APPENDIX - A

United States Court of Appeals for the Fifth Circuit

No. 21-40370

United States Court of Appeals
Fifth Circuit
FILED
March 31, 2022
Lyle W. Cayce
Clerk

BRENT STEPHENS,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Eastern District of Texas
USDC No. 4:18-CV-103

Before SMITH, HIGGINSON, and WILLETT, *Circuit Judges*.

PER CURIAM:

Brent Stephens, Texas prisoner #01981218, seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 application. Stephens filed the application to challenge his 23-year sentence for four counts of indecency with a child by contact. In his COA motion, Stephens asserts ineffective assistance of counsel as cause for his procedurally defaulted claims. He also contends that the district court erred in denying his claims of ineffective assistance of counsel without conducting an evidentiary hearing.

To obtain a COA, Stephens must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where a district court has rejected a claim on the merits, an applicant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. When, as here, a district court denies relief on procedural grounds and, in the alternative, on the merits, the COA applicant "must show *both* that jurists of reason could debate the validity of the procedural [] ruling *and* that those same jurists could debate the validity of the merits ruling." *Cardenas v. Stephens*, 820 F.3d 197, 201 (5th Cir. 2016); *see Slack*, 529 U.S. at 484.

Stephens has failed to make the requisite showing. He abandons the claims he does not raise in his COA motion. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999). As Stephens fails to make the required showing for a COA, we do not reach the issue whether the district court erred by denying an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020), *cert. denied*, 142 S. Ct. 122 (2021).

Accordingly, Stephens's motion for a COA is DENIED.

APPENDIX - B

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

BRENT STEPHENS, #1981218	§	
	§	
VS.	§	CIVIL ACTION NOS. 4:18cv103,4:18cv104
	§	
DIRECTOR, TDCJ-CID	§	

POSTJUDGMENT ORDER

The court is in receipt of Petitioner's objections to the Report and Recommendation (Dkt. #40). A review of the docket shows that the Report and Recommendation was filed on February 22, 2021 (Dkt. #33); thus, objections were initially due by March 8, 2021. On March 20, 2021, however, Petitioner was granted an extension of time to file objections (Dkt. #36). Petitioner was instructed he may file objections no later than March 26, 2021. On March 30, 2021, having received no objections, this court issued its Final Judgment in this case (Dkt. #39). Objections were not received by the Clerk of Court until April 5, 2021. In his objections, Petitioner states he placed them in the prison mail system on March 26, 2021. Accordingly, Petitioner's objections were timely filed pursuant to the prison mailbox rule. *Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998) (the timeliness of petition for determining the effective date of the AEDPA limitations deadline depends on the date prisoner delivered his papers to prison authorities for filing). Thus, the court has conducted a *de novo* review of Petitioner's objections.

Having conducted a *de novo* review of the objections raised by Petitioner to the Report, the court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and the objections of Petitioner are without merit.

It is accordingly **ORDERED** that Petitioner's objections are **OVERRULED**. All motions not previously ruled upon are **DENIED**.

SIGNED this 12th day of April, 2021.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

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

BRENT STEPHENS, #1981218	§	
	§	
VS.	§	CIVIL ACTION NOS. 4:18cv103,4:18cv104
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Having conducted a *de novo* review of the objections raised by Petitioner to the Report, the court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and the objections of Petitioner are without merit.

It is accordingly **ORDERED** that Petitioner's objections are **OVERRULED**. All motions not previously ruled upon are **DENIED**.

SIGNED this 12th day of April, 2021.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

APPENDIX - C

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

BRENT STEPHENS, #1981218	§	
	§	
VS.	§	**CIVIL ACTION NOS. 4:18cv103,4:18cv104**
	§	
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pro Se Petitioner Brent Stephens, an inmate confined in the Texas prison system, filed petitions for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petitions were referred to the United States Magistrate Judge Kimberly C. Priest Johnson for findings of fact, conclusions of law, and recommendations for the disposition of the cases pursuant to 28 U.S.C. § 636, and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

I. PROCEDURAL BACKGROUND

Petitioner is challenging his Denton County convictions. Petitioner was convicted of three counts of indecency with a child in Cause No. F-2013-121-B, and engaging in indecency with a child in Cause No. F-2014-0742-B. He pled not guilty, but a jury found him guilty. On January 16, 2015, the jury sentenced Petitioner in Cause No. F-2013-121-B to two terms of five years for counts one and two, and ten years for count three, each to be served consecutively, with count one to commence after Petitioner served his sentence in Cause No. F-2014-0742-B. Petitioner was sentenced to ten years confinement in Cause No. F-2014-0742-B. (Dkt. # 16-20, pp. 180-95; Dkt. # 16-21, pp. 91-101).

Petitioner appealed his convictions, which were affirmed. *Stephens v. State*, Nos. 02–15–00046–CR, 02–15–00047–CR, 2016 WL 2586639, at *1 (Tex. App.—Fort Worth May 5, 2016). (Dkt. # 16-9). The Texas Court of Criminal Appeals ("TCCA") refused Petitioner's petitions for discretionary review ("PDR"). *Stephens v. State*, Nos. PD-0740-16, PD-0741-16 (Tex. Crim. App. Aug. 24, 2016). (Dkt. # 16-16). Petitioner filed two applications for state habeas corpus relief, which the TCCA denied without written order on findings of the trial court without a hearing. *Ex parte Brent Stephens,* Nos. WR-87,651-01, WR-87-651-02. (Dkt. # 16-29, Dkt. # 17-18). Petitioner filed the instant petitions on January 29, 2018. The Director filed a response arguing there are no grounds for relief. On October 9, 2018, Petitioner filed a motion to voluntarily dismiss two unexhausted claims, which this Court granted on March 13, 2019.[1] (Dkt. # 23; Dkt. # 24). On June 14, 2019, the Director filed an amended response, addressing the remaining claims after dismissal of the two unexhausted clams. Petitioner filed a reply, wherein he alleges:

1. the trial court abused its discretion by admitting evidence of extraneous offense(s) allegedly committed by Petitioner without conducting a hearing outside the presence of the jury;

2. Texas Penal Code 3.03 has been incorrectly interpreted to allow for the court to supersede the jury's determination at sentencing;

3. he was denied effective assistance of counsel because trial counsel failed to:

    a. object to the lack of a 38.37 hearing;

    b. investigate the conspiracy theory and acquire enough information to put in front of the jury;

    c. adequately convey a plea bargain and advise Petitioner to turn down a verbal one hundred and twenty day plea offer, stating he could get Petitioner

[1] The dismissed claims are: (1) the trial court abused its discretion by admitting complainant's video-recorded forensic interview (original claim one); and (2) the trial court erred in its exclusion of testimony regarding Petitioner's conspiracy theory defense (original claim three).

a misdemeanor, without advising him that the county had a ninety-eight percent conviction rate;

d. call credible witnesses, including William Stephens, Dr. Sam Roberts, and Sharon Wagner;

e. conduct pretrial investigation by failing to "interview any of the witnesses Petitioner requested that he interview;"

f. object to the State's ongoing bolstering and introduction of evidence not on record and leading the witnesses, primarily by "us[ing] the words confession, vagina, and ejaculation;"

g. impeach testimony of eye witness and expose perjury;

h. prepare for trial by failing to interview and secure any testimony or evidence as Petitioner had advised him throughout the two years that Petitioner was on house arrest; and

i. investigate extraneous offense evidence "allowing the state to put forward bad man theory with evidence that was never proven beyond a reasonable doubt to have been committed by Petitioner;"

4. the trial court abused its discretion in consistently ruling against the Petitioner in violation of the Fifth and Fourteenth Amendment by:

a. trying the two cases together "which helped the State bolster their 'bad man theory' because Petitioner had an absolute right to sever;"

b. not holding a 38.37 hearing, which allowed hearsay testimony into evidence;

c. giving the jury an improper charge in "den[ying] the Petitioner a jury determination for the State's and Court's intent to 'stack' any multiple jury imposed sentences;"

d. improperly "over[uling] the Petitioner's objection to stacking the jury imposed sentences after one

statement from both sides, stating intent to stack, 'having heard evidence in both cases;'" and

(e.) acting "without jurisdiction to cumulate sentences by solely relying on Texas Penal Code 3.03 in an effort to supersede and circumvent the jury's verdict not to cumulate;" and

5. Petitioner is actually innocent.

II. FACTUAL BACKGROUND

The appellate court described the facts as follows:

S.G. (Sarah) was born in December 2003. When Sarah was two years old, her mother S.S. (Mother) married [Stephens]. Thus, [Stephens] became Sarah's stepfather. Mother, [Stephens], Sarah, and Sarah's older brother lived in a large house in Trophy Club. The house had an indoor pool.

Sarah and [Stephens] were fond of each other, and they spent time together. Sarah referred to [Stephens] as "Daddy Brent." As Sarah grew older, because Mother worked during the day, [Stephens] became primarily responsible for Sarah's care. Although Sarah had her own bedroom, on some occasions, she would sleep in a bed between Mother and [Stephens].

When Sarah was about seven years old, on a couple of occasions, she and [Stephens] swam together while naked in the pool. During those occasions, [Stephens] sometimes held Sarah as she wrapped her legs around him.

Mother and [Stephens] divorced in 2012. When Sarah swam at [Stephens]'s apartment after the divorce, he would help her change into her swimming suit in his bathroom while closing the door to her older brother. While at the apartment, Sarah also napped with [Stephens] in his bed.

In November 2012, Mother's ex-husband (the man she was married to before she married [Stephens]) informed Mother that he had been told that [Stephens] may have had an inappropriate sexual relationship with Sarah. Mother spoke with Sarah about that allegation; without providing many details, Sarah said that she had touched [Stephens]'s private parts and that he had touched hers.

Mother took Sarah to talk with a school counselor. Sarah told the counselor that she and [Stephens] had "massaged" each other's private parts. Sarah said that this had occurred on approximately twenty occasions while they were living together in the Trophy Club house and after [Stephens] had moved into the apartment.

Sarah participated in a forensic interview with Lori Nelson, the program director at the Children's Advocacy Center for Denton County. Sarah told Nelson about [Stephens]'s sexual acts with her and gave sensory details about those acts. The sensory details that Sarah gave made Nelson believe that Sarah was credible. Rebecca Burchett, a Child Protective Services (CPS) investigator, watched Sarah's forensic interview through a one-way mirror and believed that Sarah was credible, descriptive, and consistent while discussing [Stephens]'s sexual abuse. CPS reached a "reason to believe" disposition concerning Sarah's allegation of sexual abuse by [Stephens]. Cathy Champ, the clinical director at the advocacy center, provided counseling to Mother, Sarah, and Sarah's older brother after Sarah's outcry.

Sarah also spoke with and was examined by Joanie Sackett, a sexual assault nurse examiner. Sarah was cooperative and talkative while speaking with Sackett. Sackett testified that she did not see signs of injury when examining Sarah's genitals but explained that finding such signs of injury is rare even when a sexual assault has occurred.

