United States Court of Appeals for the Fifth Circuit

No. 21-40238

United States Court of Appeals
Fifth Circuit
FILED
November 22, 2021
Lyle W. Cayce
Clerk

TOM ILES WHITE, III,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Eastern District of Texas
USDC No. 4:18-CV-86

ORDER:

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

IT IS FURTHER ORDERED that Appellant's motion to proceed in forma pauperis is GRANTED.

KURT D. ENGELHARDT
United States Circuit Judge

APPENDIX B

REPORT AND RECOMMENDATION OF THE U.S. MAGISTRATE JUDGE;
AND ORDER OF DISMISSAL - U.S. DISTRICT COURT

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

TOM ILES WHITE, III, #1960343	§	
	§	
VS.	§	CIVIL ACTION NO. 4:18cv086
	§	
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

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

I. PROCEDURAL BACKGROUND

Petitioner is challenging his Collin County conviction. Petitioner was convicted of one count of continuous sexual assault of a child, three counts of indecency with a child by contact, and one count of indecency with a child by exposure. Cause No. 219-81783-2013. (Dkt. # 8-3, pp. 94-106). Petitioner pled not guilty and was tried by a jury. The jury assessed punishment at thirty years' confinement for continuous sexual assault, ten years' confinement and a $5,000 fine for the first count of indecency with a child by contact, ten years' confinement and a $5,000 fine for the second and third counts of indecency with a child by contact combined, and five years' confinement and a $5,000 fine for indecency with a child by exposure. Confinement was ordered to run concurrently

for all counts, except the first count of indecency with a child by contact, for which confinement was ordered to run consecutively.

Petitioner appealed his conviction, which was affirmed on May 25, 2016. *White v. State*, No. 05-14-01359 (Tex. App. – Dallas 2016); 2016 WL 3098429, at *1. (Dkt. # 8-2). The Texas Court of Criminal Appeals ("TCCA") refused Petitioner's petition for discretionary review ("PDR") on September 28, 2016. *In re White*, PD-0680-16 (Tex. Crim. App. 2016). (Dkt. # 8-1). Petitioner filed five applications for state habeas corpus relief on November 18, 2016, which were denied without written order on the findings of the trial court without a hearing on June 14, 2017. *Ex parte Tom Iles White, III*, Nos. WR-86,910-01; 86, 910-02; 86,910-03; 86,910-04; and 86,910-05. (Dkt. # 16, Dkt. # 21, Dkt. # 26, Dkt. # 31, Dkt. # 36).

Petitioner filed the instant petition on February 2, 2018. The Director filed a response arguing there are no grounds for relief. Petitioner filed a reply. Petitioner alleges:

1. his counsel prevented him from testifying;
2. the trial court judge denied him the right to present a complete defense;
3. the prosecutor misrepresented the evidence during closing remarks;
4. the prosecutor made other improper remarks;
5. his counsel was ineffective for failing to call a medical expert;
6. his counsel was ineffective for failing to make use of available forensic psychologist testimony; and
7. his counsel was ineffective for failing to object to the prosecutor's misconduct, ask for an instruction and a mistrial.

II. FACTUAL BACKGROUND

The state court of appeals described the facts as follows:

> The complainant in this case, A.L., was appellant's stepdaughter. She was thirteen years old at the time of trial. A.L. testified that appellant began showing her pornography when she was four years old. As she got older, appellant progressed to touching her, kissing her and, eventually, to sexual contact. On occasions, appellant would show A.L. pornography and then force her to perform sexual acts. A.L. stated she was afraid that if she told anyone about what appellant was doing, he would hurt her. According to A.L., appellant told her that if she ever told anyone what they were doing, she would be forced to live in a trailer home with her grandparents and her family would die without his money.
>
> In January 2013, when A.L. was twelve years old, her mother became concerned about her angry behavior and the way she was treating her younger brother. Her mother told her she was being "abusive." Her mother also became upset when appellant dismissed her concerns about A.L. and told her he thought A.L.'s behavior was normal. A.L.'s mother eventually confronted A.L. in the car after a youth group meeting and asked if anyone had been bullying or hurting her. A.L. responded "no." A.L.'s mother then asked if appellant was touching her. At first A.L. said he was not. But when A.L.'s mother began to drive home, A.L. stopped her and told her appellant was touching her, that he made her swallow "white stuff," and that she did not want to do it anymore. A.L.'s mother called 911 from the car. The police helped A.L.'s mother remove her other two children from her and appellant's home and take all three children to a motel.

White, 2016 WL 3098429, at *1.

III. STANDARD FOR FEDERAL HABEAS CORPUS RELIEF

The role of federal courts in reviewing habeas corpus petitions by prisoners in state custody is exceedingly narrow. A person seeking federal habeas corpus review must assert a violation of a federal constitutional right. *Lowery v. Collins*, 988 F.2d 1354, 1367 (5th Cir. 1993); *Malchi v. Thaler*, 211 F.3d 953, 957 (5th Cir. 2000). Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also present. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *West v. Johnson*, 92 F.3d 1385, 1404 (5th Cir. 1996);

Brown v. Dretke, 419 F.3d 365, 376 (5th Cir. 2005)) In the course of reviewing state proceedings, a federal court does not sit as a super state appellate court. *Dillard v. Blackburn*, 780 F.2d 509, 513 (5th Cir. 1986).

The prospect of federal courts granting habeas corpus relief to state prisoners has been further limited by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The new provisions of Section 2254(d) provide that an application for a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) was contrary to federal law then clearly established in the holdings of the Supreme Court; (2) involved an unreasonable application of clearly established Supreme Court precedent; or (3) was based on an unreasonable determination of the facts in light of the record before the state court. *See Harrington v. Richter*, 562 U.S. 86, 97-98 (2011). The statutory provision requires federal courts to be deferential to habeas corpus decisions on the merits by state courts. *Moore v. Cockrell*, 313 F.3d 880, 881 (5th Cir. 2002); *Renico v. Lett*, 559 U.S. 766, 773 (2010). This Court must accept as correct any factual determinations made by the state courts unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. *Miller–El v. Dretke*, 545 U.S. 231, 240 (2005). The presumption of correctness applies to both implicit and explicit factual findings. *Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941, 948 n. 11 (5th Cir. 2001).

A decision by a state court is "contrary to" the Supreme Court's clearly established law if it "applies a rule that contradicts the law set forth in" the Supreme Court's cases. *Brown v. Payton,* 544 U.S. 133, 141 (2005) (citing *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A federal court's review of a decision based on the "unreasonable application" test should only review the "state

court's 'decision' and not the written opinion explaining that decision." *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002). "Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas corpus court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams*, 529 U.S. at 411. Rather, that application must be objectively unreasonable. *Id.* at 409. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree'" on the correctness of the decision. *Harrington*, 562 U.S. at 87 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). On federal habeas review of a claim that was fully adjudicated in state court, the state court's determination is granted "a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Richter*, 526 U.S. at 101.

"In Texas writ jurisprudence, usually a denial of relief rather than a "dismissal" of the claim by the Court of Criminal Appeals disposes of the merits of a claim." *Singleton v. Johnson*, 178 F.3d 381, 384 (5th Cir. 1999); *Henderson v. Cockrell,* 333 F.3d 592, 598 (5th Cir. 2003); *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) (holding a "denial" signifies an adjudication on the merits while a "dismissal" means the claim was declined on grounds other than the merits). Additionally, federal habeas relief is foreclosed if a claim: (1) is procedurally barred as a consequence of a failure to comply with state procedural rules, *Coleman v. Thompson*, 501 U.S. 722 (1991); (2) seeks retroactive application of a new rule of law to a conviction that was final before the rule was announced, *Teague v. Lane*, 489 U.S. 288 (1989); or (3) asserts trial error that, although of constitutional magnitude, did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *Wesbrook v.*

Thaler, 585 F.3d 245, 255 (5th Cir. 2009).

IV. ANALYSIS

A. The Trial Court Judge Denied Petitioner the Right to Present a Complete Defense (Claim Two)

In his second claim, Petitioner argues that the trial court denied him the right to present a complete defense because it refused to admit a video recording of an interview conducted by Detective Chris Jones with Petitioner at the Collin County Jail. During cross-examination, defense counsel attempted to admit the video recording into evidence. (Dkt. # 8-9, pp. 211-214). The State objected to its admission as hearsay, and the trial court sustained the objection. (Dkt. # 8-9, p. 214). On re-direct examination, the State asked Detective Jones about certain statements Petitioner made during the interview. On re-cross-examination, counsel again attempted to admit the video recording into evidence, citing the rule of optional completeness. (Dkt. # 8-9, p. 222). After a lengthy discussion held outside the presence of the jury, the trial court allowed defense counsel to admit into evidence those portions of the video recording which the State had questioned Detective Jones about, which included finding DNA on a blanket and finding pornography on his phone. (Dkt. # 8-10, p. 10). Petitioner argues that the admission of the entire videotape was necessary because the jury was lead to believe that he had destroyed evidence.

This issue was thoroughly discussed and dismissed by the appellate court:

> In his first issue, appellant contends the trial court erred when it refused to admit the entirety of a videotaped conversation between appellant and a police detective after the State inquired about statements made during the interview. . . .
>
> Appellant contends the trial court abused its discretion in refusing to admit the entire videotape under Texas Rule of Evidence 107. Rule 107 states,
>
> > If a party introduces part of an act, declaration, conversation, writing,

> or recorded statement, an adverse party mat inquire into any other part on the same subject. An adverse party may also introduce any other act, declaration, conversation, writing, or recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent. TEX. R. EVID. 107.

Appellant argues the admission of the entire videotape was necessary to show the context in which his statements were made. Appellant asserts his statements about the blanket and pornography were made as a result of professional interrogation techniques designed to elicit incriminating responses and taking the statements out of this context misled the jury and left them with a false impression that he had destroyed evidence. Under rule 107, the portions of the videotape sought to be admitted must be "on the same subject" as the material already introduced, and must be "necessary to make it fully understood." *See Sauceda v. State*, 129 S.W.3d 116, 123 (Tex. Crim. App. 2004). The purpose of the rule is to reduce the possibility of the jury receiving a false impression from hearing only part of some act, conversation, or writing. *See Credille v. State*, 925 S.W.2d 112, 116 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). *The trial court in this case granted appellant permission to introduce all portions of the videotape that related to the blanket and the alleged pornography on his phone. Such portions would necessarily include the "interrogation techniques" used by the detective to elicit the statements given by appellant on those topics. Appellant does not explain why the contents of the video pertaining to other subjects would provide additional "context" to his statements necessary to make the conversation fully understood. . . .*

Appellant argues that the prohibition on admitting the police interview under the hearsay rule infringes his weighty interest in showing the jury that he denied the charges against him during interrogation. Appellant further argues this infringement is disproportionate to the purpose the rule is designed to serve. Appellant did not testify at the trial of this case. The State contends that admission of his self-serving out-of-court statements would be the equivalent of allowing him to testify before the jury concerning his innocence without making him subject to cross-examination.

