lead the Court to conclude that the state courts unreasonably applied the standards set forth in *Strickland* based on the evidence presented in state court. See 28 U.S.C. § 2254(d).

Petitioner claims his appellate counsel, Scott Brown, was ineffective by failing to attack the legal sufficiency of the evidence to prove the "30-day duration element." (Pet. 7-7(a), doc. 1.) Counsel responded to the allegation via affidavit, in relevant part, as follows (all spelling, punctuation, and/or grammatical errors are in the original):

> On the 19th day of April, I mailed a letter, via CMRR, to Mr. Canfield explaining the Appellate process to him. I later received information from Mr. Canfield's mother that he did not receive this letter. Therefore, on

June 27, 2013, I sent a second letter to Mr. Canfield, via CMRR, explaining the appellate process. Within this letter, I explained to Mr. Canfield several key aspects of the appellate process. These included the following:

- In order to prepare his appellate brief, I would review the clerk's record and the court reporter's transcript of the proceedings in his case;
- I would obtain a copy of the court reporter's record from the clerk and was required to return this copy to the clerk once I had filed the appellate brief on behalf of Mr. Canfield;
- With regard to the substance of the appellate brief, I was limited to presenting arguments based upon the "testimony, evidence, and documents that appear in the court reporter's record of [his] trial and the clerk's record (this includes evidence admitted as exhibits);"
- Generally, points of error in appellate briefs are limited to adverse rulings of the court;
- Errors in the jury charge can also be addressed in a appellate brief;
- On rare occasions, an argument that the evidence was insufficient to support a conviction could be a viable point of error;
- A point of error in an appellate brief could not be based upon actions of Mr. Canfield's trial attorney that occurred outside the record or upon documents that were not present in the record.

In Ground Seven of his Application for Writ of Habeas Corpus, Petitioner Canfield alleges I provided ineffective assistance by failing to "raise and challenge the legal sufficiency of the 30 day duration period allegation in the indictment." In support of this allegation, Petitioner states that "[E]very witness used the extraneous offense in Tennessee to support the 30 day period . . ."

In making this allegation, Petitioner confuses what he may consider weak evidence with legally sufficient evidence. In reviewing the legal sufficiency of the evidence, an appellate court views the evidence in the light most favorable to the verdict. So viewing the evidence, a reviewing court must determine whether any rational trier of fact could have found each of the essential elements of the offense to have been proven beyond a reasonable doubt.

I reviewed the clerk's record and the court reporter's transcript of the trial testimony. Based upon this review, I researched potential points of appeal that I believed were preserved and even those that were not preserved. Based upon this review and research, I drafted an appellate brief that included all viable points of appeal.

During Petitioner's trial, several witnesses provided enough factual information to meet the legal sufficiency standard. Jessica Killion testified to the following:

- Her parents are Mike and Ronda Canfield;
- She is Petitioner's cousin;
- The alleged injured party (hereinafter "M.C.") is Petitioner's daughter;
- From approximately May to October, 2010, Petitioner lived with Ms. Killion and her parents in Bedford, Texas;
- For some period of time during this stay, M.C. and Petitioner slept in the same bedroom (along with M.C.'s brother);
- In 2010, M.C. was five years old;
- In early 2012, M.C. told Ms. Killion that Petitioner "touches her private parts;
- A day after this initial outcry, M.C. told Ms. Killion "[W]ell, sometimes he (Petitioner) touched my private parts with hands and sometimes with his mouth and sometimes with his private parts . . . and sometimes I also had to touch his private parts with my hands and body."
- Petitioner was in Tennessee when M.C. made these statements to Ms. Killion.

Ronda Canfield testified to the following:

- Jessica Killion is her daughter;
- Mike Canfield is her husband;
- M.C. is her great-niece on Mike's side of the family;
- Petitioner is M.C.'s father;
- In May, 2010, Petitioner brought M.C. and her brother to visit Mike and Ronda in Bedford, Texas;
- Petitioner and his children stayed with Mike and Ronda for approximately six months;

- In October, 2010, Petitioner took M.C. and her brother "back to Tennessee;"
- In July, 2011, Petitioner called Ronda and Mike and asked them to come to Tennessee and bring his children to Bedford;
- Mike and Ronda went to Tennessee and brought Petitioner's children back to their house in Bedford;
- In early 2012, M.C. told Ronda that Petitioner had touched her private parts;
- M.C. told Ronda that it happened in the downstairs bedroom in the Bedford house and in Tennessee.

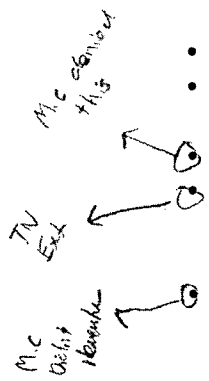
Mike Canfield testified to the following:

- He is Petitioner's great-uncle;
- Ronda Canfield is his wife
- M.C. is his great-niece;
- In 2010, Petitioner and his children (M.C. and her brother) lived with Mike and Ronda at their home in Bedford, Texas;
- In October, 2010, Petitioner took his children back to Tennessee;
- In the Summer of 2011, Mike and Ronda went to Tennessee and brought Petitioner's children back to Bedford;
- In January, 2012, M.C. told Mike "that her daddy kisses her private parts and touches his private parts to hers.

