United States Court of Appeals
for the Fifth Circuit

No. 20-40563

RONALD BLAKE FEARS,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
No. 1:19-CV-184

(Filed Aug. 30, 2022)

Before SMITH, CLEMENT, and HAYNES, *Circuit Judges*.

PER CURIAM:*

A Texas jury convicted Ronald Fears of continually sexually abusing his stepdaughter. Fears says his trial

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* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

counsel inadequately defended him by allowing the introduction of harmful, inadmissible evidence. The Texas Court of Criminal Appeals ("CCA") disagreed; it denied Fears's state habeas corpus petition after concluding that he had suffered no prejudice.

Fears tried again in federal court but met the same fate. We review that denial under the unforgiving standard required by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Although Fears's claim is compelling, we cannot say that every reasonable jurist would agree that he suffered prejudice. We affirm the denial of his habeas petition.

I.

A.

When Fears's stepdaughter, C.T., was fourteen years old, she confided to a friend that Fears had been sexually abusing her for years. C.T.'s friend persuaded her to tell an adult family friend about the abuse. That friend reported C.T.'s account to police and Child Protective Services.

Investigators deemed C.T.'s story credible. But physical examinations failed to turn up corroborating evidence. That does not necessarily indicate that no abuse occurred, but it meant that the state's case against Fears would live or die on C.T.'s credibility.

C.T., however, had a history of deception. So some had difficulty believing her claims. In fact, at the time of Fears's trial, neither C.T.'s mother nor

her grandmother believed Fears had abused C.T. Fears relied in part on their testimony to make his case that C.T. had fabricated her story.

In response, the state highlighted the consistency of C.T.'s recitals over time. One way it did that was through the testimony of those who had interviewed C.T. But it needed to tread lightly because Texas law strictly limits witnesses' ability to comment on other witnesses' credibility.

Texas law requires lay witnesses to stick to matters rationally within their perception that can aid the jury. TEX. R. EVID. 701. Similarly, expert witnesses may opine only when doing so can "help the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 702. Under those rules, experts cannot "give an opinion that [a] complainant . . . is truthful,"[1] and lay witnesses cannot give "[d]irect opinion testimony about the truthfulness of another witness[] without prior impeachment."[2] Some Texas courts have described those principles as one rule: A witness cannot "offer a direct opinion as to the

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[1] *Yount v. State*, 872 S.W.2d 706, 712 (Tex. Crim. App. 1993) (en banc).

[2] *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011). Once a witness's "character for truthfulness has been attacked," another witness may offer testimony about that witness's reputation for truthfulness or his opinion about that witness's truthfulness. TEX. R. EVID. 608(a).

truthfulness of another witness."[3] That rule "applies to expert and lay witness testimony alike."[4]

Fears points to five instances where witnesses strayed at least close to the line marked by that rule.

First, the state asked C.T.'s friend, "[D]id you believe that [oral sex] had happened between [C.T.] and her stepfather?" She replied, "Yes."

Second, the adult who reported C.T.'s allegations to the police testified that she was "close enough to [C.T.] to believe she would not mislead [her]."

Third, Fears's lawyer asked a witness, after describing him as a "veteran police officer," whether it was a good idea to have interviewed C.T. in detail about the alleged abuse. The officer said that it was. And he said he thought "a crime had occurred just based solely on [C.T.'s] testimony."

Fourth, another officer said he "believe[d] that [the] crime had occurred" because of C.T.'s "consistent statements . . . and the details that she gave." He explained that he doesn't always refer cases for prosecution but that he had referred C.T.'s case, further implying that he believed her. He later dismissed the suggestion that C.T. was just "being rebellious" and opined that children do not "use that type of an outcry

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[3] *Blackwell v. State*, 193 S.W.3d 1, 21 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

[4] *Id.* (citing *Arzaga v. State*, 86 S.W.3d 767, 776 (Tex. App.—El Paso 2002, no pet.), and *Fisher v. State*, 121 S.W. 3d. 38, 41 (Tex. App.—San Antonio 2003, pet. ref'd)).

for rebellion against the parent." He said his assessment of C.T.'s truthfulness was based on her "demeanor change[]" as the interview's topic shifted to sexual abuse. Because she showed strong "emotion," the officer thought C.T. had been "traumatized."

Fifth, an investigator for Child Protective Services told the jury that he had found "reason to believe" Fears had abused C.T. He based that conclusion on the "consisten[cy]" of C.T.'s testimony and the "details" she gave.

Fears's lawyers did not object to any of that testimony. In some cases, they elicited it.

The jury convicted Fears of several serious sex crimes. He was sentenced to fifty years' imprisonment.

Fears unsuccessfully appealed, then filed a state habeas petition. He claimed that his trial counsel had been constitutionally ineffective in failing to object to the five opinions we have just described. Fears's petition languished in procedural limbo for a few years.

Eventually, a state district court recommended that Fears receive a new trial. It found that the original "trial court would have granted a motion in limine to exclude opinion testimony [concerning C.T.'s] credibility." Reasoning that the evidence in question "made . . . the State's case significantly more persuasive by improperly bolstering C.T.'s credibility in a case where her credibility was paramount," it concluded that Fears's counsel had prejudiced his defense with constitutionally deficient representation.

The CCA disagreed. It tersely reported that it had "review[ed] the record" and "conclude[d] that [Fears] ha[d] not shown that he was prejudiced" under the second prong of *Strickland v. Washington*, 466 U.S. 668 (1984). So it denied his petition.

B.

Fears petitioned the federal district court for habeas relief. Among other grounds, he again asserted that his trial representation was constitutionally deficient. He said the failure to object to the bolstering testimony prejudiced him because the case turned on C.T.'s credibility.

The court denied his petition in a summary judgment. As relevant here, it adopted the magistrate judge's report, which recommended concluding that the challenged evidence did not prejudice Fears even if it was erroneously admitted. Applying AEDPA's deferential standard, it explained that the CCA might reasonably have concluded that the bolstering evidence added little to the state's case because the jury otherwise heard enough evidence to "formulate its own opinion of [C.T.'s] credibility."

The district court also denied Fears a certificate of appealability ("COA") after concluding that none of his claims raised issues that were "debatable among jurists of reason[] and that Fears fail[ed] to make a 'substantial showing of the denial of a constitutional right.'" (Quoting 28 U.S.C. § 2253(c)(2).)

Fears then asked this court for a COA regarding only his ineffective-assistance claim. We granted the COA to decide "whether the state courts' rejection of the claim of ineffective assistance of counsel . . . was entitled to deference under [AEDPA]."

II.

Our review is *de novo* because the district court denied Fears's petition in a summary judgment. *Guy v. Cockrell*, 343 F.3d 348, 351-52 (5th Cir. 2003). And we review only the question contained in the order granting the COA. *See* 28 U.S.C. § 2253(c)(1)(A).

The AEDPA standard under which federal courts review state merits adjudications of prisoners' constitutional claims is familiar. A habeas petition arising from a state merits adjudication "shall not be granted" unless the state system's final decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1). Contrariness means that a decision "relies on legal rules that directly conflict with prior" Supreme Court decisions or "reaches a different conclusion . . . on materially indistinguishable facts." *Busby v. Dretke*, 359 F.3d 708, 713 (5th Cir. 2004). An unreasonable application "correctly identifies the governing legal principle . . . but unreasonably applies it to the facts of the particular case." *Id.* (quoting *Bell v. Cone*, 535 U.S. 685, 694 (2002)). In either case, a petitioner must show "that the state court's ruling on [his claims] was so lacking in

justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Fears advances two reasons to discard that deference here. Both reasons rely on the brevity of the CCA's opinion. Neither is ultimately dispositive.

A.

First, Fears invokes *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (per curiam). There, the Court vacated a CCA decision in another ineffective-assistance case and remanded for the CCA to "address the prejudice prong" of the legal standard. *Id.* at 1887. Fears says his case is similar because the CCA again "fail[ed] to conduct a meaningful prejudice analysis" by issuing an essentially summary denial. That, he claims, continues a "practice of summarily rejecting without explanation a habeas trial judge's fact-findings and recommendation to grant relief."

Irrespective of whether the CCA has any such "practice," it has nothing to do with *Andrus*. That decision turned on the Supreme Court's inability to discern the analytical prong on which the CCA had rejected a petition. *Id.* at 1886-87. Here, the CCA left no doubt: It said Fears had "not shown that he was prejudiced." We thus have no difficulty identifying the decision entitled to our deference, so *Andrus* is inapposite.

Summary rulings are entitled to AEDPA deference. *Richter*, 562 U.S. at 99. This case is no exception.

B.

Second, Fears reasons that we must "look through" the CCA's decision to the lower state court's decision because the CCA "provided no rationale for its no-prejudice decision." That position relies on *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), where the Court authorized a similar procedure in some circumstances. The idea is that it can be hard to figure out whether a state decision has been faithful to clearly established federal law if the state court does not explain itself. *Id.* at 1192. In such cases, federal courts can "presume that the unexplained decision adopted" the reasoning of the "last related state-court decision that does provide a relevant rationale." *Id.*

Here, we cannot look through to the state trial habeas court's decision for two reasons. *First*, Fears has forfeited his position. *Second*, it makes no sense to attribute the lower state court's reasoning to the CCA where the CCA disagreed about how to resolve the case.