The hearsay rules are designed to promote the reliability of evidence and are a valid limitation on a defendant's evidence when correctly applied. *Id.* The ability to confront and cross-examine witnesses, and thereby ensure the reliability of evidence, is essential to achieving a fair trial. *See Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Pointer v. Texas*, 380 U.S. 400, 405 (1965). This purpose is not outweighed by appellant's interest in this case because, among other things, appellant was not prevented from presenting the substance of his defense. *Appellant elicited testimony from Jones about the interrogation techniques he used during the interview and the fact that appellant repeatedly denied the allegations made by A.L. Accordingly, to the extent appellant believed his denials in the face of interrogation were a*

fundamental element of his defense, this information was before the jury.

White, 2016 WL 3098420, at * 1-4 (emphasis added). First, because Petitioner is complaining that the trial court failed to properly apply state evidentiary law, this claim is not cognizable on federal habeas review. *Estelle*, 502 U.S. at 62 (rejecting a claim that evidence was improperly admitted because "federal habeas corpus relief does not lie for errors of state law"). Federal habeas corpus courts typically "do not review state courts' application of state evidence law." *Jones v. Cain*, 600 F.3d 527, 536 (5th Cir. 2010) (citing *Castillo v. Johnson*, 141 F.3d 218, 222 (5th Cir. 1998)).

Additionally, this claim merits no relief. To prevail on a claim of trial-court error, a habeas petitioner must show that the alleged error was "so extreme that it constituted denial of fundamental fairness." *Prystash v. Davis*, 854 F.3d 830, 840 (5th Cir. 2017) (citations and internal quotation marks omitted). On habeas corpus review of a state conviction, the federal harmless error standard applies, which means that, to warrant relief, the trial court's error must have "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 507 U.S. at 637-38 (quoting *Kotteakos v. United States,* 328 U.S. 750, 776 (1946)). This requires Petitioner to demonstrate actual prejudice. *Id.* at 637. As the appellate court noted, Petitioner was not prevented from presenting the substance of his defense, because trial counsel elicited testimony from Jones about the interrogation techniques he used during the interview, and the fact that Petitioner repeatedly denied the allegations. *White,* 2016 WL 3098420, at * 4. "Accordingly, to the extent appellant believed his denials in the face of interrogation were a fundamental element of his defense, this information was before the jury." *Id.* Thus, Petitioner has failed to show that the trial court's ruling produced a fundamentally unfair trial.

The state habeas court found that Petitioner did not offer any evidence to contradict Detective

Jones's testimony. Furthermore, it found that Petitioner failed to play the portion of the video regarding Petitioner's statement that pornography would be found on his phone:

> 22.Applicant alleges that the State left the jury with the false impression that he had deleted child pornography off of his cell phone;
>
> 23.Detective Chris Jones testified on direct examination that he conducted an interview with Applicant at the Collin County Jail. During cross-examination, Applicant attempted to admit a video recording of the interview.;
>
> 24.The State objected on the ground that the video constituted inadmissible hearsay and the trial court sustained the objection;
>
> 25.On redirect examination, the State asked Jones questions about statements Applicant made during the interview;
>
> 26.The State asked whether Applicant told the detective that his DNA could be found on a blanket he allegedly used when having sexual contact with the victim and whether he admitted that the police would find pornography on his phone;
>
> 27.When Jones indicated Applicant had said both these things, the State then asked whether it was concerning that the police did not find either DNA on the blanket or pornography on his phone;
>
> 28.Jones answered that it was concerning and indicated the possibility that the evidence had been destroyed;
>
> 29.On re-cross-examination, Applicant again attempted to admit the entire video recording of the interview, this time citing the rule of optional completeness;
>
> 30.The trial court allowed Applicant to admit anything to do with the blanket or the alleged pornography on the phone, but not the entire video;
>
> 31.Applicant played a portion of the video for the jury in which Applicant discussed the blanket the victim said they used when they engaged in sexual activity;
>
> 32.Applicant stated on the recording that there was a possibility of finding his DNA on the blanket if he and his wife had used it and not washed it;
>
> *33.Applicant did not play any of the video pertaining to Applicant's statements about pornography on his phone*;

> 34.Applicant has not offered any evidence to contradict Jones's testimony that Applicant told him that pornography would be found on his phone, but it was not, in fact, found on his phone. . . .

(Dkt. # 8-25, p. 129) (emphasis added). Because the TCCA denied Petitioner's state application without written order on the findings of the trial court, that constitutes an adjudication on the merits. Petitioner fails to rebut the presumption of correctness to which the state findings are entitled. *Valdez*, 274 F.3d at 947. Petitioner fails to show there was no reasonable basis for the state court to deny relief. *Richter*, 526 U.S. at 98. Additionally, Petitioner fails to show that the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *Williams,* 529 U.S. at 402-03; *Childress v. Johnson,* 103 F.3d 1221, 1224-25 (5th Cir. 1997).

B. Prosecutorial Misconduct (Claims Three and Four)

1. Improper and Misleading Statements (Claim Three)

a. The State Misled The Jury by Referencing Child Pornography

Petitioner contends that the prosecutor mislead the jury by making several misrepresentations of evidence. Petitioner first argues that the prosecutor implied that he had deleted evidence of child pornography, as opposed to adult pornography. The state habeas court found that Petitioner failed to object to this exchange:

> 41.Applicant alleges that the State misled the jury by implying that Applicant had deleted the pornography that he told police would be there;
>
> 42.The writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal;

43.Applicant did not, however, object to the complained-of statement at trial. . . .

(Dkt. # 8-25, pp. 131-32). Thus, the state habeas court found this claim to be barred by both the lack of a contemporaneous objection and the failure to raise the claim on direct appeal.

It is well-settled that federal review of a claim is procedurally barred if the last state to consider the claim expressly and unambiguously based its denial of relief on a state procedural default. *Coleman*, 501 U.S. at 729. Additionally, if the state court explicitly invokes a procedural bar and alternatively reaches the merits of a defendant's claims, a federal court is still bound by the state procedural default. *Harris v. Reed*, 489 U.S. 255, 264 n. 10 (1989). Where a state court has explicitly relied on a procedural bar, a petitioner may not obtain federal habeas corpus relief absent a showing of cause for the default and actual prejudice that is attributable to the default, or that the federal court's failure to consider the claim will result in a miscarriage of justice. *Coleman*, 501 U.S. at 750. A miscarriage of justice in this context means that the petitioner is actually innocent of the crime for which he was convicted. *Sawyer v. Whitley*, 505 U.S. 333, 339-40 (1992). "The procedural-default doctrine precludes federal habeas review when the last reasoned state-court opinion addressing a claim explicitly rejects it on a state procedural ground." *Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 801, 803 (1991)). As noted, the state habeas court rejected this claim on a state procedural ground. Because the TCCA denied the application for state habeas corpus relief without written order on the findings of the trial court without a hearing, the state habeas court was the last reasoned-state court opinion.

In his reply, Petitioner contends that he can overcome the procedural bar due to the ineffectiveness of his counsel. Petitioner cites to *Martinez v. Ryan*, 566 U.S. 1 (2012). *Martinez*, together with *Trevino v. Thaler*, 569 U.S. 413 (2013), established that a procedural default does not

bar federal habeas review of a substantial claim of ineffective assistance at trial if counsel in the initial-review collateral proceeding was ineffective. In *Martinez*, the Supreme Court held that where state law provides that "claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez,* 566 U.S. at 17; *see also Trevino*, 569 U.S. at 428 (recognizing that the "narrow exception" created by *Martinez* applies in Texas, where claims of ineffective assistance of trial counsel are precluded from direct appeal "as a matter of course"). However, in this case, the procedural default is not barring a claim of ineffective assistance of trial counsel, but one of prosecutorial misconduct. Thus, Petitioner's argument is without merit.

Petitioner's claim is not only procedurally barred, but also fails on the merits. The Supreme Court has recognized that prosecutorial misconduct may "so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process." *Greer v. Miller,* 483 U.S. 756, 765 (1987) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). To constitute a due process violation, the prosecutorial misconduct must be "'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" *Greer,* 483 U.S. at 765 (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985) (quoting *United States v. Agurs*, 427 U.S. 97, 108 (1976)). Only where improper prosecutorial comments substantially affect the defendant's right to a fair trial do they require reversal. *Styron v. Johnson*, 262 F.3d 438, 449 (5th Cir. 2001) (citing *United States v. Diaz-Carreon*, 915 F.2d 951, 956 (5th Cir.1990)).

Set out below is the exchange that occurred during the State's examination of Detective Chris Jones:

> Q. Did the defendant tell you that his DNA would be on the blanket because he had had sex with Erica on that blanket?
>
> A. Yes.
>
> Q. Did he also tell you that you would find child pornography on his telephone?
>
> A. Yes.

(Dkt. # 8-9, pp. 220-21). After a bench conference, the State clarified that Petitioner had mentioned only pornography, and not child pornography:

> Q. And Detective Jones, I want to clear up something for in case there were any mistakes yesterday. The pornography that the defendant said would be found on his phone was regular pornography, correct?
>
> A. To my understanding. Yes, ma'am.
>
> Q. I guess, adult. He didn't say anything about child pornography, correct?
>
> A. No. The term "child pornography," from my recollection, never came up in our conversation.
>
> Q. And so what we were expecting to find on the phone was pornography?
>
> A. Yes.

(Dkt. # 8-10, p. 12). Thus, Petitioner's contention is erroneous, because the State clarified the error for the jury. Additionally, Petitioner has not met his burden and shown that the comment denied him his right to a fair trial.

b. The State Elicited False Testimony From Detective Phelan

Petitioner next argues that during direct examination, the State asked Detective Phelan if he found any pornography on the PlayStation 3 found in Petitioner's home. Detective Phelan testified

that the memory had been cleared. (Dkt. # 8-10, p. 28). Petitioner contends that the North Texas Regional Computer Forensics Laboratory Report reflected only that no evidence of child pornography was found, and not that the memory had been cleared. (Dkt. # 8-13, pp. 29-31). Petitioner contends that Detective Phelan's statement lead the jury to believe that Petitioner had deleted evidence.

Petitioner did not raise this claim in either his application for state habeas corpus relief or in his PDR. (Dkt. # 8-15, # 8-20). A state prisoner must exhaust all remedies available in state court before proceeding in federal court unless circumstances exist that render the state corrective process ineffective to protect the prisoner's rights. 28 U.S.C. §§ 2254(b)(c). To exhaust properly, Petitioner must "fairly present" all of his claims to the state court. *Picard v. Connor*, 404 U.S. 270, 275 (1971). In Texas, all claims must be presented to and ruled on by the Court of Criminal Appeals of Texas. *Richardson v. Procunier*, 762 F.2d 429, 430-31 (5th Cir. 1985); *Deters v. Collins*, 985 F.2d 789 (5th Cir. 1993). The TCCA has not had the opportunity to consider and rule on these grounds of relief. Petitioner may not file a habeas petition in this Court until a decision has been rendered by the Court of Criminal Appeals of Texas. Thus, this claim should be dismissed for failure to exhaust.