While they were married, Mother and [Stephens] were friends with a family from Argyle. S.L. (Stacy) was one of the children in that family, and she served as a flower girl at [Stephens] and Mother's wedding.[2] Sometimes, Stacy's family would visit Mother, [Stephens], and Sarah at the house in Trophy Club. [Stephens] had previously coached Stacy in soccer.

During [Stephens]'s visits with Stacy's family, [Stephens] often tickled her; he did so even after Stacy's father asked him to stop. There was also one occasion in which someone approached Stacy's father about [Stephens] touching Stacy inappropriately while swimming with her. Stacy's father confronted [Stephens] about the allegation, and [Stephens] stated that the touching had occurred accidentally.

After [Stephens]'s relationship with Stacy's family became strained, Stacy disclosed to her babysitter and to her father that [Stephens] had touched her sexually. Stacy asked her father to not talk to anyone else about what had occurred, and he agreed not to. [Stephens] eventually sent a card to Stacy. On the card, he wrote, "I MESSED UP! I AM SORRY! PLEASE FORGIVE ME, I MISS YOU AND YOUR FAMILY VERY MUCH!"

When Burchett, the CPS investigator, spoke with Mother about [Stephens]'s sexual abuse of Sarah, Burchett became concerned that [Stephens] might have also sexually abused another child. The Trophy Club Police Department eventually began to investigate whether [Stephens] had sexually abused Stacy. Stacy gave an

[2] The two complainants will be referred to as S.G. and S.L.

> interview at the advocacy center and disclosed, while crying, that [Stephens] had sexually abused her.
>
> Through separate indictments, the State charged [Stephens] with three counts of indecency with a child by contact against Sarah and with one count of indecency with a child by contact against Stacy. [Stephens] filed several pretrial documents, including an election for the jury to assess his punishment if he was convicted. The trial court held a trial on all offenses against both complainants. [Stephens] pled not guilty to all of the charges.
>
> Sarah was eleven years old at the time of the trial. She testified that on several occasions when she had slept in a bed with [Stephens], he had massaged her sexual organ with his hand while Mother was "[p]robably sleeping." She also testified that after [Stephens] had moved out of the Trophy Club house and into the apartment, he had continued to massage her sexual organ when she visited him there. She explained that he had once done so in a bathroom while helping her put on a swimming suit and that he had also done so while they watched a movie together after swimming. She also testified that when she and [Stephens] had changed clothes before swimming, she had massaged his private part.
>
> Stacy was seventeen years old at the time of the trial. She testified that when she was much younger, [Stephens] had touched her sexual organ over her clothes while she was swimming with him. Stacy also testified that on other occasions, [Stephens] had touched her sexual organ over her panties.
>
> [Stephens] testified and denied any sexual contact with Sarah or Stacy; he stated that they had lied. He also disputed the testimony of other witnesses concerning their accounts of his interactions with Sarah and Stacy. He admitted that on two occasions, he had touched Sarah's genitals, but he testified that she had put his hand there and that he had received no sexual gratification from doing so. He also conceded that Sarah had once touched his penis on her own volition.

Stephens, 2016 WL 2586639 at *1–3 (footnotes omitted). (Dkt. # 16-9).

III. STANDARD FOR FEDERAL HABEAS CORPUS RELIEF

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

Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); *West v. Johnson*, 92 F.3d 1385, 1404 (5th Cir. 1996); *Brown v. Dretke*, 419 F.3d 365, 376 (5th Cir. 2005). In the course of reviewing state proceedings, a federal court does not sit as a super state appellate court. *Dillard v. Blackburn*, 780 F.2d 509, 513 (5th Cir. 1986).

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

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

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

"In Texas writ jurisprudence, usually a denial of relief rather than a 'dismissal' of the claim by the Court of Criminal Appeals disposes of the merits of a claim." *Singleton v. Johnson*, 178 F.3d 381, 384 (5th Cir. 1999); *Henderson v. Cockrell,* 333 F.3d 592, 598 (5th Cir. 2003); *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) (holding a "denial" signifies an adjudication on the merits while a "dismissal" means the claim was declined on grounds other than the merits). Additionally, federal habeas relief is foreclosed if a claim: (1) is procedurally barred as a consequence of a failure to comply with state procedural rules, *Coleman v. Thompson*, 501 U.S. 722 (1991); (2) seeks retroactive application of a new rule of law to a conviction that was final before the rule was announced, *Teague v. Lane*, 489 U.S. 288 (1989); or (3) asserts trial error that, although of constitutional magnitude, did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *Wesbrook v. Thaler*, 585 F.3d 245, 255 (5th Cir. 2009).

IV. ANALYSIS

A. Procedural Bar

It is well-settled that federal review of a claim is procedurally barred if the last state court to consider the claim expressly and unambiguously based its denial of relief on a state procedural default. *Coleman*, 501 U.S. at 729. Additionally, if the state court explicitly invokes a procedural bar and alternatively reaches the merits of a defendant's claims, a federal court is still bound by the state procedural default. *Harris v. Reed*, 489 U.S. 255, 264 n. 10 (1989). Where a state court has explicitly relied on a procedural bar, a Petitioner may not obtain federal habeas corpus relief absent a showing of cause for the default and actual prejudice that is attributable to the default, or that the federal court's failure to consider the claim will result in a miscarriage of justice. *Coleman*, 501 U.S. at 750. A miscarriage of justice in this context means that the petitioner is actually innocent of the crime for which he was convicted. *Sawyer v. Whitley*, 505 U.S. 333, 339-40 (1992).

1. Petitioner's Claims One and Four (b), (c), and (e) are Procedurally Barred Because Petitioner Failed to Object at Trial

The Court of Appeals for the Fifth Circuit has repeatedly recognized a procedural default premised upon a federal habeas petitioner's failure to comply with Texas' contemporaneous objection rule, as is the case here. *Scheanette v. Quarterman*, 482 F.3d 815, 823-24 (5th Cir. 2007) (Texas contemporaneous objection is "an adequate and independent state procedural bar to federal habeas review."). Counsel's failure to object constituted a procedural default in the state habeas court that likewise bars this Court from considering the claims. *See Rowell v. Dretke*, 398 F.3d 370, 374 (5th Cir. 2005) (concluding state habeas court properly found the claim procedurally defaulted based on the Texas contemporaneous objection rule).

In his first claim, Petitioner contends the trial court abused its discretion by admitting evidence of extraneous offense(s) allegedly committed by Petitioner without conducting a hearing

outside the presence of the jury. In Claim Four (b), Petitioner argues the trial court abused its discretion in consistently ruling against him in violation of the Fifth and Fourteenth Amendments of the United States Constitution by not holding a hearing pursuant to Article 38.37 of the Texas Code of Criminal Procedure, and allowing unchallenged hearsay into evidence. Thus, both claims challenge the trial court's failure to hold a hearing outside the jury's presence prior to admitting extraneous offense evidence.

Petitioner raised this claim on direct appeal. The appellate court found that "[b]ecause appellant failed to object to the lack of a hearing under article 38.37, we conclude that he forfeited that complaint, and we overrule his second issue." *Stephens*, 2016 WL 2586639, at * 7 (citations omitted). (Dkt. # 16-16). Petitioner subsequently raised this issue in his PDRs, but the TCCA refused his petitions. *Stephens,* Nos. PD-0740-16, PD 0741-16. (Dkt. # 16-16). The state habeas court found that Petitioner "failed to object at trial regarding a hearing under article 38.37," and concluded that Petitioner's "claim that the Court erred by not holding a hearing under article 38.37 should be **denied** because it is waived due to a failure to object at trial. . . ." (Dkt. # 17-17, p. 11; Dkt. # 17-30, pp. 50-52) (emphasis in original). The TCCA adopted the findings in denying Petitioner relief. (Dkt. # 16-29, Dkt. # 17-18).

Additionally, in Claim Four (c), Petitioner argues the trial court erred in improperly charging the jury regarding the stacking of his sentences. In Claim Four (e), Petitioner argues the trial court lacked jurisdiction to cumulate his sentences. Neither claim was raised on direct appeal or in Petitioner's PDRs. *Stephens,* 2016 WL 2586639; *Stephens,* Nos. PD-0740-16, PD-0741-16. (Dkt. # 16-19). Petitioner raised the claims for the first time in his application for state habeas relief. The state habeas court found that these arguments were procedurally defaulted, finding that Petitioner's "claims that the Court improperly charged the jury regarding stacking and that it did

not have jurisdiction to cumulate the sentences should be **denied** because they were not preserved by objection at trial. . . ." (Dkt. # 17-30, p. 52) (emphasis in original). Again, the TCCA adopted the findings in denying relief. (Dkt. # 16-29, Dkt. # 17-18).

"The procedural-default doctrine precludes federal habeas review when the last reasoned state-court opinion addressing a claim explicitly rejects it on a state procedural ground." *Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 801, 803 (1991)). Because the TCCA denied the applications for state habeas corpus relief without written order on the findings of the trial court without a hearing, the state habeas corpus was the last reasoned-state court opinion. Petitioner has failed to even mention cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750. Thus, these claims are procedurally barred.

2. Petitioner's Claims Four (a), (c) and (e) are Procedurally Barred Because Petitioner Failed to Raise Them on Direct Appeal

The Fifth Circuit has explained that a petitioner who fails to present his claims on direct appeal cannot seek federal habeas relief until the claims have been raised and adjudicated in a state habeas proceeding. *Ames v. Middlebrooks*, 369 F.2d 113, 115 (5th Cir.1966). Texas law requires a petitioner to raise records-based claims on direct appeal or forfeit review of the claims. *Ex parte Cruzata*, 220 S.W.3d 518, 520 (Tex. Crim. App.2007). The Fifth Circuit recognizes that "this rule is an 'adequate state ground capable of barring federal habeas review.'" *Scheanette*, 482 F.3d at 827 (quoting *Busby v. Dretke*, 359 F.3d 708, 719 (5th Cir.2004)). As noted, when a petitioner procedurally defaults a claim in state court, federal habeas review is available only if he can show cause and prejudice. *Coleman*, 501 U.S. at 749–50.