Fears never told the federal district court that it ought to have examined the state habeas court's reasoning. Instead, he told the magistrate judge that the CCA's decision "involved an unreasonable application of [federal law] and appears to have been based on an unreasonable determination of the facts." In other words, he recited the ordinary AEDPA standard. The

magistrate judge then cited *Wilson* in support of the *contrary* proposition: that the magistrate judge's review was of the CCA's "decision alone." (Quotation omitted.) Still, Fears said nothing of deference in his objections to the magistrate judge's report.

The first time Fears mentioned *Wilson* or looking through the CCA's decision was in his application to this court for a COA.

But Fears cannot raise this position for "the first time on appeal." *Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021). To preserve it for our review, he needed to "identify it as a proposed basis for deciding the case." *Pickett v. Tex. Tech Univ. Health Scis. Ctr.*, 37 F.4th 1013, 1037 (5th Cir. 2022) (quotation omitted and alterations adopted). In other words, he needed to tell the district court to grant his petition at least in part because it needed to defer to the lower state court's reasoning recommending that he get a new trial. *See id.* But he never even mentioned that possibility to the district court.

Parties may forfeit their pleas to attribute a lower state court's reasoning to a state court of last resort. That's because looking through under *Wilson* does not alter the standard of review.

Standards of review cannot be forfeited. *United States v. Vasquez*, 899 F.3d 363, 380 (5th Cir. 2018). So parties cannot forfeit the question whether to apply AEDPA at all. *Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir. 2015), *abrogated on other grounds, Ayestas v. Davis*, 138 S. Ct. 1080 (2018).

This question is different. Regardless of whether we look through to the trial court's reasoning, the standard of review is the same: We apply AEDPA to the state highest court's decision. To "look through" is just to attribute another court's reasoning *to* the high court. *Wilson*, 138 S. Ct. at 1192 (instructing courts to "presume that the unexplained decision adopted the same reasoning"). Because it does not alter the standard of review, Fears's position is an ordinary merits contention that can be forfeited. *See Howard v. Davis*, 959 F.3d 168, 172 n.9 (5th Cir. 2020) (collecting cases).

But Fears need not worry that his forfeiture altered the outcome. His position is also foreclosed by *Thomas v. Vannoy*, 898 F.3d 561, 569 (5th Cir. 2018), which held that we "cannot 'look through' the [state high court's] opinion [where it] was the only state court to consider and reject [a] claim." After all, *Wilson*'s look-through procedure is a rebuttable presumption. *Wilson*, 138 S. Ct. at 1192. What could better rebut the presumption that a state high court adopted a lower state court's reasoning than the fact that the two courts reached different conclusions?

Accordingly, we apply AEDPA deference to the CCA's decision holding that Fears has "not shown that he was prejudiced."

III.

To prevail, Fears must identify "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*,

562 U.S. at 103. He posits such an error in the CCA's application of *Washington*.

Washington established a two-part test for evaluating trial counsel's effectiveness. First comes deficiency. To satisfy the Sixth Amendment, a defendant's lawyer must provide "reasonably effective assistance" —assistance, that is, that conforms to "prevailing professional norms." *Washington*, 466 U.S. at 687-88. Next comes prejudice. Even if a lawyer's performance was not reasonably effective, the Constitution is not offended "if the error had no effect on the judgment." *Id.* at 691.

Though the test has a first and second prong, we do not always proceed in that order. We should not address the deficiency prong if we conclude that the defendant suffered no prejudice. *Bouchillon v. Collins*, 907 F.2d 589, 595 (5th Cir. 1990). Our objective is "not to grade counsel's performance." *Washington*, 466 U.S. at 697. So if a defendant cannot get relief, there is no sense in debating deficiency.

That is true here. Because we conclude that Fears cannot satisfy the AEDPA standard on the prejudice prong, our inquiry begins and ends there.

A.

A defendant shows prejudice where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is

a probability sufficient to undermine confidence in the outcome." *Id.*

Fears must show that the CCA's application of that standard was "unreasonable." *See Richter*, 562 U.S. at 112. And our deference to the CCA in this area is further heightened—we must apply "doubly deferential judicial review." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). Our review is doubly deferential because AEDPA and *Washington* require deference to the state court and the trial lawyer, respectively. *Richter*, 562 U.S. at 105. Double deference applies to both the deficiency and prejudice prongs.[5]

Satisfying that doubly deferential standard means that "every reasonable jurist would conclude that it is reasonabl[y] likely that" Fears would have been acquitted had his trial counsel objected to the bolstering testimony. *Adekeye v. Davis*, 938 F.3d 678, 684 (5th Cir. 2019). "[E]ven a strong case for relief" may not be enough. *Id.* (quoting *Richter*, 562 U.S. at 102).

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[5] *Richter*, 562 U.S. at 105; *Cullen v. Pinholster*, 563 U.S. 170, 202 (2011); *Anaya v. Lumpkin*, 976 F.3d 545, 554 (5th Cir. 2020). Our decisions contain some contrary statements, but those must yield to *Pinholster* and *Anaya* because no case holding that double deference does not apply to the prejudice prong is precedential. *See Sanchez v. Davis*, 888 F.3d 746, 749 (5th Cir. 2018) (single-judge order); *Spicer v. Cain*, No. 18-60791, 2021 WL 4465828, at *9 (Sept. 29, 2021) (unpublished). Nor could those cases displace *Pinholster*, since neither construed its holding. *See Gahagan v. U.S. Citizenship & Immigr. Servs.*, 911 F.3d 298, 302 (5th Cir. 2018).

B.

Fears's strongest rationale for finding prejudice is that the state's case turned on C.T.'s credibility. He thinks the bolstering testimony—particularly that of the three investigators with substantial experience investigating child-sex-abuse cases—"carr[ied] exceptional weight and an aura of reliability" in the jurors' minds. (Quotation omitted.) Although those witnesses were not qualified as experts, Fears contends the jury likely thought of them as similarly authoritative. The case, he maintains, "depended on [C.T.'s] credibility," and the conflicting evidence on that point meant that the jury needed help deciding whom to believe.

But the importance of C.T.'s credibility cuts both ways. As the state observes, the jury knew that its task was to decide whether C.T. was telling the truth. The jury had plenty of opportunities to assess her credibility itself—it could compare her trial testimony with her prior accounts, scrutinize her demeanor in court, and consider the evidence of her past perfidy. What's more, even if the investigators had kept their assessments of C.T.'s truthfulness to themselves, their belief in her story would have been implicit anyway because the investigation progressed to an indictment and a trial based on their conclusions.

On that view, the challenged testimony was just cumulative evidence of C.T.'s credibility. And the introduction of cumulative evidence is harmless.[6]

Fears replies that, under Texas law, the bolstering evidence could not have been cumulative because bolstering evidence is treated differently from other evidence of credibility. That is, after all, the whole point of a rule against "offer[ing] a direct opinion as to the truthfulness of another witness." *Blackwell*, 193 S.W.3d at 21.

The question, however, is one not of Texas law but, instead, is whether, as a matter of federal constitutional law, an error was sufficiently likely to have influenced the jury that it "undermine[s] confidence in the outcome." *Washington*, 466 U.S. at 694. It would be different if Texas law treated the introduction of improperly bolstering evidence as *per se* reversible error. If that were true, we would know that counsel's failure to object changed the outcome. But that's not so. Consider *Lopez v. State*, 343 S.W.3d at 143, where the CCA reversed a conviction based in part on bolstering testimony but remanded for further development on the question "why trial counsel failed to object" to its introduction. If the introduction of bolstering testimony were *per se* reversible error, remanding would have been pointless: No "reasonably sound strategic motivation" could have explained the decision not to object. *Id.*

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[6] *United States v. El-Mezain*, 664 F.3d 467, 526 (5th Cir. 2011); *United States v. Escamilla*, 852 F.3d 474, 487 (5th Cir. 2017); *United States v. Hall*, 500 F.3d 439, 444 (5th Cir. 2007).

Given that Texas law does not control the outcome, the appropriate resolution is debatable by reasonable jurists. One rationally could conclude that the bolstering evidence gave the jury nothing it didn't already have. From that perspective, the investigators' conclusions were based on the same facts available to the jury, and their belief in C.T.'s story was already implicit because each of them advanced the case against Fears. That perspective is reconcilable with the applicable Supreme Court caselaw.

AEDPA requires us to defer to the CCA's no-prejudice decision. The judgment is AFFIRMED.

United States Court of Appeals
for the Fifth Circuit

No. 20-40563

RONALD BLAKE FEARS,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:19-CV-184

(Filed Aug. 30, 2022)

Before SMITH, CLEMENT, and HAYNES, *Circuit Judges.*

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

United States Court of Appeals
for the Fifth Circuit

No. 20-40563

RONALD BLAKE FEARS,

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 Southern District of Texas
USDC No. 1:19-CV-184

(Filed Aug. 5, 2021)

ORDER:

Ronald Blake Fears, Texas prisoner #1883420, was convicted by jury of continuous sexual abuse of a child, sexual assault of a child, and indecency with a child by contact. He seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 application. Fears contends that his counsel was ineffective for failing to object to inadmissible opinion testimony regarding the victim's credibility

and that the district court erred by concluding that the state court's rejection of that claim is entitled to deference.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). When the district court rejects constitutional claims on their merits, a COA should issue only if the petitioner " demonstrate[es] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Fears has demonstrated that jurists of reason could find the district court's resolution of his § 2254 application debatable, in particular, whether the state courts' rejection of the claim of ineffective assistance of counsel set forth above was entitled to deference under the standards of § 2254. *See id.* Accordingly, the motion for a COA is GRANTED as to this claim. The clerk is DIRECTED to establish a briefing schedule, notify the respondent that a COA has been granted, and include the respondent in the briefing schedule.