This claim is also procedurally barred. "A procedural default . . . occurs when a prisoner fails to exhaust available state remedies and 'the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.'" *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997) (citing *Coleman*, 501 U.S. at 735 n.1)). If Petitioner presented this claim at this time to the TCCA in another state writ application, the court would find it to be procedurally barred under the Texas abuse of the writ doctrine. Tex. Code Crim. Proc. Ann. art. 11.07 § 4 (Vernon's 2013); *Ex parte Whiteside*, 12 S.W.3d

819, 821 (Tex. Crim. App. 2000). Thus, this claim is barred from federal habeas review under the federal procedural default doctrine. *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) (the Texas abuse of the writ doctrine is an adequate procedural bar for purposes of federal habeas review). Petitioner fails to overcome the procedural bar by demonstrating either cause and prejudice for the default or that a fundamental miscarriage of justice would result from the court's refusal to consider the claim. *Id.* at 642.

Finally, this claim merits no relief. Petitioner has failed to show how the State's comment during argument that the memory had been cleared, as opposed to Sergeant Meehan's testimony that he found no evidence of child pornography, "so infec[ted] the trial with unfairness as to make the resulting conviction a denial of due process." *Greer,* 483 U.S. at 765 (citation omitted).

c. The State Misled The Jury During Closing Argument Because it Stated That Petitioner Had Deleted Evidence of Pornography on His Phone

Petitioner next agues that the State mislead the jury during closing argument because it stated that Petitioner had deleted evidence of pornography on his phone. The State argued that Petitioner "had the opportunity and the control and he had the power. He got rid of that evidence." (Dkt. # 8-11, p. 12). Petitioner contends that the State misrepresented the evidence by making this statement, because Sergeant Meehan had testified that no pornography was found on his phone. The state habeas court found that this claim was procedurally defaulted:

> 41.Applicant alleges that the State misled the jury by implying that Applicant had deleted the pornography that he told police would be there;
>
> 42.The writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal;
>
> 43.Applicant did not, however, object to the complained-of statement at trial. . . .

(Dkt. # 8-25, p. 132). As noted, because the state habeas court explicitly relied on a procedural bar, Petitioner may not obtain federal habeas corpus relief absent a showing of cause for the default and actual prejudice that is attributable to the default, or that the federal court's failure to consider the claim will result in a miscarriage of justice. *Coleman*, 501 U.S. at 750. Because Petitioner has failed to even mention, let alone demonstrate causation and prejudice, or that a failure to address the claim will result in a fundamental miscarriage of justice, this claim is procedurally barred. *Id.*

Additionally, this claim does not warrant relief. Under Texas law, the Texas Court of Criminal Appeals has repeatedly held that the following areas are proper for argument: (1) summary of the evidence, (2) reasonable deductions from the evidence, (3) responses to opposing counsel's argument, and (3) pleas for law enforcement. *Borjan v. State*, 787 S.W.2d 53, 55 (Tex. Crim. App. 1990); *Allridge v. State*, 762 S.W.2d 146, 155 (Tex. Crim. App. 1988). The Fifth Circuit has recognized that these four areas are acceptable under Texas law. *Buxton v. Collins*, 925 F.2d 816, 825 (5th Cir. 1991). In the present case, the State's closing argument fell within the parameters of a proper jury argument. Sergeant Meehan testified that there was very little internet history found on Petitioner's iphone, and that he could detect no internet history on the older phone. (Dkt. # 8-10. pp. 14-16). However, he did not testify that no pornography had been deleted from either of Petitioner's phones.

d. The State Misled The Jury by Making Misleading Statements Concerning a Blanket Found at Petitioner's Home

Petitioner argues that the State made misleading statements to the jury concerning a blanket found at his home. Petitioner contends that the Texas Department of Public Safety report found that there was no evidence of his DNA on the blanket (Dkt. # 8-13, pp. 26-27). Petitioner contends that

the State mislead the jury in closing argument:

> You saw the video. You saw him talk to the officer. He said you're going to find my DNA, unless it's been washed. You heard him say that. Unless it's been washed. Washing the sheets and washing the comforter and washing the blankets was on his mind because he did it that night. He had the opportunity and and the control and he had the power. He got rid of that evidence.

(Dkt. # 8-11, p. 13). The state habeas court found that this claim was also procedurally defaulted:

> 41.Applicant alleges that the State misled the jury by implying that Applicant had deleted the pornography that he told police would be there;
>
> 42.The writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal;
>
> 43.Applicant did not, however, object to the complained-of statement at trial;
>
> 44.Applicant alleges that the State misled the jury by claiming by implying that Applicant had washed the blanket to destroy DNA evidence;
> 45.Although Applicant objected to other claims about the blanket during closing arguments, he did not object again after the State argued, "He said you're going to find my DNA, unless it's been washed";
>
> 46.The writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal. . . .

(Dkt. # 8-25, p. 132). As noted, because the state habeas court explicitly relied on a procedural bar, Petitioner may not obtain federal habeas corpus relief absent a showing of cause for the default and actual prejudice that is attributable to the default, or that the federal court's failure to consider the claim will result in a miscarriage of justice. *Coleman*, 501 U.S. at 750. Because Petitioner has failed to even mention, let alone demonstrate causation and prejudice, or that a failure to address the claim will result in a fundamental miscarriage of justice, this claim is procedurally barred. *Id.*

Moreover, this claim lacks merit. The record reflects that Petitioner told Detective Jones that his DNA would be found on the blanket, because he had sex with his wife on it. (Dkt. # 8-10, p.

220). Thus, the State's closing argument fell within the parameters of a proper jury argument. *Buxton*, 925 F.2d at 825.

2. Petitioner's Due Process Rights Were Violated Because of the Prosecution's Improper Arguments (Claim Four)

a. Improper Opening Argument

Petitioner argues that the State improperly argued that he was guilty in its opening argument, stating that "I'm going to ask you to find him guilty, because there is no doubt in this case that he is." (Dkt. # 8-9, p.35). The state habeas court found that this claim was procedurally defaulted:

> 47.Applicant alleges that the State improperly attacked his credibility by calling him a liar and telling the jury that he was guilty;
>
> 48.Applicant did not, however, object to the complained-of testimony at trial;
>
> 49.The writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal. . . .

(Dkt. # 8-25, pp. 132-33). As noted, because the state habeas court explicitly relied on a procedural bar, Petitioner may not obtain federal habeas corpus relief absent a showing of cause for the default and actual prejudice that is attributable to the default, or that the federal court's failure to consider the claim will result in a miscarriage of justice. *Coleman*, 501 U.S. at 750. Because Petitioner has failed to even mention, let alone demonstrate causation and prejudice, or that a failure to address the claim will result in a fundamental miscarriage of justice, this claim is procedurally barred. *Id.* Additionally, Petitioner has not shown that this comment "so infec[ted] the trial with unfairness as to make the resulting conviction a denial of due process." *Greer,* 483 U.S. at 765 (citation omitted)

b. The State Asked The Trial Court to Take Judicial Notice That Petitioner Had Violated His Bond Conditions

Petitioner argues that the State improperly asked the trial court to take judicial notice that

Petitioner had violated his bond conditions. Petitioner contends that this left the jury with a false impression of an extraneous offense, and that it should have been brought up outside the presence of the jury. The state habeas court found that this claim was procedurally defaulted:

> 53.Applicant alleges that the State improperly asked the trial court to take judicial notice that Applicant had violated his bond conditions in front of the jury;
>
> 54.Applicant contends that he did not violate his bond conditions;
>
> 55.Applicant did not object to the State's request that the trial court take judicial notice that Applicant had a "no contact with minors" condition of his bond;
>
> 56.Trial counsel informed the trial court that if the information was in the file, the trial court could take judicial notice of the bond conditions;
>
> 57.The writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal. . . .

(Dkt. # 8-25, pp. 133-34). As noted, because the state habeas court explicitly relied on a procedural bar, Petitioner may not obtain federal habeas corpus relief absent a showing of cause for the default and actual prejudice that is attributable to the default, or that the federal court's failure to consider the claim will result in a miscarriage of justice. *Coleman*, 501 U.S. at 750. Because Petitioner has failed to even mention, let alone demonstrate causation and prejudice, or that a failure to address the claim will result in a fundamental miscarriage of justice, this claim is procedurally barred. *Id.* Additionally, Petitioner has not shown that the State's comments "so infec[ted] the trial with unfairness as to make the resulting conviction a denial of due process." *Greer,* 483 U.S. at 765 (citation omitted).

c. The State Falsely Implied in Closing Argument That Petitioner Did Not Want to Play The Entire Video of His Interview With Detective Chris Jones

Petitioner next contends that Ms. Levonius, one of the prosecutors, falsely implied in closing

argument that Petitioner did not want to play the entire video of his interview with Detective Jones.

The state habeas court found trial counsel had failed to properly object:

> 50.Applicant alleges that the State improperly told the jury that the victim's videotaped interview was not admissible but then objected to Applicant's trial counsel's comment on the admissibility of Applicant's videotaped interview;
>
> 51.Applicant did not object to this comment at trial;
>
> 52.The writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal. . .
>
> 58.Applicant alleges that the State improperly commented on his failure to testify;
>
> 59.During closing arguments, the State told the jury, "The last thing I'm going to address is I offered defense counsel to submit the entire video to you, and he said no because that was no longer his strategy. So, for him to come in to you today —."
>
> 60.Applicant objected to this argument as being outside the evidence;
>
> 61.Applicant did not object that this was a comment on his failure to testify;
>
> 62.The writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal;
>
> 63.The State's argument was not about Applicant's failure to testify, but about counsel's failure to present the entire video of the interview to the jury while arguing that Applicant did not make certain statements during his interview with police. . . .

(Dkt. # 8-25, pp. 133-34). As noted, because the state habeas court explicitly relied on a procedural bar, Petitioner may not obtain federal habeas corpus relief absent a showing of cause for the default and actual prejudice that is attributable to the default, or that the federal court's failure to consider the claim will result in a miscarriage of justice. *Coleman*, 501 U.S. at 750. Because Petitioner has failed to even mention, let alone demonstrate causation and prejudice, or that a failure to address the claim will result in a fundamental miscarriage of justice, this claim is procedurally barred. *Id.* Additionally, Petitioner has not met his burden and shown that this comment "so infec[ted] the trial

with unfairness as to make the resulting conviction a denial of due process." *Greer,* 483 U.S. at 765 (citation omitted).

d. The State Improperly Attacked Petitioner's Credibility by Calling Him a Liar During Closing Argument

Finally, Petitioner argues that the prosecutor called him a liar, complaining about the following portion of closing argument:

> The defense attorney keeps asking about how wrongful convictions occur. You read the newspapers. They occur because of misidentification, because witnesses and victims don't know the defendant. And they misidentify them in court. We don't have a problem of misidentification in this case. Arieal knows exactly who sexually assaulted her. She was called a liar in this courtroom. The defendant's family called her a liar. This is a man who lies to the women he says he loves. You heard his ex-wife Robyn describe how she thought he was a good person. She thought he was a good person. And he had at least three affairs that we know about when he was dating her. Who is the liar? Who can disguise who he is? It's this defendant.

(Dkt. # 8-11, p. 39). The state habeas court found that this claim was procedurally defaulted.

> 47.Applicant alleges that the State improperly attacked his credibility by calling him a liar and telling the jury that he was guilty;
>
> 48.Applicant did not, however, object to the complained-of testimony at trial;
>
> 49.The writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal. . . .