In Claim Four (a), Petitioner argues the trial court erred in trying his two cases together. In Claim Four (c), Petitioner argues the trial court erred in improperly charging the jury regarding the stacking of his sentences. In Claim Four (e), Petitioner argues the trial court lacked jurisdiction to cumulate his sentences. Petitioner did not raise these claims on direct appeal. *Stephens*, 2016 WL 2586639, *Stephens v. State*, PD-0740-16, PD-0741-16. (Dkt. # 16-9, Dkt. # 16-12, Dkt. #16-15). Petitioner raised the claims for the first time in his application for state habeas relief. However, the state habeas court found that all three claims should be denied because they were based on the record, and Petitioner failed to raise them on direct appeal:

> 37. Applicant's contention that this Court erred by trying these two cases together is based entirely on the trial record, and he did not raise the same point on direct appeal.
>
> 38. Applicant's contention that this Court erred by improperly charging the jury regarding sentence stacking is based entirely on the trial record, and he did not raise the same point on direct appeal.
>
> 39. Applicant's contention that this Court did not have jurisdiction to cumulate the sentences is based entirely on the trial record, and he did not raise the same point on direct appeal. . . .
>
> *Conclusions of Law*
>
> 3. Whether the Court erred by trying together Applicant's two cases together, whether it erred by improperly charging the jury regarding sentence-stacking, and whether it had jurisdiction to cumulate his sentences are claims based entirely on the record on direct appeal, and Applicant did not raise them on direct appeal; they are therefore not cognizable here and should be **denied.** *See Ex parte Gardner,* 959 S.W.2d 189, 199 (Tex. Crim. App. 1998 (op. on reh'g); *Ex parte Townsend*, 137 S.W.3d 79, 81-82 (Tex. Crim. App. 2004).

(Dkt. # 17, 30, pp. 50-51, Dkt. # 17-33, p. 16). Again, the TCCA adopted the findings in denying Petitioner relief. (Dkt. # 16-29, Dkt. # 17-18). Because the TCCA denied the application for state habeas corpus relief without written order on the findings of the trial court without a hearing, the state habeas corpus was the last reasoned-state court opinion. *Matchett*, 380 F.3d at 848 (citing

Ylst, 501 U.S. 7 at 801, 803). Petitioner has failed to even mention cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750. Thus, these claims are procedurally barred because Petitioner failed to raise them on direct appeal.

Even if viewed on the merits, the claims fail. First, as noted, a person seeking federal habeas corpus review must assert a violation of a federal constitutional right. *Lowery*, 988 F.2d at 1367. Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also present. *Estelle* , 502 U.S. at 67-68; *West*, 92 F.3d at 1404. Therefore, because Petitioner complains that the trial court erred in not following state law, the issues are not appropriate for federal habeas corpus review.

Moreover, to prevail on a claim of trial-court error, a habeas petitioner must show the alleged error was "so extreme that it constituted denial of fundamental fairness." *Prystash v. Davis*, 854 F.3d 830, 840 (5th Cir. 2017) (citations and internal quotation marks omitted). On habeas corpus review of a state conviction, the federal harmless error standard applies, which means that, to warrant relief, the trial court's error must have had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637-38. This requires Petitioner to demonstrate actual prejudice. *Id.* at 637.

The record reflects there was no error in the trial court's failure to hold a 38.37 hearing. The State filed a notice of intent to use evidence of other crimes, wrongs or act, pursuant to Article 38.37 of the Texas Code of Criminal Procedure. (Dkt. # 16-20, pp. 94-101). The State also filed a written motion to try the cases together, pursuant to Section 3.02 of the Texas Penal Code. (Dkt. # 16-20, p. 82). Petitioner subsequently filed a motion to sever the cases. (Dkt. # 16-20, pp.173-74). Article 3.04 of the Texas Penal Code states that a defendant is not entitled to a severance of

offenses of indecency with a child "unless the court determines that the defendant or the state would be unfairly prejudiced by a joinder of offenses, in which event the judge may order the offenses to be tried separately or may order other relief as justice requires." The trial court did not make the requisite finding, and denied Petitioner's motion to sever. (Dkt. # 16-20, pp. 171-72; Dkt. # 16-23, p. 37). Because the two cases were tried together, there was no extraneous offense evidence and no need to hold a hearing. Therefore, Petitioner cannot show that the trial court's actions had "a substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637-38.

Additionally, the trial court instructed the jury that any extraneous offense evidence that was admitted was admitted for the purpose set forth in Section one of Article 38.37 of the Texas Code of Criminal Procedure:

> You are instructed that if there is any testimony before you in this case regarding the defendant's having committed offense other than the offense alleged against him in the indictment in this case, you cannot consider said testimony for any other purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other offenses, if any were committed, and even then you may only consider the same in determining, the state of mind of the defendant and child, or the previous and subsequent relationship between the defendant and the child, if any, in conviction with the offense, if any, alleged against him in the indictment in this case, and for no other purpose.

(Dkt. # 16-20, p. 184).

Petitioner's claim that the trial court incorrectly stacked and cumulated his sentences also lacks merit. Petitioner argues that because he elected to be sentenced by the jury, Article 3.03(b) of the Texas Code of Criminal Procedure does not expressly give the trial court the right to decide whether sentences will run consecutively or concurrently.

Article 42.08(a) of the Texas Code of Criminal Procedure provides, in relevant part, that a trial court judge has the discretion to cumulate the sentences when a defendant has been convicted in two or more cases:

> When the same defendant has been convicted in two or more cases, judgment and sentence shall be pronounced in each case in the same manner as if there had been but one conviction. Except as provided by Subsections (b) and (c), in the discretion of the court, the judgment in the second and subsequent convictions may either be that the sentence imposed or suspended shall begin when the judgment and the sentence imposed or suspended in the preceding conviction has ceased to operate, or that the sentence imposed or suspended shall run concurrently with the other case or cases, and sentence and execution shall be accordingly.

Section 3.03(b)(2)(A) of the Texas Penal Code further provides that the sentences in Petitioner's offenses may run concurrently or consecutively:

> (b) If the accused is found guilty of more than one offense arising out of the same criminal episode,[3] the sentences may run concurrently or consecutively if each sentence is for a conviction of. . . .
>
> (2) an offense:
>
> (A) under Section 33.021 or an offense under Section 21.02, 21.11, 22.011, 22.021, 25.02, or 43.25 committed against a victim younger than 17 years of age at the time of the commission of the offense regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of more than one section. . . .

Petitioner raised this issue on appeal. The appellate court rejected the argument and found that TCCA precedent supports the trial court's authority to cumulate Petitioner's sentences:

> In his fourth issue, appellant argues that section 3.03 of the penal code has been "incorrectly interpreted to allow for the Court to supersede the jury's determination on sentencing." *See* Tex. Penal Code Ann. § 3.03(b)(2)(A) (West Supp. 2015). Appellant concedes that "this [c]ourt is bound by [precedent from the court of criminal appeals that] compels an adverse ruling." He states that he is raising this issue in this court so that he can raise it in the court of criminal

[3] Texas Penal Code Section 3.01(2) defines criminal episode as "the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person . . . where the offenses are the repeated commission of the same or similar offenses."

> appeals. We agree with appellant's position that precedent requires us to overrule his argument that the trial court had no authority to cumulate his sentences under section 3.03. *See Bonilla v. State*, 452 S.W.3d 811, 819 (Tex. Crim. App. 2014); *Barrow v. State*, 207 S.W.3d 377, 380–82 (Tex. Crim. App. 2006). Thus, we overrule appellant's fourth issue.

Stephens, 2016 WL 2586639, at * 8. (Dkt. # 16-9). The TCCA refused Petitioner's PDRs. *Stephens,* Nos. PD-0740-16, PD-0741-16. (Dkt. # 16-16). The state habeas court found the issue was argued on direct appeal and the appellate court rejected the argument. (Dkt. # 17-30, p. 50).

Because the TTCA denied Petitioner's state applications without written order on the findings of the trial court, such ruling constitutes an adjudication on the merits. Petitioner fails to rebut the presumption of correctness to which the state findings are entitled. *Valdez*, 274 F.3d at 947. Petitioner also fails to show there was no reasonable basis for the state court to deny relief. *Richter*, 526 U.S. at 98. Moreover, Petitioner fails to show the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly-established federal law, as determined by the Supreme Court of the United States, or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Williams*, 529 U.S. at 402-03 (2000); *Childress v. Johnson,* 103 F.3d 1221, 1224-25 (5th Cir. 1997).

B. Improper Stacking

In his second claim, Petitioner argues that Section 3.03 of the Texas Penal Code has been incorrectly interpreted to allow for the court to supersede the jury's determination at sentencing. In Claim Four (d), Petitioner argues he was denied his rights to due process because the trial court improperly overruled his objection to stacking the jury-imposed sentences.

As already noted, a person seeking federal habeas corpus review must assert a violation of a federal constitutional right. *Lowery*, 988 F.2d at 1367. Federal habeas corpus relief will not

issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also present. *Estelle*, 502 U.S. at 67-68; *West*, 92 F.3d at 1404. Because Petitioner complains that the trial court erred in not following state law, these issues are not appropriate for federal habeas corpus review. Moreover, the Court already addressed these claims and found they lacked merit.

The TCCA refused Petitioner's PDRs. *Stephens,* Nos. PD-0740-16, PD-0741-16. The state habeas court found that this issue was argued on direct appeal and the appellate court rejected the argument. (Dkt. # 17-30, p. 50). Because the TCCA denied Petitioner's state applications without written order based on the findings of the trial court without a hearing, that constitutes an adjudication on the merits. Petitioner fails to rebut the presumption of correctness to which the state findings are entitled. *Valdez*, 274 F.3d at 947. Petitioner fails to show there was no reasonable basis for the state court to deny relief. *Richter*, 526 U.S. at 98. Additionally, Petitioner fails to show the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Williams,* 529 U.S. at 402-03; *Childress,* 103 F.3d at 1224-25.

C. Ineffective Assistance of Counsel

In Claim Three, Petitioner raises nine grounds alleging ineffective assistance of counsel. A petitioner who seeks to overturn his conviction on the grounds of ineffective assistance of counsel must prove entitlement to relief by a preponderance of the evidence. *James v. Cain*, 56 F.3d 662, 667 (5th Cir. 1995). To succeed on a claim of ineffective assistance of counsel, a petitioner must show "counsel's representation fell below an objective standard of reasonableness," with reasonableness judged under professional norms prevailing at the time counsel rendered

assistance. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).This requires the reviewing court to give great deference to counsel's performance, strongly presuming counsel exercised reasonable professional judgment. *Id.* at 688 - 690. The right to counsel does not require errorless counsel; instead, a criminal defendant is entitled to reasonably effective assistance. *Boyd v. Estelle*, 661 F.2d 388, 389 (5th Cir. 1981); *see also Rubio v. Estelle*, 689 F.2d 533, 535 (5th Cir. 1982); *Murray v. Maggio*, 736 F.2d 279 (5th Cir. 1984). Additionally, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Petitioner must "affirmatively prove," not just allege, prejudice. *Id.* at 693. If petitioner fails to prove the prejudice component, the court need not address the question of counsel's performance. *Id.* at 697.