/s/ Leslie H. Southwick
LESLIE H. SOUTHWICK
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

RONALD BLAKE FEARS, Petitioner,	§	
VS.	§	CIVIL ACTION NO. 1:19-CV-184
LORIE DAVIS, Respondent.	§	

ORDER

(Filed Aug. 20, 2020)

In January 2013, a Texas state-court jury found Petitioner Ronald Blake Fears guilty of continuous sexual abuse of a child, and the trial court judge sentenced him to 50 years imprisonment.[1] After exhausting his direct appellate rights, Fears filed a habeas action in a Texas state court, alleging that he received ineffective assistance of counsel during his trial and at sentencing. The Texas Court of Criminal Appeals applied *Strickland* and concluded that Fears failed to demonstrate prejudice from any ineffective assistance of counsel. Fears then filed his federal habeas petition.[2]

Respondent now moves for summary judgment, urging the denial of the Petition. (Motion, Doc11) The

[1] Fears was also found guilty of related counts, for which the trial court judge sentenced him to 20 years imprisonment per count, to run concurrently with the 50-year sentence.

[2] The Report and Recommendation summarizes the lengthy procedural and factual background.

Magistrate Judge issued a Report and Recommendation, recommending that the Court grant the Motion and deny the Petition. (R&R, Doc. 19) Both Fears and the Government have objected to the Report and Recommendation. (Fears Objs., Doc. 20; Resp. Objs., Doc. 21)

The Court has conducted a *de novo* review of the Petition, the briefing of the parties, the record in this case, and the applicable law. The court concludes that the Motion should be granted.

I. Ineffective Assistance at Trial

Fears objects to the portion of the Report and Recommendation considering whether Fears' counsel provided constitutionally ineffective assistance at his trial. He makes two primary arguments. First, Fears contends that the Magistrate Judge failed to consider the conclusions of the state habeas trial court, which determined that Fears' counsel provided ineffective assistance at trial that prejudiced Fears. Second, Fears claims that the Magistrate Judge also did not weigh "the habeas prosecutor's acknowledgment during summation at the evidentiary hearing that Fears probably is innocent." (Pet. Objs., Doc. 20, 3) In support of his first point, Fears cites to several state-court decisions for the proposition that a trial counsel's failure to object to opinion testimony concerning the credibility of the victim requires a new trial. (*Id.* (citing *Black v. State*, 634 S.W.2d 356 (Tex. App.—Dallas 1982, no writ); *Matter of G.M.P.*, 909 S.W.2d 198 (Tex. App.—

Houston [14th Dist.] 1995, no writ); *Miller v. State*, 757 S.W.2d 880 (Tex. App.—Dallas 1988, writ ref'd)))

In making these objections, however, Fears misapplies the applicable standard. "Federal habeas relief is 'not a substitute for ordinary error correction through appeal.' *Adekeye v. Davis*, 938 F.3d 678, 683 (5th Cir. 2019) (quoting *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011)).[3] "Because the state court has already adjudicated [Fears'] ineffective-assistance claim on the merits, he must show that the court's no-prejudice decision is 'not only incorrect but 'objective[ly] unreasonable". *Id.* at 684 (quoting *Maldonado v. Thaler*, 625 F.3d 229, 236 (5th Cir. 2010)). To make this showing, Fears must demonstrate that "every reasonable jurist would conclude that it is reasonabl[y] likely that [he] would have fared better at trial had his counsel" provided effective assistance. *Id.* And because the Texas Court of Criminal Appeals did not explain its rationale for its no-prejudice decision, the Court must "gather the arguments and theories that could support the state court's ultimate decision and ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with Supreme Court precedent." *Thomas v. Vannoy*, 898 F.3d 561, 568-69 (5th Cir. 2018) (cleaned up).

Rather than applying this standard, Fears effectively asks the Court to accept the conclusions of the

[3] Although *Adekeye* concerned a trial counsel's alleged failure to conduct an adequate pretrial investigation, the decision's recitation of the applicable standard applies equally to Fears' claims.

state habeas trial court. But it is the Texas Court of Criminal Appeals' decision that is the focus of this analysis. And Fears does not show either that the state high court's application of *Strickland*, including its implicit disagreement with the lower-court decision as to the prejudice prong, was objectively unreasonable, or that every fairminded jurist would conclude that the decision was inconsistent with Supreme Court precedent applying *Strickland.* Fears also objects that the Magistrate Judge did not consider all of the evidence before the Texas Court of Criminal Appeals. But governing law only requires that a court gather the arguments and theories that *could have* supported the state high court's decision. The Magistrate Judge did so, and the Court finds his analysis sound. In addition, Fears' citation to state court decisions concerning the prejudicial admission of opinion testimony does not help him, as those cases all concerned direct appeals rather habeas petitions applying *Strickland.*

For these reasons, Fears' objections to the Report and Recommendation are overruled.

II. Ineffective Assistance at Sentencing

With respect to the portion of the Report and Recommendation that addresses the alleged ineffective assistance of counsel at Fears' sentencing hearing, only the Government objects. Specifically, the Government agrees with the Magistrate Judge's conclusion that Fears suffered no prejudice from any ineffective assistance, but contends that the Magistrate Judge did not

apply the appropriate standard. According to the Government, the Magistrate Judge applied a standard appropriate for claims concerning alleged ineffective assistance during the guilt-or-innocence phase, rather than for claims arising from sentencing proceedings. (Resp. Objs., Doc. 21, 2)

The Court agrees on both points: The Magistrate Judge did not rely on the standard that applies specifically to claims concerning sentencing proceedings, but ultimately, he reached the correct conclusion. The Court sustains the Government's objection as it pertains to the applicable standard.

In his Petition for Habeas Corpus, Fears alleges that he received ineffective assistance of counsel at sentencing when his counsel failed to object to the prosecutor's arguments. The Texas Court of Criminal Appeals decided the issue against Fears based on the prejudice prong of the *Strickland* analysis. Fears then filed the instant habeas action. In this posture, "[t]he pertinent inquiry is whether the state court reasonably concluded that, absent the [counsel's deficient representation], there was no reasonable probability that [Petitioner's] sentence[ ] would have been significantly less harsh." *Charles v. Thaler*, 629 F.3d 494, 499 (5th Cir. 2011) (citing *Spriggs v. Collins*, 993 F.2d 85, 88 (5th Cir. 1993)); *see also Dale v. Quarterman*, 553 F.3d 876, 880 (5th Cir. 2008).[4] "A reasonable probability is a

[4] In contrast, the Report and Recommendation recites the standard as follows: "In order to be entitled to relief on this claim, Fears must demonstrate that there is a reasonable probability that, if [an objection] had been made and denied, the Texas Court

probability sufficient to undermine confidence in the outcome." *Charles*, 629 F.3d at 499 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). Relevant factors include the defendant's actual sentence, the possible sentencing range and the placement of the actual sentence within that range, and any relevant mitigating or aggravating circumstances. *United States v. Segler*, 37 F.3d 1131, 1136 (5th Cir. 1994).

The Magistrate Judge summarized the grounds and legal theories that the Texas Court of Criminal Appeals could have relied upon in concluding that, assuming Fears' counsel erroneously failed to object to the prosecutor's arguments at sentencing, Fears nevertheless suffered no prejudice under *Strickland*. Based on this record and the applicable law, the Court concludes that Fears fails to show that the state high court acted unreasonably in determining that there is no reasonable probability that his sentence would have been significantly less harsh absent the alleged errors by his counsel.

III. Conclusion

The Court **Adopts in Part and Declines in Part** the Report and Recommendation, as explained in this Order. It is:

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of Criminal Appeals would have reversed his conviction and sentence on appeal." (Report, Doc. 19, 16 (quoting *Henderson v. Cockrell*, 333 F.3d 592, 6o1-02 (5th Cir. 2003))

ORDERED that Respondent Lorie Davis's Motion for Summary Judgment (Doc. 11) is **GRANTED**; and

ORDERED that Petitioner Ronald Blake Fears' Petition for a Writ of Habeas Corpus: 28 U.S.C. § 2254 is **DENIED**.

In addition, after reviewing the Petition for Writ of Habeas Corpus and the applicable law, the Court finds that no outstanding issue would be debatable among jurists of reason, and that Fears fails to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Accordingly, the Court **DENIES** the request for a Certificate of Appealability.

The Clerk of Court is directed to close this matter.

SIGNED this 20th day of August, 2020.

/s/ Fernando Rodriguez, Jr.
Fernando Rodriguez, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

RONALD BLAKE FEARS, Petitioner,	§	
VS.	§	CIVIL ACTION
LORIE DAVIS,	§	NO. 1:19-CV-184
Respondent.	§	

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

(Filed Jul. 2, 2020)

On September 26, 2019, Petitioner Ronald Blake Fears filed a petition for writ of habeas corpus by a person in state custody, pursuant to 28 U.S.C. § 2254. Dkt. No. 1.

On January 17, 2020, Respondent Lorie Davis, in her official capacity as Director of the Correctional Institutions Division ("the State") filed a motion for summary judgment. Dkt. No. 11. Fears filed a response to the motion for summary judgment. Dkt. No. 12.

After reviewing the record and the relevant caselaw, it is recommended that the motion for summary judgment be granted and the petition for writ of habeas corpus be denied. The state court acted reasonably when it denied Fears's claims to relief.