(Dkt. # 8-25, pp. 132-33). As noted, because the state habeas court explicitly relied on a procedural bar, Petitioner may not obtain federal habeas corpus relief absent a showing of cause for the default and actual prejudice that is attributable to the default, or that the federal court's failure to consider the claim will result in a miscarriage of justice. *Coleman*, 501 U.S. at 750. Because Petitioner has failed to even mention, let alone demonstrate causation and prejudice, or that a failure to address the claim will result in a fundamental miscarriage of justice, this claim is procedurally barred. *Id.*

Moreover, this claim lacks merit, as this argument is both a summary of the evidence and a reasonable deductions from the evidence and fell within the parameters of a proper jury argument. *Borjan*, 787 S.W.2d at 55; *Buxton*, 925 F.2d at 825.

In summary, in all of Petitioner's claims regarding prosecutorial misconduct, because the TCCA denied Petitioner's state application without written order based on the findings of the trial court without a hearing, that constitutes an adjudication on the merits. Petitioner fails to rebut the presumption of correctness to which the state findings are entitled. *Valdez*, 274 F.3d at 947. Petitioner also fails to show there was no reasonable basis for the state court to deny relief. *Richter*, 526 U.S. at 98. Petitioner's allegations are procedurally defaulted, and fail to present a substantive issue for federal habeas review. Petitioner is also not entitled to relief because he has not shown the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *Williams*, 529 U.S. at 402-03; *Childress,* 103 F.3d at 1224-25.

C. Ineffective Assistance of Counsel (Claims One, Five, Six and Seven)

A petitioner who seeks to overturn his conviction on the grounds of ineffective assistance of counsel must prove entitlement to relief by a preponderance of the evidence. *James v. Cain*, 56 F.3d 662, 667 (5th Cir. 1995). To succeed on a claim of ineffective assistance of counsel, a petitioner must show "counsel's representation fell below an objective standard of reasonableness," with reasonableness judged under professional norms prevailing at the time counsel rendered assistance. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).This requires the reviewing court to give great

deference to counsel's performance, strongly presuming counsel exercised reasonable professional judgment. *Id.* at 688 - 690. The right to counsel does not require errorless counsel; instead, a criminal defendant is entitled to reasonably effective assistance. *Boyd v. Estelle*, 661 F.2d 388, 389 (5th Cir. 1981); *see also Rubio v. Estelle*, 689 F.2d 533, 535 (5th Cir. 1982); *Murray v. Maggio*, 736 F.2d 279 (5th Cir. 1984). Additionally, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Petitioner must "affirmatively prove," not just allege, prejudice. *Id.* at 693. If petitioner fails to prove the prejudice component, the court need not address the question of counsel's performance. *Id.* at 697.

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

Reviewing Petitioner's ineffective-assistance-of-counsel claim through the lens of AEDPA, however, means that he has a higher bar to exceed in order to prevail. "Surmounting *Strickland*'s

high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult" because "[t]he standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. at 105 (citations omitted). Moreover, unreasonableness under *Strickland* and under § 2254(d) are not the same. First, "[t]he *Strickland* standard is a general one, so the range of reasonable applications is substantial." *Id.* Second, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.*

1. Counsel Prevented Petitioner From Testifying (Claim One)

In his first claim, Petitioner contends that he made several verbal and written requests to testify, but counsel ignored his requests and advised him not to testify. Petitioner attached the affidavit of Cindy Brown to his application for state habeas court relief, who declared that she heard Petitioner ask to testify and saw his written requests to testify. (Dkt. # 8-25, p. 126).

A criminal defendant has the right to take the stand and testify in his or her own defense. *Rock v. Arkansas*, 483 U.S. 44 (1987). When a petitioner argues that his attorney interfered with his right to testify, a court applies the *Strickland* standard to ineffectiveness claims concerning the right to testify. *See United States v. Willis*, 273 F.3d 592, 598 (5th Cir.2001); *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir.2001).

In compliance with the state habeas court's order, counsel filed an affidavit, and stated that he had advised Petitioner not to testify because the "[c]hild pornography movies had not been admitted in guilt, and they would have if he testified." (Dkt. # 8-25, p. 73). Counsel also added that

Petitioner decided against testifying. Counsel's decision can reasonably be viewed as trial strategy. "'A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness.'" *Geiger v. Cain*, 540 F.3d 303, 309 (5th Cir. 2008) (citations omitted). Petitioner must overcome a strong presumption that counsel's advice not to testify was sound trial strategy. *Sayre*, 238 F.3d at 635. An analysis of counsel's performance must take into account the reasonableness of counsel's actions in light of all the circumstances. *See Strickland*, 466 U.S. at 689. The prospect of opening the door to the possession of child pornography is a valid reason not to testify.

Petitioner has not produced any evidence or cited to any authority to refute trial counsel's statement regarding the admission of the child pornography. Additionally, Cindy Brown's affidavit does not undermine trial counsel's assertion that Petitioner ultimately chose not to testify. In his reply, Petitioner states that if he had testified, the jury would have had an opportunity to gauge the veracity of his denial and his credibility. He also states he would have presented his side of family history and marital issues. However, Petitioner fails to specify what the substance of his testimony would have been, or how it would have changed the outcome of the trial. "In the absence of a specific showing of how these alleged errors and omissions were constitutionally deficient, and how they prejudiced his right to a fair trial, we [can find] no merit to these [claims]." *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000) (quoting *Barnard v. Collins*, 958 F.2d 634, 642 (5th Cir.1992)). Petitioner's self-serving conclusory statement that his testimony would have resulted in a different result at trial, standing alone, falls far short of satisfying Strickland's prejudice element. *See Sayre,* 238 F.3d at 635.

Petitioner has not shown that his counsel's representation amounted to incompetence under prevailing professional norms. *Richter,* 562 U.S. at 88. Petitioner fails to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland.* 466 U.S. at 693. The state habeas trial court found that counsel was not ineffective in his advice to Petitioner:

> 70.Applicant alleges that counsel was ineffective for not allowing him to testify at trial;
>
> 71.Counsel advised Applicant that he should not testify because child pornography had not been admitted but would have been admitted had Applicant chose to testify;
>
> 72.The decision not to testify was solely Applicant's, and he made the decision not to testify;
>
> 73.Counsel's advice not to testify was not deficient given the evidence that could be presented by the State if Applicant chose to testify;
>
> 74.Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient;
>
> 75.Applicant made the ultimate decision not to testify;
>
> 76.Applicant has not shown by a preponderance of the evidence that the outcome of the trial would have been different had counsel given different advice. . . .

(Dkt. # 8-25, pp. 135-36).

2. Counsel Was Ineffective For Failing to Call a Medical Expert (Claim Five)

Petitioner next contends that his counsel was ineffective because he failed to have a medical expert testify to rebut the testimony of Dr. Cox, who testified as the State's medical expert witness. Petitioner argues that a medical expert would have refuted Dr. Cox's testimony that it is normal in prepubescent girls to have a thin hymen, would have reviewed the complainant's colopsic slides and testified that there were no injuries to the complainant's genital areas. Petitioner also argues that

counsel failed to obtain and object to the study that Dr. Cox mentioned in his testimony, which showed that teenage girls could get pregnant without evidence of penetration. Petitioner contends that "a battle of the experts would be necessary to adequately rebut state's expert." (Dkt. # 1, p. 13).

The requirements of proof for an allegation of ineffective assistance of counsel for failing to call an expert witness are the same as the requirements for failing to call a lay witness. *Evans v. Cockrell*, 285 F.3d 370, 377–78 (5th Cir.2002). "[C]omplaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative." *Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir.1978). Further, the presentation of witness testimony is essentially strategy and, thus, within the trial counsel's domain. *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir.1985). A petitioner must overcome a strong presumption that his counsel's decision in not calling a particular witness was a strategic one. *Murray*, 736 F.2d at 282.

Counsel responded to these allegations in his affidavit presented to the state habeas court, stating that his strategy was to obtain this information from cross-examination, rather than have a "battle of the experts:"

> I am not sure if we hired the expert or not. I consulted with an expert. The information the forensic expert gave me was so basic that I wanted to get that information from cross examination from the State's witnesses. I did not want a battle of the experts. It was a tactical trial decision based on lack of need of independent testimony and the overall appearance of testimony in front of the jury.

(Dkt. # 8-25, pp. 73-74). The record reflects that counsel conducted an extensive cross-examination of Dr. Cox, and thoroughly questioned him about complainant's physical examination and his failure to find any injury:

Q. Now. What are notches in this context?

A. Notches, when we're describing the hymen, are variations in the shape or the contour of the hymen. So the little divot or piece of tissue that's amiss.

Q. Can you tell me what -- they're tissue that's missing. What is the reason for that? What's the medical reason for that?

A. It can be a normal variation. It can be a sign of prior injury. So, it can -- it just varies depending on the patient.

Q. But you note notches in your report because they can often be a sign of injury. Is that right?

A. A notch can be a sign of prior trauma. Yes.

Q. And it remains visible after the trauma. Would that be fair?

A. If the injury to the hymen persists, yes. Some notches can heal over the course of time. And the hymen shaped based on puberty and stuff changes. So, it really varies based on the timing of the examination whether or not a notch exists.

Q. They exist for a long period of time in cases. Is that right?

A. They can. Yes, sir.

Q. How long?

A. I mean, a child who's injured at age 4 can have that injury visible at age 15. So, it can be for a decade. It depends on the history.

Q. And, so, if we had injury at 6, and 7, and 8, and 9, and 10, and 11, and 12, and we had injury, we might see notches of a considerable nature or observation. Would that be fair?

A. Notches might be an injury that is seen on the hymen. Yes.

Q. And they could certainly be present at your exam at age 12 if we had injuries through all those years, correct?

A. If she had a tear in her hymen that resulted in a notch. Yes.

Q. Is a notch -- it's a small measurement, I assume?

A. Well, a notch can be a shallow of a notch, or it can be a very deep notch. It's very

variable as well based on how much hymen tissue there is.

Q. So, in this case, you noted no notches on Arieal Lum. Is that correct?

A. *I noted a smooth contour, I believe. So, that would indicate no notches.*

Q. Okay. So, we're saying the same thing, no notches?

A. Yes, sir.

Q. Okay. And you don't have any idea of a baseline reading in this particular girl about whether the thin rim of her hymen is because of healing or that's natural for her you. You simply do not know. Is that fair?

A. Correct. I can't say what she looked like before.

Q. Can there be damage to the labia and other parts of the anatomy in addition to the hymen?

A. Yes.

Q. *Did you see any damage?*

A. *I did not with her. No.*

Q. What kind of damage can you see to some of the other structures, the labia for example?

A. So, genital trauma can involve bruises, sometimes lacerations of the skin of the labia. It can involve tearing of the tissue inside the labia called mucosal tissues. So, there can be lacerations or abrasions or deep tears of those tissues. That kind of tissue is the same kind on the inside of our cheek. You can have bruises around the urethra. We see sometimes tearing of the anatomic structures between the skin and the hymen surface. So, that depth that we talked about. That structure there can be injured. The skin that's the border between the outside and the inside can be torn. So, there's lots of different potential areas where there can be injury from sexual contact.