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

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

> that the testimony was not based on inadmissible hearsay. The following exchange then occurred between the trial court and appellant's fiancée:
>
> THE COURT: You had indicated that [Timothy] and [Mother] had met on numerous occasions?
>
> THE WITNESS: Yes. That's my understanding.
>
> THE COURT: Okay. Well, and that's what I'm getting at is, is it your direct observation or is it your understanding?
>
> THE WITNESS: Are you asking if I ever saw them together?
>
> THE COURT: Correct.
>
> THE WITNESS: I guess I'd have to say no.
>
> THE COURT: And what do you base -- what do you base this on then?
>
> THE WITNESS: Written statements that he sent to me.
>
> THE COURT: [Timothy]?
>
> THE WITNESS: Yes, [Timothy]. I have not really -- I've only met [Mother] once.
>
> THE COURT: Okay.
>
> THE WITNESS: And I did not have occasion to see her with my ex-husband.
>
> At that point, appellant's counsel represented that he had text messages from Timothy to appellant's fiancée that established Timothy's connection to Mother, but the State argued that such statements contained inadmissible hearsay. The trial court excluded the testimony of appellant's fiancée on the ground that it was based on what Timothy had told her, which the court found to be inadmissible hearsay. The court also agreed that the testimony was speculative and irrelevant.

Stephens, 2016 WL 2586639, at * 8 (footnote omitted). (Dkt. # 16-9, pp. 17-19). The trial court found the proposed testimony to be inadmissible hearsay. (Dkt. # 16-27, pp. 13-17).

Counsel responded to Petitioner's allegations in an affidavit he filed with the state habeas court. Counsel noted that although he attempted to introduce evidence of Petitioner's conspiracy theory, the trial court would not allow Ms. Rowan to testify about the alleged conspiracy:

> There was no credible or substantive evidence of any conspiracy between Timothy Szal and Stephanie Stephens and others against the applicant. The issue was brought up to me by the Defendant and Grace Szal (a/k/a Grace Rowan). The conspiracy theory was their genuine belief. . . .
>
> Grace Szal and Brent Stephens were convinced that a conspiracy was being perpetrated to lodge false charges against Mr. Stephens as revenge for his romance with Ms. Szal. There was ample evidence there was immense and constant communication between Mr. Szal and Ms. Stephens. There was also evidence that Mr. Szal had hired a private investigator to learn of Ms. Szal's whereabouts and all indications were the private investigator was utilized for a tactical advantage in the Szal divorce action. There was no concrete evidence of a conspiracy to lodge charges against Mr. Stephens. There were only the speculative allegations of Mr. Stephens and Ms. Szal that were based on what they perceived with no specifics to back them up. They conveyed to me that their belief was genuine. The theory was fully investigated and found to be false and one of many "rabbit trails."
>
> The overall problem assuming *arguendo* the conspiracy theory was valid, it does not change the overwhelming fact that Mr. Stephens:
>
> > failed an instant offense and sexual history polygraph;
> >
> > admitted to sexual offenses . . . when speaking with the LSOTP and polygraph examiner Chimarys during the Psychosexual Risk Assessment;
> >
> > admitted his hand touched the genitals of Ms. Gentry to Inv. Burris on video during a custodial interrogation after being Mirandized; and
> >
> > admitted contact in his testimony at trial.
>
> Because of the overwhelming facts against Mr. Stephens coupled with his admissions, any collusion between Mr. Szal and Ms. Stephens would have been solely to make sure justice was done. Mr. Stephens own admissions and the lack of even a scintilla of evidence defeat any "false charge" conspiracy.
>
> I attempted to have admitted Ms. Szal's testimony of her perception of the conspiracy and the Court refused to allow her to testify on that subject. It was very clear from my work on the case that neither Mr. Szal nor Ms. Stephens were great admirers of Mr. Stephens. They were not. There was simply no proof of conspiracy theory other than the unfounded suspicions of Ms. Szal and Mr. Stephens.

(Dkt. # 17-11, pp. 5-6).

Defense counsel has the obligation to conduct a "reasonably substantial, independent investigation." *Neal*, 239 F.3d at 688 (quoting *Baldwin v. Maggio*, 704 F.2d 1325, 1332–33 (5th

Cir. 1983)). However, "a defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." *Druery v. Thaler*, 647 F.3d 535, 541 (5th Cir. 2011) (quoting *Nelson v. Hargett*, 989 F.2d 847, 850 (5th Cir. 1993)). Petitioner has not shown how counsel could have avoided the fact that Ms. Rowan's testimony was based on inadmissible hearsay, was speculative, and was not relevant. Petitioner has failed to meet his burden and allege with specificity what any additional investigation would have revealed, and how it would have altered the outcome of his trial.

The state habeas court found that counsel investigated the conspiracy claim and found it was baseless:

> 17. Mr. Powers [trial counsel] investigated and explored Applicants' opinion that the source of the charges against him was a conspiracy, and Mr. Powers found Applicant's opinion to be baseless.
>
> 18. Mr. Powers determined that Applicant's theories about the cases were not based on any credible proof. . . .
>
> 1. Applicant has not proved that Mr. Powers failed to act as a reasonably competent attorney would have regarding any of his allegations, and his claims should be **denied**. . . .
>
> *Conclusions of Law* . . .
>
> 2. Additionally, Applicant has not proved that the result of the guilt-innocence phase of trial would have been different but for counsel's alleged errors, and his claims should therefore be **denied.**

(Dkt. # 17-30, pp. 48, 51) (emphasis in original). Because the TCCA denied Petitioner's state applications without written order based on the findings of the trial court without a hearing, such ruling constitutes an adjudication on the merits. Petitioner fails to rebut the presumption of correctness to which the state findings are entitled. *Valdez*, 274 F.3d at 947. Petitioner fails to show there was no reasonable basis for the state court to deny relief. *Richter*, 526 U.S. at 98.

Additionally, Petitioner fails to show the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Williams,* 529 U.S. at 402-03; *Childress,* 103 F.3d at 1224-25.

3. Counsel Failed to Adequately Advise Petitioner About a Plea Bargain

In Claim Three (c), Petitioner argues his counsel advised him to turn down a verbal one hundred and twenty-day plea offer. Petitioner argues that counsel advised him that he could get Petitioner a misdemeanor, but failed to tell him that the county has a ninety-eight percent conviction rate.

In *Lafler v. Cooper*, 566 U.S. 156, 163 (2012), the Supreme Court held the Sixth Amendment right to counsel applies in the context of plea negotiations. "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." *Id.* at 168. Claims of ineffective assistance of counsel during the plea process are evaluated under the two-pronged test in *Strickland. See Lafler*, 566 U.S. at 163; *Hill v. Lockhart,* 474 U.S. 52, 58-59 (1985). Pursuant to that standard, a convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires the defendant to show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland*, 466 U.S. at 687. In the context of guilty pleas, counsel's performance falls below the objective standard of reasonableness announced in *Strickland* if, during the plea bargaining process, counsel fails to advise the defendant of the maximum sentence he could receive should he lose at trial. *See United States v. Herrera*, 412 F.3d 577, 581 (5th Cir. 2005); *Teague v. Scott*, 60 F.3d 1167, 1171 (5th Cir. 1995). "The second, or

'prejudice,' requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

Counsel addressed this issue in his affidavit filed with the state habeas court, stating that he never received a one hundred and twenty-day offer:

> All plea bargain offers conveyed to me by the State were conveyed to the Defendant. He rejected all of the State's offers. I never made a recommendation on acceptance or rejection of a 120 day offer because there was no such offer.
>
> There was never any plea bargain offer of 120 days conveyed by the State to me. One numerous occasions after discussion with the Defendant, I did attempt to have the charges reduced to a misdemeanor and on numerous occasions I sought a dismissal from the prosecution. Each of the counts carried a punishment range of a minimum of two years and a maximum of 20 years in the Texas Department of Criminal Justice, thus a plea offer of 120 days was outside the punishment range. On several occasions the Defendant and I had discussed plea offers made by the State. He had offered to plead guilty to a lesser included misdemeanor offense and I conveyed that to the CAC prosecutors during numerous discussions about the case. The State was never willing to reduce the charges nor were they ever willing to offer him probation. The initial plea offer on the case was 8 years TDCJ. Attached as Exhibit "A" is a reset slip which contains the Defendant's signature showing that plea offer. Just prior to trial the State had offered 15 years (all sentences to run concurrent). The Defendant rejected that offer on the record. (See Exhibit "B").
>
> Mr. Stephens and I did have a discussion on whether or not the Defendant should accept the offer. At the onset - Defendant had always made it clear he was never going to accept any prison offer nor was he going to plead guilty to a sexual offense. All offers were conveyed and I told him he needed to consider each offer carefully. He was also informed if there was a conviction in more than one count Defendant's cases could be stacked and I believed it was likely that Judge Burgess would grant the State's motion for cumulative sentences. He also affirmed to the court he understood this and was informed of this by me on the record. Also the record contains references to the Application for Probation filed with the Court prior to jury selection. It was made clear to the Defendant that was being filed only in the event there was a conviction for the lesser included offense and because the alleged

> victims were under 15 years of age at the time of the offense he would not be eligible for probation in the event of a conviction.

(Dkt. # 17-11, p. 7). In the State's answer to Petitioner's application for state habeas corpus relief, the State noted that counsel passed on all plea bargain offers to Petitioner. Additionally, the State noted that it did not offer a one hundred and twenty-day plea; it offered only a fifteen-year offer. (Dkt. # 17-11, p. 41). The record reflects that Petitioner was advised in open court regarding the plea bargain offered by the State, and refused it. (Dkt. # 16-23, pp. 4-7). Petitioner has not shown that counsel performed deficiently. As counsel noted, he advised Petitioner about the maximum sentence he could receive. Additionally, Petitioner cannot show prejudice because he has not shown "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

The state habeas court found that Petitioner was adequately advised regarding the State's plea offers:

> 6. All of the State's plea bargain offers were conveyed by Mr. Powers [counsel] to Applicant.
>
> 7. Applicant maintained his innocence, did not wish to plead guilty to any sexual offenses, and would not accept any prison offers.
>
> 8. Mr. Powers sought to have the charges reduced to misdemeanors or to have them dismissed during negotiations with the State.
>
> 9. The State never offered Applicant a plea bargain of 120 days' confinement.
>
> 10. The State was never willing to reduce the charges, nor was it willing to offer a probation plea bargain.
>
> 11. The initial offer was eight years' confinement, and the final offer before trial was fifteen years' confinement; Applicant rejected that offer on the record.
>
> 12. Mr. Powers informed Applicant that his sentences could run consecutively, and that he believed the trial judge was likely to grant the State's motion to that effect.

> 13. Mr. Powers informed Applicant that an application for probation was filed only in the event there was a conviction on a lesser-included offense, and that he would not be eligible for probation were he convicted of the offenses with which he was charged.