Araceli Desmarais testified to the following:

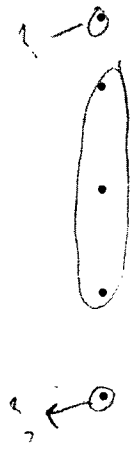
- She is employed as a sexual assault nurse examiner at Cook Children's Medical Center;
- She conducted an examination of M.C.;
- M.C. told her Petitioner had touched her "pussy" and her "booty" with his "dick;"
- M.C. told her this happened in Tennessee and at "Aunt Ronda and Uncle Mike's house;"
- M.C. told her that Petitioner performed "oral sex on her";
- M.C. told her she had to touch Petitioner's "dick";
- M.C. told her these acts happened "more than one time" at her "Aunt Ronda and Mike's house and when they lived in Tennessee."

Lindsey Dula testified to the following:



- She is the director of program services for the Alliance for Children;
- On February 3rd, 2012, she interviewed M.C.;
- M.C. told her Petitioner touched "her pussy with his dick;"
- M.C. told her this "happened a lot;"
- M.C. told her this happened in an apartment in Tennessee and at her Aunt Ronda's house and at her Grandfather Bobby' house;
- M.C. told her this happened from the time she was five until she was about six or seven."

M.C. testified to the following:



- She was eight years old at the time of her testimony;
- Petitioner is her father;
- Petitioner touched her private parts when she lived in Tennessee;
- Petitioner touched his private parts to her private parts when they lived with Aunt Ronda and Uncle Mike in Bedford;
- Petitioner touched his "dick" to her "pussy" when they lived with Aunt Ronda and Uncle Mike in Bedford;
- Petitioner touched his "dick" to her "butt" when they lived with Aunt Ronda and Uncle Mike in Bedford;
- When she first came to Texas, "things started happening with her dad again" and they continued to happen.

The jury charge instructed the jurors on several key points. The jurors were instructed:

> In order to find the Defendant guilty of the offense of continuous sexual abuse of a child, you must agree unanimously that the Defendant, during a period that was 30 days or more in duration, on or about the 1st day of May 2010, through the 31st day of August 2010, committed two or more acts of sexual abuse.

The application paragraph of the charge made it clear the jury could only rely on acts committed in Tarrant County and it detailed the specific acts the

State was relying upon.

> An extraneous offense instruction made it clear that the Tennessee allegations could not be used to find Petitioner guilty. They could only be considered "in determining motive, intent, opportunity, preparation, knowledge or absence of mistake or accident" of the Defendant in connection with the offense, if any, alleged against him in the Indictment in this case and for no other purpose." There is no indication in the record of Petitioner's trial that the jurors failed to follow the court's instructions. Petitioner's trial counsel emphasized this point in his closing argument by explaining that the extraneous Tennessee offenses could not be used to find Petitioner guilty.
>
> Several witnesses testified that Petitioner lived in Tarrant County with M.C. for six months. A rational juror could take M.C.'s testimony along with that of Jessica Killion, Ronda Canfield, Mike Canfield, Araceli Desmarais, and Lindsey Dula and conclude that Petitioner committed two or more of the acts alleged in the Continuous Sex Abuse Count of the Indictment during his six month stay in Bedford, Texas. When all the testimony is taken together, and reviewed in light of the court's charge to the jury, the evidence is legally sufficient to prove that two or more of the alleged acts of sexual abuse alleged in Petitioner's indictment occurred during a period of time that is 30 days or more in duration. Therefore, with the proper legal standard in mind, I did not include a legal sufficiency point of error in the appellate brief I drafted on behalf of Petitioner.
>
> . . .

(State Writ 55-61, doc. 18-13.)

Finding counsel's affidavit credible and supported by the record, the state habeas court found that (1) counsel did not attack the sufficiency of the evidence because "several people testified that the victim outcried that the offenses occurred at different locations while [Petitioner] lived with the victim in Tarrant County, Texas, for six months"; (2) that counsel drafted a

brief that he believed had all viable points of appeal; and (3) that counsel's decision not to attack the legal sufficiency of the evidence based on the totality of the testimony and the jury charge was the result of reasonable appellate strategy. (Id. at 70.) Based on its findings, and applying the *Strickland* standard, the court concluded that Petitioner had failed to prove that his appellate counsel's representation fell below an objective standard of reasonableness or that there was a reasonable probability the result of his appeal would have been different had counsel raised the issue on appeal. (Id. at 79.) The Texas Court of Criminal Appeals, adopting the state court's findings, denied relief.