Q. And I guess it would be fair to say this is a fairly sensitive and delicate area on girl's body?

A. Yes.

Q. *Did we see any of these injuries on this case?*

A. *When I examined her, I did not. No.*

Q. I would like to talk about -- forgive me -- the anal area of the girl's body.

A. Okay.

Q. What type of injuries can exist in this region?

A. Injuries to the anus can be lacerations of the mucosal tissues, deep lacerations including tearing of the sphincters, the muscle that closes the anus, bruises can be seen from anal trauma. It can affect the anal tone. So, some patient's who have been sodomized have had dilated anus or lack of anal tone as a rule of that. Those type of injuries can be seen.

Q. *Did you see any of those injuries?*

A. *I did not with Arieal. No.*

(Dkt. # 8-10 at 112-16) (emphasis added).

Petitioner admits that "some of this information was gleaned in cross-examination." (Dkt. # 1, p. 13). In many instances cross-examination will be sufficient to expose defects in an expert's presentation. *Richter*, 562 U.S. at 111. Additionally, Petitioner has not produced an affidavit of a proposed expert, but merely states that an expert would have refuted Dr. Cox's claims. Petitioner's unsubstantiated and conclusory allegation concerning this allegedly favorable witness is insufficient to prove that counsel acted deficiently. *See Kinnamon v. Scott*, 40 F.3d 731, 734–35 (5th Cir. 1994) (finding "speculation" of ineffective assistance to be no basis for habeas relief). Moreover, to succeed on the claim, Petitioner must have shown that had counsel located and called a medical witness, the testimony would have been favorable and the person would have been willing to testify on Petitioner's behalf. *Alexander*, 775 F.2d at 602; *Gomez v. McKaskle*, 734 F.2d 1107, 1109-10 (5th Cir. 1984). Petitioner has failed to meet his burden.

Petitioner has not shown that his counsel's representation amounted to incompetence under

prevailing professional norms. *Richter,* 562 U.S. at 88. Additionally, Petitioner's self-serving conclusory statement that a defense medical expert would have refuted Dr. Cox's testimony does not meet Strickland's prejudice element. *See Sayre,* 238 F.3d at 635. As noted, Dr. Cox testified that he detected no injury. Thus, Petitioner fails to "affirmatively prove," and not just allege prejudice. *Strickland.* 466 U.S. at 693.

The state habeas court found that trial counsel had a valid legal strategy in not calling an expert to testify:

> 77.Applicant alleges that counsel should have called an expert to counter testimony regarding the victim's hymen;
>
> 78.Counsel consulted with an expert;
>
> 79.The expert was helpful in planning counsel's cross-examination of the State's witnesses regarding the victim's forensic examination;
>
> 80.Counsel did not call the expert to testify because he did not want a "battle of the experts" in front of the jury, and he did not need independent testimony;
>
> 81.Counsel had a valid legal strategy in not calling the expert to testify. Applicant has not, therefore, shown by a preponderance of the evidence that counsel was deficient for not calling the expert to testify;
>
> 82.Applicant has not alleged what an expert would have testified to;
>
> 83.Applicant has not met his burden of proof by a preponderance of the evidence that the outcome of trial would have been different. . . .

(Dkt. # 8-25, p. 136).

3. Petitioner's Counsel Was Ineffective For Failing to Make Use of Available Forensic Psychologist Testimony (Claim Six)

Petitioner next states that he had enlisted an expert forensic psychologist, Dr. Alexandria Doyle, in his divorce case. He contends that counsel should have called Dr. Doyle as a witness,

because her testimony was favorable to the defense. In his affidavit, counsel stated why he did not call Dr. Doyle as a witness:

> The psychologist expert proposed a "typical" child molester profile. And would testify that the defendant did not fit it. I thought it was complete rubbish and did not want to present that before a jury. The expert also believed that there was alienation of all the children in the home from the defendant by the Mother. I also thought that idea was not credible and did not want to present that to a jury.

(Dkt. # 8-25, p. 74).

Petitioner argues that Dr. Doyle could have rebutted statements made by Dan Powers, an expert who testified for the State about child abusers. However, counsel stated that he did not object to Dan Powers' testimony because it was admissible since Mr. Powers was hired as an expert, and was allowed to rely on studies and research. (Dkt. # 8-25, p. 78). Petitioner has failed to refute this assertion. Petitioner also fails to state what the basis of Dr. Doyle's testimony would have been, and that she would have been available and willing to testify. *Alexander*, 775 F.2d at 602; *Gomez*, 734 F.2d at 1109-10. "[T]he presentation of testimonial evidence is a matter of trial strategy and . . . allegations of what a witness would have testified are largely speculative." *Buckelew*, 575 F.2d at 521. Petitioner merely speculates that "the results of these examinations were favorable defense testimony that the jury never had an opportunity to hear. Petitioner's unsubstantiated and conclusory allegation concerning Dr. Doyle's proposed testimony is insufficient to prove that counsel acted deficiently. *Kinnamon*, 40 F.3d at 734–35. Thus, Petitioner has not shown that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Additionally, Petitioner fails to "affirmatively prove," and not just allege prejudice. *Id.* at 693.

The state habeas court found that Petitioner did not meet his burden because he failed to explain what the proposed testimony would have been:

> 84.Applicant alleges that counsel was ineffective for failing to call a forensic psychologist to give "crucial" information to the jury;
>
> 85.Applicant does not explain what this testimony was;
>
> 86.Applicant has not met his burden of proof by a preponderance of the evidence that the outcome of trial would have been different;
>
> 87.A forensic psychologist was hired for Applicant's divorce case, and counsel had access to the expert and the report;
>
> 88.The expert was prepared to testify that Applicant did not fit a "typical" child molester profile and that there was alienation by Applicant's mother when he was a child;
>
> 89.Counsel did not believe that the expert was credible, and made a tactical decision not to call the witness in front of a jury;
>
> 90.Counsel had a valid legal strategy in not calling the expert to testify;
>
> 91.Applicant has not shown by a preponderance of the evidence that counsel was deficient for not calling the expert to testify. . . .

(Dkt. # 8-25, p. 138).

4. Counsel Was Ineffective For Failing to Object to the Prosecutor's Misconduct, Ask for an Instruction And Seek a Mistrial (Claim Seven)

Petitioner next argues that his counsel should have objected to the prosecutor's misconduct, misrepresentation of the evidence, attacks on Petitioner's character, and other improper statements. Petitioner refers to the arguments he raises in claims two and three, which the Court addressed above. Counsel contended in his affidavit that none of these proposed objections had merit. (Dkt. # 8-25, pp. 74-75). Counsel are not required to raise futile objections. *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994). A failure to object does not constitute deficient representation unless a sound basis exists for objection. *See Emery v. Johnson*, 139 F.3d 191, 198 (5th Cir. 1997) (a futile or meritless objection cannot be grounds for a finding of deficient performance). An attorney may

render effective assistance despite a failure to object when the failure is a matter of trial strategy. *See Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993) (noting that a failure to object may be a matter of trial strategy as to which courts will not second guess counsel). Petitioner also argues that counsel should have sought a mistrial due to prosecutorial misconduct. However, "[i]t is oft-recognized that the decision not to seek a mistrial is frequently a strategic one." *Geiger*, 540 F.3d at 309. Petitioner merely argues that "there is a reasonable probability that, but for the unprofessional errors by trial counsel, the results of the trial would have been different." (Dkt. # 1, p. 15). Petitioner's claims are speculative because he has not demonstrated deficient performance. *See Barnard*, 958 F.2d at 643 n.11 (holding that "conclusory allegations" of ineffective assistance are without merit "[i]n the absence of a specific showing of how these alleged errors and omissions were constitutionally deficient, and how they prejudiced his right to a fair trial").

The state habeas court addressed these claims in depth and found all lacked merit:

> 147. Applicant alleges that counsel was ineffective for failing to object to all of the allegations of prosecutorial misconduct that he raised in grounds two through eleven of his application for writ of habeas corpus;
>
> 148. Counsel did not object to any of these allegations because they were all without merit;
>
> 149. Applicant alleges that counsel should have objected to the State leaving a false impression that Applicant had deleted pornography off of his cell phone and conflicting testimony regarding who took the victim to church;
>
> 150. There is no legal objection to "false evidence";
>
> 151. Applicant has not shown by a preponderance of the evidence that the testimony was false or misleading;
>
> 152. Applicant has wholly failed to meet his burden of proof by a preponderance of the evidence that counsel was deficient for failing to object to the complained-of evidence and has failed to meet his burden of proof by a preponderance of the

evidence that the outcome of the trial would have been different had counsel made this meritless objection;

153. Applicant alleges that trial counsel should have objected to the State's comments during closing arguments that he claims falsely misled the jury into believing that he had deleted pornography from his cellphone;

154. Proper jury argument must encompass one of the following: (1) a summation of the evidence presented at trial; (2) a reasonable deduction drawn from that evidence; (3) an answer to the opposing counsel's argument; or (4) a plea for law enforcement;

155. There had been evidence presented during trial that Applicant told police that they would find pornography on his cell phone, but pornography was not found; it appeared as though Applicant had deleted it;

156. The State's argument, "He had the power over the items to delete the pornography that he told police officers would for sure be there," was a proper summation of the evidence and reasonable deduction from the evidence;

157. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient for not objecting to this argument and that the outcome of trial would have been different had counsel made this meritless objection;

158. Applicant also alleges that counsel should have objected to the State's closing argument that Applicant had washed the blanket that he told police would contain his DNA;

159. The detective testified that Applicant told him that his DNA would be on the blanket because he had sex with his wife on the blanket;

160. No DNA was found on the blanket;

161. The detective testified that the lack of DNA on the blanket Applicant claimed to have sex with his wife on indicated that the blanket had been washed;

162. The complained-of argument was a proper summation of the evidence presented at trial and a reasonable deduction from the evidence;

163. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient in not objecting to this argument and that the outcome of trial would have been different had counsel made this meritless objection;

164. Applicant further alleges that counsel should have objected to the State's closing arguments calling him a "liar" and "I'm going to ask you to find him guilty because there is no doubt in this case he is.";

165. Applicant had told police that evidence would be found, but when police searched for that evidence it was not there, indicating to police that the evidence had been destroyed;

166. Applicant's ex-wife testified that he had hidden extra-marital affairs from her during the course of their marriage;

167. The complained-of argument that Applicant was a liar was a reasonable deduction from the evidence;

168. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient for not objecting to this argument and that the outcome of trial would have been different had counsel made this meritless objection;

169. The prosecutor's request that the jury find Applicant guilty was a plea for law enforcement;

170. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient in not objecting to this argument and that the outcome of trial would have been different had counsel made this meritless objection;

171. Applicant also alleges that counsel was ineffective for not objecting to the State's comment to the jury that the victim's videotaped interview was not admissible but then objected to Applicant's trial counsel's comment on the admissibility of Applicant's videotaped interview;

172. Applicant has not alleged on what grounds counsel should have objected to this comment;

173. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient for not objecting to this comment and that the outcome of trial would have been different had counsel made an unknown objection;