(Dkt. # 17-30, pp. 46-47). Because the TTCA denied Petitioner's state applications without written order based on the findings of the trial court without a hearing, such ruling constitutes an adjudication on the merits. Petitioner presents nothing that would undermine the presumption of correctness to which the state courts' findings are entitled. *Valdez*, 274 F.3d at 947.Petitioner also fails to show there was no reasonable basis for the state court to deny relief. *Richter*, 526 U.S. at 98. The claim should be denied for the additional reason that Petitioner fails to show the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Williams,* 529 U.S. at 402-03; *Childress*, 103 F.3d at 1224-25.

4. Counsel Failed to Call Credible Witnesses and Conduct a Pretrial Investigation

In Claim Three (d), Petitioner contends his trial counsel failed to call credible witnesses, including his son, William Stephens, Dr. Sam Roberts, and Sharon Wagner. In Claim Three (e), Petitioner argues his trial counsel failed to conduct a pretrial investigation by failing to interview any of these witnesses. In Claim Three (h), Petitioner contends his trial counsel failed to prepare for trial by failing to interview and secure any testimony or evidence.

"[C]omplaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative." *Buckelew v. United States*, 575 F.2d 515, 521 (5th

Cir.1978). Further, the presentation of witness testimony is essentially strategy and, thus, within the trial counsel's domain. *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir.1985). A petitioner must overcome a strong presumption that his counsel's decision in not calling a particular witness was a strategic one. *Murray*, 736 F.2d at 279. "Defense counsel is not required 'to investigate everyone whose name happens to be mentioned by the defendant.'" *Schwander v. Blackburn*, 750 F.2d 494, 500 (5th Cir. 1985) (quoting *United States v. Cockrell*, 720 F.2d 1423, 1428 (5th Cir.1983)). Where "the only evidence of a missing witness's testimony is from the defendant," claims of ineffective assistance are viewed with great caution. *Cockrell*, 720 F.2d at 1427.

Petitioner must show that the witnesses were available and, had counsel located and called the witnesses, their testimony would have been favorable and they would have been willing to testify on Petitioner's behalf. *See Alexander*, 775 F.2d at 602; *Gomez v. McKaskle*, 734 F.2d 1107, 1109-10 (5th Cir. 1984). Failure to produce an affidavit (or similar evidentiary support) from the uncalled witness severely undermines a claim of ineffective assistance. *Sayre v. Anderson*, 238 F.3d 631, 636 (5th Cir. 2001). Upon a reasonable investigation, defense counsel also has an obligation to make reasonable strategic decisions regarding which witnesses and evidence he will present. *Strickland*, 466 U.S. at 690–91. "[T]he failure to present a particular line of argument or evidence is presumed to have been the result of strategic choice." *Taylor v. Maggio*, 727 F.2d 341, 347 (5th Cir. 1984).

Counsel addressed his investigation of witnesses in his affidavit he filed with the state habeas court, setting out the extent of his interviews, investigation, and preparation:

> Q- Whether counsel investigated possible witnesses, including Williams Stephens, Dr. Sam Roberts, and Sharon Wagner.
>
> The roles of all individuals listed and other were explored. I spoke to William Stephens prior to trial and discussed his potential testimony. I did call Dr. Roberts on two occasions but had to leave a message. After those calls were made he never

> phoned back. However, his role was fully disclosed to me by LSOTP Denise Baker during an interview as part of the assessment we requested. Dr. Roberts reported positive feedback regarding Mr. Stephens' struggles and reported improvement in his patient's depression and problems sleeping. Dr. Roberts also reported that Mr. Stephens appeared to be utilizing appropriate coping skills. When Dr. Roberts was questioned by Ms. Baker as to any other type of therapy other than medication modification, Dr. Roberts reportedly stated his sole responsibility was medication modification in treating Mr. Stephens. In my opinion Dr. Roberts would have had no relevant testimony as a fact witness, and if called as a punishment witness may have had damaging testimony and may have opened the door to the Assessment conducted which would have been devastating to the Defendant's case.
>
> I had extensive interview notes from Ms. Mann (in the record she is identified as witness Lauren Mann Dawson) prior to trial and researched her credentials and any prior potential biases before trial.
>
> Mia Flannery was a boarder in Ms. Stephens' home who would have (according to the Defendant) classified Stephanie Stephens as "batsh*t crazy." Ms. Flannery had similar charges to Mr. Stephens and did not want to discuss anything with us. Mr. Stephens in an email to me conveyed he did not think she would be a good witness. See Exhibit C. Our office left messages for Ms. Flannery she never returned our calls.
>
> Additionally, I had interview notes from every witness who testified at trial prior to trial and had seen all video, electronic and tangible evidence prior to trial and was 100% familiar with all aspects of the case.
>
> Noteworthy during my investigation, one contact with a witness revealed the following: Steve Krohn (who was a roommate of Mr. Stephens) chose not to testify because of his criminal record and said that he believed that Mr. Stephens might well have been guilty and felt that Mr. Stephens' interaction with Sharla was odd. After he revealed that to me, I made the decision not to subpoena him as a witness.

(Dkt. # 17-11, p. 8).

Petitioner has not produced the affidavit of any witness, nor has he shown that these witnesses were available and, had counsel located and called them, their testimony would have been favorable and they would have been willing to testify on Petitioner's behalf. *Alexander*, 775 F.2d at 602. Petitioner contends that Dr. Roberts would have testified that Petitioner was a family man. However, that testimony would have been repetitive because several witnesses presented similar testimony, including Petitioner's sons, William and Jason, his fiancée Grace Rowan, and

former wife Nancy Stephens. (Dkt. # 16-27, pp. 79-99). Petitioner also fails to negate counsel's contention that if Dr. Roberts had been called as a punishment witness, he may have opened the door to the fact that Petitioner failed his assessments:

> With regard to Shanna Lucas, Mr. Stephens denied the allegations in all discussions with me. With regard to Ms. Gentry, Mr. Stephens admitted to me there was physical contact between his hand and the genitals of Ms. Gentry as well as contact between Ms. Gentry's hand and his penis. He also admitted such contact during a video recorded interview with Inv. Keith Burris of Trophy Club PD. His rationale was there was no sexual gratification involved, rather he wanted to make sure as a *de facto* parent that Sharla (his step-daughter) was not uncomfortable with her body. Mr. Stephens also commented he didn't want her to be embarrassed had he removed his hand when she placed it on her genitals while she was in the bed between him and her mother. . . .
>
> As part of our defense preparation, Mr. Stephens participated in two polygraph examinations. One was independent, one was part of a Psychosexual Risk Assessment which included an MSI (Multiphase Sexual Inventory). During those phases of the assessments, Mr. Stephens failed both instant offense and sexual history polygraph examinations administered by local polygraph examiner Michael Chimarys. Further Mr. Stephens, according to the report admitted to LSOTP Denise Baker the "sexual aspects" of his behavior with his stepdaughter" and also admitted to an additional offense in communication with Ms. Baker. . . .

(Dkt. # 17-11, pp. 4-5).

Petitioner has failed to show how any testimony from his proposed witnesses would have changed the outcome of his trial. Petitioner's unsubstantiated and conclusory allegations concerning allegedly favorable witnesses that counsel should have discovered is insufficient to prove that counsel acted deficiently. *Kinnamon v. Scott*, 40 F.3d 731, 734–35 (5th Cir. 1994) (finding "speculation" of ineffective assistance to be no basis for habeas relief); *Barnard v. Collins*, 958 F.2d 634, 643 n.11 (5th Cir. 1992) (holding that "conclusory allegations" of ineffective assistance are without merit "[i]n the absence of a specific showing of how these alleged errors and omissions were constitutionally deficient, and how they prejudiced his right to a fair trial").

Petitioner also argues that trial counsel failed to conduct a pretrial investigation by failing to interview any of these witnesses, and only interviewed certain witnesses several weeks before trial. "[A] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." *Druery*, 647 F.3d at 541 (quoting *Nelson v. Hargett*, 989 F.2d 847, 850 (5th Cir. 1993)). Petitioner has failed to meet this burden.

Defense counsel has the obligation to conduct a "reasonably substantial, independent investigation." *Neal*, 239 F.3d at 688 (quoting *Baldwin*, 704 F.2d at 1332–33). As counsel noted, during his investigation, he spoke with many witnesses, including William Stephens, and he attempted to contact Dr. Roberts. He also stated that he had good reasons for not calling Dr. Roberts as a witness. A "'conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness.'" *Geiger v. Cain*, 540 F.3d 303, 309 (5th Cir. 2008) (quoting *Johnson v. Dretke,* 394 F.3d 332, 337 (5th Cir.2004) (quoting *United States v. Jones*, 287 F.3d 325, 331 (5th Cir.2002)). Petitioner has not shown that counsel performed deficiently. Petitioner has also failed to demonstrate prejudice, which requires he show that a particular witness would have testified at trial and that the testimony would have been favorable to Petitioner. *Alexander*, 775 F.2d at 602.

The state habeas court found that counsel adequately investigated and interviewed witnesses:

> 14. Mr. Powers [counsel] investigated the roles of W.S. [William Stephens], Dr. Sam Roberts, and Sharon Wagner as possible witnesses.
>
> 15. Mr. Powers extensively interviewed Lauren Mann Dawson and researched her credentials and possible biases.

16. Mr. Powers attempted to communicate with M.F., [Mia Flannery], but she was unwilling to discuss anything with him; furthermore, Applicant conveyed that he did not think she would be a good witness. . . .

21. Mr. Powers prepared interview notes prior to trial for every witness who testified at trial. . . .

33. Mr. Powers called appropriate witnesses at the punishment phase of trial who testified that Applicant is [a] man of good character.

(Dkt. # 17-30 at pp. 47-48, 50). Because the TTCA denied Petitioner's state applications without written order based on the findings of the trial court without a hearing, such ruling constitutes an adjudication on the merits. Petitioner presents nothing that would undermine the presumption of correctness to which the state courts' findings are entitled. *Valdez*, 274 F.3d at 947.Petitioner also fails to show there was no reasonable basis for the state court to deny relief. *Richter*, 526 U.S. at 98. The claim should be denied for the additional reason that Petitioner fails to show the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Williams,* 529 U.S. at 402-03; *Childress*, 103 F.3d at 1224-25.

5. Counsel Failed to Object to the State's Bolstering and Introduction of Evidence Not on Record and Leading the Witnesses

In Claim Three (f), Petitioner argues his trial counsel was ineffective for failing to object to the State's ongoing bolstering and introduction of evidence not on record, and for leading the witnesses. Petitioner argues the State lead the witnesses primarily by "us[ing] the words 'confession' referring to Petitioner, vagina, and ejaculation.'" (Dkt. # 1, p. 12). However, Petitioner has failed to cite to any part of the trial record in which these terms were used.

After a review of the record, the Court cannot locate reference to the word "confession" in any testimony. Additionally, S.G. did not use the term ejaculate in her testimony, but instead described Petitioner's ejaculate as "some kind of liquid" that came out of Petitioner that was "like a clear, sticky sap" that was "gooier" than water, "[l]ike syrup." (Dkt. # 16-24, pp. 273-75). S.L. did not testify about ejaculate at all.