To prevail on a claim of ineffective assistance of counsel on appeal, a petitioner must make a showing that had counsel performed differently, he would have prevailed on appeal. *Sharp v. Puckett,* 930 F.2d 450, 453 (5th Cir. 1991) (citing *Strickland,* 466 U.S. at 687)). Appellate counsel is not required to urge every possible argument, regardless of merit. *Smith v. Robbins,* 528 U.S. 259, 288 (2000); *Sharp,* 930 F.2d at 452. It is counsel's duty to choose among potential issues, according to his judgment as to their merits and the tactical approach taken. *Jones v. Barnes,* 463 U.S. 745, 749 (1983).

Petitioner asserts that the state courts' finding that "several people testified that the victim outcried that the offenses occurred at different locations while [Petitioner] lived

with the victim in Tarrant County, Texas, for six months," is not true. Instead, he argues, in part (all spelling, punctuation, and/or grammatical errors are in the original):

> The Complainant outcried to three different locations. Ronda's House in Bedford, Texas. The Apartment in Union City, Tennessee. And her grandfather's house in Canden, Tennessee. Therefore, the truth is there was only one location in Texas. Second every occurrence dealing with the timeframes are heavily entangled together with the Tennessee extraneous offenses. . . .
>
> The State relied on the following conclusory statements: "It started in Tennessee and continued in Bedford, Texas;" "It happened more than one time;" and "It happened a lot of times." The statements are wholly conclusory that the state relied upon to prove the 30-day duration element of the indictment. Truly, there is no evidence in the record that will support and prove the 30-day duration period that occurred in Bedford, Texas. In other words, without the Tennessee extraneous offenses, the only evidence left will leave the jury to speculate on what and how long the offense occurred; instead of drawing a proper inference from the evidence indicted, legally, at trial.

(Pet. 7(a)-(b), doc. 1 (record references omitted).)

Although the testimony does indicate that the abuse occurred only in one location in Texas, Aunt Ronda's Bedford house, the Court cannot conclude on this record that the jury would be unable to infer that at least two acts of abuse occurred in the house during the relevant time period because the state did not elicit more detailed testimony from the child victim. *See Villalon v. State*, 791 S.W.2d 130, 134 (Tex. Crim. App. 1990) (providing "we cannot expect the child victims of violent crimes to testify with the same clarity and ability as is expected of mature and capable

Juror sworn to treat M.C as they would an adult. ??

adults"). Notwithstanding the details of the abuse reported to family members, the child-abuse forensic examiner, and the sexual-assault nurse examiner, M.C. personally testified that when they first came to Texas the abuse started happening again and continued to happen and that during their stay at Aunt Ronda's house, Petitioner touched his private part to her "booty" and touched his private part to her private part, and she was able to give certain details related to those instances. (Reporter's R., vol. 3, 231-33, doc. 18-5.) Although M.C. did not provide specific dates as to when the instances of sexual abuse occurred in Aunt Ronda's house, the jury could have inferred from her testimony alone that at least two acts of sexual abuse occurred at the house between May 1 and August 1, 2010. Thus, it follows that counsel was not ineffective for failing to raise a sufficiency-of-the-evidence issue on appeal. As noted by the state habeas court, an attorney is under an ethical obligation not to raise frivolous issues on appeal. (Id. at 79.) *See McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 436 (1988). Nor does prejudice result from appellate counsel's failure to assert meritless claims or arguments. *See United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994). Petitioner is not entitled to relief under grounds two, three, four, or five.

3. Actual Innocence

Lastly, under his sixth ground, Petitioner claims that he is actually innocent of the offense because the victim's testimony was

induced by coaching of the prosecution and/or other state witnesses. (Pet. 7(f), doc. 1.) A stand-alone claim of "actual innocence" is itself not an independent ground for habeas-corpus relief. *Herrera v. Collins*, 506 U.S. 390, 400 (1993); *Foster v. Quarterman*, 466 F.3d 359, 367 (5th Cir. 2006); *Dowthitt v. Johnson*, 230 F.3d 733, 741-42 (5th Cir. 2000). The United States Supreme Court reaffirmed in *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013), that it has not resolved whether a prisoner may be entitled to habeas-corpus relief based on a freestanding claim of actual innocence. Until that time, such a claim is not cognizable on federal habeas review. Petitioner is not entitled to relief under his sixth ground.

VI. Conclusion

For the reasons discussed, the Court DENIES Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Further, a certificate of appealability will not be issued. Such a certificate may issue "only if the [Petitioner] has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Under this standard, when a district court denies habeas relief by rejecting constitutional claims on their merits, 'the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *McGowen v. Thaler*, 675 F.3d 482, 498 (5th Cir. 2012) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484

MIME-Version:1.0
From:ecf_txnd@txnd.uscourts.gov
To:Courtmail@localhost.localdomain

Message-Id:<10645675@txnd.uscourts.gov>
Subject:Activity in Case 4:16-cv-01000-Y Canfield v. Davis-Director TDCJ-CID Memorandum Opinion and Order
Content-Type: text/plain
This is an automatic e-mail message generated by the CM/ECF system.
Please DO NOT RESPOND to this e-mail because the mail box is unattended.
NOTE TO PUBLIC ACCESS USERS There is no charge for viewing opinions.