I. Background

A. Factual Background

On direct appeal, the Thirteenth District Court of Appeals of Texas made specific factual findings. Fears v. State, 479 S.W.3d 315 (Tex. App. 2015). As provided by law, the court sets forth and adopts those findings.[1] Thus, all of the facts, unless otherwise indicated, are quoted from the state Court of Appeals decision, changing only the formatting and headings, but keeping all footnotes.

1. Initial Outcry

During the weekend of October 2, 2011, C.T.,[2] the minor complainant in this case, was sleeping over at the home of her friend Chesney St. John (Chesney) and helping to babysit Chesney's younger siblings. At the time, Chesney was sixteen years old and C.T. was fourteen years old.[3] C.T. confided to Chesney that C.T. needed help telling something to C.T.'s mother, which C.T. evidently found difficult to discuss. Chesney

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[1] Any factual findings made by the state court are "presumed to be correct," unless the petitioner can show "by clear and convincing evidence" that they were incorrect. Norris v. Davis, 826 F.3d 821, 827 (5th Cir. 2016), cert. denied, 137 S. Ct. 1203, 197 L. Ed. 2d 250 (2017) (citing 28 U.S.C. § 2254(e)(1)). Fears has raised no such challenge. Indeed, Fears has not challenged any specific factual findings by the state court. Accordingly, the Court adopts the factual findings of the state court.

[2] C.T. testified under this pseudonym in the trial court. We will continue to refer to her by it in an effort to protect her privacy.

[3] Chesney was eighteen years old at the time of the trial.

testified that C.T. typed a message into the text message function of her phone, showed Chesney what she wished to tell her mother, and then erased it. According to Chesney, the message revealed that C.T. was being sexually abused by appellant, her stepfather. Chesney further testified that she learned that the abuse began when C.T. was eight years old. Chesney called her parents, who returned to the house. Chesney first repeated some of C.T.'s statements to Chesney's parents because C.T. was crying too much to speak.

Chesney's mother, Natalie, questioned C.T. after Chesney finished speaking and testified to C.T.'s responses at trial.[4] Natalie testified that C.T. stated that appellant forced her to perform oral sex on him and appellant performed oral sex on C.T. The most recent abuse occurred one week earlier. C.T. told her that the abuse occurred in her parents' bedroom on multiple occasions, and on one occasion, appellant attempted to vaginally penetrate her as she lay naked on the bed but stopped after she curled into a fetal position and began to cry. Natalie called the San Benito Police Department; she and Chesney accompanied C.T. to the police station and waited while C.T. gave a statement to Officer Carlos Andrade.

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[4] The trial court certified Natalie as the outcry witness under article 38.072 because she was the first person older than eighteen years to whom C.T. made a statement about the abuse. See TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(a)(3).

2. Statement to San Benito Police

Officer Andrade testified that he learned from his interview with C.T. that appellant "was only touching [C.T.'s] private areas" and that he had not penetrated her with his fingers or forced her to perform oral sex. However, Officer Andrade further testified that he did not determine before conducting the interview whether C.T. understood the terms "penetration" and "oral sex." Chesney testified that C.T. did not know the meaning of the term "oral sex" until she and C.T. spoke after C.T. gave a statement to Andrade. Chesney testified that after explaining the term, she believed that appellant had forced C.T. to perform oral sex. Andrade also testified that C.T. confirmed that the abuse began when she was eight years old. Andrade testified that he felt that there was enough evidence to determine that a crime had been committed and contacted Child Protective Services (CPS).

3. Statement to CPS Investigator

CPS Investigator Francisco Lopez testified on direct examination that he was assigned to the case after CPS received reports from Chesney and Natalie and the San Benito Police. On Sunday, October 3, 2011 (the day after C.T. first spoke to Chesney), Lopez and another CPS investigator went to Chesney and Natalie's home to interview C.T. Lopez testified that they would normally bring a child complainant for a forensic interview at Maggie's House, the Children's Advocacy Center, but it was closed that day. Lopez personally

interviewed C.T. and made an audio recording of the interview, which we will refer to as the "Lopez Recording."

During the interview, C.T. confirmed that the abuse started when she was eight years old, that she had recently learned the meaning of the term "oral sex" from Chesney, that appellant had forced her to perform oral sex, and that appellant had performed oral sex on her. C.T. clarified to Lopez that she told Officer Andrade that he did not force her to perform oral sex because she did not know the meaning of the term until she spoke to Chesney after giving the statement. C.T. also described the specific appearance of appellant's genitalia, including whether his pubic hair was shaved or unshaved, that he had pimples on his thighs, and that she sometimes saw "red dots" on his genital area. Lopez questioned C.T.'s mother when she arrived to pick up C.T. and testified that C.T.'s mother gave a similar description of appellant's genitalia.

Immediately prior to Lopez's testimony, appellant's counsel orally moved for a continuance to review any documents prepared by Lopez during his investigation because the documents "could be pretty voluminous." The trial court overruled the motion as premature. At the beginning of cross-examination by appellant's counsel, Lopez confirmed that he had prepared an eight-page report of his investigation, that he used a copy of the report to refresh his memory prior to testifying, and that he had not provided the report to the State, the trial court, or appellant because it was confidential by law. See TEX. FAM. CODE § 261.201.

Appellant's counsel moved under Texas Rule of Evidence 615 that the court order Lopez to turn over the report and orally moved for a continuance to give him time to review the report before using it to cross-examine Lopez. See TEX. R. EVID. 615. The trial judge denied both motions. At the end of Lopez's testimony, appellant's counsel again requested the report. Appellant's counsel also filed a written motion for continuance and a motion for disclosure of confidential records. The trial judge never explicitly ruled on the motions but carried them through the trial. The trial judge also ordered the State to tender the CPS files generated in the case to the court under seal. After reviewing the records in camera, the trial judge disclosed a copy of Lopez's eight-page report to the defense and read two additional pages into the record.

4. CPS Interview of Younger Sister

Lopez briefly interviewed B.F., C.T.'s younger sister, on the same day as his original interview with C.T. Lopez also made an audio recording of that interview. At trial, the State called B.F. as a witness. During the State's direct examination, B.F. denied that she had ever told Lopez that appellant and C.T. were alone "many times" in her parents' room with the door closed. The State offered into evidence a portion of the audio recording of Lopez's interview with B.F. that was inconsistent with this testimony. See TEX. R. EVID. 613. The trial court judge admitted that portion of the statement into evidence over appellant's objections. At the end of the State's examination, B.F. admitted that

her mother had told her what to say during her trial testimony.

5. Second Interview with CPS

The day after the initial interviews, Lopez took C.T. for a forensic interview at Maggie's House. Lopez described C.T.'s interview, which we discuss in detail below, as containing more details, but consistent with C.T.'s prior statements. Following the interview, Detective Manuel Cisneros decided to file charges against appellant.

6. Testimony at Trial

C.T. testified on direct examination that the first incident of abuse occurred when she was eight years old and appellant touched the surface of her vagina with his fingers. She remembered at least one other incident of appellant doing similar acts around the same time period. C.T. testified that the abuse escalated in "stages." On subsequent occasions, appellant would "play with my nipples or my boobs. He'd suck on them or he'd put his mouth to my vagina." C.T. further testified that appellant also forced her to perform oral sex on him more than ten times. She testified that appellant actually tried to insert his penis into her vagina on two occasions, in contrast to the single incident that she described to Natalie, Chesney, Officer Andrade, Lopez, and the interviewer at Maggie's House. C.T. explained that at the time of her initial outcry, her

"nerves were running very thin, and like, I was not thinking fully."

C.T. mentioned during direct examination that she gave a statement to Lopez prior to the interview at Maggie's House. At the end of the State's direct examination, appellant objected and requested that the court disclose any statements C.T. gave to CPS. After an in camera review of the sealed CPS files, the trial judge disclosed the existence of two audio files of C.T.'s interview with Lopez to all parties. The trial judge denied appellant's motion for continuance but gave appellant's counsel time to listen to the recordings before proceeding with the trial.[5] The State moved on redirect to introduce a portion of the video recording of C.T.'s interview at Maggie's House. The State argued that it was admissible to counteract a false impression of C.T.'s tendency to lie that was left in the jurors' minds by counsel's cross-examination. See TEX. R. EVID. 801(e)(1)(c). The trial court admitted that portion of the video over appellant's objections.[6]

Fears was indicted for continuous sexual abuse of a child; aggravated sexual assault of a child; sexual assault of a child; and, three counts of indecency with a child via sexual contact. Dkt. No. 13-11, pp. 1229-1230.[7] The aggravated sexual assault of a child charge was

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[5] The audio files run approximately twenty-five minutes in total.

[6] The direct quotation of facts, taken from the Thirteenth District Court of Appeals, ends here.

[7] The page citations refers to the Bates-stamped number on the bottom right of the page of the identified docket number.

later "abandoned." Dkt. No. 13-8, p. 1141. The continuous sexual abuse of a child charge carried a minimum sentence of 25 years and a maximum sentence of 99 years. TEX. PENAL CODE 21.02(h). The sexual assault of a child and the indecency with a child charges each carried a minimum sentence of two years and a maximum penalty of 20 years of imprisonment. TEX. PENAL CODE §§ 21.11(d); 22.011(f); 12.33(a).

The jury found Fears guilty on all pending counts. Fears chose to have the trial judge, rather than the jury, assess his punishment.