Petitioner has not shown the legal basis for an objection. Due to the nature of the offenses, the complainants needed to testify about Petitioner's conduct, which necessarily would include reference to these terms. Absent a showing that counsel failed to raise a meritorious objection and that the outcome would have been different, Petitioner fails to demonstrate deficient performance or actual prejudice. *See Parr v. Quarterman,* 472 F.3d 245, 256 (5th Cir.2006) (holding that counsel was not deficient in failing to present a meritless argument) (citation omitted).

6. Counsel Failed to Impeach the Testimony of Eyewitnesses and Expose Perjury

In Claim Three (g), Petitioner contends his trial counsel failed to impeach Stephanie Stephens's testimony that she and her daughter S.G. had never bathed together with Petitioner. Complainant S.G. testified that she had never taken a bath with anyone:

> [Trial Counsel]: And did you ever take a bath in the bathtub?
>
> [S.G.]: Yes.
>
> [Trial Counsel]: Okay. And did you ever take a bath with anybody else in the bathtub?
>
> [S.G.]: No.
>
> [Trial Counsel]: So the only one who was in there anytime was ever you?
>
> [S.G.]: Yes. . . .
>
> [Trial Counsel]: Okay. So when you said your mom was there, was your mom in the bathroom or was she in the bathtub with you?
>
> [S.G]: Either way, I guess. . . .

[Trial Counsel]: Was [Stephens] ever in the bathtub with you?

[S.G.] : No.

(Dkt. # 16-25, pp. 11-12). Stephanie Stephens testified that she had taken a bath with her daughter, S.G., but that she and S.G. had never bathed with Petitioner. (Dkt. # 16-24, p. 204). Jason Stephens, Petitioner's son, testified that he saw SG, her mother Stephanie Stephens, and Petitioner in the bathtub together. (Dkt. # 16-27, p. 22). First, Petitioner fails to show the significance of this testimony. Conclusory allegations do not state a claim for federal habeas corpus relief and are subject to summary dismissal. *Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983) (noting that "mere conclusory allegations do not raise a constitutional issue in a habeas proceeding"). Further, counsel brought out this discrepancy during his direct examination of Jason Stephens and in his closing argument. (Dkt. # 16-27, pp. 23, 59).

Petitioner also refers to an alleged text message that S.G.'s brother, Andrew, sent to Steve Krohn, to try to restore his relationship with Krohn. As noted earlier, Steve Krohn resided at Petitioner's home. However, Petitioner has not shown that this text message would have been admissible, or how impeaching Andrew regarding this text message would have affected the outcome of his trial.

The state habeas court found that counsel "prepared and investigated so that he was able to impeach the victim in cause number F-2013-0121-B, S.G., and her brother, A.M., adequately." (Dkt. # 17-30, p. 49). Because the TTCA denied Petitioner's state applications without written order based on the findings of the trial court without a hearing, such ruling constitutes an adjudication on the merits. Petitioner presents nothing that would undermine the presumption of correctness to which the state courts' findings are entitled. *Valdez*, 274 F.3d at 947.Petitioner also fails to show there was no reasonable basis for the state court to deny relief. *Richter*, 526 U.S. at

98. The claim should be denied for the additional reason that Petitioner fails to show the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Williams,* 529 U.S. at 402-03; *Childress*, 103 F.3d at 1224-25.

7. Counsel did not Prepare for Trial

In Claim Three (h), Petitioner contends his counsel failed to prepare for trial. He states that trial counsel repeatedly advised him that he would not have to testify. Petitioner states that he had to testify because counsel failed to interview and secure any testimony or evidence. Counsel stated in his affidavit that he met with Petitioner in his office and spoke over the phone "on all aspects of trial but just prior to trial we specifically prepared for his direct testimony and potential cross-examination issues that might or might not be raised by the prosecution during cross-examination." (Dkt. # 17-11, p. 9). "Defendant was also informed that by testifying he could be potentially opening the door to the admissibility of some of those items that would normally not be admissible." (Dkt. # 17-11, p. 10). Counsel put Petitioner on the stand outside the presence of the jury and thoroughly questioned him about the implications of testifying:

> Q And the first day of trial on Monday we talked about Fifth Amendment right and -- and all the other things about right to self-incrimination and right to testify, right to invoke that privilege. And has any questions come up in your mind about the rights that you have under the Texas and the United States Constitutions?
>
> A No.
>
> Q And you realize that the right you have and the ability to -- and also realize that if you do elect to testify, then the State has an absolute right to cross-examine you, you can't invoke the right midway through the your testimony and they can answer you – they can ask you questions and that a number of things that might not have come up in trial, such as potentially past bad acts that are alleged or numerous other

things could -- they could ask you questions on many of those if the judge finds that to be appropriate?

A Yes.

Q And that there is also a possibility, you are well aware from on Monday and the judge's ruling, that the interview with Detective Burris – well, actually the judge didn't make a ruling on it. Detective Burris hasn't been played because the State agreed in an abundance of caution not to play that and exclude it from the evidence, but that we may be opening the door to that by you testifying? You understand that?

A I do.

Q And that may come in?

A Yes.

Q And -- and knowing all of that, have you made a knowing, intentional and voluntary decision on whether or not you want to testify?

A I have.

Q Okay. Do you want to testify?

A I do.

Q Okay. And are there any questions that I have been able to not answer for you or do you have any questions of the Court?

A No.

Q Okay.

(Dkt. # 16-26, pp. 164-66). Petitioner's claim fails because Petitioner fails to show counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

The state habeas court found that counsel "met with Applicant at his office – and spoke over the phone – to discuss all aspects of trial; prior to trial, they met and prepared for Applicant's testimony and cross-examination, including preparation for issues that might be brought up by the

State." (Dkt. # 17-30, p. 49). Because the TTCA denied Petitioner's state applications without written order based on the findings of the trial court without a hearing, such ruling constitutes an adjudication on the merits. Petitioner presents nothing that would undermine the presumption of correctness to which the state courts' findings are entitled. *Valdez*, 274 F.3d at 947.Petitioner also fails to show there was no reasonable basis for the state court to deny relief. *Richter*, 526 U.S. at 98. The claim should be denied for the additional reason that Petitioner fails to show the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Williams,* 529 U.S. at 402-03; *Childress*, 103 F.3d at 1224-25.

8. Counsel Failed to Investigate Extraneous Offense Evidence

In Claim Three (i), Petitioner argues his trial counsel only objected to the extraneous offense testimony because it was vague. Counsel stated in his affidavit that he discussed all of the alleged offenses with Petitioner and performed a full investigation. (Dkt. # 17-11, p. 10). As already noted, because the trials were consolidated, there was no extraneous offense evidence. "To establish that an attorney was ineffective for failure to investigate, a petitioner must allege with specificity what the investigation would have revealed and how it would have changed the outcome of the trial." *Miller v. Dretke*, 420 F.3d 356, 361 (5th Cir. 2005). Petitioner has failed to meet his burden.

D. <u>Petitioner is Actually Innocent</u>

Finally, Petitioner argues he is actually innocent. In *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013), the Supreme Court held that "actual innocence, if proved, serves as a gateway through

which a petitioner may pass [even if] the impediment is a procedural bar . . . or . . . expiration of the statute of limitations." *Hancock v. Davis*, 906 F.3d 387, 389–90 (5th Cir. 2018). As a threshold matter, a credible gateway "claim [of actual innocence] requires [the] petitioner to support his allegations of constitutional error with new reliable evidence . . . that was not presented at trial." *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). "[T]enable actual-innocence gateway pleas are rare: '[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *Id.* (quoting *Perkins*, 569 U.S. at 386 (quoting *Schlup*, 513 U.S. at 329)). Petitioner has not met his burden and presented new evidence.

The state habeas court found that "Applicant does not present any new evidence in his application," and "Applicant has not presented the Court with any new evidence of innocence, and he has not proven any constitutional violations; his actual-innocence claim should therefore be **denied**." (Dkt. # 17-30, pp. 50, 52) (emphasis in original). Because the TTCA denied Petitioner's state applications without written order based on the findings of the trial court without a hearing, such ruling constitutes an adjudication on the merits. Petitioner presents nothing that would undermine the presumption of correctness to which the state courts' findings are entitled. *Valdez*, 274 F.3d at 947. Petitioner also fails to show there was no reasonable basis for the state court to deny relief. *Richter*, 526 U.S. at 98. The claim should be denied for the additional reason that Petitioner fails to show the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Williams,* 529 U.S. at 402-03; *Childress*, 103 F.3d at 1224-25.

V. CONCLUSION

Federal habeas corpus review of Petitioner's Claims One and Four (a), (b), (c), and (e) is procedurally barred because the last reasoned state-court opinion addressing the claims explicitly rejected them on a state procedural ground. Petitioner has failed to show cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. Additionally, these claims lack merit.

Petitioner's claims that the trial court erred in stacking his sentences (Claims Two and Four (d)) are also not appropriate for federal habeas corpus review because Petitioner has failed to assert a violation of a federal constitutional right. Additionally, the claims lack merit.

Petitioner's ineffective assistance of counsel claims fail because Petitioner has failed to show counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Petitioner's actual innocence claim fails because he has failed to support his allegation with new reliable evidence that was not presented at trial.

In respect to all of Petitioner's claims, Petitioner has failed to demonstrate the state habeas court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Petitioner presents nothing that would undermine the presumption of correctness to which the state courts' findings are entitled. Petitioner also fails to show there was no reasonable basis for the state court to deny relief. Petitioner's claims should be denied for the additional reason that Petitioner fails to show the state

court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

VI. CERTIFICATE OF APPEALABILITY

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

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected constitutional claims on the merits, the petitioner must demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). When a district court denies a motion on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue when the Petitioner shows, at least, that jurists of reason would find it debatable whether the

petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.*

In this case, it is recommended that reasonable jurists could not debate the denial of Petitioner's § 2254 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, it is recommended the Court find that Petitioner is not entitled to certificates of appealability.

VII. RECOMMENDATION

Based on the foregoing, it is recommended that the above-styled petitions filed under 28 U.S.C. § 2254 be denied and the cases be dismissed with prejudice. It is further recommended that certificates of appealability be denied.

Within fourteen days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(c). To be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object *See Douglass v. United Servs. Auto. Ass'n*,

79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superceded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

So ORDERED and SIGNED this 22nd day of February, 2021.

KIMBERLY C. PRIEST JOHNSON
UNITED STATES MAGISTRATE JUDGE

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

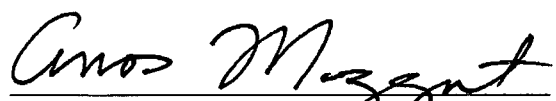
BRENT STEPHENS, #1981218	§	
	§	
VS.	§	CIVIL ACTION NOS. 4:18cv103,4:18cv104
	§	
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

The above-entitled and numbered civil actions were referred to United States Magistrate Judge Kimberly C. Priest Johnson. The Report and Recommendation of the Magistrate Judge, which contain proposed findings of fact and recommendations for the disposition of such actions, has been presented for consideration. No objections were filed. The court concludes that the findings and conclusions of the Magistrate Judge are correct and adopts the same as the findings and conclusions of the court.