174. Applicant also alleges that counsel was ineffective in failing to object to the State's request that the trial court take judicial notice that Applicant had violated the conditions of his bond in the presence of the jury;

175. Applicant does not allege the grounds on which Applicant should have challenged the State's request;

176. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient for not objecting to this comment and that the outcome of trial would have been different had counsel made an unknown objection;

177. Applicant alleges that trial counsel should have objected to the State's comment on his failure to testify;

178. During closing arguments, the State told the jury, "The last thing I'm going to address is I offered defense counsel to submit the entire video to you, and he said no because that was no longer his strategy. So, for him to come in to you today --.";

179. Applicant objected to this argument as being outside the evidence;

180. Applicant did not object that this was a comment on his failure to testify;

181. The State's argument was not about Applicant's failure to testify, but about counsel's failure to present the entire video of the interview to the jury while arguing that Applicant did not make certain statements during his interview with police;

182. Any objection that the argument was a comment on Applicant's failure to testify would have been meritless;

183. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient for not objecting to this argument and that the outcome of trial would have been different had counsel made this meritless objection;

184. Applicant alleges that counsel was ineffective for failing to object to the State being "vindictive" for allowing the Double Jeopardy Clause to be violated and for asking the judge to have his sentences stacked;

185. Applicant does not allege the grounds on which Applicant should have challenged the State's actions;

186. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient for not objecting to this comment and that the outcome of trial would have been different had counsel made an unknown objection;

187. Applicant alleges that counsel was ineffective because although he objected to the State's comment on his failure to testify, he did not move for a mistrial;

188. During closing arguments, the State told the jury, "The last thing I'm going to address is I offered defense counsel to submit the entire video to you, and he said no because that was no longer his strategy. So, for him to come in to you today --.";

189. Applicant objected to this argument as being outside the evidence;

190. Applicant did not object that this was a comment on his failure to testify;

191. The State's argument was not about Applicant's failure to testify, but about counsel's failure to present the entire video of the interview to the jury while arguing that Applicant did not make certain statements during his interview with police;

192. Any request for a mistrial would have been meritless;

193. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient in not objecting to this argument and that the outcome of trial would have been different had counsel made this meritless objection. . . .

(Dkt. # 8-25, pp. 145-153).

In summary, in respect to all Petitioner's ineffective assistance of counsel claims, because the TCCA denied Petitioner's state application without written order on the findings of the trial court, that constitutes an adjudication on the merits. Petitioner fails to rebut the presumption of correctness to which the state findings are entitled. *Valdez*, 274 F.3d at 947. Petitioner fails to show there was no reasonable basis for the state court to deny relief. *Richter*, 526 U.S. at 98. Additionally, Petitioner fails to show that the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *Williams*, 529 U.S. at 402-03 (2000); *Childress,* 103 F.3d at 1224-25.

V. CONCLUSION

Petitioner's claims regarding trial court error merit no relief because Petitioner has not shown that the alleged error was so extreme that it constituted denial of fundamental fairness. Petitioner's allegations regarding prosecutorial misconduct fail because they are both procedurally

barred and fail to show a violation of constitutional law. Petitioner's ineffective assistance of counsel claims lack merit because he fails to prove prejudice, or show that his counsel's representation amounted to incompetence under prevailing professional norms.

In all of his claims, Petitioner fails to rebut the presumption of correctness to which the state findings are entitled. Petitioner fails to show there was no reasonable basis for the state court to deny relief. Additionally, Petitioner fails to show that the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

VI. CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the Court of Appeals from a final order in a proceeding under § 2254 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(B). Although Petitioner has not yet filed a notice of appeal, it is respectfully recommended that this court, nonetheless, address whether Petitioner would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained

the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected constitutional claims on the merits, the petitioner must demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). When a district court denies a motion on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue when the Petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.*

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

VII. RECOMMENDATION

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

Within fourteen days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(c). To be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place

in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superceded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this 17th day of February, 2021.

Christine A. Nowak
UNITED STATES MAGISTRATE JUDGE

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

TOM ILES WHITE, III, #1960343	§	
	§	
VS.	§	CIVIL ACTION NO. 4:18cv086
	§	
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

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

Having made a *de novo* review of the objections raised by Petitioner to the Report, the court concludes that the findings and conclusions of the Magistrate Judge are correct. Thus, the court adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the court.

It is accordingly **ORDERED** the petition for writ of habeas corpus is **DENIED**, and the case is **DISMISSED** with prejudice. A certificate of appealability is **DENIED**

SIGNED this 19th day of March, 2021.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

APPENDIX C

ORDER DENYING PETITIONER'S MOTION FOR EVIDENTIARY HEARING
U.S. DISTRICT COURT

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

TOM ILES WHITE, III, #1960343	§	
	§	
VS.	§	CIVIL ACTION NO. 4:18cv086
	§	
DIRECTOR, TDCJ-CID	§	

ORDER

Pro Se Petitioner Tom Iles White, III filed a motion for an evidentiary hearing. (Dkt. # 22). Evidentiary hearings are not required in federal habeas corpus proceedings. Rule 8, Rules Governing Section 2254 Cases in the United States District Courts; *McCoy v. Lynaugh*, 874 F.2d 954, 966–67 (5th Cir.1989). "[T]o receive a federal evidentiary hearing, a petitioner must allege facts that, if proved, would entitle him to relief." *Wilson v. Butler*, 825 F.2d 879, 880 (5th Cir. 1987); *East v. Scott*, 55 F.3d 996, 1000 (5th Cir.1995) (opportunity for evidentiary hearing only mandatory where there is a factual dispute which, if resolved in the petitioner's favor, would entitle the petition to relief and the petitioner has not received a full and fair evidentiary hearing in state court).This requirement "avoids wasting federal judicial resources on the trial of frivolous habeas corpus claims." *Wilson*, 825 F.2d at 880. In this case, Petitioner fails to show he is entitled to an evidentiary hearing. *United States v. Auten*, 632 F. 2d 478, 480 (5th Cir. 1980) (mere conclusory allegations are not sufficient to support a request for a hearing).

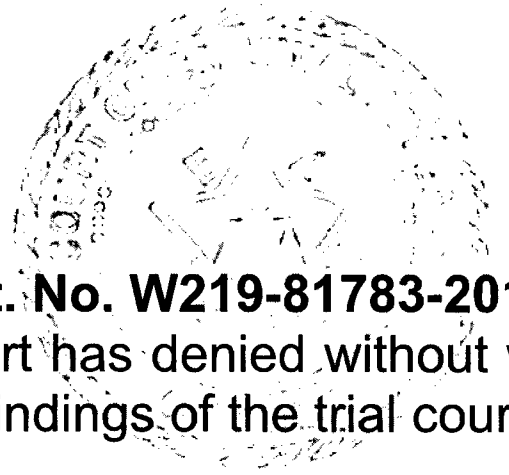
It is accordingly **ORDERED** Petitioner's motion for an evidentiary hearing (Dkt. # 22) is **DENIED**. **SIGNED this 17th day of March, 2021.**

Christine A. Nowak
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

TEXAS COURT OF CRIMINAL APPEALS WRIT 11.07 DENIED
STATE HABEAS CORPUS PROCEEDING

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



6/14/2017

WHITE, TOM ILES III Tr. Ct. No. W219-81783-2013-HC 1 WR-86,910-01

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

TOM ILES WHITE III
ALLRED UNIT - TDC # 1960343
2101 FM 369 NORTH
IOWA PARK, TX 76367

APPENDIX E

FINDING OF FACT AND RECOMMENDATION
STATE HABEAS CORPUS PROCEEDING

Filed: 5/8/2017 2:52:40 PM
Lynne Finley
District Clerk
Collin County, Texas
By Renee Sims Deputy
Envelope ID: 16897896

W219-81783-2013-HC4

Ex parte Tom Iles White, III	§	In the
	§	
	§	199th District Court
	§	
	§	of Collin County, Texas

Findings of Fact and Recommendation

On this day came to be heard Applicant's Application for Writ of Habeas Corpus and the State's Response. The Court finds that:

Double Jeopardy

1. Applicant alleges that his convictions violate his right against double jeopardy;
2. Applicant appears to be complaining that his indecency charges were merely a lesser included offense of the continuous sexual assault offense;
3. To determine if an accused has been charged with multiple punishments for the same offense, as Applicant alleges, courts use the "same elements" test or *Blockburger* test;
4. The *Blockburger* test provides that, where the same act or transaction constitutes a violation of two distinct statutory provision, the test to be applied to determine whether there are two offenses or only one, is

whether each provision requires proof of an element that the other does not;

5. Applicant was charged with one count of continuous sexual abuse, three counts of indecency with a child by contact, and one count of indecency with a child by exposure;
6. A person commits the offense of continuous sexual abuse if during a period that is 30 days or more in duration, the person commits two or more acts of sexual abuse. Tex. Penal Code Ann. § 21.02(b) (West 2011);
7. The act of *touching the breast* of a child is expressly excluded from the "acts of sexual abuse" described in § 21.02(a). *Id.* at § 21.02(a);
8. The basis for Applicant's convictions in counts 2 through 4 were for touching the victim's breast;
9. This act was specifically excluded from acts that may constitute sexual abuse under section 21.02(c) and cannot support a charge of continuous sexual abuse;
10. Because the acts that underlie the counts of indecency with a child by contact cannot be the basis of a charge of continuous sexual abuse, they cannot be the same offense for Double Jeopardy purposes;

11. Applicant's convictions for counts 1 through 4 do not violate the Double Jeopardy Clause;

12. Applicant appears to be arguing that the act of exposing his genitals to the victim was subsumed by the acts of sexual abuse;

13. The victim gave a detailed account of all of the acts of sexual abuse she suffered and testified that Applicant would get undressed in front of her;

14. Thus, the acts of exposure were separate from the acts of sexual abuse;

15. The facts in this case, however, clearly establish that Applicant committed both indecency by exposure and contentious sexual abuse;

16. Applicant has unquestionably been punished separately for both offenses, and rights under the Double Jeopardy Clause have not been offended;

False Evidence

17. Applicant alleges that the State offered false testimony;

18. Habeas claims challenging the use of false testimony are reviewed under a slightly different analysis than other claims in a writ of habeas corpus;

19. The State's use of *material* false testimony violates a defendant's due-process rights under the Fifth and Fourteenth Amendments to the United States Constitution;

20. Therefore, in any habeas claim alleging the use of material false testimony, this Court must determine (1) whether the testimony was, in fact, false, and, if so, (2) whether the testimony was material;

21. The second prong in a false-testimony claim is materiality, not harm;

22. Applicant alleges that the State left the jury with the false impression that he had deleted child pornography off of his cell phone;

23. Detective Chris Jones testified on direct examination that he conducted an interview with Applicant at the Collin County Jail. During cross-examination, Applicant attempted to admit a video recording of the interview.;

24. The State objected on the ground that the video constituted inadmissible hearsay and the trial court sustained the objection;

25. On redirect examination, the State asked Jones questions about statements Applicant made during the interview;

26. The State asked whether Applicant told the detective that his DNA could be found on a blanket he allegedly used when having sexual

contact with the victim and whether he admitted that the police would find pornography on his phone;