At the sentencing hearing, the former family babysitter testified that Fears repeatedly had sexual relations with her, during the summer of 2008, when she was 16 years old. Dkt. No. 13-8, pp. 1102-09. She testified that Fears called her into his bedroom and told her that he needed to discuss something with her; she assumed that the conversation would be about "something happened that I need to be aware of for the kids." Id, p. 1105. Once she entered the room, he "started trying to kiss me and stuff like that and take off my clothes," and she "didn't try to fight back." Id. She said that they "had sex" and that he would have sex with her "almost every day during the whole summer" that she babysat his children. Id., p. 1106.

The judge also considered a letter written by C.T., the victim. In that letter, the victim asked that the statutory minimum sentence of 25 years be imposed. Dkt. No. 13-8, p. 1135.

In pronouncing the sentence, the trial judge explained his reasoning as follows:

> I want you to know that I've taken into consideration [C.T.'s] letter. I think it's written by her, it's in her language and I've taken into consideration. However, this is a child that the court, the jury, found that you had preyed on for quite some time. Apparently, it's not the only child you have preyed on, and whereas I'm going to take every consideration to [C.T.'s] letter, I'm not going to give you life, but I am going to sentence you to 50 years in the Texas Department of Corrections Institutional Division and I will give you credit for time served. Thank you, sir.

Dkt. No. 13-8, p. 1140.

Accordingly, Fears was sentenced to 50 years of imprisonment for the continuous sexual abuse of a child. Dkt. No. 13-8, p. 1140. As to the convictions for sexual assault of a child and indecency with a child, Fears was sentenced to 20 years of imprisonment as to each charge. Id., p. 1141. All of the sentences were to run concurrently. Id.

B. Direct Appeal

On direct appeal, Fears raised fifteen issues, which the Court restates as the following eleven issues: (1) the trial court abused its discretion by denying several motions for a continuance to review new evidence; (2) the trial court erred when it did not order the State to

produce a copy of Lopez's report; (3) the State committed Brady violations; (4) the State did not lay the proper predicate before impeaching B.F. with her prior inconsistent statement; (5) the trial court erred by not issuing a limiting instruction regarding the audio recording of B.F.'s interview; (6) the video recording of C.T.'s interview should not have been admitted into evidence; (7) the State elicited improper opinion testimony that C.T. was telling the truth; (8) the trial court erred when it prohibited Fears from calling the justice of the peace as a fact witness as to why the judicial officer refused to sign a probable cause affidavit; (9) the trial court erred when it overruled Fears's objections to Natalie's testimony that she warned her daughter not to be in the pool with Fears; (10) the trial judge and State made improper comments during voir dire; (11) the cumulative effect of all of the errors required a new trial. Fears, 479 S.W.3d 315.

On April 23, 2015, the Thirteenth District Court of Appeals issued an opinion, affirming Fears's conviction. Id. The appellate court specifically rejected each and every claim for relief. Id. As relevant here, the appellate court held that Fears waived any claim of error as to the improper opinion testimony, because his attorney did not contemporaneously object to that testimony. 479 S.W.3d at 334-35.

On November 28, 2015, the Texas Court of Criminal Appeals refused Fears's petition for discretionary review. Dkt. No. 13-27, p. 1973.

No petition for writ of certiorari was filed with the Supreme Court of the United States.

D. State Habeas Proceedings

On September 28, 2016, Fears filed an application for a writ of habeas corpus in the Court of Criminal Appeals of Texas. Dkt. No. 13-28, p. 1977. In his petition, Fears raised two issues: (1) counsel was ineffective for failing to object to the opinion testimony of several witnesses that C.T. was telling the truth; and (2) counsel did not make proper objections to several arguments made by the prosecutor at sentencing, which failed to preserve the issues for appellate review. Id. at 1980-84.

On February 21, 2017, the trial judge issued findings of fact and conclusions of law, finding that counsel rendered effective assistance and that Fears was not entitled to relief. Dkt. No. 13-28, pp. 2150-59. As to the claims regarding the lack of objections at sentencing, the trial judge found that any error was harmless. Id., p. 2158.

On June 28, 2017, the Court of Criminal Appeals issued an order, remanding the case to the trial court. Ex parte Fears, No. WR-86,519-01, 2017 WL 3380040, at *1 (Tex. Crim. App. June 28, 2017). The appellate court ordered the trial court to "specifically address Applicant's claims that counsel was ineffective at the guilt stage." Id.

On September 22, 2017, the trial judge issued new findings of fact and conclusions of law, which reached the same conclusions as the initial findings. Dkt. No. 13-32, pp. 2214-2225.

On November 8, 2017, the Court of Criminal Appeals again remanded the case to the trial court, requiring an evidentiary hearing. Ex parte Fears, No. WR-86,519-01, 2017 WL 5167001, at *1 (Tex. Crim. App. Nov. 8, 2017).

On November 28, 2017, the trial judge recused himself. Dkt. No. 14-1, p. 2243. A new judge was assigned to the case. Id., p. 2244.

On March 28, 2018, the second trial court judge issued findings of fact and conclusions of law. Dkt. No. 14-1, pp. 2269-2276. This judge found that counsel rendered effective assistance during the guilt phase of the trial. Id., p. 2275. This judge, however, found that the failure to object to prejudicial arguments, during the punishment phase, was constitutionally ineffective and recommended that Fears receive a new sentencing hearing. Id., p. 2276.

On October 24, 2018, the Court of Criminal Appeals again remanded the case to the trial court. Ex parte Fears, No. WR-86,519-01, 2018 WL 7570466, at *1 (Tex. Crim. App. Oct. 24, 2018). The trial court was ordered to "specifically determine whether counsel was deficient for failing to file a motion in limine, failing to object to, and/or eliciting improper opinion testimony at the guilt stage, as Applicant contends in his first ground. He shall then determine whether, but for

counsel's alleged deficient conduct, taken as a whole, there is a reasonable probability the result at guilt would have been different." Id.

On November 1, 2018, the second judge recused himself. Dkt. No. 14-13, p. 2415. On that same day, a senior judge was assigned to the matter. Id., p. 2416.

On February 27, 2019, the third trial court judge issued findings of fact and conclusions of law. Dkt. No. 14-13, pp. 2476-81. This judge found that Fears was entitled to relief on both of his claims. Dkt. Id. Thus, three trial court judges in the state system decided matters related to this case and all three reached different conclusions.

On July 3, 2019, the Court of Criminal Appeals denied the petition for writ of habeas corpus. Ex parte Fears, No. WR-86,519-01, 2019 WL 2870316, at *1 (Tex. Crim. App. July 3, 2019). The Court's analysis was a single sentence: "After reviewing the record, we conclude that Applicant has not shown that he was prejudiced." Id.

E. Federal Habeas Petition

On August 24, 2018, Fears filed a petition for writ of habeas corpus in this Court. Dkt. No. 1. In his petition, Fears raised the same two claims that he raised in his state habeas petition.

On January 17, 2020, the State timely filed a motion for summary judgment. In that motion, the state argued that Fears has not shown that the state

appellate court, i.e. the last reasoned decision in the state courts, unreasonably applied federal law in denying relief. Dkt. No. 11.

On January 20, 2020, Fears filed a response to the motion for summary judgment. Dkt. No. 12.

II. Applicable Law

A. Summary Judgment

Summary judgment pursuant to Rule 56(c) is appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

All inferences are made and doubts are resolved in favor of the nonmoving party. Dean v. City of Shreveport, 438 F.3d 448, 454 (5th Cir. 2006). Despite those inferences, hearsay is not competent summary judgment evidence. Martin v. John W. Stone Oil Distributor, Inc., 819 F.2d 547, 549 (5th Cir. 1987).

Summary judgment is an appropriate vehicle through which to resolve a habeas petition – including challenges based upon procedural grounds – where the facts otherwise support such resolution. Goodrum v. Quarterman, 547 F.3d 249, 255 (5th Cir. 2008); O'Veal v. Davis, 664 F. App'x 355, 356 (5th Cir. 2016).

B. Section 2254

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a prisoner convicted in a state court may challenge his conviction to the extent it violates "the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Accordingly, only violations of the United States Constitution or federal law are subject to review by this Court under § 2254.

In conducting such a review, a federal district court:

> may not issue a writ of habeas corpus for a defendant convicted under a state judgment unless the adjudication of the claim by the state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

> determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding."

Riddle v. Cockrell, 288 F.3d 713, 716 (5th Cir. 2002) (quoting 28 U.S.C. § 2254(d)(1)(2))

"A decision is contrary to clearly established federal law under § 2254(d)(1) if the state court (1) arrives at a conclusion opposite to that reached by the Supreme Court on a question of law; or (2) confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and reaches an opposite result." Simmons v. Epps, 654 F.3d 526, 534 (5th Cir. 2011) (quoting Williams v. Taylor, 529 U.S. 362, 405 (2000)) (cleaned up).[8]

"The state court makes an unreasonable application of clearly established federal law if the state court (1) identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts; or (2) either unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses

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[8] "Cleaned up" is a parenthetical that signals to the reader that the author "has removed extraneous, non-substantive clutter such as brackets, quotation marks, ellipses, footnote signals, internal citations or made un-bracketed changes to capitalization," in order to make the quotation more readable, but has not altered the substance of the quotation. Na v. Gillespie, 2017 WL 5956773, at *3, 234 Md. App. 742, 174 A.3d 493 (Md. Ct. Spec. App. Dec. 1, 2017); see also Flores-Abarca v. Barr, 937 F.3d 473, 479-81 (5th Cir. 2019) (using "cleaned up").

to extend that principle to a new context where it should apply." Simmons, at 534 (quoting Williams, at 407) (cleaned up).