U.S. District Court
Northern District of Texas

Notice of Electronic Filing
The following transaction was entered on 3/28/2018 4:04 PM CDT and filed on 3/28/2018

Case Name: Canfield v. Davis-Director
TDCJ-CID
Case Number: 4:16-cv-01000-Y
https://ecf.txnd.uscourts.gov/cgi-bin/DktRpt.pl?280852

Filer:

Document Number: 23

Copy the URL address from the line below into the location bar of your Web browser to view the document:
https://ecf.txnd.uscourts.gov/doc1/177111432529?caseid=280852&de_seq_num=75&magic_num=MAGIC

Docket Text:
OPINION AND ORDER: For the reasons discussed, the Court DENIES Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Further, a certificate of appealability will not be issued. (Ordered by Senior Judge Terry R Means on 3/28/2018) (tln)

4:16-cv-01000-Y Notice has been electronically mailed to:
Jessica Michelle Manojlovich jessica.manojlovich@oag.texas.gov, laura.haney@oag.texas.gov, tammy.visage@oag.texas.gov

4:16-cv-01000-Y Notice required by federal rule will be delivered by other means (as detailed in the Clerk's records for orders/judgments) to:

Jerry Lee Canfield
No. 01848978
TDCJ Coffield Unit
2661 FM 2054
Tennessee Colony, TX 75884

The following document(s) are associated with this transaction:
Document description: Main Document
Original filename: n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1004035775 [Date=3/28/2018] [FileNumber=10645674-0]
[ce95917f05760751f8f3b2dade626b60cce085c686f481eae1c21095b918e8c0fe30cdcdbb7e169
587bb58c6f850c61ef1951f77d28eddb5731d9e70cd0e2fa6]]

MIME-Version:1.0
From:ecf_txnd@txnd.uscourts.gov
To:Courtmail@localhost.localdomain

Message-Id:<10645701@txnd.uscourts.gov>
Subject:Activity in Case 4:16-cv-01000-Y Canfield v. Davis-Director TDCJ-CID Judgment
Content-Type: text/plain
This is an automatic e-mail message generated by the CM/ECF system.
Please DO NOT RESPOND to this e-mail because the mail box is unattended.
NOTE TO PUBLIC ACCESS USERS Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if
receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court
Northern District of Texas

Notice of Electronic Filing
The following transaction was entered on 3/28/2018 4:06 PM CDT and filed on 3/28/2018

Case Name: Canfield v. Davis-Director TDCJ-CID
Case Number: 4:16-cv-01000-Y
https://ecf.txnd.uscourts.gov/cgi-bin/DktRpt.pl?280852

Filer:

WARNING: CASE CLOSED on 03/28/2018

Document Number: 24

Copy the URL address from the line below into the location bar of your Web browser to view the document:
https://ecf.txnd.uscourts.gov/doc1/177111432558?caseid=280852&de_seq_num=77&magic_num=MAGIC

Docket Text:
FINAL JUDGMENT: In accordance with its opinion and order signed this day, the Court DENIES the petition of Jerry Lee Canfield pursuant to 28 U.S.C. § 2254 in the above-captioned action. (Ordered by Senior Judge Terry R Means on 3/28/2018) (tln)

4:16-cv-01000-Y Notice has been electronically mailed to:
Jessica Michelle Manojlovich jessica.manojlovich@oag.texas.gov, laura.haney@oag.texas.gov, tammy.visage@oag.texas.gov

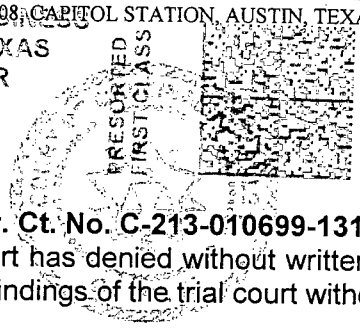
4:16-cv-01000-Y Notice required by federal rule will be delivered by other

means (as detailed in the Clerk's records for orders/judgments) to:

Jerry Lee Canfield
No. 01848978
TDCJ Coffield Unit
2661 FM 2054
Tennessee Colony, TX 75884

The following document(s) are associated with this transaction:
Document description: Main Document
Original filename: n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1004035775 [Date=3/28/2018] [FileNumber=10645700-0]
[11e39bca56bc93d73f6e74ffe4bc02b477d0b19e35f14a3a23bf01c29bbf2aa8983bd01e9628758
5c9f05a23af7673e8cd14db92a88f57245275cbb43ca95f6d]]

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
OFFICIAL BUSINESS P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711
STATE OF TEXAS
PENALTY FOR
PRIVATE USE



9/7/2016

CANFIELD, JERRY LEE Tr. Ct. No. C-213-010699-1317398-A WR-85,500-01

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing.