It is therefore **ORDERED** that the petitions for writ of habeas corpus are **DENIED** and the cases are **DISMISSED** with prejudice. Certificates of appealability are **DENIED**. All motions by either party not previously ruled on are hereby **DENIED**.

SIGNED this 30th day of March, 2021.



AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

APPENDIX - D

United States Court of Appeals for the Fifth Circuit

No. 21-40370

BRENT STEPHENS,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Eastern District of Texas
USDC No. 4:18-CV-103

ON PETITION FOR REHEARING EN BANC

Before SMITH, HIGGINSON, and WILLETT, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a motion for reconsideration (5TH CIR. R. 35 I.O.P.), the motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX - E

CONSTITUTION OF THE UNITED STATES

Table of Contents

Amendments

Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX - F

CONSTITUTION OF THE UNITED STATES

Table of Contents

Amendments

Amendment 6 Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX - G

CONSTITUTION OF THE UNITED STATES

Table of Contents

Amendments

Amendment 14

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives—Power to reduce apportionment.] Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.] No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.] The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.] The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX - H

UNITED STATES CODE SERVICE

First Session of the 117th Congress (Public Laws 116-1 to 117-31)

Part VI. PARTICULAR PROCEEDINGS

CHAPTER 153. HABEAS CORPUS

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255 [28 USCS § 2255].

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 2254] that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 2254] that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

APPENDIX - I

UNITED STATES CODE SERVICE

First Session of the 117th Congress (Public Laws 116-1 to 117-31)

Part VI. PARTICULAR PROCEEDINGS

CHAPTER 153. HABEAS CORPUS

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255 [28 USCS § 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue

or issues satisfy the showing required by paragraph (2).

APPENDIX - J

UNITED STATES CODE SERVICE

First Session of the 117th Congress (Public Laws 116-1 to 117-31)

Part VI. PARTICULAR PROCEEDINGS

CHAPTER 153. HABEAS CORPUS

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court

proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 [28 USCS § 2254].

APPENDIX - K

TEXAS STATUTES

Penal Code

Title 1 Introductory Provisions

Chapter 3 Multiple Prosecutions

Sec. 3.01. Definition.

In this chapter, "criminal episode" means the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances:

(1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or

(2) the offenses are the repeated commission of the same or similar offenses.

APPENDIX - L

TEXAS STATUTES

Penal Code

Title 1 Introductory Provisions

Chapter 3 Multiple Prosecutions

Sec. 3.03. Sentences for Offenses Arising Out of Same Criminal Episode.

(a) When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced. Except as provided by Subsection (b), the sentences shall run concurrently.

(b) If the accused is found guilty of more than one offense arising out of the same criminal episode, the sentences may run concurrently or consecutively if each sentence is for a conviction of:

(1) an offense:

(A) under Section 49.07 or 49.08, regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of both sections; or

(B) for which a plea agreement was reached in a case in which the accused was charged with more than one offense listed in Paragraph (A), regardless of whether the accused is charged with violations of the same section more than once or is charged with violations of both sections;

(2) an offense:

(A) under Section 33.021 or an offense under Section 21.02, 21.11, 22.011, 22.021, 25.02, or 43.25 committed against a victim younger than 17 years of age at the time of the commission of the offense regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of more than one section; or

(B) for which a plea agreement was reached in a case in which the accused was charged with more than one offense listed in Paragraph (A) committed against a victim younger than 17 years of age at the time of the commission of the offense regardless of whether the accused is charged with violations of the same section more than once or is charged with

violations of more than one section;

(3) an offense:

(A) under Section 21.15 or 43.26, regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of both sections; or

(B) for which a plea agreement was reached in a case in which the accused was charged with more than one offense listed in Paragraph (A), regardless of whether the accused is charged with violations of the same section more than once or is charged with violations of both sections;

(4) an offense for which the judgment in the case contains an affirmative finding under Article 42.0197, Code of Criminal Procedure;

(5) an offense:

(A) under Section 20A.02, 20A.03, or 43.05, regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of more than one section; or

(B) for which a plea agreement was reached in a case in which the accused was charged with more than one offense listed in Paragraph (A), regardless of whether the accused is charged with violations of the same section more than once or is charged with violations of more than one section;

(6) an offense:

(A) under Section 22.04(a)(1) or (2) or Section 22.04(a-1)(1) or (2) that is punishable as a felony of the first degree, regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of more than one section; or

(B) for which a plea agreement was reached in a case in which the accused was charged with more than one offense listed in Paragraph (A) and punishable as described by that paragraph, regardless of whether the accused is charged with violations of the same section more than once or is charged with violations of more than one section; or

(7) any combination of offenses listed in Subdivisions (1)-(6).

(b-1) Subsection (b)(4) does not apply to a defendant whose case was transferred to the court under Section 54.02, Family Code.

APPENDIX - M

TEXAS STATUTES

Penal Code

Title 5 Offenses Against the Person

Chapter 21 Sexual Offenses

Sec. 21.11. Indecency with a Child.

(a) A person commits an offense if, with a child younger than 17 years of age, whether the child is of the same or opposite sex and regardless of whether the person knows the age of the child at the time of the offense, the person:

(1) engages in sexual contact with the child or causes the child to engage in sexual contact; or

(2) with intent to arouse or gratify the sexual desire of any person:

(A) exposes the person's anus or any part of the person's genitals, knowing the child is present; or

(B) causes the child to expose the child's anus or any part of the child's genitals.

(b) It is an affirmative defense to prosecution under this section that the actor:

(1) was not more than three years older than the victim and of the opposite sex;

(2) did not use duress, force, or a threat against the victim at the time of the offense; and

(3) at the time of the offense:

(A) was not required under Chapter 62, Code of Criminal Procedure, to register for life as a sex offender; or

(B) was not a person who under Chapter 62 had a reportable conviction or adjudication for an offense under this section.

(b-1) It is an affirmative defense to prosecution under this section that the actor was the spouse of the child at the time of the offense.

(c) In this section, "sexual contact" means the following acts, if committed with the intent to

arouse or gratify the sexual desire of any person:

(1) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child; or

(2) any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person.

(d) An offense under Subsection (a)(1) is a felony of the second degree and an offense under Subsection (a)(2) is a felony of the third degree.

APPENDIX - N

TEXAS STATUTES

Code of Criminal Procedure

Title 1 Code of Criminal Procedure of 1965

Trial and Its Incidents

Chapter 37 The Verdict

Art. 37.07. Verdict Must Be General; Separate Hearing on Proper Punishment.

Sec. 1. (a) The verdict in every criminal action must be general. When there are special pleas on which a jury is to find they must say in their verdict that the allegations in such pleas are true or untrue.

(b) If the plea is not guilty, they must find that the defendant is either guilty or not guilty, and, except as provided in Section 2, they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty.

(c) If the charging instrument contains more than one count or if two or more offenses are consolidated for trial pursuant to Chapter 3 of the Penal Code, the jury shall be instructed to return a finding of guilty or not guilty in a separate verdict as to each count and offense submitted to them.

Sec. 2. (a) In all criminal cases, other than misdemeanor cases of which the justice court or municipal court has jurisdiction, which are tried before a jury on a plea of not guilty, the judge shall, before argument begins, first submit to the jury the issue of guilt or innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment to be imposed. If the jury fails to agree on the issue of guilt or innocence, the judge shall declare a mistrial and discharge the jury, and jeopardy does not attach in the case.

(b) Except as provided by Article 37.071 or 37.072, if a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense; provided, however, that (1) in any criminal action where the jury may recommend community

supervision and the defendant filed his sworn motion for community supervision before the trial began, and (2) in other cases where the defendant so elects in writing before the commencement of the voir dire examination of the jury panel, the punishment shall be assessed by the same jury, except as provided in Section 3(c) of this article and in Article 44.29. If a finding of guilty is returned, the defendant may, with the consent of the attorney for the state, change his election of one who assesses the punishment.

(c) Punishment shall be assessed on each count on which a finding of guilty has been returned.

Sec. 3. Evidence of prior criminal record in all criminal cases after a finding of guilty.

(a) (1) Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act. A court may consider as a factor in mitigating punishment the conduct of a defendant while participating in a program under Chapter 17 as a condition of release on bail. Additionally, notwithstanding Rule 609(d), Texas Rules of Evidence, and subject to Subsection (h), evidence may be offered by the state and the defendant of an adjudication of delinquency based on a violation by the defendant of a penal law of the grade of:

(A) a felony; or

(B) a misdemeanor punishable by confinement in jail.

(2) Notwithstanding Subdivision (1), evidence may not be offered by the state to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct.

(3) Regardless of the plea and whether the punishment is assessed by the judge or the jury, during the punishment phase of the trial of an offense under Section 35A.02, Penal Code, subject to the applicable rules of evidence, the state and the defendant may offer evidence not offered during the guilt or innocence phase of the trial concerning the total pecuniary loss to the affected health care program caused by the defendant's conduct or, if applicable, the scheme or continuing course of conduct of which the defendant's conduct is part. Evidence may be offered in summary form concerning the total pecuniary loss to the affected health care program.

Testimony regarding the total pecuniary loss to the affected health care program is subject to cross-examination. Evidence offered under this subdivision may be considered by the judge or jury in ordering or recommending the amount of any restitution to be made to the affected health care program or the appropriate punishment for the defendant.

(b) After the introduction of such evidence has been concluded, and if the jury has the responsibility of assessing the punishment, the court shall give such additional written instructions as may be necessary and the order of procedure and the rules governing the conduct of the trial shall be the same as are applicable on the issue of guilt or innocence.

(c) If the jury finds the defendant guilty and the matter of punishment is referred to the jury, the verdict shall not be complete until a jury verdict has been rendered on both the guilt or innocence of the defendant and the amount of punishment. In the event the jury shall fail to agree on the issue of punishment, a mistrial shall be declared only in the punishment phase of the trial, the jury shall be discharged, and no jeopardy shall attach. The court shall impanel another jury as soon as practicable to determine the issue of punishment.

(d) When the judge assesses the punishment, the judge may order a presentence report as contemplated in Subchapter F, Chapter 42A, and after considering the report, and after the hearing of the evidence hereinabove provided for, the judge shall forthwith announce the judge's decision in open court as to the punishment to be assessed.

(e) Nothing herein contained shall be construed as affecting the admissibility of extraneous offenses on the question of guilt or innocence.

(f) In cases in which the matter of punishment is referred to a jury, either party may offer into evidence the availability of community corrections facilities serving the jurisdiction in which the offense was committed.