27. When Jones indicated Applicant had said both these things, the State then asked whether it was concerning that the police did not find either DNA on the blanket or pornography on his phone;

28. Jones answered that it was concerning and indicated the possibility that the evidence had been destroyed;

29. On re-cross-examination, Applicant again attempted to admit the entire video recording of the interview, this time citing the rule of optional completeness;

30. The trial court allowed Applicant to admit anything to do with the blanket or the alleged pornography on the phone, but not the entire video;

31. Applicant played a portion of the video for the jury in which Applicant discussed the blanket the victim said they used when they engaged in sexual activity;

32. Applicant stated on the recording that there was a possibility of finding his DNA on the blanket if he and his wife had used it and not washed it;

33. Applicant did not play any of the video pertaining to Applicant's statements about pornography on his phone;

34. Applicant has not offered any evidence to contradict Jones's testimony that Applicant told him that pornography would be found on his phone, but it was not, in fact, found on his phone;

35. Applicant has not shown by a preponderance of the evidence that the testimony was false;

36. Applicant alleges that the State presented false testimony regarding who took the victim to church;

37. The victim testified that her mother took her to church, and the victim's mother testified that Applicant had taken her to church;

38. The jury was presented with this conflicting testimony, and it was within their province to determine the credibility of the testimony;

39. The jury was not left with a false impression regarding who took the victim to church;

40. Applicant has not met his burden of proof by a preponderance of the evidence that false evidence was presented to the jury;

Prosecutor's Statement Regarding Pornography on Cell Phone

41. Applicant alleges that the State misled the jury by implying that Applicant had deleted the pornography that he told police would be there;

42. The writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal;

43. Applicant did not, however, object to the complained-of statement at trial;

Prosecutor's Statement Regarding DNA Evidence

44. Applicant alleges that the State misled the jury by claiming by implying that Applicant had washed the blanket to destroy DNA evidence;

45. Although Applicant objected to other claims about the blanket during closing arguments, he did not object again after the State argued, "He said you're going to find my DNA, unless it's been washed";

46. The writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal;

Prosecutor's Comments on Applicant's Credibility

47. Applicant alleges that the State improperly attacked his credibility by calling him a liar and telling the jury that he was guilty;

48. Applicant did not, however, object to the complained-of testimony at trial;

49. The writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal;

Prosecutor's Comments on Videos

50. Applicant alleges that the State improperly told the jury that the victim's videotaped interview was not admissible but then objected to Applicant's trial counsel's comment on the admissibility of Applicant's videotaped interview;

51. Applicant did not object to this comment at trial;

52. The writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal;

Prosecutor's Comments on Violating Bond Conditions

53. Applicant alleges that the State improperly asked the trial court to take judicial notice that Applicant had violated his bond conditions in front of the jury;

54. Applicant contends that he did not violate his bond conditions;

55. Applicant did not object to the State's request that the trial court take judicial notice that Applicant had a "no contact with minors" condition of his bond;

56. Trial counsel informed the trial court that if the information was in the file, the trial court could take judicial notice of the bond conditions;

57. The writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal;

Prosecutor's Comment on Failure to Testify

58. Applicant alleges that the State improperly commented on his failure to testify;

59. During closing arguments, the State told the jury, "The last thing I'm going to address is I offered defense counsel to submit the entire video to you, and he said no because that was no longer his strategy. So, for him to come in to you today --."

60. Applicant objected to this argument as being outside the evidence;

61. Applicant did not object that this was a comment on his failure to testify;

62. The writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal;

63. The State's argument was not about Applicant's failure to testify, but about counsel's failure to present the entire video of the interview to the jury while arguing that Applicant did not make certain statements during his interview with police;

Vindictiveness

64. Applicant alleges that the prosecutor was "vindictive" for allowing the Double Jeopardy Clause to be violated and for asking the judge to have his convictions stacked;

65. The habeas applicant must show both that some constitutional violation occurred and that he was prejudiced;

66. Applicant has not alleged any constitutional violations, only that the prosecutor was "vindictive";

Ineffective Assistance of Counsel

67. Counsel Cary Piel is an officer of the Court, well known to the court, and credible;

68. Counsel Piel's affidavit is credible;

69. Counsel's trial strategy in this case was that Applicant did not commit the crimes and that his wife, the victim's mother, had fabricated the allegations because she was upset over Applicant's infidelity;

70. Applicant alleges that counsel was ineffective for not allowing him to testify at trial;

71. Counsel advised Applicant that he should not testify because child pornography had not been admitted but would have been admitted had Applicant chose to testify;

72. The decision not to testify was solely Applicant's, and he made the decision not to testify;

73. Counsel's advice not testify was not deficient given the evidence that could be presented by the State if Applicant chose to testify;

74. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient;

75. Applicant made the ultimate decision not to testify;

76. Applicant has not shown by a preponderance of the evidence that the outcome of the trial would have been different had counsel given different advice;

77. Applicant alleges that counsel should have called an expert to counter testimony regarding the victim's hymen;

78. Counsel consulted with an expert;

79. The expert was helpful in planning counsel's cross-examination of the State's witnesses regarding the victim's forensic examination;

80. Counsel did not call the expert to testify because he did not want a "battle of the experts" in front of the jury, and he did not need independent testimony;

81. Counsel had a valid legal strategy in not calling the expert to testify. Applicant has not, therefore, shown by a preponderance of the

evidence that counsel was deficient for not calling the expert to testify;

82. Applicant has not alleged what an expert would have testified to;

83. Applicant has not met his burden of proof by a preponderance of the evidence that the outcome of trial would have been different;

84. Applicant alleges that counsel was ineffective for failing to call a forensic psychologist to give "crucial" information to the jury;

85. Applicant does not explain what this testimony was;

86. Applicant has not met his burden of proof by a preponderance of the evidence that the outcome of trial would have been different;

87. A forensic psychologist was hired for Applicant's divorce case, and counsel had access to the expert and the report;

88. The expert was prepared to testify that that Applicant did not fit a "typical" child molester profile and that there was alienation by Applicant's mother when he was a child;

89. Counsel did not believe that the expert was credible, and made a tactical decision not to call the witness in front of a jury;

90. Counsel had a valid legal strategy in not calling the expert to testify;

91. Applicant has not shown by a preponderance of the evidence that counsel was deficient for not calling the expert to testify;

92. Applicant alleges that his trial counsel was ineffective for failing to request that Kimberly Marinoni and J. Patrick Shuey be called back to clarify their responses after it was made known that it was hard to hear the venire panel;

93. Counsel does not recall that some venire members could not be heard;

94. The record does indicate that the trial court had trouble hearing some of the venire members, including Marinoni;

95. Neither the State or trial counsel indicated that they could not hear her responses, and both indicated that they had no reason to strike Shuey;

96. There is no indication in the record that there was a problem hearing Shuey;

97. Applicant also appears to argue that even if Marinoni and Shuey were not brought in to clarify their answers, they should have been struck because they stated they would not presume innocence;

98. Neither of these two venire members said that they would not presume Applicant innocent;

99. Marinoni stated that she would be unable to judge someone innocent or guilty without more information, and that she believed that children often lied;

100. Marinoni later stated that she believed that in another case the attorney may not proven the client was not guilty, but clarified that she had never been on a jury before;

101. Counsel used this answer to educate the panel on the presumption of innocence;

102. Counsel did not ask Shuey about the presumption of innocence; in fact, counsel clarified that he was not talking about the presumption but was asking the panel about how they tell if someone is factually innocent;

103. Nothing in the record indicates that counsel could not hear the responses given by Marinoni and Shuey;

104. Applicant has not shown by a preponderance of the evidence that counsel was deficient for failing to request that these venire members be brought in to clarify their answers;

105. Applicant has not shown by a preponderance of the evidence that the outcome of trial would have been different had counsel made this request;

106. Neither Marinoni nor Shuey said that they would not presume Applicant guilt; they merely answered the questions that were presented to them;

107. Applicant has not shown by a preponderance of the evidence that counsel was deficient for failing to challenge them or that the outcome of trial would have been different had counsel challenged these venire members;

108. Applicant alleges that counsel was ineffective for failing to object to Dr. Matthew Cox's testimony regarding a study on hymens in children on which he based his expert opinion about the victim's hymen in this case;

109. According to Applicant, this testimony violated the Texas Rules of Evidence, *Daubert*, and *Melendez-Diaz* because the author of the study was not available to testify;

110. Dr. Cox testified during the State's rebuttal that he was a medical doctor, specially trained in conducting child sexual assault examinations and "the area of child abuse evaluations.";

111. He was the director of the REACH Program at Children's Hospital, which conducted evaluations of children at risk for neglect or physical or sexual abuse;

112. Dr. Cox testified regarding A.L.'s demeanor during the exam, the verbal history of abuse she provided, and the physical signs of sexual abuse he observed;

113. Dr. Cox testified that he knew of a study about pregnant teenagers who had no signs of injury to their hymen;

114. Dr. Cox then testified that in light of the thousands of exams that he had performed, his opinion was that the victim's hymen was thinner than he would expect in the average twelve-year-old girl;

115. Applicant has not alleged which Rule of Evidence counsel should have relied on in his objection;

116. Under the Rules of Evidence, an expert may rely on studies in forming his opinion;

117. Applicant has not, therefore, shown by a preponderance of the evidence that counsel was ineffective for not raising this objection or that the outcome of trial would have been different had counsel made this unknown objection;

118. Applicant does not explain how the *Daubert/Kelly* test for the reliability of scientific evidence required the testimony of the author of the study that Dr. Cox relied on in making his conclusions regarding the victim's hymen;

119. Applicant has not shown by a preponderance of the evidence that counsel was ineffective for not raising this objection or that the

outcome of trial would have been different had counsel made this unknown objection;

120. Applicant has not shown that *Melendez-Diaz* requires that the author of the study be available for cross-examination;

121. Dr. Cox was the expert who made the determination about the physical condition of the victim's hymen and gave his conclusions on whether the victim showed physical signs of being sexually assaulted;

122. Dr. Cox testified that he also based his conclusion on his own experience examining the hymens of young girls;

123. Defense counsel vigorously cross-examined Dr. Cox about his conclusions on the victim's hymen;

124. Dr. Cox relied on his own experience in making his conclusions regarding the victim's hymen;

125. Any objection under *Melendez-Diaz* would have without been merit;

126. Applicant has not shown by a preponderance of the evidence that counsel was ineffective for not raising this objection or that the outcome of trial would have been different had counsel made this unknown objection;

127. Applicant alleges that trial counsel was ineffective because he did not object to Dr. Cox's testimony;

128. During his testimony, the State asked, "Was there anything about the interaction between [the victim] and her mother that led you to believe that maybe [the victim] was being coached?";

129. Appellant objected that this testimony was "outside the scope of his medical examination.";

130. The trial court overruled the objection, and Dr. Cox testified that he did not have any concerns of coaching based on his interaction with A.L. and her mother;

131. Applicant alleges that counsel should have objected to relevance in order to preserve the argument for appellate review;

132. Lisa Martinez, who performed the victim's forensic interview, testified about the signs of coaching she had been trained to look for and that she had not seen any indication the victim had been coached into making the allegations;