Abel Acosta, Clerk

2104
SEP 9 2016

JERRY LEE CANFIELD
COFFIELD UNIT - TDC # 1848978
2661 FM 2054
TENNESSEE COLONY, TX 75884

1 CMAGN3B 75884

Appendix D

In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-13-00161-CR

JERRY LEE CANFIELD, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 213th District Court
Tarrant County, Texas
Trial Court No. 1317398R; Honorable Louis E. Sturns, Presiding

February 19, 2015

MEMORANDUM OPINION

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

Appellant, Jerry Lee Canfield, was convicted by a jury of continuous sexual assault of a child (M.C.) and assessed a sentence of fifty years confinement.[1] By four issues, Appellant asserts the trial court erroneously admitted portions of the testimony

[1] TEX. PENAL CODE ANN. § 21.02(b) (West Supp. 2014). A person commits the offense of continuous sexual assault of a child if, during a period that is 30 or more days in duration, he commits two or more acts of sexual abuse, and at the time of the commission of each act of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age. An offense under this section is a felony of the first degree, punishable by imprisonment for life, or for any term of not more than 99 years or less than 25 years.

Appendix E

of (1) Jessica Canfield Killion, (2) Ronda Canfield, (3) Michael Canfield, and (4) Lindsey Dula. Specifically, Appellant contends their testimony concerning statements made by M.C. was inadmissible hearsay because those statements did not qualify as admissible outcry statements under the provisions of article 38.072 of the Texas Code of Criminal Procedure.[2] We affirm.

BACKGROUND

Appellant was charged by indictment of intentionally or knowingly committing two or more acts of sexual abuse of M.C., a child younger than 14 years of age, during the period from May 1, 2010 through August 31, 2010. Specifically, the indictment alleged Appellant committed aggravated sexual assault of M.C. "by causing the sexual organ of [M.C.] to contact the mouth of the defendant, and/or by causing the sexual organ of [M.C.] to contact the sexual organ of the defendant, and/or by causing the anus of [M.C.] to contact the sexual organ of the defendant." The indictment went on to allege Appellant also committed the offense of indecency with a child with intent to arouse or gratify the sexual desire of any person "by touching the genital of [M.C.] and/or by causing [M.C.] to touch the genitals of the defendant, and/or by touching the anus of [M.C.]." The indictment further alleged the statutory requirement that "at the time of the commission of each of these acts of sexual abuse the defendant was 17 years of age or older and [M.C.] was younger than 14 years of age."

---

[2] TEX. CODE CRIM. PROC. ANN. art. 38.072 (West Supp. 2014). Unless otherwise indicated, all future references to an "article" or "articles" are references to the Texas Code of Criminal Procedure.

On December 3, 2012, the State filed five separate notices, entitled *Notice of Outcry Pursuant to Article 38.072 CCP,* each naming one of the following witnesses: Ronda Canfield, Jessica Canfield,[3] Michael Canfield, Lindsey Dula, and Beth Hobbs. Each notice gave a summary of their proposed testimony concerning statements made by M.C.[4] In April 2013, a jury trial was held during which, among others, each of the following witnesses testified: (1) Ronda Canfield (M.C.'s great aunt), (2) Jessica Canfield (Ronda's daughter), (3) Michael Canfield (M.C.'s great uncle), and (4) Lindsey Dula (a forensic examiner who interviewed M.C.).

At trial, Jessica was the first to testify. She testified that, in January 2012, while she, M.C. and Jessica were in the kitchen at the Canfield's home in Bedford, Texas, M.C. told her that Appellant had touched her private parts. Jessica further testified that in a conversation that took place the next day, M.C. told her Appellant had touched her private parts with his hands, mouth, and private part and that M.C. stated she "had to touch [Appellant's] private parts with [her] hands and [her] body." During her testimony, Appellant's counsel never objected to the testimony concerning M.C.'s statements to her.

Ronda was the next witness to testify. During her direct examination, she too testified concerning the conversation that took place in the kitchen of her home. Ronda testified that during that conversation M.C. told her Appellant touched her private parts. She also stated that M.C. told her it happened when she was in the downstairs bedroom

[3] Jessica Canfield and Jessica Canfield Killion are the same person. At the time of her original statement to the police she used her maiden name.

[4] The State filed a more detailed description of Lindsey Dula's testimony on March 19, 2013, pursuant to a notice entitled *Notice of Outcry Supplement Pursuant to Article 38.072 CCP.*

in Bedford and that it also happened in a room in Tennessee. Ronda testified that, at that point, she asked her husband to come into the kitchen and she asked M.C. to tell him what she had just told her. When Michael and M.C. began to talk, she and Jessica left the room to take care of M.C's brother. During Ronda's testimony, Appellant's counsel never objected to the testimony concerning M.C.'s statements to her.