(g) On timely request of the defendant, notice of intent to introduce evidence under this article shall be given in the same manner required by Rule 404(b), Texas Rules of Evidence. If the attorney representing the state intends to introduce an extraneous crime or bad act that has not resulted in a final conviction in a court of record or a probated or suspended sentence, notice of that intent is reasonable only if the notice includes the date on which and the county in which the alleged crime or bad act occurred and the name of the alleged victim of the crime or bad act. The requirement under this subsection that the attorney representing the state give notice applies only if the defendant makes a timely request to the attorney representing the state for the notice.

(h) Regardless of whether the punishment will be assessed by the judge or the jury, neither the state nor the defendant may offer before sentencing evidence that the defendant plans to undergo an orchiectomy.

(i) Evidence of an adjudication for conduct that is a violation of a penal law of the grade

of misdemeanor punishable by confinement in jail is admissible only if the conduct upon which the adjudication is based occurred on or after January 1, 1996.

Sec. 4. (a) In the penalty phase of the trial of a felony case in which the punishment is to be assessed by the jury rather than the court, if the offense of which the jury has found the defendant guilty is an offense under Section 71.02, Penal Code, other than an offense punishable as a state jail felony under that section, an offense under Section 71.023, Penal Code, or an offense listed in Article 42A.054(a), or if the judgment contains an affirmative finding under Article 42A.054(c) or (d), unless the defendant has been convicted of an offense under Section 21.02, Penal Code, an offense under Section 22.021, Penal Code, that is punishable under Subsection (f) of that section, or a capital felony, the court shall charge the jury in writing as follows:

"The length of time for which a defendant is imprisoned may be reduced by the award of parole.

"Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, the defendant will not become eligible for parole until the actual time served equals one-half of the sentence imposed or 30 years, whichever is less. If the defendant is sentenced to a term of less than four years, the defendant must serve at least two years before the defendant is eligible for parole. Eligibility for parole does not guarantee that parole will be granted.

"It cannot accurately be predicted how the parole law might be applied to this defendant if sentenced to a term of imprisonment, because the application of that law will depend on decisions made by parole authorities.

"You may consider the existence of the parole law. You are not to consider the manner in which the parole law may be applied to this particular defendant."

(b) In the penalty phase of the trial of a felony case in which the punishment is to be assessed by the jury rather than the court, if the offense is punishable as a felony of the first degree, if a prior conviction has been alleged for enhancement of punishment as provided by Section 12.42(b), (c)(1) or (2), or (d), Penal Code, or if the offense is a felony not designated as a capital felony or a felony of the first, second, or third degree and the maximum term of imprisonment that may be imposed for the offense is longer than 60 years, unless the offense of which the jury has found the defendant guilty is an offense that is punishable under Section 21.02(h), Penal Code, or is listed in Article 42A.054(a) or the judgment contains an affirmative finding under Article 42A.054(c) or (d), the court shall charge the jury in writing as follows:

"The length of time for which a defendant is imprisoned may be reduced by the award of parole.

"Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn early parole eligibility through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

"Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, the defendant will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed or 15 years, whichever is less. Eligibility for parole does not guarantee that parole will be granted.

"It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

"You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant."

(c) In the penalty phase of the trial of a felony case in which the punishment is to be assessed by the jury rather than the court, if the offense is punishable as a felony of the second or third degree, if a prior conviction has been alleged for enhancement as provided by Section 12.42(a), Penal Code, or if the offense is a felony not designated as a capital felony or a felony of the first, second, or third degree and the maximum term of imprisonment that may be imposed for the offense is 60 years or less, unless the offense of which the jury has found the defendant guilty is listed in Article 42A.054(a) or the judgment contains an affirmative finding under Article 42A.054(c) or (d), the court shall charge the jury in writing as follows:

"The length of time for which a defendant is imprisoned may be reduced by the award of parole.

"Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn early parole eligibility through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

"Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, the defendant will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed. Eligibility for parole does not guarantee that parole will be granted.

"It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

"You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant."

(d) This section does not permit the introduction of evidence on the operation of parole and good conduct time laws.

APPENDIX - O

TEXAS STATUTES

Code of Criminal Procedure

Title 1 Code of Criminal Procedure of 1965

Trial and Its Incidents

Chapter 37 The Verdict

Art. 37.072. Procedure in Repeat Sex Offender Capital Case.

Sec. 1. If a defendant is found guilty in a capital felony case punishable under Section 12.42(c)(3), Penal Code, in which the state does not seek the death penalty, the judge shall sentence the defendant to life imprisonment without parole.

Sec. 2. (a) (1) If a defendant is tried for an offense punishable under Section 12.42(c)(3), Penal Code, in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment without parole. The proceeding shall be conducted in the trial court and, except as provided by Article 44.29(d) of this code, before the trial jury as soon as practicable. In the proceeding, evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court considers relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty. This subdivision may not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death. The introduction of evidence of extraneous conduct is governed by the notice requirements of Section 3(g), Article 37.07. The court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (b) or (e).

(2) Notwithstanding Subdivision (1), evidence may not be offered by the state to

establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually engaged in the conduct prohibited by Section 22.021, Penal Code, or did not actually engage in the conduct prohibited by Section 22.021, Penal Code, but intended that the offense be committed against the victim or another intended victim.

(c) The state must prove beyond a reasonable doubt each issue submitted under Subsection (b) of this section, and the jury shall return a special verdict of "yes" or "no" on each issue submitted under Subsection (b) of this section.

(d) The court shall charge the jury that:

(1) in deliberating on the issues submitted under Subsection (b) of this section, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty;

(2) it may not answer any issue submitted under Subsection (b) of this section "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree; and

(3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this section.

(e) (1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b), it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

(2) The court shall:

(A) instruct the jury that if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed, the court will sentence the defendant to imprisonment in the Texas Department of Criminal Justice for life without parole; and

(B) charge the jury that a defendant sentenced to confinement for life without parole under this article is ineligible for release from the department on parole.

(f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this section, the jury:

(1) shall answer the issue "yes" or "no";

(2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree;

(3) need not agree on what particular evidence supports an affirmative finding on the issue; and

(4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

(g) If the jury returns an affirmative finding on each issue submitted under Subsection (b) and a negative finding on an issue submitted under Subsection (e)(1), the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under Subsection (b) or an affirmative finding on an issue submitted under Subsection (e)(1) or is unable to answer any issue submitted under Subsection (b) or (e), the court shall sentence the defendant to imprisonment in the Texas Department of Criminal Justice for life without parole.

(h) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals.

APPENDIX - P

TEXAS STATUTES

Code of Criminal Procedure

Title 1 Code of Criminal Procedure of 1965

Trial and Its Incidents

Chapter 38 Evidence in Criminal Actions

Art. 38.37. Evidence of Extraneous Offenses or Acts.

Sec. 1. (a) Subsection (b) applies to a proceeding in the prosecution of a defendant for an offense, or an attempt or conspiracy to commit an offense, under the following provisions of the Penal Code:

(1) if committed against a child under 17 years of age:

(A) Chapter 21 (Sexual Offenses);

(B) Chapter 22 (Assaultive Offenses); or

(C) Section 25.02 (Prohibited Sexual Conduct); or

(2) if committed against a person younger than 18 years of age:

(A) Section 43.25 (Sexual Performance by a Child);

(B) Section 20A.02(a)(7) or (8); or

(C) Section 43.05(a)(2) (Compelling Prostitution).

(b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence, evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters, including:

(1) the state of mind of the defendant and the child; and

(2) the previous and subsequent relationship between the defendant and the child.

Sec. 2. (a) Subsection (b) applies only to the trial of a defendant for:

(1) an offense under any of the following provisions of the Penal Code:

(A) Section 20A.02, if punishable as a felony of the first degree under Section 20A.02(b)(1) (Sex Trafficking of a Child);

(B) Section 21.02 (Continuous Sexual Abuse of Young Child or Disabled Individual);

(C) Section 21.11 (Indecency With a Child);

(D) Section 22.011(a)(2) (Sexual Assault of a Child);

(E) Sections 22.021(a)(1)(B) and (2) (Aggravated Sexual Assault of a Child);

(F) Section 33.021 (Online Solicitation of a Minor);

(G) Section 43.25 (Sexual Performance by a Child); or

(H) Section 43.26 (Possession or Promotion of Child Pornography), Penal Code; or

(2) an attempt or conspiracy to commit an offense described by Subdivision (1).

(b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence, and subject to Section 2-a, evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2) may be admitted in the trial of an alleged offense described by Subsection (a)(1) or (2) for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.

Sec. 2-a. Before evidence described by Section 2 may be introduced, the trial judge must:

(1) determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt; and

(2) conduct a hearing out of the presence of the jury for that purpose.

Sec. 3. The state shall give the defendant notice of the state's intent to introduce in the case in chief evidence described by Section 1 or 2 not later than the 30th day before the date of the defendant's trial.

Sec. 4. This article does not limit the admissibility of evidence of extraneous crimes, wrongs, or acts under any other applicable law.

APPENDIX - Q

TEXAS STATUTES

Code of Criminal Procedure

Title 1 Code of Criminal Procedure of 1965

Chapter 38 Evidence in Criminal Actions

Proceedings After Verdict

Chapter 42 Judgment and Sentence

Art. 42.08. Cumulative or Concurrent Sentence.

(a) When the same defendant has been convicted in two or more cases, judgment and sentence shall be pronounced in each case in the same manner as if there had been but one conviction. Except as provided by Subsections (b) and (c), in the discretion of the court, the judgment in the second and subsequent convictions may either be that the sentence imposed or suspended shall begin when the judgment and the sentence imposed or suspended in the preceding conviction has ceased to operate, or that the sentence imposed or suspended shall run concurrently with the other case or cases, and sentence and execution shall be accordingly; provided, however, that the cumulative total of suspended sentences in felony cases shall not exceed 10 years, and the cumulative total of suspended sentences in misdemeanor cases shall not exceed the maximum period of confinement in jail applicable to the misdemeanor offenses, though in no event more than three years, including extensions of periods of community supervision under Article 42A.752(a)(2), if none of the offenses are offenses under Chapter 49, Penal Code, or four years, including extensions, if any of the offenses are offenses under Chapter 49, Penal Code.

(b) If a defendant is sentenced for an offense committed while the defendant was an inmate in the Texas Department of Criminal Justice and serving a sentence for an offense other than a state jail felony and the defendant has not completed the sentence he was serving at the time of the offense, the judge shall order the sentence for the subsequent offense to commence immediately on completion of the sentence for the original offense.

(c) If a defendant has been convicted in two or more cases and the court suspends the imposition of the sentence in one of the cases, the court may not order a sentence of confinement

to commence on the completion of a suspended sentence for an offense.

Additional material from this filing is available in the Clerk's Office.