Additionally, the AEDPA requires that federal law be "clearly established" "as articulated by the Supreme Court." Woodfox v. Cain, 609 F.3d 774, 800 n. 14 (5th Cir. 2010). A decision by a federal appellate court "even if compelling and well-reasoned, cannot satisfy the clearly established federal law requirement under § 2254(d)(1)." Salazar v. Dretke, 419 F.3d 384, 399 (5th Cir. 2005).

In deciding § 2254 cases, the Court looks to the last reasoned decision of the state courts, which is "the last related state-court decision" that provides "a relevant rationale" for their decision. Wilson v. Sellers, ___ U.S. ___, 138 S. Ct. 1188, 1192 (2018). When "a higher state court has ruled on a petitioner's motion on grounds different than those of the lower court, we review the higher court's decision alone." Salts v. Epps, 676 F.3d 468, 479 (5th Cir. 2012).

C. Ineffective Assistance

To establish ineffective assistance of counsel, a petitioner must demonstrate: (1) that his counsel's performance was objectively unreasonable, rendering it deficient; and (2) that the deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 689-94 (1984). To merit relief, the petitioner must meet both prongs. Id. In contrast, "a court need not address both prongs of the conjunctive Strickland

standard, but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test." Amos v. Scott, 61 F.3d 333, 348 (5th Cir. 1995).

To satisfy the first prong, the petitioner must establish that counsel's performance was deficient. "[T]he proper measure of attorney performance is reasonableness under prevailing professional norms." U.S. v. Molina-Uribe, 429 F.3d 514, 519 (5th Cir. 2005). Courts will not "audit decisions that are within the bounds of professional prudence." Id. at 518. To wanant relief, because of ineffective assistance of counsel, counsel's performance must be so deficient that it "renders the result of the . . . proceeding fundamentally unfair." Lockhart v. Fretwell, 506 U.S. 364, 372 (1993).

Even if counsel's performance was deficient, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test . . . and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." Strickland, 466 U.S. at 693 (internal citation omitted). A petitioner must establish that the error prejudiced the outcome of his trial. A petitioner establishes prejudice where he proves "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. To merit relief, the petitioner must show an error that undermines confidence in the reliability of the verdict. Id. At the same time, "any amount of

actual jail time has Sixth Amendment significance." Tutt v. Cockrell, 273 F.3d 1107 (5th Cir. 2001).

Furthermore, establishing that "a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult." Harrington v. Richter, 562 U.S. 86, 105 (2011). "Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 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. (emphasis added). Thus, the question is whether the state court was unreasonable in its resolution of the issue presented, not whether the state court may have been wrong.

"[R]eview of the state court's resolution of . . . [an] ineffective-assistance-of-counsel claim is doubly deferential . . . since the question is whether the state court's application of the Strickland standard was unreasonable." Druery v. Thaler, 647 F.3d 535, 539 (5th Cir. 2011) (internal quotations and citations omitted). Thus, in order to succeed on a § 2254 habeas claim, based upon ineffective assistance of counsel, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id.

III. Analysis

The Court begins by noting that, in the § 2254 context, it must determine whether the last state court decision unreasonably applied Supreme Court precedent or was based upon an unreasonable application of the facts. 28 U.S.C. § 2254(d). In this case, the last state court decision was the Court of Criminal Appeals decision denying Fears's habeas petition application, which merely found that Fears had not established prejudice as to either of his ineffective assistance claims. The Court of Criminal Appeals opinion was the last state court decision to provide a relevant rationale – namely that Fears was not prejudiced by any errors – for the claims he is making in this Court. Wilson, 138 S.Ct. at 1192. Because the Court of Criminal Appeals holding does not precisely lay out why it held that Fears was not prejudiced, the Court must "gather the arguments and theories that could support the state court's ultimate decision and ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with Supreme Court precedent." Thomas v. Vannoy, 898 F.3d 561, 568-69 (5th Cir. 2018) (cleaned up). The fact that the state trial court reached a different conclusion does not factor into this analysis. Salts, 676 F.3d at 479.

Under these circumstances – where the Texas Court of Criminal Appeals decides an ineffective assistance claim solely on the prejudice prong – this Court "review[s] the deficient performance prong [. . .] de novo and the prejudice prong under the more deferential AEDPA standard." White v. Thaler, 610 F.3d 890,

899 (5th Cir. 2010). If a case can be disposed of, solely on the prejudice prong, the Courts have been "urged" to do so. Bouchillon v. Collins, 907 F.2d 589, 595 (5th Cir. 1990). Accordingly, the Court will focus upon the prejudice prong in assessing both of Fears's claims.

A. Ineffective Assistance During Guilt Phase

Fears asserts that trial counsel was ineffective for failing to prevent several prosecution witnesses from opining that C.T. was telling the truth. The state appellate court did not unreasonably apply federal law in deciding that Fears did not demonstrate prejudice.

Fears must establish that there is a reasonable probability that the outcome of the trial would have been different, but for counsel's errors. Adekeye v. Davis, 938 F.3d 678, 682 (5th Cir. 2019). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. In order to be entitled to relief on a § 2254 petition, Fears must demonstrate "that every fairminded jurist would agree there was prejudice." Id. at 683 (emphasis added). Fears has not met this standard.

The victim's credibility was the overriding issue at trial. As might be expected, there was no physical evidence to substantiate her claims. The jury heard directly from the victim, including cross-examination. Dkt. No. 13-5, pp. 724-845; Dkt. No. 13-6, pp. 86398. The jury heard about her propensity to lie, including a months-long deception of a teacher at her school in

which the victim pretended to be blind in order to get special treatment. Dkt. No. 13-6, pp. 969-70. At the same time, the jury watched the victim's interview with CPS and was able to compare her in-court testimony with that video to ascertain if there were any inconsistencies. Dkt. No. 13-6, pp. 887. The jury heard testimony from witnesses – both for the prosecution and the defense – regarding the victim's credibility. The victim's mother – who may have instructed the younger daughter, B.F., to incorrectly testify about the encounters between C.T. and Fears – testified that she believed that Fears was innocent and that her daughter was lying. Dkt. No. 13-6, pp. 98081.

Given these facts, the Court cannot say that every fairminded jurist would find that the introduction of testimony from several prosecution witnesses, that C.T. was telling the truth, was prejudicial under Strickland. The jury heard directly from C.T. and was able to formulate its own opinion of her credibility, especially in comparison to her recorded interview. The opinion testimony of a few prosecution witnesses constituted very small pieces of the credibility puzzle. A reasonable jurist could easily conclude that the jury would have likely reached the same verdict, even if the opinion testimony had been excluded.

Accordingly, Fears has not met the high standard necessary for relief as to this claim and it should be denied.

B. Ineffective Assistance at Sentencing

Fears argues that counsel was ineffective for failing to properly object to the prosecutor's arguments at sentencing, entitling him to a new sentencing hearing. Again, Fears fails to show that every fairminded jurist would find that he was prejudiced by counsel's alleged failures. Adekeye 938 F.3d at 683.

Fears argues that the prosecution made several improper arguments during the sentencing hearing, including that "Fears is statistically much more likely to reoffend, that the community commented in the media that it wants him to receive life sentences, and that a jury gave life sentences in the first continuous sexual abuse case tried in the county." Dkt. No. 2, p. 27.[9] Fears asserts that if counsel had properly objected to these arguments and been overruled, "there is a reasonable probability that an appellate court would have vacated the sentences." Id., pp. 27-28. The crux of Fears's argument is that because counsel did not properly object and obtain adverse rulings, the issues were waived for appeal and that proper objections would have resulted in a reversal of the sentence on appeal.

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[9] The Court notes that it is not holding that the prosecutor's arguments were acceptable. The argument that "the community has been commenting on all of the news articles saying they want life" is very dangerous. Dkt. No. 13-8, p. 1139. The finder of fact at the punishment stage – whether a jury or a judge – should not be pressured to meet the demands of the community. Rivera v. State, 82 S.W.3d 64, 69 (Tex. App. 2002). That argument lends itself to an invitation for mob rule. That can never be the case. Indeed, had that argument been made to the jury, the outcome of this case may be very different.

In order to be entitled to relief on this claim, Fears must "demonstrate that there is a reasonable probability that, if [an objection] had been made and denied, the Texas Court of Criminal Appeals would have reversed his conviction and sentence on appeal." Henderson v. Cockrell, 333 F.3d 592, 601-02 (5th Cir. 2003). To ascertain if Fears has met the required standard, the Court must examine the prosecutor's arguments within the context of the overall sentencing hearing.

The sentencing in this case was done by the presiding judge, as opposed to having the jury determine the sentence. As to the conviction for continuous sexual abuse of a child, Fears faced a minimum sentence of 25 years and a maximum sentence of 99 years. TEX. PENAL CODE 21.02(h).

The victim – C.T. – wrote a letter to the judge, asking that Fears be sentenced to the statutory minimum sentence of 25 years. Dkt. No. 13-8, p. 1135. At the sentencing hearing, the former family babysitter testified that Fears repeatedly had sexual relations with her when she was 16 years old. Dkt. No. 13-8, pp. 1103-08. The prosecutor's arguments had little, if any, weight as considered by the trial judge. Indeed, when defense did object during the sentencing hearing, the trial judge replied, "There is no jury. It's all before the bench. You know, just to get to the end . . . [identifying the prosecutor]." Dkt. No. 13-8, p. 1139.