Michael was the third witness. During both direct and cross-examination, Michael testified that, in January 2012, M.C. told him her father kissed her private parts and touched his private parts to her private parts. As with Jessica and Ronda, during Michael's testimony before the jury, Appellant's counsel never objected to any testimony concerning M.C.'s statements to him.[5]

After a Bedford Police Department detective testified, the State called Lindsey Dula, the director of program services at Alliance for Children. Lindsey, a child abuse forensic examiner, interviewed M.C. concerning the allegations of abuse she had disclosed to Jessica, Ronda, and Michael. Lindsey described M.C.'s statements to

[5] In a pretrial article 38.072 hearing conducted immediately prior to the jury being seated, Michael testified concerning the statements made to him by M.C. At that time, Appellant's counsel made the following objection:

> I would agree that some of the things that Jessica has said may have differed slightly from what [M.C.] had told Ronda, especially the second time. However, I think what she told Mike Canfield is identical to what she had told Jessica and Ronda at the earlier time. Therefore, I would object to Mike Canfield being an outcry witness because none of the outcries were any different from what she told to Ronda and Jessica earlier. So I would object to Mike as an outcry witness.

After some discussion, without expressly ruling on the objection, the trial court stated, "Now, with respect to [the State] calling both Ronda and Mike as an outcry witness, I'm a bit concerned there, so I probably will just allow one."

those witnesses as a "rolling outcry."[6] She testified M.C. told her that Appellant touched her private parts and put his private part into her private part more than once. She also testified that M.C. told her these incidents occurred in an apartment in Tennessee and at Aunt Ronda's house. According to Lindsey's testimony, M.C. also demonstrated the position she would be in when Appellant would enter her anus and that M.C. indicated she and Appellant had vaginal and anal sex multiple times. M.C. also indicated to Lindsey that when Appellant put his mouth on her vagina, he would penetrate her vagina with his tongue. M.C. also told Lindsey Appellant would show her adult sexual organs on his computer.

Prior to this testimony being given, in an article 38.072 hearing conducted outside the presence of the jury, Appellant made the following objection concerning M.C.'s statements to Lindsey:

> My understanding of the outcry statements given by Ms. Dula are duplicative of the outcry statements that have already been elicited from Jessica and from Ronda and also the statements given by Mike, so we would object.

The trial court overruled the objection.

Araceli Desmarais, a Sexual Assault Nurse Examiner, was the next witness. She testified M.C. told her that Appellant touched her private part with his private part. M.C. indicated that, when this took place, she was not wearing her pants or underwear and Appellant had removed his pants and boxers. According to M.C.'s statement, this type of encounter occurred multiple times in Tennessee and in Bedford. M.C. also indicated

[6] Lindsey described a "rolling outcry" as multiple instances where a child would describe only part of the sexual abuse awaiting a reaction from the listeners. If the listeners did not react negatively and the child felt safe, the child would reveal additional instances and/or more detail of abuse.

that her father showed her adult sexual organs on his computer. She told Araceli that Appellant performed oral sex on her and made her touch his private parts more than once at the Canfield home in Bedford. M.C. also indicated there was pain when Appellant penetrated her private part. Appellant's counsel did not object to Araceli's testimony.

M.C. was the State's final witness. M.C. testified her father touched her private parts when they lived in Tennessee and that he also touched his private part to her private part when she was living in Bedford. She testified that when he touched her with his private part, sometimes she was on her stomach and other times on her back. She did not have any panties on and her father was not wearing any pants or underwear. She indicated that when her father was on top of her and she was on her tummy, it hurt. She also indicated her father made noises and something came out of his private part.

Following M.C.'s testimony, the State rested. The defense then rested without calling any additional witnesses. Thereafter, the jury convicted Appellant of continuous sexual assault and, at the conclusion of the punishment phase of trial, assessed his punishment at fifty years confinement. This appeal followed.

ARTICLE 38.072—OUTCRY STATEMENTS

Hearsay is generally inadmissible. TEX. R. EVID. 802. However, article 38.072 creates a statutory hearsay exception for a child-complainant's out-of-court outcry statement in the prosecution of certain sexually related offenses if, in relevant part, (1) the statement describes the alleged offense; (2) committed by the defendant against a

child who is younger than fourteen years of age; (3) where the statement was made to the first person who was eighteen years old or older, other than the defendant, that the child spoke to about the offense; (4) the "trial court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement," and (5) the child testifies or is available to testify at trial. Art. 38.072, § 2. Continuous sexual assault of a child, the offense at issue in this case, is Chapter 21 sexual offense covered by article 38.072. TEX. PENAL CODE ANN. § 21.02(b) (West Supp. 2014); Art. 38.072, § 1(1). The child-victim's statements must describe the alleged offense in some discernable way such that the outcry is "more than words which give a general allusion that something in the area of child abuse is going on . . . ." *Garcia v. State*, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990).

Furthermore, outcry witness testimony is event-specific, not person-specific. *Lopez v.* State, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011). That is, where more than one offense is being prosecuted, there may be more than one outcry statement and more than one outcry witness. *Robinett v.* State, 383 S.W.3d 758, 761-62 (Tex. App.—Amarillo 2012, no pet.). In such situations, each outcry statement must meet the requirements of article 38.072, and because designation of the proper outcry witness is event-specific, the outcry statements related by different witnesses must concern different events and not simply be the repetition of the same event told by the victim at different times to different individuals. *See Lopez*, 343 S.W.3d at 140 (stating "[t]here may be only one outcry witness per event"); *Robinett*, 383 S.W.3d at 762; *Solis v. State*, No. 02-12-00529-CR, 2014 Tex. App. LEXIS 4493, at *11 (Tex. App.—Fort Worth April 24, 2014, no pet.) (mem. op., not designated for publication). Where, as here, the

prosecution of the singular offense of continuous sexual assault involves establishing the commission of "two or more acts of sexual abuse," committed "during a period that is thirty or more days in duration," there may be an outcry statement as to each act of sexual abuse and, therefore, more than one outcry witness as to that particular offense.