133. It is well settled that an error in admission of evidence is cured where the same evidence comes in elsewhere without objection;

134. Even if counsel had objected and preserved the argument for appellate review, the outcome would not have been different because

any error was rendered harmless by the admission of similar evidence without objection;

135. Applicant has not shown by a preponderance of the evidence that the outcome of the appeal would have been different had counsel preserved the argument that the testimony was not relevant for appellate review;

136. Applicant alleges that trial counsel was ineffective for failing to object to Dan Powers's answers to hypothetical questions;

137. Powers is the clinical director for the Children's Advocacy Center of Collin County and has been a clinical social worker for 25 years;

138. During his testimony on rebuttal, Powers responded to a number of hypothetical questions about sex offenders and their behaviors, such as grooming;

139. As an expert, Powers was allowed to offer his opinion solely on hypothetical questions posed at trial;

140. Any objection to the State's use of hypotheticals would have been overruled;

141. Applicant has not shown by a preponderance of the evidence that counsel was deficient for failing to object to Powers's testimony;

142. Applicant has not shown by a preponderance of the evidence that the outcome of the trial would have been different had counsel made this meritless objection;

143. Applicant alleges that counsel was ineffective for failing to object to his convictions on the grounds that they violated the Double Jeopardy Clause;

144. Applicant's conviction did not violate the Double Jeopardy Clause;

145. Applicant has not shown by a preponderance of the evidence that counsel was deficient for failing to object;

146. Applicant has not shown by a preponderance of the evidence that the outcome of trial would have been different had counsel made this meritless objection;

147. Applicant alleges that counsel was ineffective for failing to object to all of the allegations of prosecutorial misconduct that he raised in grounds two through eleven of his application for writ of habeas corpus;

148. Counsel did not object to any of these allegations because they were all without merit;

149. Applicant alleges that counsel should have objected to the State leaving a false impression that Applicant had deleted pornography off of his cell phone and conflicting testimony regarding who took the victim to church;

150. There is no legal objection to "false evidence";

151. Applicant has not shown by a preponderance of the evidence that the testimony was false or misleading;

152. Applicant has wholly failed to meet his burden of proof by a preponderance of the evidence that counsel was deficient for failing to object to the complained-of evidence and has failed to meet his burden of proof by a preponderance of the evidence that the outcome of the trial would have been different had counsel made this meritless objection;

153. Applicant alleges that trial counsel should have objected to the State's comments during closing arguments that he claims falsely misled the jury into believing that he had deleted pornography from his cellphone;

154. Proper jury argument must encompass one of the following: (1) a summation of the evidence presented at trial; (2) a reasonable

deduction drawn from that evidence; (3) an answer to the opposing counsel's argument; or (4) a plea for law enforcement;

155. There had been evidence presented during trial that Applicant told police that they would find pornography on his cell phone, but pornography was not found; it appeared as though Applicant had deleted it;

156. The State's argument, "He had the power over the items to delete the pornography that he told police officers would for sure be there," was a proper summation of the evidence and reasonable deduction from the evidence;

157. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient for not objecting to this argument and that the outcome of trial would have been different had counsel made this meritless objection;

158. Applicant also alleges that counsel should have objected to the State's closing argument that Applicant had washed the blanket that he told police would contain his DNA;

159. The detective testified that Applicant told him that his DNA would be on the blanket because he had sex with his wife on the blanket;

160. No DNA was found on the blanket;

161. The detective testified that the lack of DNA on the blanket Applicant claimed to have sex with his wife on indicated that the blanket had been washed;

162. The complained-of argument was a proper summation of the evidence presented at trial and a reasonable deduction from the evidence;

163. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient in not objecting to this argument and that the outcome of trial would have been different had counsel made this meritless objection;

164. Applicant further alleges that counsel should have objected to the State's closing arguments calling him a "liar" and "I'm going to ask you to find him guilty because there is no doubt in this case he is.";

165. Applicant had told police that evidence would be found, but when police searched for that evidence it was not there, indicating to police that the evidence had been destroyed;

166. Applicant's ex-wife testified that he had hidden extra-marital affairs from her during the course of their marriage;

167. The complained-of argument that Applicant was a liar was a reasonable deduction from the evidence;

168. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient for not objecting to this argument and that the outcome of trial would have been different had counsel made this meritless objection;

169. The prosecutor's request that the jury find Applicant guilty was a plea for law enforcement;

170. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient in not objecting to this argument and that the outcome of trial would have been different had counsel made this meritless objection;

171. Applicant also alleges that counsel was ineffective for not objecting to the State's comment to the jury that the victim's videotaped interview was not admissible but then objected to Applicant's trial counsel's comment on the admissibility of Applicant's videotaped interview;

172. Applicant has not alleged on what grounds counsel should have objected to this comment;

173. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient for not objecting to this comment and that the outcome of trial would have been different had counsel made an unknown objection;

174. Applicant also alleges that counsel was ineffective in failing to object to the State's request that the trial court take judicial notice that Applicant had violated the conditions of his bond in the presence of the jury;

175. Applicant does not allege the grounds on which Applicant should have challenged the State's request;

176. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient for not objecting to this comment and that the outcome of trial would have been different had counsel made an unknown objection;

177. Applicant alleges that trial counsel should have objected to the State's comment on his failure to testify;

178. During closing arguments, the State told the jury, "The last thing I'm going to address is I offered defense counsel to submit the entire video to you, and he said no because that was no longer his strategy. So, for him to come in to you today --.";

179. Applicant objected to this argument as being outside the evidence;

180. Applicant did not object that this was a comment on his failure to testify;

181. The State's argument was not about Applicant's failure to testify, but about counsel's failure to present the entire video of the interview to the jury while arguing that Applicant did not make certain statements during his interview with police;

182. Any objection that the argument was a comment on Applicant's failure to testify would have been meritless;

183. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient for not objecting to this argument and that the outcome of trial would have been different had counsel made this meritless objection;

184. Applicant alleges that counsel was ineffective for failing to object to the State being "vindictive" for allowing the Double Jeopardy Clause to be violated and for asking the judge to have his sentences stacked;

185. Applicant does not allege the grounds on which Applicant should have challenged the State's actions;

186. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient for not objecting to this comment and that the outcome of trial would have been different had counsel made an unknown objection;

187. Applicant alleges that counsel was ineffective because although he objected to the State's comment on his failure to testify, he did not move for a mistrial;

188. During closing arguments, the State told the jury, "The last thing I'm going to address is I offered defense counsel to submit the entire video to you, and he said no because that was no longer his strategy. So, for him to come in to you today --.";

189. Applicant objected to this argument as being outside the evidence;

190. Applicant did not object that this was a comment on his failure to testify;

191. The State's argument was not about Applicant's failure to testify, but about counsel's failure to present the entire video of the interview to the jury while arguing that Applicant did not make certain statements during his interview with police;

192. Any request for a mistrial would have been meritless;

193. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient in not objecting to this argument and that the outcome of trial would have been different had counsel made this meritless objection;

Ineffective Assistance of Appellate Counsel

194. Applicant alleges that his appellate counsel was ineffective for failing to raise the claim of the violation of the Double Jeopardy Clause on direct appeal;

195. Counsel Gary Udashen is an officer of the Court, well known to the court, and credible;

196. Counsel Udashen's affidavit is credible;

197. Counsel reviewed and researched this the issue of a Double Jeopardy violation, but did not believe that there was a solid legal argument to make and he did not believe that the Court of Appeals would find a Double Jeopardy violation;

198. Applicant's conviction did not violate the Double Jeopardy Clause;

199. Applicant has not shown by a preponderance of the evidence that counsel was deficient for not raising this issue on direct appeal; and

200. Applicant has not shown by a preponderance of the evidence that the outcome of trial would have been different had raised this claim on direct appeal.

Accordingly, this Court **recommends that the** Application be **DENIED**.

IT IS ORDERED that the Clerk of this Court shall send copies of the Order to: (1) Applicant, Tom Iles White III, TDCJ # 01960343, Allred Unit, 2101 FM 369 North, Iowa Park, TX 76367, (2) the Appellate Division of the Collin County Criminal District Attorney's Office, and (3) the Court of Criminal Appeals.

SIGNED this 22nd day of May, 2017.

JUDGE PRESIDING

APPENDIX F

WITNESS' AFFIDAVIT (AFFIDAVIT IN SUPPORT OF GROUND 12); and
MOTION FOR EVIDENTIARY HEARING - STATE HABEAS CORPUS PROCEEDING

W219-81783-2013

(W219-81783-2013, HC1, HC2, HC3, HC4, HC5)

EX PARTE § IN THE

§

§ 219th DISTRICT COURT

TOM ILES WHITE III § OF COLLIN COUNTY, TEXAS

FILED
MAY 15 PM 4:12
LYNNE FINLEY
DISTRICT CLERK
COLLIN COUNTY, TX
BY _____ DEPUTY

AFFIDAVIT OF FACT IN SUPPORT OF "GROUND 12" IN EACH HABEAS CORPUS APPLICATIONS 1, 2, 3, 4, 5

Before me, the undersigned notary, on this day, personally appeared, Cindy Brown, a person whose identity is known to me. After I administered an oath to her, upon her, she said.

"My name is Cindy Brown. I am capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct."

"I, Cindy Brown, heard verbal requests and saw many written requests from Tom Iles White III (Applicant) to his Defense counsel requesting the opportunity to testify at his trial.

I

Cindy Brown
Cindy Brown

SWORN TO and SUBSCRIBED before me by Cindy Brown on May 15, 2017.

YOLANDA W SMITH
Notary ID # 3840348
My Commission Expires
May 7, 2019

Yolanda W. Smith
Notary Public in and for the State of Texas

My Commission Expires: May 7, 2019

SB

W219-81783-2013-HC4

Ex parte Tom Iles White III § In the
§
§ 219th District Court
§ of Collin County, Texas

APPLICANT'S MOTION FOR EVIDENTIARY HEARING

Applicant files this request, Motion requesting an Evidentiary Hearing.

1.

Applicant requests Evidentiary Hearing, to submit evidence supporting all grounds in Habeas Application, for this Court's consideration of issues to designate, if not all of them. Evidentiary Hearing will also assist this Court in making its finding of facts and conclusions of law; and afford the Applicant a full and fair evidentiary hearing on the grounds submitted.

2.

Applicant has stated grounds that include vindictive and improper prosecutor conduct. The State has indicated they wanted to assist the Court in making its finding of fact and conclusions of law. Considering the grounds submitted, Applicant questions how fair the State's "assistance" will be.

3.

Applicant prayerfully requests an Evidentiary Hearing to allow the Applicant the opportunity to submit to this Court evidence supporting each ground in the Habeas Corpus application.

Respectfully submitted,

Tom Iles White III
APPLICANT
TDCJ#01960343
Allred Unit
2101 FM369N
Iowa Park, TX 76367

Certificate of Service

A copy of the foregoing document has been served on District Attorney, care of Lynne Finley, District Clerk of Collin Co., Texas by first class mail, postage prepaid, to 2100 Bloomdale Rd, Ste12132 McKinney, TX 75071 on December 8, 2016.

Tom Iles White III