In pronouncing the sentence, the trial judge stated that he was giving "every consideration to [C.T.]'s letter" asking for leniency. Dkt. No. 13-8, p. 1140. But he

also told Fears that C.T. was "not the only child that you have preyed on." Id. The trial judge stated that he would not give Fears a life sentence, apparently referring to a 99-year sentence. Id. Rather, he would sentence Fears to 50 years imprisonment on the continuous sexual abuse of a child charge and 20 year sentences on all other counts, to be served concurrently. Id., pp. 1140-42.

Fears's argument is that if counsel had properly objected to all of the prosecutor's improper arguments, then appellate counsel could have raised those arguments on direct appeal and would have won him a new sentencing hearing. Fears never addresses the fact that the allegedly improper arguments were made to the trial judge rather than before the jury. Texas courts presume that trial judges, when sitting as the finder of fact, are not swayed by improper arguments. Trevino v. State, No. 13-09-00511-CR, 2010 WL 3279492, at *9 (Tex. App.–Corpus Christi 2010) (citing Lopez v. State, 725 S.W.2d 487, 490 (Tex. App.–Corpus Christi 1987, no pet.)). There is no evidence in the record that the trial judge was swayed by the improper arguments. Rather, the trial judge almost expressly limited his consideration of sentencing factors to the victim's desire for the minimum sentence and the fact that C.T. may not have been the only victim.

The state appellate court could have reasonably concluded that Fears would not be entitled to a new punishment phase because the prosecutor's allegedly improper comments were harmless error. Fears has not overcome the presumption that the trial judge

ignored the prosecutor's improper arguments. Absent that showing, there is no reasonable probability that a Texas appellate court would have reversed his sentence.

Accordingly, this claim should be denied.

IV. Recommendation

It is recommended that the motion for summary judgment filed by Respondent Lorie Davis be granted. Dkt. No. 11. It is further recommended that Ronald Blake Fears's petition for writ of habeas corpus by a person in state custody pursuant to 28 U.S.C. § 2254 be denied.

A. Certificate of Appealability

Unless a circuit justice or judge issues a Certificate of Appealability ("COA"), a petitioner may not appeal the denial of a § 2254 motion to the Court of Appeals. 28 U.S.C. § 2253(c)(1)(A). A petitioner may receive a COA only if he makes a "substantial showing of the denial of a constitutional right." § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). To satisfy this standard, a petitioner must demonstrate that jurists of reason could disagree with the court's resolution of his constitutional claims or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further. Id. at 327; Moreno v. Dretke, 450 F.3d 158, 163 (5th Cir. 2006). "Importantly, in determining this issue, we view the

petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." Druery v. Thaler, 647 F.3d 535, 538 (5th Cir. 2011) (internal quotations omitted) (citing Barrientes v. Johnson, 221 F.3d 741, 772 (5th Cir.2000)). The district court must rule upon a certificate of appealability when it "enters a final order adverse to the applicant." Rule 11, Rules Governing § 2254 Petitions.

After reviewing Fears's § 2254 motion and the applicable Fifth Circuit precedent, the Court is confident that no outstanding issue would be debatable among jurists of reason. Although Fears's § 2254 motion raises issues that the Court has carefully considered, he fails to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Accordinpgly, it is recommended that a COA should be denied.

B. Notice to Parties

The parties have fourteen (14) days from the date of being served with a copy of this Report and Recommendation in which to file written objections, if any, with the United States District Judge. 28 U.S.C. § 636(b)(1). A party filing objections must specifically identify the factual or legal findings to which objections are being made. The District Judge is not required to consider frivolous, conclusive, or general objections. Battle v. United States Parole Comm'n, 834 F.2d 419, 421 (5th Cir. 1987).

If any party fails to timely object to any factual or legal findings in this Report and Recommendation, the

District Judge is not required to conduct a de novo review of the record before adopting those findings. If the District Judge chooses to adopt such findings without conducting a de novo review of the record, the parties may not attack those findings on appeal, except upon grounds of plain error. Alexander v. Verizon Wireless Servs., L.L.C., 875 F.3d 243, 248 (5th Cir. 2017).

DONE at Brownsville, Texas, on July 2, 2020.

/s/ Ronald G. Morgan
Ronald G. Morgan
United States Magistrate Judge

FILE COPY

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

9/6/2019
FEARS, RONALD BLAKE WR-86,519-01
Tr. Ct. No. 2012-DCR-00986-B

This is to advise that the applicant's suggestion for reconsideration has been denied without written order. Judge Newell would grant.

Deana Williamson, Clerk

RANDY SCHAFFER
ATTORNEY AT LAW
1021 MAIN ST. #1440
HOUSTON, TX 77002
* DELIVERED VIA E-MAIL *

FILE COPY

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

8/21/2019
FEARS, RONALD BLAKE WR-86,519-01
Tr. Ct. No. 2012-DCR-00986-B

Pursuant to Texas Rules of Appellate Procedure, Rule 79.2(d), applicant's Motion for Reconsideration/ Rehearing has been dismissed.

Deana Williamson, Clerk

RANDY SCHAFFER
ATTORNEY AT LAW
1021 MAIN ST. #1440
HOUSTON, TX 77002
* DELIVERED VIA E-MAIL *

[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-86,519-01

EX PARTE RONALD BLAKE FEARS, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 2012-DCR-00986-B IN THE 138TH DISTRICT COURT FROM CAMERON COUNTY

***Per curiam*. NEWELL and WALKER, JJ., dissent.**

ORDER

Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for a writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of one count of continuous sexual abuse of a child, one count of sexual assault, and three counts of indecency with a child. He was sentenced to imprisonment for one term of fifty years and four terms of twenty years. The Thirteenth Court of Appeals affirmed his convictions.

Fears v. State, No. 13-13-00111-CR (Tex. App.—Corpus Christi Apr. 23, 2015) (not designated for publication).

Applicant contends that trial counsel was ineffective at the guilt and punishment stages of trial. The trial court concluded that trial counsel was deficient and Applicant was prejudiced and recommended that we grant Applicant a new trial on guilt or, in the alternative, on punishment. After reviewing the record, we conclude that Applicant has not shown that he was prejudiced. Relief is denied.

Filed: July 3, 2019
Do not publish

[SEAL]

IN THE DISTRICT COURT
OF CAMERON COUNTY, TEXAS
THE 138TH JUDICIAL DISTRICT OF TEXAS

THE STATE OF TEXAS
vs. **No. 2012-DCR-00986-B**
RONALD BLAKE FEARS **[CCA #WR-86,519-01]**
[TDCJ #1883420]

FINDINGS OF FACT, CONCLUSIONS OF LAW, RECOMMENDATION AND ORDER

(Filed Feb. 28, 2019)

The Court[1] has reviewed the post-conviction Application for Writ of Habeas Corpus filed by RONALD BLAKE FEARS, Applicant: the State's Answer; all pleadings on this proceeding; the record of the evidentiary hearing from January 12, 2018; and the record of

[1] Judge Arturo Cisneros Nelson the elected Judge of this Court presided over the trial of the case and considered Applicant's original application. After he submitted his findings of fact, conclusions of law and recommendation, the Court of Criminal Appeals remanded the cause for further proceedings. After Jude Nelson made his supplemental findings and conclusions, the Court of Criminal Appeals again remanded the application and ordered Judge Nelson to hold a live evidentiary hearing. Judge Nelson then recused himself. Former Judge Leonel Alejandro was then assigned to the case and he presided at the evidentiary hearing of January 12, 2018. Judge Alejandro concluded that counsel was not ineffective at the guilt stage but recommended that Applicant be granted a new punishment hearing based on counsel's failure to object to improper arguments. However, the Court of Criminal Appeals again remanded the Application and directed Judge Alejandro to make further findings and conclusions on the issues stated in its Order. The undersigned Judge was then assigned to the Application.

the trial of the underlying case. The Court now makes the following findings of fact and conclusions of law, Recommendation and Order.[2]

FINDINGS OF FACT

A. Facts from the Trial

1. On January 29, 2013, Applicant was convicted by the jury of continuous sexual abuse, sexual assault, and indecency with a child. Having elected to have the Court set the punishment, the Court sentenced Applicant to 50 years imprisonment for continuous sexual abuse and 20 years imprisonment for the other offenses. The sentences were imposed to run concurrently.

2. Ray Rodriguez, assisted by Victor Ramirez, represented Applicant at trial.

3. C.T., Applicant's step-daughter, testified that Applicant began to sexually abuse her when she was eight years old. (5RR 95-98). She testified that she made outcry to an older friend, Chesney St. John, when she was 14. (3RR 24, 35-40). C.T. testified that she told Chesney about the abuse because she did not want Applicant to sexually abuse B.F., her sister, who as about to turn eight. (5RR 121-23). Chesney told her mother, Natalie. C.T. then told Natalie about the sexual abuse

[2] Both Applicant and the State submitted proposed findings of fact and conclusions of law. Both used graphic or explicit language to describe the alleged offenses. I will not do likewise, but will focus on the facts specific to the issues raised by the parties.

that Applicant had committed to her. (3RR 76-77; 89-90).

4. Natalie testified that she called Child Protective Services (CPS) and took C.T. to the San Benito Police Department to make a report. (3RR 92-93). Natalie also testified that, after she explained to C.T. what oral sex is, she believed that C.T. and Applicant had engaged in oral sex. (3RR 48). On cross-examination by co-counsel Ramirez, Natalie testified that she was close enough to C.T. to believe that C.T. would not mislead her. (3RR 107).