Additionally, the hearsay exception provided by article 38.072 applies only if the statute's stringent procedural requirements are met. *Garcia*, 792 S.W.2d at 91. In order to invoke the statutory exception, the party intending to offer the statement must notify the adverse party of the name of the witness through whom it intends to offer the statement and provide a written summary of the statement. *See* Art. 38.072, § 2(b)(1). The statute's explicit content and procedural requirements are mandatory, even though they may at times result in admission of a less detailed statement from the child. *Id.*

STANDARD OF REVIEW

An appellate court reviews a trial court's decision to admit or exclude evidence under an abuse of discretion standard of review. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g.). Under that standard, the appellate court will reverse the trial court's decision only if it acted arbitrarily, unreasonably, or without reference to any guiding rules or principles. *Id.* at 380. This Court should uphold the trial court's ruling if it is within the zone of reasonable disagreement. *Id.* at 391.

ISSUES ONE AND TWO

By his first two issues, Appellant asserts the trial court erroneously permitted Jessica and Ronda to testify as outcry witnesses because M.C.'s statements to them did not qualify as outcry statements. Specifically, Appellant contends M.C.'s statements to Jessica were vague and Ronda's testimony was redundant of Jessica's earlier testimony. The State contends Appellant waived these complaints by failing to contemporaneously object to their testimony.

In general, as a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection or motion. *See* TEX. R. APP. P. 33.1(a). That request, objection or motion must state the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. *Id.*

Here, Appellants did not object to the testimony of Jessica or Ronda on the basis that they were not qualified outcry witnesses. Accordingly, the trial court was never afforded the opportunity to consider the complaints Appellant now raises before ruling on the admissibility of their testimony. Because Appellant failed to raise these issues in the trial court below, any error in admitting their testimony was not preserved for our review. *Wilson v. State,* 311 S.W.3d 452, 473 (Tex. Crim. App. 2010) (op. on reh'g.) (reviewing court should not address the merits of an issue that has not been preserved for appeal). As such, these issues have been forfeited. *Clark v. State*, 365 S.W.3d 333, 339-40 (Tex. Crim. App. 2012). Appellant's first and second issues are overruled.

ISSUE THREE

By his third issue, Appellant contends the trial court erroneously allowed Michael to testify to M.C.'s hearsay statements because that testimony was redundant of the testimony given by both Jessica and Ronda. The State responds to this argument by contending Appellant's complaint on appeal does not comport to his objection at trial; or, alternatively, his testimony is admissible because it describes a different event.

As to Michael's testimony, although an objection was made during the article 38.072 hearing concerning the redundancy of this testimony, Appellant never obtained a ruling with respect to that objection. Because the trial court did not rule on the objection, Appellant did not preserve error as to the introduction of Michael's testimony concerning M.C.'s outcry statements. *See* TEX. R. APP. P. 33.1(a)(2). As such, Appellant's third issue is overruled.

Alternatively, because the trial court allowed Michael to testify to matters Appellant appeared to be objecting to during the article 38.072 hearing, it can be argued the trial court implicitly overruled that objection. *See* TEX. R. APP. P. 33.1(a)(2)(A). Assuming the trial court did implicitly overrule Appellant's objection, thereby preserving error, the State alternatively contends Michael's testimony is admissible because it describes a different event. Specifically, Appellant's objection at the article 38.072 hearing was as follows:

> I think what [M.C.] told Mike Canfield is identical to what she had told Jessica and Ronda at the earlier time. Therefore, I would object to Mike Canfield being an outcry witness because none of the outcries were any different from what she told to Ronda and Jessica earlier.

This objection refers to the statements M.C. made to Ronda and Jessica in the kitchen on the first day. Those statements were to the effect that Appellant had merely touched her private parts. In that statement, M.C. did not say anything about Appellant having kissed her private parts or touched his private parts to her private parts. Although the differentiation between the two events is not the model of clarity, because the statements describe two different event-specific offenses, we find the complaint being raised on appeal is not the same as the complaint asserted at trial. *See* TEX. R. APP. P. 33.1(a)(1); *Knox v. State,* 934 S.W.2d 678, 687 (Tex. Crim. App. 1996) (finding nothing preserved for review if objection at trial does not comport with issue on appeal). Therefore, even assuming Appellant preserved error by his objection, that error fails because it does not conform to the complaint now being raised on appeal. For this additional reason, Appellant's third issue is overruled.