5. C.T. told officer Carlos Andrade that Applicant had been sexually abusing her since she was eight years old. (3RR 130,139). Andrade testified that he determined that a crime occurred based solely on C.T.'s "testimony." (3RR 146-48, 153)

6. C.T. was examined at the hospital the following day. (4RR 82). She told the nurse that Applicant sexually abused her and made her sexually touch him the previous week and twice tried to sexually assault her the previous summer. (4RR 84). The exam showed no evidence of physical trauma (4RR 85-86, 103).

7. C.T. testified that Applicant sexually touched her when she was eight years old and told her that it was their secret and not to tell her mother. (5RR 95-98). He sexually touched her with his fingers and his mouth many times, and had her sexually touch him many times when she was 10 to 14 years old. (5RR 101-07, 113).

8. C.T. admitted that she had lied to her parents to get out of trouble when she was young, lied to her teachers about being blind to gain attention, and stole money and makeup from her mother. (5RR 94-95, 167,170).

9. Detective Cisneros testified for the State that he believed that a crime occurred based on C.T.'s consistent statements and her emotional reactions during the videotaped interview. (3RR 184, 194-95; 4RR 16). On cross-examination by Ramirez, Cisneros testified that he did not believe that a child would falsely accuse a parent of sexual abuse. (3RR 213).

10. CPS Investigator Lopez testified for the State that he had to determine whether he believed C.T.'s accusations and that, after he completed his investigation, he found "reason to believe" that they were true. (4RR 199-201, 217).

11. M.T., C.T.'s father, testified for the State that C.T. has "always been very adamant that she was telling the truth" about the allegations. (5RR 41-42).

12. Melinda Hockaday and Dorraine Arraiza, who taught C.T. in the sixth and seventh grades, each testified for the defense that C.T. was a compulsive liar and attention seeker who had a bad reputation at school. (6RR 56-58, 70-73). For example, C.T. pretended to be blind and said that she was transferring to a school for the blind; her teachers believed her until they observed her on security cameras. (6RR 58-60).

13. H.F., C.T.'s mother and a kindergarten teacher and Applicant's wife, testified for the defense that C.T. stole money from her and lied to her. 6RR 115, 119). C.T. did not appear to be uncomfortable around Applicant, and H.F. never saw any indication of sexual abuse. (6RR 124). C.T. became angry when Applicant would not allow her to attend a football game after she did not do the laundry. (6RR 139-40). C.T. did not like Applicant because he moved her family out of town. (6RR 94-95).

14. B.G., C.T.'s grandmother, testified for the defense, that C.T. has a history of stealing money and lying. (6RR 78, 87). C.T. did not seem depressed or scared. (6RR 87). B.G. initially believed C.T., but changed her mind because C.T. gave different versions regarding the frequency of the abuse. (6RR 83, 86, 98-99).

15. The State argued that Applicant should be convicted because C.T. did not make inconsistent statements about whether she was sexually abused, knew what sperm looks like, and knew that Applicant shaved his pubic area. (7RR 22, 52).

16. The defense argued to the jury that: Applicant should be acquitted because C.T. lied to get attention; she made inconsistent statements during various interviews; there was no medical evidence of sexual abuse; mere repetition of accusations to various people did not corroborate that she had been sexually abused; and her mother, grandmother, and teachers did not believe that she was credible. (7RR 22, 52).

17. Applicant also complained to his Rodriguez's repeated references to C.T. as the "victim" or "child victim" and to Rodriguez's failure to object when the prosecutor, Officer Andrade and Detective Cisneros also referred to C.T. as the "victim."

B. Facts from the Habeas Hearing

18. Lead counsel Rodriguez testified at the writ hearing that he only occasionally reads slip opinions from the Court of Criminal Appeals and courts of appeals and does not do so on a weekly basis. (HC RR 6-7).

19. Although Rodriguez continued to believe that Applicant is inconsistent and was wrongfully convicted, he refused to answer the questions sent to him by habeas counsel after promising to do so. (HC RR 15, 16-17).

20. Rodriguez testified that he knew before trial that it was important to exclude any opinion testimony that C.T. was telling the truth, since the use turned on her credibility. (HC RR 25-26).

21. Rodriguez agreed that opinions of Chesney St. John, Natalie St. John, Detective Cisneros, CPS Investigator Lopez and Officer Andrade that C.T. was telling the truth were inadmissible. (HC RR29, 33, 35, 37, 39).

22. Although Rodriguez filed a "form" motion in limine prior to trial, the motion did not seek to exclude opinion testimony that C.T. was telling the truth or

was truthful or was credible. He agreed that he should have included this subject in the motion and would do so if he were to retry the case. Had the trial court denied the motion, he should have objected to these opinions to preserve any error for appeal. (HC RR 31, 33, 35, 39, 40).

23. The trial court would have granted a motion in limine to exclude opinion testimony of the credibility of the victim.

24. Rodriguez agreed that he should have objected to testimony from C.T.'s father that she has "always been very adamant that she was telling the truth" and that he should have included this subject in a motion in limine. Had the trial court denied the motion, he should have objected to this testimony to preserve error for appeal. (HC RR 50, 51, 52, 54).

25. The trial court would have granted a motion in limine to exclude the father's testimony of regarding what C.T. told him.

26. Rodriguez agreed that the prosecutor's final argument at the punishment hearing before the court that (1) sexual predators statistically are four times more likely to re-offend; (2) that "the community has been commenting on all of the news articles saying they want life" for Applicant; and (3) that a Cameron County jury gave seven life sentences in the first continuous sexual abuse of a child case that that "the community and the state would expect [Applicant) to get life" were improper. He agreed that the defense should have objected to these arguments and should have

obtained rulings to preserve error for appeal. (NC RR 57-58, 59-60, 62).

CONCLUSIONS OF LAW

1. The Sixth Amendment to the United States Constitution guarantees the defendant the right to the reasonably effective assistance of counsel at trial. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

2. Applicant must show that his trial counsels' performance was deficient in that it fell below an "objective standard of reasonableness . . . under prevailing professional norms." *Strickland v. Washington*, 465 U.S. 668 (1984). Applicant must also show that his counsels' deficient performance resulted in prejudice; that is, but for counsels' errors, there is a reasonable probability that the outcome of the trial would have been different. *Id.* At 692. If counsels' deficient performance undermines the court's confidence in the verdict and/or judgment. Applicant is entitled to a new trial. *Kyles. v. Whitley*, 514 U.S. 419, 430 (1995).

3. The inadmissible opinion testimony of a detective, of a police officer, of a CPS investigator and of lay witnesses that, in essence, C.T. was telling the truth about the alleged sexual abuse made C.T. more believable than not and the State's case significantly more persuasive by improperly bolstering C.T.'s credibility in a case where her credibility was paramount. Despite defense evidence that C.T. was a liar and stole money and that there was no objective medical or scientific evidence that corroborated C.T.'s allegations, such

inadmissible and prejudicial opinion testimony greatly undercut the defense's case, abdicated the jury's responsibility to determine if C.T. was telling the truth, and deprived Applicant his right to a fair trial.

4. Defense counsel admitted that they did not file a motion in limine to exclude such opinion testimony: that they should have objected to such to such opinion evidence; and that, if they were to represent Applicant at a re-trial of the case, they would file such a motion and object to such testimony if offered. Although counsel attacked the credibility of C.T., their failure to keep out opinion testimony of her credibility fell far below an objective standard of reasonableness and greatly prejudiced Applicant's right to a fair trial.

5. But for counsel's deficient conduct, taken as a whole, there is a reasonable probability the result at guilt would have been different.

6. Counsel also failed to object to improper argument at the punishment hearing. Failing to object to such improper prejudicial argument fell below an objective standard of reasonableness and greatly prejudiced Applicant to a fair punishment hearing.

7. Although his counsel's reference to C.T. as the "victim" or "child victim" may have been unwise, Applicant's complaint that counsel did so is without merit. Similarly, his complaints that his counsel failed to object to like references to C.T. by the prosecutor, Officer Andrade and Detective Cisneros are also without merit.

RECOMMENDATIONS

1. The habeas Court recommends a new trial on the issue of guilt because counsel's objectively deficient performance undermines its confidence in the outcome of the trial. *Ex parte Overton*, 444 S.W3d 632 (Tex.Crim.App. 2014).

2. In the event a new trial is not ordered, the habeas Court further recommends a new punishment hearing because of counsel's failure to object to improper and prejudicial argument. *Andrews v. State*, 159 S.W3d 98 (Tex.Crim.App. 2005).

ORDER

IT IS ORDERED that the Clerk of this Court certify the FINDINGS OF FACT, CONCLUSIONS OF LAW, RECOMMENDATION AND ORDER of this Court to the Clerk of the Court of Criminal Appeals and that said Clerk forward a supplemental record of this proceeding beginning with all filings by the parties since the Order of the Court of Criminal Appeals dated October 24, 2018, including but not limited to each party's proposed findings of fact and conclusions of law.

The Clerk shall also send a certified copy of this Order to the Applicant, Applicant's Habeas counsel, and the State of Texas through its District Attorney.

Signed on February 27, 2019.

/s/ Jose Manuel Banales
JOSE MANUEL BAÑALES
SENIOR JUDGE PRESIDING
BY ASSIGNMENT

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