ISSUE FOUR

Finally, Appellant asserts the trial court erred by permitting Lindsey to testify to statements by M.C. that were repetitive of statements testified to by the other outcry witnesses. Assuming, without deciding, the trial court committed error in admitting Lindsey's testimony, we must conduct a harm analysis to determine whether that error affected Appellant's substantial rights. *See* TEX. R. APP. P. 44.2(b). We review this error as nonconstitutional error. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

Improper admission of evidence is not reversible error if the same or similar evidence is admitted without objection at another point in the trial. *Anderson v. State,*

717 S.W.2d 622, 627-28 (Tex. Crim. App. 1986). Without objection, both M.C. and Araceli, the nurse examiner, testified at trial. Both of these witnesses provided substantially the same account of the offense as Lindsey provided in her testimony. Thus, examining the record as a whole, we conclude that error, if any, by the trial court in admitting Lindsey's testimony about the offense did not have a substantial and injurious effect or influence in determining the jury's verdict. *See Nino v. State*, 223 S.W.3d 749, 754 (Tex. App.—Houston [14th Dist.] 2007, no. pet). Because we conclude that the trial court's error, if any, was harmless, we overrule Appellant's fourth issue.

CONCLUSION

The trial court's judgment is affirmed.

Patrick A. Pirtle
Justice

Do not publish.

FILE COPY
SID: 50003486

COURT OF APPEALS
SEVENTH DISTRICT OF TEXAS
AMARILLO

FILED
THOMAS A WILDER, DIST. CLERK
TARRANT COUNTY, TEXAS
MAY 13 2015
TIME 8:05
BY _____ DEPUTY

MANDATE

THE STATE OF TEXAS

To the 213th District Court of Tarrant County, Greeting:

BEFORE our Court of Appeals for the Seventh District of Texas, on February 19, 2015, the cause upon appeal to revise or reverse your judgment between

Jerry Lee Canfield v. The State of Texas

Case Number: 07-13-00161-CR Trial Court Number: 1317398R

was determined and therein our said Court made its order in these words:

Pursuant to the opinion of the Court dated February 19, 2015, it is ordered, adjudged and decreed that the judgment of the trial court be affirmed.

Inasmuch as this is an appeal *in forma pauperis*, no costs beyond those that have been paid are adjudged.

It is further ordered that this decision be certified below for observance.

o O o

WHEREFORE, WE COMMAND YOU to observe the order of said Court of Appeals for the Seventh District of Texas, in this behalf, and in all things to have it duly recognized, obeyed and executed.

WITNESS, the Honorable Justices of our said Court, with the seal thereof annexed, at the City of Amarillo on May 12, 2015.

Vivian Long
VIVIAN LONG, CLERK

DEFENDANT IS HEREBY GRANTED CREDIT
FOR TIME SERVED:
FROM: 2/12/2012 TO: DATE

JUDGE, 213th District Court

CASE NO. 1317398R COUNT ONE
INCIDENT NO./TRN: 9178463858

THE STATE OF TEXAS	§	IN THE 213TH DISTRICT COURT
V.	§	
JERRY LEE CANFIELD	§	TARRANT COUNTY, TEXAS
STATE ID NO.: TX50003486	§	

JUDGMENT OF CONVICTION BY JURY

Judge Presiding:	HON. LOUIS E. STURNS	Date Judgment Entered:	4/3/2013
Attorney for State:	JOE SHANNON, JR. J ERIC NICKOLS ANDREA RISINGER	Attorney for Defendant:	BARRY ALFORD

Offense for which Defendant Convicted:
SEX ABUSE OF CHILD CONTINUOUS: VICTIM UNDER 14 YEARS OF AGE

Charging Instrument: **Indictment**	Statute for Offense: **21.02 PC**
Date of Offense: **May 1, 2010 through August 31, 2010**	
Degree of Offense: **1ST DEGREE FELONY**	Plea to Offense: **NOT GUILTY**
Verdict of Jury: **Guilty**	Findings on Deadly Weapon: **N/A**
Plea to 1st Enhancement Paragraph: **N/A**	Plea to 2nd Enhancement/Habitual Paragraph: **N/A**
Findings on 1st Enhancement Paragraph: **N/A**	Findings on 2nd Enhancement/Habitual Paragraph: **N/A**

Punishment Assessed by:	Date Sentence Imposed:	Date Sentence to Commence:
Jury	**4/3/2013**	**4/3/2013**

Punishment and Place of Confinement: **50 YEARS Institutional Division, TDCJ**

THIS SENTENCE SHALL RUN **N/A.**

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

Fine:	Court Costs:	Restitution:	Restitution Payable to:
$0.00	**$394.00**	**N/A**	☐ VICTIM (see below) ☐ AGENCY/AGENT (see below)

☒ Attachment A, Order to Withdraw Funds, is incorporated into this judgment and made a part thereof.

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

The age of the victim at the time of the offense was **14 Years or younger.**

If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.

Time Credited: **From: 2/12/2012 To: 4/3/2013**

If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter days credited below.

N/A Days Notes: N/A

Appendix F

END OF APPENDIX VOLUME

END OF APPENDIX VOLUME

END OF APPENDIX VOLUME